Decisions

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- Bailiffs Act <http://www.ontario.ca/lat/english/Pages/Decisions/2010/ba.aspx>
- Building Code Act, 1992, O. Reg. 350/06, Division C, Part 3
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/bca.aspx>
- Cemeteries Act (Revised)
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/ca.aspx>
- Child and Family Services Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/cfsa.aspx>
- Collection Agencies Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/caa.aspx>
- Consumer Protection Act, 2002
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/cpa02.aspx>
- Consumer Reporting Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/cra.aspx>
- Day Nurseries Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/dna.aspx>
- Discriminatory Business Practices Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/dbpa.aspx>
- Film Classification Act, 2005
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/fca.aspx>
- Funeral Directors and Establishments Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/feea.aspx>
- Highway Traffic Act
  - Section 32(5)(b)(i) - Medical (MED)
    <http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-section-32(5)(b)(i).aspx>
  - Subsection 47(1) - Medical (MED)
    <http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-section47(1).aspx>
  - Section 47(1) and subsections 17(2), (3) - Commercial Vehicle Operator's Registration - (CVOR
    <http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-cvor.aspx>)
  - Section 48.3(2) - Administrative Driver's Licence Suspension - (ADLS)
    <http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-adls.aspx>
  - Section 82.1 - Commercial Vehicle Impoundment and Suspension - (CVIS)
    <http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-cvis.aspx>
  - Section 95(1) - Motor Vehicle Inspection Licence - (GAR)
    <http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-garage.aspx>
  - Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)
    <http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-mvia.aspx>

- Intercountry Adoption Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/iaa.aspx>
- Motor Vehicle Dealers Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/mvda.aspx>
- Motor Vehicle Dealers Act, 2002
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/mvda2002.aspx>
- Ontario New Home Warranties Plan Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/onhwpa.aspx>

- Paperback and Periodical Distributors Act
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/ppda.aspx>
- Post-Secondary Education Choice and Excellence Act, 2000, O. Reg. 281/02
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/psecea.aspx>
- Private Career Colleges Act, 2005
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/pcca.aspx>
- Private Security and Investigative Services Act, 2005
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/psisa.aspx>
- Real Estate and Business Brokers Act, 2002
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/rebba.aspx>
- Travel Industry Act, 2002
  <http://www.ontario.ca/lat/english/Pages/Decisions/2010/tia02.aspx>

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Decisions under the Bailiffs Act

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Decisions under the Building Code Act, 1992, O. Reg. 350/06, Division C, Part 3

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Decisions under the Cemeteries Act (Revised)

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Decisions under Consumer Protection Act, 2002

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Decisions under Consumer Reporting Act

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Decisions under Day Nurseries Act

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Decisions under Discriminatory Business Practices Act

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Decisions under the Film Classification Act, 2005

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Decisions under the Funeral Directors And Establishments Act

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- 5777-FDEA-Claim
- Prabhjot Kaur Johal

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5777 – FDEA – CLAIM

APPEAL FROM A DECISION OF THE BOARD OF FUNERAL SERVICES COMPLAINTS COMMITTEE UNDER THE *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT,* R.S.O. 1990, c. F.36

DECLINING TO REFER A MATTER TO THE DISCIPLINE COMMITTEE

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: DAWNE JUBB, Counsel representing the Applicant

JULIE MACIURA, Counsel representing the Registrar, *Funeral Directors and Establishments Act*

LILY I. HARMER and DANNY KASTNER, Counsel representing the Added Parties, McDougall & Brown Funeral Home and Adam McBrain

DATES OF HEARING: April 12, 13 and 14, 2010 Toronto

REASONS FOR DECISION AND ORDER

This hearing arises out of a Notice of Appeal to this Tribunal filed by the Applicant and dated November 27, 2009, in respect to a decision of the Board of Funeral Services Complaints Committee dated November 4, 2009. The Applicant complains to this Tribunal in respect of certain alleged unsavoury practices of McDougall & Brown.

The name of the Applicant and members of his family will not be used to protect their privacy.

The Complaints Committee is established under sections 7 and 10 of the *Funeral Directors and Establishments Act* (the "FDEA" or the "Act").

The Applicant in a letter dated February 5, 2010, in compliance with a Licence Appeal Tribunal ("LAT") order at a pre-hearing of the matter, set out, among other things, ten remedies that he requested the Tribunal to grant. They were as follows:

1. Recommend that the Minister order an in-depth consumer protection investigation into whether there are systemic issues of misrepresentations, upselling and unfair policies and procedures of licensees and operators;

2. Recommend that the Director order the Licensee to stop making of false and misleading representation in contravention of the Act, pursuant to subsection 27(1) of the Act.

3. Recommend prosecution of the Licensee for the offence of non-compliance with the Act, through failing to comply with Section 10 of Regulation 469 (the rules respecting display and pricing), and

4. Order the Licensee to issue a public apology for misleading its clients with respect to options and pricing, to be posted in prominent view in the funeral establishment and published in the principal Toronto newspaper, the Toronto Star;

5. Order the Licensee to disclose all training modules, policies and procedures, including whether there are benefits to employees who make larger sales;

6. Order the Licensee to correct the display of materials, and the signage related to the display, such that the main Price List is the only prominent document;

7. Order the Licensee to, when speaking with customers, clearly state and provide a document in writing indicating:

   a. Whether there are product options or not and any costs associated with such options, such as a standard size but custom boxes are available at no cost (s. 10(b) of Regulation 469); and

   b. The full range of prices, as set out in the main Price List (s. 10(b) of Regulation 469); and

   c. Whether rental products are available the costs associated;

8. Direct that all or part of the matter be referred to Discipline Committee to investigate the misconduct of the employees of the Licensee (s.14 (2) (b)) for breach of Subsection 44(r) of Regulation 470 (the duty on funeral directors not to act in a manner that would disgrace business practice);

9. Order costs to the plaintiff for time spent and associated costs to bring the Complaint, in the amount of $1,000; and

10. Any other remedy the Tribunal considers just.

Based on the evidence, in the phrase “Licensee” the Applicant refers to McDougall & Brown or Arbor Memorial Service Inc. (“Arbor”), a public company, and the ultimate parent of McDougall & Brown.

Preliminary Motion

The Added Parties served and filed motion materials asking this Tribunal to strike six of the remedies sought, being remedies 1, 2, 4, 5, 6 and 7, on the ground that this Tribunal lacks jurisdiction to grant such remedies.

Counsel for the Applicant, in turn, served and filed her own motion materials in support of this Tribunal's jurisdiction.

The Tribunal ruled that it would hear argument on the motion at the commencement of the hearing which took up the morning of April 12, 2010. The Tribunal adjourned the hearing until the following day and, at the outset, delivered orally the ruling. The following is a summary of that ruling.

Motion Ruling

The FDEA is consumer protection legislation and as such is to be interpreted liberally to best achieve its objects which, in the Act, include "to serve and protect the public interest".[1]

A Complaints Committee under the FDEA has only those powers conferred on it by the Legislature. This Tribunal's jurisdiction is the same as the Complaints Committee.[2]

Under the Act, it is only individual funeral directors who are subject to discipline by the Discipline Committee.[3]

Section 14 of the FDEA, however, in its opening words, says that the Complaints Committee "shall consider and investigate complaints regarding the conduct ... of any licensee...". Moreover, paragraph 14(2) (c) of the Act says that the "Complaints Committee ... may ... take or recommend such action that it considers appropriate in the circumstances and that is not inconsistent with this Act ..."

Counsel for the Added Parties submitted that the Complaints Committee is merely a step in the disciplinary proceedings. This interpretation would, however, mean that a person with a complaint against a corporation rather than an individual funeral director would be left without a remedy. This offends against the FDEA as consumer protection legislation.

The Tribunal agrees with Ms. Jubb that such an interpretation would read out the words in paragraph 14(2)(c) which would be contrary to fundamental rules of statutory interpretation, including the rule that every word in a legislative text must be given its own meaning.

The *Schmolinski*[4] decision does not deal with the individual/corporate issue with which we are concerned. The Tribunal does note that the Divisional Court in *Schmolinski* said that the "principal role" of the Complaints Committee was as a screening or

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[1] s. 3(2) FDEA
[2] *Ontario (Registrar; Board of Funeral Services) v. Schmolinski*, 88 O.R. (3d) 119, at para. 21
[3] ss. 15 and 16 FDEA
[4] *Ibid*, at para. 14

investigatory body. It did not say that was the "sole" purpose of the Complaints Committee.

The Tribunal has considered the Added Parties' submission that it would be unfair to Mr. McBrain to levy penalties without giving him an opportunity to provide a full answer to the claims against him. That, of course, is why this Tribunal will hold this hearing giving all parties a full opportunity to participate so that justice might be done.

In conclusion, therefore, the Tribunal must dismiss the motion of the Added Parties.

Hearing

The hearing into the merits of the claim commenced on Tuesday April 13, 2010, and was completed that day.

The Tribunal heard argument in the afternoon of April 14, 2010.

The Triggering Event

The brother-in-law of the Applicant died in the morning of March 19, 2009. The family decided on cremation and made an appointment to attend on McDougall & Brown in the afternoon. The Applicant went with his sister, the widow of the deceased, and her three children to McDougall & Brown.

They met with Mr. Waterman, a funeral director, at McDougall & Brown, Scarborough Chapel. The family of the deceased told Mr. Waterman they did not want a service or any visitation. During the discussion, two matters arose which disturbed the Applicant:

1. Waterman asked as to how big the deceased was and the Applicant alleges that he was told that if the deceased could not fit into the standard cremation container, a more expensive casket would have to be purchased.

2. The widow asked if her brother could build the cremation container. The Applicant alleges that the family was told that this "would not be possible".

The Complaint

The Applicant initiated his complaint, first by sending an email, on May 26, 2009,[5] to the lawyer for Arbor. The Tribunal was told that this email accurately summarized his concern. Accordingly, the Tribunal reproduces it in full hereunder:

> Iain, I couldn't find a ready way to communicate with Arbor… and see that you are corporate secretary. Could you kindly pass this on to Brian Snowdon, President and Chief Executive Officer? Thank you.

[5] Exhibit 5

> I recently had the sad occasion to accompany my sister for her meeting with one of your funeral directors, following the death of her husband. While the experience was generally a positive one, there were two aspects that disturbed me greatly.
>
> - We were handed a printed price list for caskets. The cheapest listed was still quite expensive. But there was a cheaper alternative – if you looked hard for it: on another page, in extremely small type, was a $1,500 cloth covered casket. Easily missed by most, particularly in a vulnerable state of mind. There was no cheaper alternative listed. I found that unethical, and unacceptable. Rental was not put forward as an alternative.
>
> - We then talked about cremation. Surprisingly, we were asked how big a man my brother-in-law was. He explained that the only wooden box available for cremation wasn't that big, and that, if he didn't fit, we would have no choice but to spend another $1,000 for a casket. Surely, we said, you can get a bigger box? No – that's all that's available, was the response. Of course it is possible to obtain appropriate sized boxes. The only reason I could see for the refusal to provide appropriately sized boxes was to force vulnerable customers into paying a much larger sum for an unnecessary casket.
>
> Both of these instances create the striking impression that your organization is far more interested in generating maximum profits than in providing cost-effective services that meet people's needs.
>
> Please confirm that these unsavoury practices have ceased.

The Applicant was unable to get anywhere with Arbor and so completed the Board of Funeral Services ("Board") complaint form on August 28, 2009, specifically naming Arbor/McDougall & Brown as the company complained against. By letter dated September 2, 2009, the Registrar of the Board acknowledged receipt of "complaint against Mr. McBrain of McDougall & Brown". This reply confused the Applicant and in subsequent correspondence, he made it clear that he wanted the Complaints Committee to investigate McDougall & Brown and not a funeral director, Mr. McBrain, whom he had never met.

The Investigation

The investigation was conducted by Mr. Brakel, manager inspections and investigations of the Board, and completed on October 15, 2009, when he delivered a "Background Memorandum to Complaints Committee".[6] Mr. Brakel conducted telephone interviews with the widow, Mr. Waterman and Mr. McBrain. He received a letter, dated September 8, 2009, from Mr. McBrain responding to the two concerns of the Applicant. He had the complaint of the Applicant and a bundle of email correspondence. Inexplicably, he did not interview the Applicant. The Tribunal notes one finding of Mr. Brakel in his memorandum as follows:

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[6] Exhibit 3, Tab 9

> Mr. Waterman does recall mentioning to [the Applicant] **...** that the cloth covered casket was larger than the standard cremation container, and therefore, if the dimensions of the deceased were greater than what standard cremation container would accommodate, the cloth covered casket might be suitable. Mr. Waterman does not recall saying that their standard cremation container was all that was available.

The Complaints Committee Decision

This was delivered on November 4, 2009.[7] The Tribunal notes the following about the decision:

1. It persists in restricting the investigation to Adam McBrain of McDougall & Brown in contravention of the Applicant's express complaint against McDougall & Brown as part of a corporate chain.

2. The Complaints Committee does not say when the members met to decide the issue if, indeed, they met at all.

3. There is no mention of how the public interest is served or protected by its decision.

4. Remarkably, the decision of the Complaints Committee copies verbatim the background memorandum prepared by Mr Brakel. There is no indication as to what inquiries, if any, the Complaints Committee made. For example, why was the Applicant not interviewed?

It then refers only to section 10 of Regulation 469 and states (as previously set out by Mr. Brakel in his background memorandum) the issues as follows:

> 1. Does the conduct warrant a referral to the Discipline Committee?
>
> 2 .If the conduct warrants a referral to the Discipline Committee, is there sufficient evidence to meet the standard of proof?
>
> 3. If it does not warrant a referral to the Discipline Committee, is some other disposition appropriate?

and renders its Decision:

> In accordance with clause 14(2)(c) of the *Funeral Directors and Establishments Act*, the Complaints Committee admonishes the funeral director for providing conflicting information, multiple documents referring to casket price list and for not meeting the obligation of displaying a casket from among the least expensive available on the market in accordance with the Act. The Committee recommends that the funeral director introduce caskets that are among the least expensive available on the market and include them on the funeral home's price list.

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[7] Exhibit 3, Tab 10

and The Complaints Committee then gives reasons for its Decision:

> The Committee believes that having two documents called "price list" for caskets with inconsistent information is confusing to consumers and ought not to happen.
>
> In the Committee's opinion, the selection of caskets offered by the funeral home on its price list does not meet the obligations of section 10 of the O. Reg. 469, which requires caskets from among the least expensive available on the market.
>
> The Committee believes the issue of the oversized casket was poorly communicated, particularly since in the end it was not necessary.
>
> While the Committee is concerned about what occurred here it does not believe that the conduct warrants a referral to the Discipline Committee, providing there is no recurrence.

The Complaints Committee was wrong to ignore the complaint against McDougall & Brown and to focus on the managing funeral director. The Decision shows that the Complaints Committee thought that its Decision was only a step in the process against an individual funeral director and that it need not or could not investigate corporate licensees.

The Tribunal has reviewed the Decision of the Complaints Committee and cannot find there a clear explanation of why the conduct that it directed to be changed did not warrant a referral to the Discipline Committee.

The Case for the Applicant

The Tribunal ordered all witnesses to be excluded from the hearing room. The Applicant solemnly affirmed and testified as follows. He had no previous experience in arranging a funeral. He and the family met with Mr. Waterman in a room with a big table where they were given a binder containing various options leading ultimately to choosing the "Direct Service Package" which, they understood, was the cheapest available. He was shocked when Mr. Waterman asked him "how big was the deceased?" The Applicant said that Mr. Waterman told them McDougall & Brown only offered one size of cremation container and that if the deceased did not fit they would have to acquire a bigger and more expensive casket.

In addition to the binder, a copy of a “Selection Guide & Casket Price List”[8] issued by the manufacturer was on the table. The Applicant picked it up and was concerned about the prices of caskets. However, he turned over the brochure and saw one entry under "Specialty Caskets" - Cloth Blue Steel Cloth SQ Crepe $1,615. He said that this is misleading and offensive when dealing with distraught people. According to the Applicant, Mr. Waterman looked uncomfortable, but insisted that if the deceased did not fit the standard cremation container they would have to buy the $1,615 casket. In the event they purchased the cremation container offered by McDougall & Brown for $595.00.

[8] Exhibit 4

His sister asked Mr. Waterman if her brother could make the cremation container but Mr. Waterman told them "that was not possible".

In the car on the way home, the Applicant expressed his concerns and his sister wondered if they had made the wrong choice in choosing McDougall & Brown. The Applicant said that was not the kind of service they should expect. Over the next few months, he thought about the situation and decided to complain.

He confirmed that he was not interviewed by Mr. Brakel and only saw Mr. McBrain's letter of September 8, 2009, when the Board made its disclosure as part of this appeal. The Complaints Committee decision does not reflect his concerns, in that it failed to take into account the public interest. His counsel, Ms. Jubb, then took him through the remedies he seeks, including some only raised at this time and the reasons for them. One of the new remedies sought is:

> Recommend that the Director review the Complaints and Investigation Process, including the Complaints Committee, to ensure that it [*sic*] policies and procedures are consistent with your ruling on the jurisdiction issues raised at the beginning of this hearing.

On cross-examination, he conceded that Mr. Waterman "was decent and helpful" and that Mr. Waterman had showed his sister the $595.00 container which they bought. He repeated that Mr. Waterman told them that it would not be possible for his sister's brother to build the cremation container. His impression was that Mr. Waterman was a man of integrity and was uncomfortable with the attempt to upgrade to a more expensive casket. He also said that Mr. Waterman said that he could not order in another bigger, cheaper, or same price casket container. He was also annoyed that Arbor would not respond substantively to his concerns.

Witness A

He is the son of the deceased. He solemnly affirmed and testified in support of the complaint. He was present at the meeting with Mr. Waterman. He corroborated the Applicant's testimony as to the "size-more expensive casket" issue and that his uncle would not be allowed to construct a cremation container for the deceased. He also said that he had gone on to a number of websites and discovered cremation containers as low as $99.00.

On cross- examination, he said that Mr. Waterman did say that he would not be able to make a decision on the container until the body was brought to the funeral home.

The Case for the Added Parties

Mr. Waterman solemnly affirmed and testified. He is a funeral director at McDougall & Brown Scarborough Chapel. He met with the deceased's family on March 19, 2009, at the funeral home. At that meeting, he asked as to the size of the deceased. Apparently,

if a deceased is more than 200 pounds and relatively short, the standard size cremation container will not be big enough. He said that happens in his experience three or four times a year. He is not comfortable in raising this issue with families as it is an unexpected question for most people. He said there is no policy at McDougall & Brown against "home built caskets". In fact, he did have someone build a cremation container in the parking lot about 12 years ago. Rental caskets are not an option when a family does not want a viewing of the body but simple cremation. In any event, they are expensive, starting around $2,000.00.

He said that he showed the family the price list of McDougall & Brown for caskets and a cremation container and what is involved in planning a cremation. He did not show them any other material. He said, however, that the Applicant picked up the brochure of the manufacturer[9] from the table and looked at it and commented that the caskets were expensive and mentioned that the one on the back of the brochure was the cheapest. Mr. Waterman said, "We didn't need it." He took them through the price list[10] and the family opted for the Direct Service Package and the $595.00 cremation container which he had recommended as the cheapest alternative.

Mr. Waterman took the family into the casket room and explained the "flat top" and the difficulty one might experience with a large body. He denied that he spoke to the family about prices.

He thinks it is better to discuss the "size" issue with a family in case there is a problem. If a larger cremation container is required, the funeral home will order a custom built one at the same price as the basic cremation container. He initially said that the "home built container" question did not come up. He later modified his testimony to say that it was possible that the matter did come up.

He is paid an annual bonus and such bonus is the same for all, but one, of the funeral directors at the funeral home. He does not consider himself to be a salesman and receives no sales training beyond occasional presentations by casket manufacturers, which he described as product knowledge. He did concede that the criteria for the annual bonus are predicated on the financial results of the funeral home.

He said that the funeral home had complied with the Complaints Committee decision and now offers three choices of cremation container and an updated brochure.[11] The casket selection guide of the manufacturer[12] is no longer used.
He said that the crematoria insist on the body being in a container and that he had never heard of a rental cremation container.

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[9] Exhibit 4
[10] Exhibit 3, Tab 4
[11] Exhibit 8
[12] Exhibit 4

On cross- examination, he said the following:

1. he did not mention that one could get caskets cheaper on the internet as he was not obliged to do so.

2. he did not recall the conversation with the widow about her brother building a container.

3. there was no alternative to the $595.00 as the family had to identify the body before cremation.

4. he denied that he said that the family would have to pay an additional $1,000.00 if the deceased did not fit in the standard container.

5. there were cheaper alternatives to the $1,615.00 casket which were not on the price list and he did not volunteer that information.

6. it is possible that there was an exchange around the "home built container".

On redirect, he said that he does not recommend competitors and he thought that he and the widow were in agreement when she left the funeral home. He subsequently called the widow after he had received the body and told her that the body would fit in the $595.00 container she had ordered.

Adam McBrain

He solemnly affirmed and testified that he is the managing director of this funeral home in the McDougall & Brown group. There are 10 funeral directors at this home. He and his staff are mindful that families are vulnerable at this time and he wants to ensure that every family leaves the funeral home happy with the service they have received.

There is no sales training, quotas or sales commissions. He took the Complaints Committee decision seriously and has implemented the changes that it had recommended.

On cross-examination, he said that McDougall & Brown is a branch of Trillium Funeral Service Corporation (“Trillium”), a licensee under the Act. He sets his budget which is then sent to Trillium for approval. Trillium selected the exclusive casket supplier for McDougall & Brown. He said that everybody on staff knows that people can bring in their own container. He conceded that he did not mention the two alternatives to the $1,615.00 casket in his letter[13] to the Board.

[13] Exhibit 3, Tab 4

THE LAW

Licence Appeal Tribunal Act

3. (1) The Tribunal shall hold the hearings and perform the other duties that are assigned to it by or under any Act or regulation.

(2) Except as limited by this Act, the Tribunal has all the powers that are necessary or expedient for carrying out its duties.

Statutory Powers Procedure Act

2. This Act, and any rule made by a tribunal under subsection 17.1 (4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

Funeral Directors and Establishments Act

“Board” means the Board of Funeral Services.

"funeral director" means an individual licensed as a funeral director under the Funeral, *Burial and Cremation Services Act, 2002*;

"funeral establishment" has the same meaning as in the Funeral*, Burial and Cremation Services Act, 2002*;

"licence" means a licence to operate a funeral establishment, transfer service or casket retailing business or a licence issued under clause 8 (2) (a), 10 (2) (b) or 12 (2) (b) of the Funeral*, Burial and Cremation Services Act, 2002*, where the licensee is acting on behalf of a funeral establishment operator, a transfer service operator or a casket retailing business operator, and "licensed" and "licensee" have a corresponding meaning;

"Minister" means the Minister of Government Services or whatever other member of the Executive Council to whom administration for this Act is assigned under the *Executive Council Act*;

3.(2) The principal object of the Board is to oversee the regulation of the practices of licensees in accordance with this Act, the Funeral, *Burial and Cremation Services Act, 2002*, regulations made under those Acts and the by-laws in order that the public interest may be served and protected

(3) For the purpose of carrying out its principal object, the Board has the following additional objects:

1. To make recommendations regarding the standards of knowledge and skill among licensees.

2. To make recommendations regarding the standards of qualification and standards of practice for licensees.

3. To establish, maintain and develop standards of professional ethics among licensees.

4. To administer the Compensation Fund.

5. To make recommendations regarding the oversight and inspection of trust accounts and funds that are required by law to be established or maintained.

6. To make recommendations regarding the establishment and development of standards for funeral establishments, transfer services and casket retailing businesses.

7. To establish and develop standards for funeral establishments. [repealed]

8. To perform such other duties and exercise such other powers as are imposed or conferred on the Board by or under any Act.

14. (1) The Complaints Committee shall consider and investigate complaints regarding the conduct or actions of any licensee, but no action shall be taken by the Complaints Committee under subsection (2) unless,

(a) a written complaint has been filed with the Registrar and the licensee whose conduct or actions are being investigated has been notified of the complaint and given at least two weeks in which to submit in writing to the Committee any explanations or representations the licensee may wish to make concerning the matter; and

(b) the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint.

(2) The Complaints Committee in accordance with the information it receives may,

(a) consider all or part of the matter;

(b) direct that all or part of the matter be referred to the Discipline Committee; and

(c) subject to subsection (9), take or recommend such action that it considers appropriate in the circumstances and that is not inconsistent with this Act, the regulations or the by-laws.

Decisions and reasons

The Complaints Committee shall advise the Registrar in writing of the action it proposes to take or recommend and its reasons therefor.

Notice

(4) Subsections (3) and (6) do not apply to a matter that is referred to the Discipline Committee.

Hearing

(5) The Complaints Committee is not required to hold a hearing or to afford any person an opportunity for a hearing or to make oral submissions before it prior to it taking action or making a recommendation under this section.

Notice

(6) The Registrar shall send to the complainant and to the person complained against by prepaid first class mail a copy of the proposal of the Complaints Committee and its reasons therefor, if any, together with notice that informs the person to whom it is sent that the person is entitled to a hearing by the Tribunal if the person mails or delivers to the Registrar and to the Tribunal, within fifteen days after the notice is served on the person, notice in writing requiring a hearing and the person may so require such a hearing.

No hearing

(7) If a complainant or the person complained against does not require a hearing by the Tribunal, the Complaints Committee may carry out the proposal stated in the notice to the complainant or the person complained against.

Hearing

(8) If the complainant or the person complained against requires a hearing, the Tribunal shall appoint a time for and hold a hearing.

Order

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

Conditions

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

Parties

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

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

....

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

....

(f) in the case of a corporation that operates a funeral establishment, no director of the corporation is a funeral director.

Regulation 469

10. (1) Funeral establishments which offer services to the public shall contain a room in which is displayed,

(a) at least eight adult caskets ranging in price from among the least expensive available on the market to the most expensive offered by the establishment with each casket and its price clearly shown; and

(b) a container or a picture of a container and its price, both of which are set out in a prominent place.

(2) The eight caskets referred to in clause (1) (a) must represent the range of materials from which caskets are constructed for the cultural, religious or ethnic markets being served by the funeral establishment.

Regulation 470

4. (1) An applicant for a licence to operate a funeral establishment or a transfer service shall submit to the Registrar a completed application setting out,

(a) the name of the funeral director responsible for the management of the funeral establishment or the name of the person responsible for the management of the transfer service;

(b) the name and address of any person having a beneficial interest in the operation of the business of the applicant; and

(c) if the operator of a funeral establishment or transfer service is a corporation, the names and addresses of,

(i) the officers and directors of the corporation, and

(ii) persons holding more than 10 per cent of the equity shares of the corporation and, if the persons are corporations, their officers and directors.

(2) It is a condition of a licence to operate a funeral establishment or a transfer service that the premises and vehicles are adequately insured against any public liability.

(3) It is a condition of a licence to operate a funeral establishment that it is managed and directly supervised by a licensed funeral director and, if embalming is performed, that the funeral director is licensed to perform embalming.

(4) An applicant for a licence to operate a funeral establishment or a transfer service shall submit to the Registrar a certificate of inspection of its premises issued by a medical officer of health or public health inspector within the six months preceding the date of the application for a licence.

FACTS PROVEN

March 19, 2009, was a sad day for the Applicant, his sister and her children. They had an unfortunate experience at the funeral home that afternoon.

The Tribunal readily accepts that it was an emotional time and that a witness' recollection of events at McDougall & Brown on the afternoon of March 19, 2009 may be clouded. The Tribunal accepts the testimony of the Applicant where it conflicts with Mr. Waterman or Mr. McBrain. The Applicant's testimony was corroborated by Witness A and Mr. Waterman's testimony, in at least one instance, conflicted with his earlier statement (*supra*, page 6, under "Investigation"). Thus, the Tribunal finds that the following facts are proven, on a balance of probabilities:

1. Mr. Waterman told the Applicant that if the deceased did not fit the standard container they would have to use the $1,615.00 casket.

2. There was nothing in between the $595.00 cremation container and the $1,615.00 casket. He did not tell them that there were, however, two caskets for sale which were not listed on the price list at $747.00 and $849.00.

3. McDougall & Brown allows clients to supply their own cremation container.

4. Mr. Waterman did subsequently telephone the widow that her husband fit the standard container and that a larger one was not necessary. The widow selected the Direct Service Package and bought a $595.00 cremation container.

5. Exhibit 4, being the "Selection Guide & Casket Price List", shows the name, address and telephone number of McDougall & Brown clearly on the front of the brochure. There is no reference to the casket manufacturer. The back page has one entry: "Cloth Blue Steel Cloth SQ Crepe $1,615.00"

6. McDougall & Brown still does not list the two caskets, $747.00 and $849.00 on its price list.

7. McDougall & Brown does not conduct sales training for its funeral directors; nor are there sales quotas or commissions. All, but one, of the funeral directors at the Scarborough Chapel receive the same annual bonus which is related to the financial results of the funeral home.

8. The updated brochure[14] of McDougall & Brown now lists three cremation containers and there is one authoritative price list.

[14] Exhibit 8

REASONS AND DECISION

The onus is on the Applicant to prove his case on a balance of probabilities.[15] The Applicant complained about alleged unsavoury practices at McDougall & Brown. The evidence at the hearing focussed on three issues: “custom container”, “oversized casket” and the price list.

He has proven his complaint in respect of the three issues. He has failed, however, to adduce sufficient evidence that McDougall & Brown engaged in "upselling" or other unsavoury trade practices.

The Tribunal notes that the widow bought the $595.00 casket. The Tribunal accepts Mr. Waterman’s testimony that he telephoned her when he received the body to tell her a larger casket would not be needed. The Tribunal agrees with Mr. Kastner who said, in argument, that this is hardly the action of one interested in upselling a larger casket to a distraught customer.

The Tribunal has considered all of the remedies that the Applicant seeks. The Tribunal may lack the jurisdiction to grant the Applicant all of the remedies he seeks, save two. The Tribunal need not answer the question here as, in any event, the evidence does either not support the remedy claimed or it is moot, e.g., the Tribunal is satisfied that McDougall & Brown has implemented the changes the Complaints Committee ordered; McDougall & Brown does not conduct sales training for its funeral directors. The Tribunal has jurisdiction to refer the matter to the Discipline Committee (see: paragraphs 14(1)(c) and (9) and (10)) and to recommend that the Board consider changing some of the Complaints Committee’s practices. The Registrar and the Added Parties did not object to the Tribunal’s jurisdiction in remedy 3 sought by the Applicant. See above, page 2, wherein he asked the Tribunal to recommend prosecution. The Tribunal intuits, therefore, that there will be no objection to its jurisdiction to recommend changes to the investigative process and to some of the practices of the Complaints Committee.

The Complaints Committee ignored the claim by the Applicant against the corporate licensee and did not accord the Applicant the courtesy of interviewing him or telling him why it would not or could not investigate McDougall & Brown as he asked. This was simply not fair to the Applicant. The Tribunal accepts that the principal role of the Complaints Committee is as a screening and investigatory body but the plain words of section 14 of the FDEA show that its function is wider than that.

DECISION, ORDER and RECOMMENDATION

The Tribunal has considered carefully what remedies would be appropriate in this case. The Tribunal accepts that its jurisdiction is the same as the Complaints Committee. Accordingly, and pursuant to subsection 14(9) of the Act, the Tribunal:

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[15] *F. H. v. McDougall*, 2008 SCC 53

1. admonishes McDougall & Brown for its role in the events of March 19, 2009;

2. orders McDougall & Brown to include in its price lists all caskets and containers which it might have for sale, including the two caskets discussed at the hearing which were for sale at $747.00 and $ 849.00;

3. directs that the matter be referred to the Discipline Committee; and

4. recommends that the Board conduct an in-depth review of the directives to, and the practices and procedures of, the Complaints Committee to ensure that they comply with the Act and will serve and protect the public interest. Hopefully, with better direction, the Complaints Committee will investigate complaints against corporate licensees as well as individual funeral directors.

LICENCE APPEAL TRIBUNAL

_____
Terrance Sweeney, Vice-Chair

RELEASED: May 27, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRABHJOT KAUR JOHAL

APPEAL UNDER SECTION 18 OF THE *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*, R.S.O. 1990, c. F.36 FROM A DECISION OF THE DISCIPLINE COMMITTEE OF THE BOARD OF FUNERAL SERVICES

TO SUSPEND AND TO IMPOSE RESTRICTIONS ON A LICENCE

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: LEO KLUG, Counsel, and
BETSY KLUG, Counsel, representing the Applicant

JULIE MACIURA, Counsel representing the Board of Funeral Services, *Funeral Directors and Establishments Act*

DATES OF HEARING: November 1, 2, 3, 5, 2010
December 14, 2010 Toronto

DECISION AND ORDER

This is an appeal by Ms. Prabhjot Johal to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Discipline Committee of the Board of Funeral Services (the "Discipline Committee") dated April 22, 2010 which imposes a suspension and restrictions on the licence of Ms. Johal as a funeral director under the *Funeral Directors and Establishments Act*, R.S.O. 1990, c. F.36 (the "Act") and imposes terms and conditions for the re-instatement of Ms. Johal's licence.

Facts

The factual issue in this case is deceptively simple. Two women who interned at the Benisasia Funeral Home ("Benisasia") each claim to have performed the same six embalmings. They agree that they did not perform the embalmings together. There is no evidence that they are both lying in claiming credit for them. The logically obvious conclusion is that one of them must be lying.

The significance of the deception lies in the educational requirements to become licensed as a funeral director. After completion of a recognised course, each candidate must intern for a period which is usually twelve months but which may be extended to a maximum of twenty-four months. Interns must train under a preceptor who supervises them while they perform the practical part of their training. Key among the requirements of internship is that interns perform fifty embalmings. Ideally, the preceptor supervises the conduct of the embalmings but in a busy funeral home such as Benisasia it is common to permit an intern to perform embalmings on her own after a basic level of competence has been established. Preparation Reports are completed by the intern for each embalming performed and these Preparation Reports are reviewed by the preceptor. It is common practice for both the intern and the preceptor to sign the Preparation Report after it is reviewed. At the completion of the internship, the Preparation Reports are kept by the intern and used during the practical examination.

One of the two women who claim to have performed the contested embalmings is Ms. Cathy Cowley, a former Registered Practical Nurse. After completing her funeral director's training, she began her internship at Benisasia in May, 2006. Ms. Cowley testified that Ms. Tracey Witzel, a licensed funeral director at Benisasia, was her preceptor. Ms. Witzel supervised her first embalming but then left her to perform the embalmings on her own. She did get assistance from other funeral directors as needed. Ms. Cowley would pick up ten Preparation Reports at a time. After Ms. Cowley had completed the ten embalmings and the associated Preparation Reports, her evidence was that she would return the completed reports to Ms. Witzel who reviewed and signed the reports. From time to time, Ms. Witzel would sit down with Ms. Cowley and review the reports before signing them. Ms. Cowley was able to recall details about several of the six contested embalmings, usually details about specific embalming challenges that she faced. Ms. Cowley left Benisasia on February 19, 2007, after an upsetting incident at work and after completing thirty embalmings, if one includes the six in contention.

Ms. Cowley's preceptor, Ms. Witzel, testified that she supervised a couple of Ms. Cowley's embalmings and found Ms. Cowley to be competent to proceed on her own. After that, she saw Ms. Cowley performing embalmings a number of times. Ms. Witzel would have liked to have been available to supervise Ms. Cowley during her embalmings but Ms. Witzel was assigned to the night shift, which she preferred, and so was rarely in the building when Ms. Cowley was performing the procedure. However, Ms. Witzel testified that she was satisfied that Ms. Cowley had in fact performed the embalmings because she reviewed the Preparation Reports with Ms. Cowley before signing them. She noted that Ms. Cowley's reports were particularly detailed, which might be explained by her training and experience in nursing. Ms. Witzel testified that she would ask questions about the procedure and the type and concentration of embalming fluid used and was satisfied with the answers. She would not have signed the Preparation Reports if she had not been satisfied that Ms. Cowley had done the work, she said. She testified that she has no doubt that Ms. Cowley did the six embalmings in question.

The second woman claiming credit for performing the contested embalmings is Ms. Johal. Unusually, Ms. Johal was already licensed as a funeral director and was the owner of Benisasia at the same time that she was interning there. She had originally completed her formal education and had interned for twelve months but did not do the requisite fifty embalmings. Accordingly, she was granted a licence as a funeral director without embalming privileges. There are only seventeen such licences in Ontario, out of over 2,600 funeral directors. In addition to obvious reasons of marketability, the overwhelming majority of funeral directors become licensed to perform embalmings because only funeral directors who are so licensed may become the Managing Director of a funeral establishment that performs the procedure. The Managing Director runs the funeral establishment and supervises the staff for compliance with the Act. It is a clear advantage for an owner to also be the Managing Director.

Ms. Johal became the owner of Benisasia under unusual circumstances when she was still a student. She has ambitious plans for Benisasia and at the time in question, the fall and winter of 2006/07, she was busy opening a second location for the business.

Ms. Johal testified that her preceptor during the time in question was Ms. Deborah Walters, who was also the Managing Director of the business at the time. Ms. Johal testified that she performed twenty embalmings under the supervision of Ms. Walters and that Ms. Walters was present during her performance of five of the six embalmings in question although she was in and out of the room. Ms. Walters, Ms. Johal testified, gave her permission to print Ms. Walters's name on the Preparation Reports as they had done the embalmings together. On two of the six contested embalmings, Ms. Johal testified that Ms. Walters came in on two separate Sundays, her day off, to supervise the procedure. Ms. Walters was in the habit of punching a time card but, according to Ms. Johal, on the two Sundays when Ms. Walters came in specifically to oversee the embalmings, she did not punch in. Instead, Ms. Johal made a handwritten note on the time cards. On one of the Sundays in question Ms. Johal paid Ms. Walters $85 in cash for her trouble.

Ms. Walters also gave evidence. She testified that Ms. Johal was willing to do embalmings the first couple of times but after that it was not easy to get her into the embalming room. Ms. Johal would not refuse but she would say she was too busy and Ms. Walters would end up doing the embalming herself. Ms. Walters testified that Ms. Johal did not like the smell of the embalming.

With one exception, an embalming not in issue here, Ms. Johal did not turn in her Preparation Reports to Ms. Walters. Ms. Walters was not aware that Ms. Johal was doing embalming with any other funeral directors and she was doing very few embalmings with Ms. Walters so Ms. Walters did follow up a couple of times to ask to see her Preparation Reports. When she approached Ms. Johal, she would be told things like, "Do you want to get paid this week?" and "I have more than one business to run." She interpreted this to mean that Ms. Johal was too busy to be disturbed. Ms.

Walters concluded that it was not her responsibility to chase Ms. Johal to do the requisite number of embalmings so she stopped asking for the Preparation Reports.

Ms. Walters directly contradicts Ms. Johal's evidence that she supervised Ms. Johal doing five of the six contested embalmings or that she authorised Ms. Johal to print her name on the Preparation Reports. Ms. Walters also flatly denies Ms. Johal's testimony that she paid Ms. Walters in cash to come in one Sunday to supervise one of the disputed embalmings or that Ms. Walters came in on a second Sunday to supervise another of the embalmings in issue.

Both preceptors, Ms. Witzel and Ms. Walters, gave evidence about the embalming of the intern they did not supervise. Ms. Walters testified that she saw Ms. Cowley many times in the embalming room alone. She helped Ms. Cowley from time to time and observed that "she was getting very good". Ms. Witzel testified that she saw Ms. Johal in the embalming room a couple of times but that she was more an onlooker than a participant. She would leave the "nasty parts" for others to do. Ms. Witzel could tell that Ms. Johal did not like embalming and there was perfume in the embalming room which Ms. Johal frequently used to mask the smell.

Ms. Johal is unable to explain why Ms. Walters contradicts her testimony. Concerning the evidence of Ms. Walters and Ms. Witzel about her aversion to embalming, she explained that initially, she had found the smells very unpleasant but that she had overcome this to finish the required fifty embalmings.

Concerning the sixth embalming, Ms. Johal testified that she performed the embalming in the presence of Mr. Tim Kolotyliuk, who was at the time a funeral director and who since has become Managing Director of one of Benisasia's two locations. Mr. Kolotyliuk became Ms. Johal's preceptor when Ms. Walters left Benisasia in February, 2007 and oversaw the balance of the embalmings needed by Ms. Johal to complete her licensing requirement.

Mr. Kolotyliuk corroborates Ms. Johal's testimony that he supervised her performing one of the contested embalmings, an embalming that Ms. Johal and Mr. Kolotyliuk testified occurred on November 28, 2006.

There is an inconsistency about the date of this embalming between the testimony of Ms. Cowley and the evidence of Ms. Johal and Mr. Kolotyliuk. Ms. Cowley testified that she performed this embalming on November 29, 2006, a day after the date Ms. Johal testified that she had done it. Mr. Kolotyliuk, Ms. Johal's preceptor, testified that he was present and the embalming occurred on November 28, 2006. However, Ms. Witzel, Ms. Cowley's preceptor, testified that she was collecting the body in Orangeville on November 28, 2006 at the approximate time that Ms. Johal says she was embalming it. Ms. Johal and Mr. Kolotyliuk suggested that Ms. Witzel must have been mistaken in her recollection of picking up the body.

There is another inconsistency in the two Preparation Reports of this embalming. In her Preparation Report, Ms. Cowley notes that she removed a pacemaker. The family of the deceased confirms that they had requested the pacemaker be removed. There is no mention of removing a pacemaker in Ms. Johal's Preparation Report.

Also giving evidence were two representatives of the Board of Funeral Services (the "Funeral Board"). One representative testified to another set of discrepancies between the Preparation Reports of the two women, what might be called the "height and weight" discrepancies. The women differed in their assessments of height and weight of several of people they each claim to have embalmed. The most striking of these differences was in an embalming where Ms. Cowley reported in her Preparation Report that the deceased was 6 feet 2 inches and weighed 200 pounds. Ms. Johal, on the other hand, reported that the deceased was 5 feet 3 inches and weighed 105 pounds. The family of the deceased advised that the deceased was between 6 feet 1 inch and 6 feet 2 inches and weighed 160 pounds. There are no scales in the embalming room and tape measures are not used to assess height. Various witnesses testified that they either used the table, which is about 6 foot 5 inches long, as a reference point or they used their own height and weight as a comparison. Ms. Johal is herself 5 foot 3 inches tall and weighs over 105 pounds. She testified that she has difficulty assessing weights and heights and that in this case she made a mistake.

Another Funeral Board representative, Ms. McCoy, testified that she visited Benisasia on February 9, 2007 which was, by coincidence the same day that Ms. Walters left the firm. The Funeral Board had sent Ms. McCoy to Benisasia because it was concerned that Ms. Johal was falling behind in her embalmings. Ms. McCoy testified that she met with Ms. Johal on that day and that she recalls Ms. Walters being present during the meeting. Ms. McCoy asked Ms. Johal how many embalmings she had performed and she answered that she had done approximately ten. Ms. McCoy recalls Ms. Walters and Ms. Johal agreed on this number. Ms. McCoy was concerned that Ms. Johal was now left with forty embalmings to do in the four months remaining of her internship. An extension of time to complete the internship was not possible under the internship rules but a suspension of the internship was an option. Ms. McCoy felt that it was possible for Ms. Johal to complete the required number of embalmings in the four months remaining if Ms. Johal focussed on achieving this goal. Ms. McCoy was concerned that the time Ms. Johal was spending opening her second location was distracting her from successfully completing her internship. Therefore, Ms. McCoy "strongly" encouraged Ms. Johal to suspend her internship until her second location was established and she could focus her attention on completing the required embalmings. Ms. Johal refused.

Ms. Johal testified that she declined to suspend her internship because she was confident that she could finish the required number of embalmings by June, 2007 and that, under the preceptorship of Mr. Kolotyliuk, she did complete the requirement.

Ms. Johal does not recall meeting with Ms. McCoy on February 9, 2007 and Ms. Walters gave no evidence that she attended the meeting. Both Ms. Johal and Ms. Walters recall another meeting on that day. As Ms. Walters was leaving the employ of

Benasisa, she was asked to sign a standard Funeral Board affidavit attesting to the number of embalmings Ms. Johal had performed under her preceptorship. Ms. Walters and Ms. Johal agreed that Ms. Johal had completed twenty embalmings and Ms. Walters swore her affidavit to that effect. Ms. Johal also swore an affidavit saying she had performed twenty embalmings as of that date. Ms. Walters testified that before signing the affidavit, she explained to Ms. Johal that, in calculating the number of embalmings performed, she was including approximately eleven that she believed Ms. Johal had done under her supervision and a further nine that the two women had previously agreed not to count. Ms. Johal, on the other hand, testified that she had a very brief conversation with Ms. Walters on this occasion and that they agreed that the correct number was twenty without any explanation.

In determining who is being truthful in claiming to have performed the six contested embalmings, the Tribunal considered a variety of factors, including the following.

Demeanour

Demeanour as a factor in determining credibility must be used with caution. People may respond differently to the stress and formality of giving evidence. In this case, demeanour was of little use in assessing the credibility of any of the witnesses. The two principal witnesses, Ms. Cowley and Ms. Johal, both gave their evidence with apparent candour and forthrightness and both gave consistent evidence during cross-examination. The other witnesses also gave their evidence forthrightly and with candour. Ms. Walters and Mr. Kolotyliuk both gave inconsistent evidence in cross-examination and the effect of that will be discussed below. It is important to note that all the witnesses had previously given testimony on this matter at a hearing conducted by the Discipline Committee.

As expected, there were minor inconsistencies within the evidence of each of Ms. Johal and Ms. Cowley. Mr. Klug, counsel for Ms. Johal, emphasised inaccuracies in a sworn statement of Ms. Cowley about the progress of her internship at the time she left Benisasia. She stated in her affidavit that she had arranged four funerals. In fact, Benisasia did not permit interns to arrange funerals and the four she did were “mock arrangements” she went through with her preceptor. Her preceptor, Ms. Witzel, confirmed Ms. Cowley’s testimony that these mock arrangements were completed by Ms. Cowley and that mock arrangements are accepted by the Funeral Board when there is no alternative available. The Tribunal does not consider that this inaccurate description on the affidavit affects Ms. Cowley’s credibility.

Corroboration

The Tribunal found Ms. Witzel, the preceptor of Ms. Cowley, to be a credible and convincing witness. Ms. Witzel has a habit of dating important events by reference to events in her life, which assisted her memory. The details she was able to recall about

specific events were consistent with the circumstances about which she was testifying and were plausible and reasonable.

Beyond corroborating Ms. Cowley's account, Ms. Witzel gave testimony about the discrepancy in the dates of the November, 2006 embalming noted above. She testified that she drove to Orangeville on November 28, 2006 to collect the body and was in fact picking up the body at the approximate time that Ms. Johal claims to have been embalming it. She remembers the occasion because it was a day before her birthday and because it was her first time out of town in the hearse and she was nervous about the trip. It was a sunny day and she regretted not having brought her sunglasses. The Tribunal accepts her evidence on this matter.

The Tribunal is satisfied that Mr. Kolotyliuk genuinely believes he supervised the embalming that Ms. Johal says she performed on November 28th but the Tribunal does not accept his evidence.

Mr. Kolotyliuk suffers from two disabilities, one of hearing and one of speech. He was unable to complete grade 13 and has had great difficulty finding and keeping employment as a funeral director. On two occasions he was let go after his probation period and for six years he was unable to find employment in his chosen field.

Mr. Kolotyliuk appears to be a very trusting person and there is evidence that he is highly suggestible. For example, he testified that he had been "instructed" that Ms. Walters had sworn an affidavit on her last day of work about the number of embalmings Ms. Johal had done. He evidently internalised this instruction to the point that, at the Discipline Committee hearing, he testified that he had been present during this meeting and had witnessed the oath. He concedes this is incorrect. He also, on the suggestion of Mr. Klug at the Discipline Committee hearing, testified that the November embalming he claims to have witnessed occurred in December. The Tribunal concludes that if someone Mr. Kolotyliuk trusted had told him that he had supervised the November embalming, it is probable that Mr. Kolotyliuk would believe it.

There is another embalming for which there is an inconsistency in dates. This discrepancy between the accounts of Ms. Cowley and Ms. Johal also tends to support Ms. Cowley's claim to have performed the embalming. However, Ms. Cowley's evidence is confirmed but not fully corroborated by Ms. Walters and by the work records of Benisasia. Accordingly, the Tribunal did not give this discrepancy the same weight as the inconsistency about the November, 2006 dates.

Concerning the credibility of Ms. Walters, Mr. Klug, Counsel for Ms. Johal, during his cross-examination, focussed on the fact that when Ms. Walters left Benisasia on February 9, 2007, she signed an affidavit as Ms. Johal's preceptor. In that affidavit, she swore that Ms. Johal had performed twenty embalmings under her supervision whereas Ms. Walters testified that the actual number was different. Ms. Walters testified that she was "sure" that Ms. Johal had completed eleven embalmings with her as preceptor and she understood that Ms. Johal had completed nine embalmings with a prior preceptor.

In cross-examination, Ms. Walters stated that the figure of eleven embalmings under her supervision was an estimate.

It does seem that Ms. Walters was casual in calculating the number of embalmings Ms. Johal had performed as of February, 2007 under her supervision and that she swore an affidavit without being sure of accuracy of what she was attesting. On the other hand, under cross-examination by Mr. Klug, both Ms. Cowley and Ms. Witzel testified that they considered Ms. Walters to be an honest and forthright person, based on their work experience with her. Further, Ms. Walters's account of the management and operation of Benisasia is corroborated by other witnesses. The Tribunal concludes that Ms. Walter's credibility is affected but not irretrievably undermined by her evidence surrounding the affidavit she swore on leaving Benisasia. After cautious review, the Tribunal prefers her account of certain events to that of Ms. Johal for the following reasons.

The Tribunal prefers Ms. Walters's evidence regarding the discrepancy in height and weight of one of the deceased in the contested embalmings. As noted above, in one case, Ms. Johal recorded in her Preparation Report that a body was 5 feet 3 inches and weighed 105 pounds whereas it was in fact about 6 feet 2 inches and weighed about 160 pounds. It is not plausible that Ms. Johal would have so substantially understated the weight of the deceased had she in fact done the embalming, especially given that she herself is 5 feet 3 inches and weighs more than 105 pounds. Both Ms. Witzel and Ms. Walters confirm that this is a mistake that not even a novice would make. When Ms. Walters was asked about the discrepancy, she chuckled. If she had supervised Ms. Johal doing the embalming, she testified, she would have corrected Ms. Johal's estimate of the height and weight as this was an obvious error. The Tribunal found this evidence particularly convincing.

There was a stark difference in the testimony of Ms. Johal and Ms. Walters about whether Ms. Walters supervised Ms. Johal's embalmings and permitted Ms. Johal to sign Preparation Reports on her behalf. The Tribunal prefers Ms. Walters's account for the following reasons. The embalming noted above with the significant variation in height and weight was an embalming that Ms. Johal claims took place on a Sunday and for which Ms. Johal asserts she paid Ms. Walters in cash for attending. The evidence of Ms. Johal concerning both Sundays where she claims that Ms. Walters worked "off the clock", lacks credibility. There was evidence that Ms. Walters routinely punched a time clock and no evidence that she was in the habit of not punching the time clock when she came in on her days off. There was no reason for Ms. Walters not to punch in if she in fact worked those days. It is not credible that Ms. Walters was at work on the two Sundays in question. It follows that, despite Ms. Johal's evidence to the contrary, Ms. Walters could not have supervised Ms. Johal performing the two embalmings that Ms. Johal testified occurred on Sundays

Ms. Johal was not Ms. Walters's first intern and Ms. Walters was familiar with the process of supervision. She testified that she routinely signed her interns' Preparation Reports and has never permitted someone else to sign them on her behalf. Her

testimony of following up with Ms. Johal to have her submit her Preparation Reports was convincing. It is also inconsistent with Ms. Johal's testimony. If Ms. Walters had supervised the embalmings and given Ms. Johal permission to complete the Preparation Reports without further review, there would have been no need for Ms. Walters to follow up with Ms. Johal to request them. The fact that Benisasia was a busy funeral home and that Ms. Cowley was left on her own to do embalmings also makes it less probable that Ms. Johal was being as closely supervised as she has testified.

Ms. McCoy was also a convincing witness and she vividly recalls the day she went to Benisasia, as it was her first trip to a funeral home. The Tribunal accepts her evidence that she was at Benisasia on February 9, 2007 and that she met with Ms. Johal. However, her recollection of meeting both Ms. Walters and Ms. Johal to discuss the status of Ms. Johal's embalming is implausible. It is unlikely that Ms. Johal would have invited Ms. Walters to what was a private meeting, especially since Ms. Walters had submitted her resignation earlier that day. It is also implausible that Ms. Walters would have agreed that Ms. Johal had completed ten embalmings and then, later on the same day, sworn an affidavit that Ms. Johal had in fact completed twice that number. The Tribunal does accept Ms. McCoy's testimony that Ms. Johal advised her that Ms. Johal had completed approximately ten embalmings to that date. Ms. McCoy was at Benisasia specifically to address the Funeral Board's concern about the number of embalmings Ms. Johal had performed. She based the strong recommendation she gave to Ms. Johal at that meeting on the low number of embalmings Ms. Johal had done. It is unlikely that she would have made such a fundamental mistake about the number she was given.

Prior Consistent Acts

In this case, not only is credit claimed for another's work, the nature of the lie is such that, had it been believed, the innocent victim would have found herself facing sanctions for having misled the Funeral Board. Has either Ms. Cowley or Ms. Johal told a lie that calls someone's professional reputation into question before this incident?

There is no evidence that Ms. Cowley has ever lied at the expense of another. By contrast, there was convincing evidence that Ms. Johal has lied in the past to further her own objectives at the cost of besmirching someone else's good name. When Ms. Walters left Benisasia, Ms. Cowley testified that a staff meeting was called at which Ms. Johal said that Ms. Walters was "let go" because she exposed Benisasia to legal problems due to oversights. The staff was instructed not to contact her. Ms. Cowley learned of the lie when Ms. Walters telephoned her, sounding upbeat, and told her about Ms. Walters's new job. Ms. Witzel corroborated this evidence, testifying that Ms. Johal said that Ms. Walters was not following proper Board procedures and they had to let her go. The Tribunal accepts Ms. Walters's testimony that she left voluntarily on her doctor's recommendation, because the stress of working at Benisasia was affecting her health. The Tribunal finds that Ms. Johal was lying when she said that Ms. Walters had done anything improper.

Motive

The Tribunal considered who profited from falsely claiming credit for the contested embalmings. Ms. Johal obviously did. She would be able to become the Managing Director of her business as a result. In addition, there was a more pressing motive. On February 9, 2007 Ms. Johal met with Ms. McCoy of the Funeral Board and, as noted above, the Tribunal finds that Ms. Johal told Ms. McCoy at that meeting that she had performed approximately ten embalmings. Within hours of this meeting, she permitted her preceptor to swear an affidavit stating that she had completed twenty embalmings, twice the number of embalmings that she had claimed in her meeting with Ms. McCoy. Ms. Johal also swore an affidavit saying she had completed twenty embalmings as of February 9, 2007. When the Funeral Board began its investigation, Ms. Johal had to account for approximately ten embalmings she had not done. These embalmings had to have been done during the time of Ms. Walters' supervision. All six of the contested embalmings were done in that period.

By contrast, what we know about Ms. Cowley's internship, based on the evidence of Ms. Witzel, Ms. Walters and Ms. McCoy, is that her embalmings were on track and no one was concerned about the number she was performing.

None of Ms. Cowley, Ms. Witzel or Ms. Walters had any reason to wish Ms. Johal well. They each gave evidence that they found Benisasia a stressful and harsh working environment. They each believed that working at Benisasia affected their health. However, there was no suggestion or evidence that Ms. Cowley, Ms. Witzel or Ms. Walters somehow colluded to cause trouble for Ms. Johal. Instead, it appears that each of them made the emotionally healthy decision to leave a stressful workplace. The fact that they all left in February, 2007 is notable but there was evidence that the turnover at Benisasia was high and the Tribunal accepts that the timing of their leaving was a coincidence.

Means

Some time was spent during the hearing considering whether Ms. Cowley would have had access to Ms. Johal's Preparation Reports or vice versa. This is a red herring. Having access to Ms. Johal's reports would not have greatly assisted Ms. Cowley as hers were significantly more detailed and contained information not available from Ms. Johal's work. Parenthetically, the level of detail in Ms. Cowley's Preparation Reports is one of the many small matters that add credence to Ms. Cowley's evidence. Ms. Johal, as owner of the establishment and the person who most frequently met with customers, was in a different position than her intern. She did not need to see Ms. Cowley's Preparation Reports in order to create ones of her own. Ms. Johal testified that she frequently assists in the bathing rituals performed by the South Asian community that Benisasia serves. During these rituals and in conversations with the family of the deceased, Ms. Johal could have gleaned the necessary information to fill in Preparation Reports. She had enough experience with the embalming procedure to plausibly fill in any required details of types and quantities of embalming fluid used.

The Tribunal concludes that there is very strong evidence that Ms. Johal did not perform at least two of the six embalmings for which she claims credit. As noted above, the Tribunal accepts Ms. Walters's evidence that she did not supervise Ms. Johal in the embalming where Ms. Johal reported that a 6 foot two inch, 160 pound man was 5 foot 3 inches in height and weighed 105 pounds. The discrepancy in weight and height itself supports Ms. Cowley's testimony and undermines Ms. Johal's. Both Ms. Witzel and Ms. Walters testified that it was a mistake not even a novice would make. The Tribunal finds that Ms. Johal did not perform this embalming and that Ms. Cowley did.

The Tribunal accepts Ms. Witzel's evidence that she was collecting the body on which another of the disputed embalmings was performed at the approximate time on November 28th when Ms. Johal claims that she was embalming the body. The Tribunal does not accept Mr. Kolotyliuk's evidence that he supervised this embalming. The Tribunal finds that Ms. Johal did not perform this embalming on November 28, 2006. Ms. Cowley did the embalming on November 29, 2006, as she has testified. The fact that Ms. Cowley correctly noted that a pacemaker had been removed on this occasion and that Ms. Johal overlooked this in her Preparation Report also supports Ms. Cowley's account of this embalming.

The evidence regarding the other four embalmings is not as overwhelming but it is clear cut. There is a lesser discrepancy in height and weight measurements on one embalming that supports Ms. Cowley's testimony and there is also one other instance of a difference in the date of embalming that supports Ms. Cowley's evidence. There is the evidence of Ms. Witzel that she is satisfied that Ms. Cowley performed the embalmings based on her review of the Preparation Reports with Ms. Cowley. There is the evidence of Ms. Walters that she did not supervise five of the six contested embalmings as Ms. Johal asserts. Having concluded that Ms. Cowley was telling the truth about the two embalmings discussed above, it follows that there is a greater likelihood that she is telling the truth about the others. By contrast, there are the various factors noted above that call Ms. Johal's credibility into question, including the fact that she has been found to be lying about two of the embalmings.

The Tribunal concludes that there is overwhelming evidence that Ms. Johal did not perform two of the contested embalmings. The Tribunal also finds that the Funeral Board has met the burden of proof, that of a balance of probabilities, regarding the other four embalmings. The Tribunal finds that Ms. Johal did not conduct any of the six contested embalmings for which she is claiming credit; Ms. Cowley performed them.

Decision

Ms. Johal is a bright, ambitious woman with palpable charm. She is also a woman who brazenly lied to the Tribunal. She attempted to take credit for the work of an intern she employed and she did so in circumstances where, had she been believed, the victim's licence as a funeral director would have been in jeopardy for falsifying Preparation Reports. Before considering what the consequences of this deception should be, the

Funeral Board submits that the Tribunal ought to consider the role of the Discipline Committee and the hearing it held.

To understand the respective roles of the Discipline Committee and the Tribunal, it is helpful to review the relevant provisions of the Act. Under the Act, there are three methods in which a funeral director may be sanctioned and three avenues of appeal to the Tribunal. There is a Registrar and subsection 20(2) of the Act provides that a person who has completed the educational requirements may apply to the Registrar for a licence as a funeral director. Subsection 20(3) provides that such a person in entitled to a licence unless:

> (b) the past or present conduct of personal referred to in subsection (4) affords reasonable grounds for belief that the applicant will not operate in accordance with the law and with integrity and honesty;
> (c) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for a licence

Licences may also be revoked by the Registrar for these reasons. Where the Registrar proposes to refuse or revoke a licence on these grounds, the applicant or licensee is entitled to a hearing by the Tribunal under section 22 of the Act and subsection 22(5) provides:

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

In this respect, the Act is similar to over a dozen various acts which regulate certain industries and which provide for an appeal from registrars' proposals to the Tribunal. The Divisional Court, in a series of cases, has spelled out the role of the Tribunal in appeals of this nature. In *Zahariev v. Ontario (Registrar, Motor Vehicle Dealers Act*)(2005), 205 O.A.C. 110, for example, the 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.
>
> [8] This accords with the wording of s. 7(4) of the [Motor Vehicle Dealers] Act, which reads as follows:
>
> > 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.

> [9] Counsel for the Tribunal concedes that this section requires a *de novo* hearing before the Tribunal. At that hearing, the Tribunal would be called upon to make a fresh determination of the factual issue set out in s. 5(1)(b) as to 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".
>
> [10] This court, in *Registrar, Motor Vehicle Dealers Act v. Shine Car Sales* (2003), 40 M.V.R. (4th) 86 (Ont. Div. Ct.), pointed out that *Brenner* "must be read carefully". It went on to state the following, at para. 9:
>
> > It does not establish a rule that the Registrar must be *shown to be wrong* in having concluded that there was reason to doubt that the registrant would carry on business appropriately. [*emphasis added*]
>
> [11] The court elaborated further on this point at para. 10:
>
> > It should be clearly understood that the Tribunal owes no deference to the Registar's opinion. The Registrar is the investigator. The Registrar is not a trier of fact whose opinion is based upon a hearing and so entitled to deference.

The Act also provides for a Complaints Committee which, under subsection 14(1) of the Act is to "consider and investigate complaints regarding the conduct or action of any licensee" where a written complaint has been filed. The Complaints Committee is not required to hold a hearing or afford an opportunity for a hearing. However, it may take certain action as a result of its investigation. If either the person complained against or the complainant requires a hearing, then under subsection 14(8), it is the Tribunal which is to hold the hearing. Subsection 14(9) provides:

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

It will be seen that this provision is identical to subsection 22(5) quoted above. Therefore, it follows that the decision in the *Zahariev* case would apply to appeals from a Complaints Committee decision.

The Act also provides for a Discipline Committee to be appointed by the Funeral Board. The Discipline Committee consists of four members of the Funeral Board, two of whom are not funeral directors. Under section 15 of the Act the Funeral Board or the Executive Committee of the Funeral Board may direct the Discipline Committee to hold a hearing and determine any allegation of professional misconduct on the part of a funeral director. Section 44 of Regulation 470 of the Act spells out a number of acts which would constitute professional misconduct. These include:

> (o) signing or issuing a certificate, report or other document that contains a statement the licensee knows or ought to know is false, misleading or otherwise improper: . . .
> (u) acting in a manner relevant to the practice of funeral directing that, having regard to the circumstances, would reasonably be regarded as unprofessional conduct.

The proceedings of the Discipline Committee are governed by, among other sections, Section 17 of the Act. This section provides that the Funeral Board and the funeral director whose conduct is being investigated are parties to the proceedings. The funeral director has the right to examine any written or documentary evidence to be adduced before the hearing. Discipline Committee Members are not to have taken part in the pre-hearing investigation. Discipline Committee Members are not to communicate with anyone, including any party, about the subject matter of the hearing without notifying the parties and giving them an opportunity to participate. The Discipline Committee may seek legal advice from independent counsel and the proceedings of the Discipline Committee at the hearing are recorded.

Ms. Maciura, counsel for the Funeral Board, in her submissions argued that Ms. Johal had received a full and fair hearing by the Discipline Committee. In fact, Ms. Maciura argued that the hearing before the Discipline Committee "looks more like a full hearing than this License(*sic*) Appeal process does." She bases this argument on the fact that the Discipline Committee hearings are recorded by a court reporter, there is an independent counsel in attendance and the panel consists of three or four members. While this is not a compelling argument, it is important that neither party be left with the impression that they have received a "lesser" hearing before this Tribunal than before the Discipline Committee. When the Tribunal sits in Toronto, its proceedings are recorded digitally; when it is sitting out of town, there is a court reporter. In either case, the proceedings are recorded and a transcript is available to the parties. Vice-Chairs of the Tribunal are themselves lawyers, unlike the members of the Discipline Committee, so an independent counsel does not routinely attend Tribunal hearings. The presence or absence of independent counsel to advise the Tribunal during a hearing does not affect the legitimacy of the process. Finally, the panel size of the Tribunal in any hearing may vary from one to three, depending on the anticipated legal and evidentiary complexity of the case. The number of Tribunal adjudicators sitting on a hearing does not determine whether or not a valid hearing has occurred. This is not to take away from the legitimacy of the Discipline Committee process: Mr. Klug, counsel for Ms. Johal, while disagreeing with the findings of the Discipline Committee, did not argue that the hearing itself was inadequate or denied Ms. Johal a right to know the case she had to meet and to participate fully.

Section 18 of the Act provides for an appeal from the decision or order of the Discipline Committee to the Tribunal and subsection 18(2) provides, "Subsections 14(6) to (11) apply with necessary modifications to an appeal to the Tribunal from a decision or order of the Discipline Committee." In other words, the Tribunal has the same responsibilities and authority on an appeal from the Discipline Committee as it does on a request for a hearing from the Complaints Committee, "with necessary modifications".

Ms. Maciura submits that the Tribunal's role, on an appeal from the Discipline Committee, is to review the decision of the Discipline Committee and in doing so, the Tribunal must defer to the decision of the Discipline Committee. She submits that the Act is of limited use in determining this matter because, unlike decisions of the Registrar

or the Complaints Committee, the Discipline Committee holds a hearing. Therefore, she submits, the underlying reasoning of the *Zahariev* case does not apply here. The Discipline Committee is a trier of fact and therefore is entitled to deference. The role of the Tribunal, by this logic, is to review the decision of the Discipline Committee, applying the standard of reasonableness to that review in accordance with the decision in *David Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

It is true that a principal reason given in the *Shine* case, which was cited with approval by the Court in *Zahariev,* was the fact that the Tribunal was dealing with an appeal from the decision of a Registrar who was not a trier of fact and therefore not entitled to deference. Does it follow, however, that the Tribunal ought to restrict itself to reviewing the decision of the Discipline Committee with a deferential standard of review because the Discipline Committee has conducted a hearing?

Ms. Maciura submits that it does and in support of her argument submitted a number of cases. The Tribunal is grateful for her assistance in this matter. One of the cases cited is *Woodward v. Society of Notaries Public of British Columbia* [1993] B.C.J. No. 332, 38 A.C.W.S. (3d) 1037, a decision of the British Columbia Supreme Court in Chambers. This was an application for directions in an appeal by a Notary Public from a decision of the discipline committee of the Society of Notaries Public of British Columbia. Clancy J. focuses on the wording of the statue involved because, in his words,

> Statutory appeals take different forms. The jurisdiction of the tribunal and the powers of the court on appeal or review depend on the language employed by the legislature.

The specific wording of the statue in this case provided that the Court was to "hear and determine the matter in dispute de novo". Clancy, J. concluded that the "matter in dispute" was whether the discipline committee had erred in its decision and therefore, despite the use of the wording "de novo" in the act, the Court owed deference to the earlier decision. However, this case can be distinguished from the present one because the wording of the statute differs from that of the present case. With one exception, which will be considered below, that is the difficulty with all the cases cited. They each must be regarded as specific to the legislation they consider.

It is to the Act before us that the Tribunal must turn for guidance. The question to be determined is whether, because the Discipline Committee conducted a hearing in this matter, the role of the Tribunal changes fundamentally from a full plenary jurisdiction to conduct a fresh hearing and arrive at an independent conclusion to an appellate jurisdiction to review the decision of the Discipline Committee. A consideration of subsection 18(2) yields the conclusion that it does not. It will be recalled that subsection 18(2) provides that the same provisions apply to appeals from the Discipline Committee to the Tribunal as apply to requests for a hearing from the Complaints Committee "with necessary modifications." The use of the phrase "with necessary modifications" is not sufficient to convert the role of the Tribunal from holding a fresh hearing and forming its own conclusions, substituting its judgement for that of the initial decision maker if necessary, to the role of conducting a curial review with deference to the Discipline Committee. The phrase "with necessary modifications" must be read to mean minor

modifications necessary to give sense to the provisions in their new context. It cannot be used as an excuse to re-write the appeal provisions. If the Legislature had intended a curial review of decisions of the Discipline Committee, it could easily have provided for it. For example, the Act could simply provide for an appeal to the Divisional Court bypassing the Tribunal. There is a reason the Tribunal was inserted into this process and despite the attendant expense and the obvious risks of conflicting findings of fact and contradictory decisions, the Legislature clearly intended there to be a second, independent, quasi-judicial proceeding if requested.

Ms. Maciura cites one decision of this Tribunal, *Re: Colin Wartman,* an appeal from the decision of the Discipline Committee of the Board of Funeral Services, released October 7, 2004. In that case, the panel was considering an appeal from a decision of the Disciplinary Committee and concluded that while the Act authorised the Tribunal to substitute its own opinion for that of the Discipline Committee, reference ought to be made to the case law, in particular to the decisions of the Divisional Court in *College of Physicians and Surgeons of Ontario v Payne* [2002] O.J. No. 3574 and *Flowers v. Health Professions and Appeal Board* [2004] O.J. No. 1252. The panel concluded that the Tribunal must act in an appellate role, reviewing decisions of the Discipline Committee with deference. However, the cases cited do not establish a general principle that where a full hearing has occurred, the function of a second quasi-judicial tribunal must necessarily be to review the decision of the initial trier of fact, regardless of the wording of the legislation in question. On the contrary, each of these decisions reviews and interprets the provisions of the respective statues to determine their framework and intent. The provisions of those statutes differ materially from the relevant provisions of the Act. It is important to note the *Re: Colin Wartman* decision was reached before the *Zahariev* case. Therefore the panel in *Re: Colin Wartman* did not have the benefit of that ruling and subsequent decisions of the Divisional Court commenting on the role of the Tribunal. This Tribunal is not bound by its own decisions and this panel declines to follow the case of *Re: Colin Wartman*. It is the Act which must dictate what role and authority the Tribunal has and, for all the factors considered above, the Tribunal concludes that the role of the Tribunal is to conduct a fresh hearing and arrive at an independent decision.

It is important to note that the decision of the Discipline Committee is, on consent of the parties, before this Tribunal as evidence. In determining the facts in this case, the Tribunal gave no weight to the findings of the Discipline Committee for the following reasons. This case turns on the issue of credibility. There is no special expertise involved in determining credibility that is exclusive to the Discipline Committee. The Tribunal heard the evidence and is as qualified as is the Discipline Committee to make a finding of credibility. In the result, the finding of the Discipline Committee is the same as that the Tribunal, although the Discipline Committee heard somewhat different evidence and conducted a different analysis of the evidence it heard. The Discipline Committee concluded that Ms. Johal did not perform the embalmings in question.

The Discipline Committee decided to suspend Ms. Johal's licence for ten months, to fine her and to impose restrictions on her licence and conditions on her reinstatement,

including the requirement that Ms. Johal successfully complete a prescribed professional development course and an approved ethics course. After considering the evidence, the Tribunal has decided instead to revoke Ms. Johal's licence. There are several reasons for this different result.

The Tribunal has facts that the Discipline Committee could not have known. Ms. Johal, far from showing remorse or taking any remedial action after she was found to have misled the Funeral Board by the Discipline Committee, has instead repeated her attempted deception to the Tribunal.

The Discipline Committee deferred to the recommendation of the Funeral Board in establishing the penalty. The Committee wrote:

> The Panel considered what period of suspension (in addition to the restrictions) would be minimally necessary given the facts of this case in order to meet the principles of general deterrence, to maintain public confidence in the disciplinary process and to ensure appropriate respect for the [Funeral] Board. In the Panel's view, a lengthy suspension of Ms. Johal's licence is necessary to achieve these general principles of sentencing. In fact, the Panel was concerned that the ten month period of suspension suggested by the [Funeral] Board was not adequate to address the seriousness of the conduct, however; it accepted this submission in deference to the [Funeral] Board's position. The Panel wishes Ms. Johal to know that had it not been for the [Funeral] Board's penalty submission, the Panel would have imposed a longer period of suspension.

Ms. Maciura advises that it is customary for the Discipline Committee to accept the recommendations of the Funeral Board concerning penalty. However, for the Tribunal to defer to the Funeral Board, which is a party to this proceeding, on the question of penalty would be improper.

The Discipline Committee seemed to regard this as principally an internal matter. As will be noted from the above excerpt, the Discipline Committee was concerned about deterrence of other funeral directors and maintaining respect for the Funeral Board and public confidence in the disciplinary process. It did not expressly consider the interests of the wider public in this matter.

Ms. Johal did far more than mislead the Funeral Board, an act of professional misconduct under paragraph 44(o) of Regulation 470 of the Act. In the spring of 2007, when the Funeral Board began its investigation, Ms. Johal created a calculated web of deception in which she attempted to implicate four of her employees and ex-employees. Most obviously, she took advantage of an intern in her employ. She was in a position, if not of trust, then certainly of responsibility for the instruction of Ms. Cowley. She betrayed this responsibility by claiming credit for the work of Ms. Cowley. If Ms. Johal had been believed, Ms. Cowley's licence would have been in jeopardy for misleading the Funeral Board. Even the accusation may have cast a shadow on Ms. Cowley's integrity. The Tribunal wishes to underscore the fact that two independent hearings have now established that Ms. Cowley was an innocent victim of the lies of her employer. She performed all of the six contested embalmings.

Ms. Johal also attempted to involve Ms. Walters in her deception. Ms. Johal prepared false Preparation Reports and put Ms. Walters's name on them. She implied that Ms. Walters was lying when she denied having supervised most of the contested embalmings. Ms. Johal falsified two of Ms. Walters's time cards in an attempt bolster her claims. On the day Ms. Walters left Benisasia, Ms. Johal permitted her to swear an affidavit that Ms. Johal knew to be false.

Someone persuaded Mr. Kolotyliuk that he had witnessed one of the contested embalmings. Ms. Johal permitted him to persist in this belief, and to testify to it, despite knowing it was wrong. Ms. Johal implicated the fourth employee, Ms. Witzel, by implying that she was lying in corroborating Ms. Cowley's testimony.

At any time in the past three and a half years, Ms. Johal could have unwound this web of deception. She could have recanted her testimony; she could have expressed remorse, she might have made amends to those she had attempted to harm with her lies. She did not. Instead, she persists in these falsehoods.

The Act provides that funeral directors are entitled to be licensed unless their conduct provides reasonable grounds for the belief that the director will not operate in accordance with the law and with integrity and honesty. It is important to note that the Discipline Committee does not have to demonstrate that an act of professional misconduct meets this test to consider revocation of a licence. This is the test that the Registrar must meet but the Discipline Committee has a wider scope for its consideration. However, there is nothing preventing the Discipline Committee from applying this test.

Ms. Johal's repeated deceptions, particularly given the extent and the damaging nature of her lies, constitute professional misconduct under both paragraphs 44(o) and 44(u) of Regulation 470 to the Act. These deceptions and her persistence in them raise legitimate concerns about her ability to conduct her business in accordance with the law and with integrity and honesty. Bereaved families are in a particularly vulnerable situation and they need to be assured that they are dealing with a person of probity at this time. Given that Ms. Johal has attempted to implicate her own employees and former employees in her lies, has lied to her regulating body and to this Tribunal, there are reasonable grounds to believe that she would deceive her customers if it were self-serving for her to do so.

Mr. Klug has submitted that Ms. Johal ought to be permitted to continue her business because Benisasia is the only funeral establishment serving the South Asian community in the Greater Toronto Area. However, this argument is not persuasive. The community served by Ms. Johal is entitled to the same standard of integrity as any other.

To suspend Ms. Johal, as the Discipline Committee proposed, even with the other terms it imposed, will not turn her into an honest person. One of these terms was that Ms. Johal was to complete an approved ethics course prior to her reinstatement. This might

be appropriate if there were some question as to whether Ms. Johal was confused or unaware of the proper course of conduct. The deceptions practiced by Ms. Johal are too fundamental for confusion or misunderstanding. An ethics course will not turn Ms. Johal into a person who will conduct her business lawfully, honestly or with integrity. Nor will the longer period of suspension that the Discipline Committee considered have that effect. Ms. Johal cannot have honesty and integrity imposed on her; she must find it within herself. Until she does, there are reasonable grounds to believe that she will not meet the regulated standard of conduct. For the protection of the public she serves, Ms. Johal's licence must be revoked.

Order

Under subsections 14(9) and 18(2) of the *Funeral Directors and Establishments Act,* the Licence Appeal Tribunal directs the Discipline Committee of the Board of Funeral Services to revoke the licence of Ms. Prabhjot Johal as a funeral director.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice-Chair

Released: January 17, 2011

This decision may also be available on Quicklaw.

Decisions Under the Highway Traffic Act

Section 32(5)(b)(i) - Medical

Fiscal Year 2010 - 2011

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- 5941-MED-DOWN-Downgrade of Licence
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/medical/apr/5941 med.downgrade.pdf>
- 6094-MED-SEIZ-Seizure
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/medical/jul/6094- med-seiz.down.pdf>
- 6178-MED-DOWN-Downgrade of a Licence
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- 6259-MED-SEIZ-Seizure
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- 6306-MED-DOWN-Downgrade of a Licence
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- 6352-MED-CARD-Cardialogical
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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5941-MED-DOWN-Downgrade of Licence

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32(5)(b)(i)

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

TRIBUNAL: PATRICK COFFEY, M.D., Member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Minister of Transportation

DATE OF HEARING: April 7, 2010 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(5)(b)(i) of the *Highway Traffic* Act, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Respondent's Case

Dr. M. sent to the Ministry of Transportation ("MTO") a Medical Condition Report respecting the Applicant, dated April 29, 2003, which stated as follows:

> Episode of clonic jerking and loss of consciousness on awakening from sleep at night. Fatigued from lack of sleep (working multiple shifts).
>
> No alcohol abuse. No focal signs.

> CT scan normal.
>
> Prior similar episode 2000. To have neurology follow-up for diagnosis. Not started on anticonvulsants.

After receiving this report, MTO wrote to the Applicant on May 20, 2003, to inform him that his licence was suspended for medical reasons.

Dr. N., Neurologist, wrote a consultation letter dated June 5, 2003, describing two nocturnal episodes while the Applicant was sleeping. The doctor was of the opinion that the first episode was simply an episode of syncope. The doctor stated that he could not be sure about the second episode and wrote that he would not continue to treat the Applicant as having had a seizure. The doctor decided to order a sleep-deprived EEG. Dr. N. wrote again to MTO on July 7, 2003, stating that the Applicant's EEG of June 20, 2003, was reported as normal.

As a result of the reports noted above, MTO wrote to the Applicant on July 24, 2003, to advise him that his medical report had been approved and that his licence had been reinstated.

The Applicant's family physician, Dr. N., wrote to MTO on April 3, 2006, in regard to the fact that the Applicant's application for his Class "A" licence had been denied because of the receipt of a report with the finding of Bradycardia (heart rate was 47 beats per minute). The doctor enclosed a Holter test report, which reported "no dramatic bradyarrhythmias". On receipt of this report, MTO wrote to the Applicant on May 12, 2006, informing him that the medical report had been approved for a Class "A" licence.

Dr. B. sent a Medical Condition Report concerning the Applicant to the MTO on June 15, 2009. With reference to the medical condition in question, the doctor wrote "Blackout or Loss of consciousness or Awareness". Under the heading "Optional", the only legible comments are:

> Working a lot. Poor sleep. Felt tired/light-headed when got into truck. Blackout of some type soon after...

When MTO received this report from Dr. B., a letter was written to the Applicant on July 24, 2009, informing him that his driver's licence was suspended for medical reasons.

A Motor Vehicle Accident Report (date illegible) was completed in relation to the accident involving the Applicant. The legible comments from this report are:

> Vehicle: Trailer.
>
> Driver entered R1 to go s/b from plaza exit. Driver does not remember driving vehicle. Unknown what caused blackout. Driver mounted curb, struck tree and light pole.

Dr. M., Neurologist, wrote a report to MTO on January 14, 2010, in which he stated, in part, that the Applicant suffered another spell on June 15, 2009, when he had a loss of consciousness while driving his truck and crashed into a light standard in a parking lot, driving slowly. The doctor noted that recent EEGs and the Holter monitor test were normal, and that a recent MRI of the head showed focal cortical encephalomalacia in the right frontal lobe. The doctor stated that the patient was on medication, Keppra, and was seizure-free since its initiation. In his final sentence, the doctor stated that he thought it was safe for the Applicant "to go back to driving at this point".

Dr. D., Neurologist, wrote a report on January 21, 2010. He described the past medical history of the Applicant. He noted that the Applicant had suffered a head injury causing unconsciousness in 1982. He further wrote that the Applicant was doing well on Keppra medication, that the seizures were likely related to the right frontal MRI lesion, and that the epilepsy appeared to be very mild. The doctor believed that there was an excellent chance that the Applicant would remain completely seizure-free while taking Keppra. He finally wrote that he believed that "it would be safe for <Applicant's name removed> to drive".

In the Medical Advisory Committee ("MAC") Case Summary report, dated February 16, 2010, it was written as follows:

> Recommendations: Reinstate and Downgrade.
>
> Reasons: Driver no longer meets the requirements for a commercial licence [O. Reg. 340/94, s. 17(1)(G)] nor does he meet the waiver criteria as he must establish a seizure free period on or off medication for five years (CCMTA 6.3.1). It is appreciated that the five year period could be reduced on the recommendation of a neurologist, but this driver has encephalomalacia which is likely epileptogenic, in the right polar orbital frontal surface i.e. cortical.

The MTO wrote to the Applicant on February 23, 2010, to advise him that it was required that his Class "AC" licence be changed to a Class "G".

On March 19, 2010, Dr. M., Neurologist, sent another report to MTO. The doctor reported that the "spell" thought to have been suffered by the Applicant in 2006 was an error, and, in fact, there had been no "spell". The doctor concluded his report by suggesting that the Applicant be considered for his Class "AZ" licence, which was integral to his livelihood.

<u>The Applicant's Case</u>

The Applicant testified that he is not working. He has had considerable misfortune through his working life through no fault of his own and needs to work now.

He has not had a seizure or any loss of consciousness episode since June 15, 2009. He was started on Keppra medication in October 2009. It was in 2009 that he had an

MRI test done for the first time. He is diligent about taking his medication and following the advice of his doctors.
The Applicant stated that the reason why he is now appealing and trying to get his "AC" licence back is because of what happened on June 15, 2009. He acknowledged that he fully realizes and understands what his doctors have been telling him - that there may be scar tissue in the right frontal part of his brain, which may be causing his difficulties. He pointed out that there are records which show that three neurologists have stated that he is safe to drive. He noted that Dr. D. is not just a neurologist but also specializes in the area of seizures. The Applicant is of the opinion that when his doctors wrote "he was safe to drive" in their reports, they meant that he was safe to drive a truck.

The Applicant's wife also testified. She stated that on some of the occasions when the Applicant suffered an episode or a loss of consciousness, he had been sleep-deprived or drinking, which is not happening now. She believes that her husband's doctors have confidence in the Keppra medication that the Applicant is now taking. She asserted that her husband is faithfully following the instructions of his doctors.

ISSUES

Does the Applicant suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely?

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

LAW

O. Reg. 340/94, section 14 states:

> 14. 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; or
>
> (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.

Sections 17 and 18 state:

> 17. (1) Qualifications required by an applicant for or 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 as measured by Snellen Rating that is not poorer than 20/30 with both eyes open and examined together and not poorer than 20/100 in the weaker eye, with or without the aid of corrective lenses; and

(k) has a horizontal visual field of at least 150 continuous degrees along the horizontal meridian and at least 20 continuous degrees above and below fixation, with both eyes open and examined together.

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

(3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1) (c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.

(4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5

metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. (1) An applicant for or a holder of a Class M, M1 or M2 driver's licence must have,
(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50, with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(2) An applicant for or a holder of a Class G, G1 or G2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50 with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

Section 32(5)(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.

(5) 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 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.

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

APPLICATION OF THE LAW TO FACTS

The Canadian Council of Motor Transport Administrators ("CCMTA") Medical Standards for Drivers, Standard 6.3.1., under the heading "Seizures", reads:

> If individual has been seizure-free on or off medication for 5 years, and receives a favourable report from their usual treating physician and/or a neurologist, may operate any class of motor vehicle.

The Tribunal sympathizes with the Applicant's wish to return to driving as soon as possible, especially since he needs to drive to earn a living.

The Tribunal notes that the Applicant had an episode of loss of consciousness in 2000, which Neurologist Dr. N. thought most likely due to syncope, and then another episode in 2003, which Dr. N. thought was suggestive of, but not definitely diagnostic of, a seizure. Then in 2006, due to the finding of bradycardia, the Applicant lost his commercial licence for a short period of time, but had it restored in May 2006 with the receipt of a favourable Holter test report. On June 15, 2009, the Applicant suffered another loss of consciousness episode while driving his truck in a parking lot, resulting in an accident.

The Tribunal, after serious consideration of the evidence, cannot ignore the fact that the most serious episode suffered by the Applicant was only about ten months ago (June 15, 2009 - loss of consciousness while driving a truck). The Tribunal has also considered the following:

1. The Applicant had a serious head injury in 1982 (with the possibility put forward of resulting scar tissue of the brain).

2. Dr. D.'s report of January 21, 2010, which stated that the area of encephalomalacia in the frontal lobe of the brain was likely the cause of the Applicant's seizures.

3. The MAC neurologist wrote (February 16, 2010) that he considered the area of encephalomalacia to be epileptogenic. This neurologist recommended downgrading the Applicant's licence to a Class "G", following the guidelines of CCMTA, Standard 6.3.1.

The Tribunal notes that it has been about ten months since the Applicant's last episode of loss of consciousness. The Tribunal finds that a further neurological follow-up period is required, and, in keeping with the recommendation of the MAC neurologist, serious consideration should be given to the reinstatement of the Applicant's Class "AC" licence, whenever the Applicant's neurologist expresses confidence in this step being taken.

DECISION

Upon the application by the Applicant to appeal the Respondent's decision, effective February 23, 2010, to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to section 32(5)(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 of Transportation be confirmed.

LICENCE APPEAL TRIBUNAL

_____

Patrick Coffey, M.D., Member

RELEASED: April 16, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6094-MED-SEIZ-SEIZURE

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32(5)(b)(i)

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

TRIBUNAL: PATRICK COFFEY, M.D., Presiding Member

APPEARANCES: APPLICANT, self-represented

KYLE M. BIEL, Representing the Registrar of Motor Vehicles

DATE OF HEARING: June 29, 2010 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to 32(5)(b)(i) of the *Highway Traffic* Act, R.S.O. 1990, c. H.8 (the "Act").

FACTS

Respondent's Evidence

Dr. C. sent in a report to the Ministry of Transportation (MTO) on August 6, 2008 concerning the Applicant, writing as follows:

> Mr. X, who has a history of seizure disorder, had a seizure two days ago.

When the MTO received this report, it was decided that the Applicant's driving privilege should be suspended.

Neurologist Dr.T wrote a consultation report to Dr. C., (the family physician of the Applicant), dated October 24, 2008, in which he said, in part, that the Applicant had a history of seizure since the age of 18. When the Applicant arrived in Canada seven years ago, his medication for seizure was changed to Epival.

In June 2008, the Applicant missed one dose of Epival and had an episode when he blacked out. He was told that he had a mild seizure. Then, in August 2008, the Applicant believes that he may have missed his dose of Epival again and he blacked out and was told he had an episode of mild shaking of the body and he had bitten his tongue, but there was no incontinence, muscle soreness, focal weakness, focal numbness or injury. He has not had any further seizures since August 2008.

Under Clinical Impression Dr. T wrote as follows:

> Mr. X's neurological examination is normal. The history that I obtained is suggestive of primary generalised epilepsy, possibly juvenile myoclonic epilepsy. Because of language barrier, the history is somewhat difficult to obtain. I have arranged for him to have an MRI of the brain and an EEG. I have ordered CBC, liver function tests and a Depakene level. I have told him that at present he should not be driving and not involved in any activity that would be dangerous if he would have a seizure.

EEG report (November 12, 2008):

> Mildly abnormal EEG. Intermittent, infrequent, generalised sharp waves and spikes are Identified. No other epileptiform activity or focal abnormalities are seen. These findings likely represent an interictal manifestation of an underlying primary generalised seizure disorder.

MRI of head report (November 17, 2008):

> There are a few punctate hyperintense T2 signal foci in the cerebral white matter which are entirely non-specific. The differential includes small vessel ischemic change of various etiologies or less likely demyelination. Mild generalised cerebellar atrophy.

Neurologist Dr. T sent in another report, dated March 9, 2009. The Clinical Impression reads as follows:

> Mr. X has primary, generalised epilepsy and has had no seizures since August 2008. He is taking his medications regularly. I have ordered CBC, liver function tests and Depakene level today. I have told him to carry on with things as they are. There is no reason that he cannot resume driving from the neurological point of view.

The MTO wrote to the Applicant on May 1, 2009, informing him that his Class 'G' licence was reinstated.

The MTO wrote to the Applicant on June 12, 2009, informing him that his application for a Class 'A' licence would be considered when he had established a five-year seizure-free period on or off medication.

Dr. P wrote to the MTO on August 11, 2009, stating that he was the Family/Attending physician of the Applicant. He summarised the Applicant's history and finally wrote:

> Mr. X is fully assessed including detailed history, clinical examination and investigations EEG, MRI and blood levels of Valproic acid. To best of my assessment, he is medically fit for AZ licence.

The Certified Driver Record for the Applicant, dated June 15, 2010, showed no convictions' discharges or other actions, and the Demerit Points were zero.

Applicant's Evidence

The Applicant explained that since he lost his 'A' licence, he has been out of work. He is finding it very difficult financially as a result. He has four children and is the breadwinner in the family.

He said that on the day in August 2008, when he suffered a seizure he had to work 15 hours and he missed taking his morning anti-seizure medication that day.

The Applicant drew attention to the Canadian Council of Motor Transport Administrators ("C.C.M.T.A.") Standards for Drivers under Seizures Standard 6.3.5. (Simple Partial Seizure), wondering if this Standard applied to the medical situation he was in.

He referred to the medical report of his doctor, Dr. P, dated August 11, 2009, who indicated that he was fit for an 'AZ' licence.

ISSUES

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

LAW

O. Reg. 340/94, section 14 states:

> 14. 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; or
>
> (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.

Sections 17 and 18 state:

> 17. (1) Qualifications required by an applicant for or 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 as measured by Snellen Rating that is not poorer than 20/30 with both eyes open and examined together and not poorer than 20/100 in the weaker eye, with or without the aid of corrective lenses; and

(k) has a horizontal visual field of at least 150 continuous degrees along the horizontal meridian and at least 20 continuous degrees above and below fixation, with both eyes open and examined together.

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

(3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1) (c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.

(4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. (1) An applicant for or a holder of a Class M, M1 or M2 driver's licence must have,
(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50, with both eyes open and examined together with or without the aid of corrective lenses; and
(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(2) An applicant for or a holder of a Class G, G1 or G2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50 with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

Section 32 (5)(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.

(5) The Minister may require an applicant for a driver's licence or an endorsement or a person who holds a driver's licence to submit to the examinations that are authorized by the regulations at the times and places required by the Minister and to meet other prescribed requirements, and the Minister may,

(b) in the case of a person who holds a driver's licence,

(i) impose the conditions authorized by the regulations, remove any conditions or endorsements or change the class or classes of driver's licence held by the person, in accordance with the results of the examinations and other prescribed requirements, or

Section 50 states:

50. (1) Every person aggrieved by a decision of the Minister under subclause 32(5)(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

Under the heading "Seizures" of the C.C.M.T.A. Medical Standards for Drivers, the applicable standard (Standard 6.3.1.) is written as follows:

> If individual has been seizure-free on or off medication for 5 years, and receives a favourable report from their usual treating physician and /or a neurologist, may operate any class of motor vehicle.

The Tribunal sympathises with the Applicant's wish to have his Class 'A' licence reinstated, especially since he depends on this to earn a living.

The Tribunal recognises that the Applicant is being very careful not to miss any of his medication and that he is seeing his neurologist regularly. Also, the Tribunal recognises that the Applicant has an excellent driving record.

The Tribunal notes that in both seizures, the one in June 2008, and the one in August 2008, the Applicant suffered loss of consciousness. It notes that he has not had a seizure since

August 2008. It also notes that he has been diagnosed with Epilepsy (Primary, generalised Epilepsy).

Therefore, the Tribunal concludes that the C.C.M.T.A. Standard that applies to the Applicant under the heading “Seizures” is Standard 6.3.1. The Tribunal has decided that the decision of the Registrar should be upheld.

DECISION

Upon the application by the Applicant to appeal the decision dated September 21, 2008 of the Minister (“Respondent”) to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(5)(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 Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

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Patrick Coffey, M.D., Presiding Member

RELEASED: *July 2, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6178-MED-DOWN-Downgrade of a Licence

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32(5)(b)(i)

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

TRIBUNAL: PATRICK COFFEY, M.D., Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Minister of Transportation

DATE OF HEARING: August 19, 2010 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(5)(b)(i) of the *Highway Traffic* Act, R.S.O. 1990, c. H.8 (the "Act").

PRELIMINARY MATTERS

At the onset of the hearing, the Applicant submitted an additional document, namely a medical report from Dr. S., dated August 3, 2010. The Agent for the Respondent agreed to the admission of this report into evidence, and it was marked as Exhibit #4.

FACTS

The Respondent's Case

Dr. M. sent a Medical Condition Report to the Ministry of Transportation ("MTO") on January 7, 2010, in which he wrote that the Applicant suffered a seizure or loss of consciousness on January 5, 2010. He also wrote "Situation is a serious road safety risk" and "Patient is aware of this report".

The Applicant was referred to a neurologist, Dr. S., by his family physician. Dr. S. sent a report to MTO on February 18, 2010, concerning the Applicant. In this report, the neurologist stated that he had assessed the Applicant regarding a possible epileptic seizure on January 5, 2010. The Applicant had no previous seizure-like episodes. His physical examination was normal, and the CT scan of the head, MRI of the head, EKG and EEG were normal. The doctor described how the Applicant was awakened in the night in order to return to snow-ploughing during a storm. The Applicant ploughed for two hours, not feeling well, and when he returned to the work site he "blacked out", and was seen to have tonic clonic movement. Dr. S. noted that in the Ambulance Report, the Applicant's blood sugar level was written as borderline low at 3.8 at 04:04 hours, which was 25 minutes after the ambulance received the incident call, so he was given an oral glucose tablet. Blood glucose was only 2.8 at 04:17 hours (although this was written in as 3.8 at 04:18 hours). Dr. S. concluded the report by stating his opinion that the Applicant had probably suffered tonic clonic movements associated with hypoglycaemia, compounded by fatigue. The doctor believed that there was no evidence to suggest that the Applicant was likely to have recurrent seizures or any similar neurological disorder, and from the neurological point of view, he believed that "he [the Applicant] may be allowed to drive without risk".

A laboratory report on the Applicant, dated April 4, 2010, showed a normal blood sugar reading of 4.6 (normal range is 3.6 – 6.0).

On April 21, 2010, MTO wrote to the Applicant to inform him that his Class "A" licence was being changed to a Class "G" licence.

The Certified Driver Record for the Applicant, dated August 4, 2010, showed that between September 2007 and April 2010, the Applicant was convicted of failure to have insurance card on three occasions, and speeding on three occasions. Current demerit points are zero.

Neurologist Dr. S. wrote another report concerning the Applicant, dated August 3, 2010. He stated that the Applicant had had no further seizures and the neurological examination was normal. In conclusion, he wrote:

> There is no need for any further investigation from a neurological point of view. In my opinion, there is no significant risk of any further seizures. I believe he is not at risk in any way as a driver of any type.

The Applicant's Case

The Applicant testified that his work consists of running a concrete pump (a type of crane), and in the winter he also does snow-ploughing. He needs a Class "D" licence for this purpose.

The Applicant stated that he cannot collect unemployment or disability payments, and noted that he had tried retraining. He is still not able to work and is not earning any money. He has a family. He has never had a seizure before. With his work, he is not a threat on the highway.

The Applicant described what happened during the night of the seizure (January 5, 2010). He had done a full day's work the day before and went to bed at the work site. He took a Gravol tablet in order to help him sleep. After about two hours of sleep, he was woken up (at about 3:00 a.m.) in order to do more snow-ploughing. He ploughed for approximately two hours, until about 5:00 a.m., and did not feel well during that time. He then returned to the work site, and when he got into the office, he suffered the seizure. As far as the Applicant knows, he was unconscious for about one or two minutes. The seizure was seen by his supervisor. He had a bad headache when he woke up. He was taken to a hospital in the ambulance, and was given glucose by mouth while in the ambulance.

ISSUES

Does the Applicant suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely?

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

LAW

O. Reg. 340/94, section 14 states:

> 14. 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; or
>
> (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.

Sections 17 and 18 state:

17. (1) Qualifications required by an applicant for or 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 as measured by Snellen Rating that is not poorer than 20/30 with both eyes open and examined together and not poorer than 20/100 in the weaker eye, with or without the aid of corrective lenses; and

(k) has a horizontal visual field of at least 150 continuous degrees along the horizontal meridian and at least 20 continuous degrees above and below fixation, with both eyes open and examined together.

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

(3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1) (c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.

(4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. (1) An applicant for or a holder of a Class M, M1 or M2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50, with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(2) An applicant for or a holder of a Class G, G1 or G2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50 with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

Section 32(5)(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.

(5) 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 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

The Tribunal notes that the Applicant suffered a seizure on January 5, 2010. This was observed by his supervisor, and the description given was that of a generalized or grand mal seizure. The Applicant did not have any seizures before this, nor has he had one since. At the time that he had this seizure (about 5:00 a.m.), the Applicant had been fasting and working for a prolonged period of time. The February 18, 2010 report of neurologist Dr. S. described the blood glucose level of the Applicant as being low, not long after the seizure. The Applicant was not taking any medication which might cause a seizure or low blood glucose. In the report, Dr. S. wrote "I believe he probably had tonic clonic movements associated with hypoglycaemia compounded by fatigue". The Tribunal is aware that hypoglycaemia can be the cause of a seizure.

The Canadian Council of Motor Transport Administrators Medical Standards for Drivers, Standard 6.3.2., under the heading "Seizures" reads:

> Not eligible for any class of licence until a complete neurological assessment has been conducted.
>
> May be considered for a higher (1-4) class of licence if there are no signs of epileptiform activity and individual has been seizure-free for 12 months.

The Tribunal notes that the Applicant has only been seizure-free for seven and a half months, but is of the opinion that the following should be taken into consideration:

Dr. S., a neurologist, has been following the Applicant since soon after his seizure - his first report being dated February 18, 2010, and his last report being dated August 3, 2010. In this last report, the doctor wrote "In my opinion there is no significant risk of any further seizures. I believe he is not at risk in any way as a driver of any type".

This opinion, expressed without any ambiguity, cannot be ignored. Therefore, the Tribunal has decided that the Applicant's Class "A" licence should be reinstated.

DECISION

Upon the application by the Applicant to appeal the Respondent's decision, effective April 21, 2010, to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to section 32(5)(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 of Transportation be set aside.

LICENCE APPEAL TRIBUNAL

_____

Patrick Coffey, M.D., Member

RELEASED: August 31, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6259-MED-SEIZ-Seizure

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32(5)(b)(i)

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

TRIBUNAL: DAVID W. HURST M.D., Presiding Member

APPEARANCES: JOE BALL, Agent, Representing the Applicant,

RUSSELL MCKNIGHT, Respondent
Representative for the Minister of Transportation

DATE OF HEARING: October 14, 2010 Belleville, ON

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to 32(5)(b)(i) of the *Highway Traffic* Act, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Applicant, a 52 year old transport driver, suffered an event on the 20th of January 2010 necessitating transport to a local emergency room. A Medical Condition Report was completed by Dr. A.B. in which he ticked off the possibility of seizure(s) – cerebral, and blackout or loss of consciousness or awareness. His comments included the statement that the Applicant had suffered a possible severe episode with loss of consciousness for about two minutes with tonic clonic movements and a post ictal state. A C.T. study demonstrated a small lesion in the pons suspicious for metastasis from previous thyroid cancer. Plans to investigate further included an MRI study.

On March 4, 2010, the MTO wrote to the Applicant explaining that they had received this report indicating that he suffered from a medical condition which may impair his ability to safely operate a motor vehicle. This letter stated that the Registrar of Motor Vehicles had decided to suspend his driving privilege for medical reasons under section 47(1) of the *Highway Traffic Act.*

In this letter the MTO explained that they would reconsider his case upon receipt of medical information satisfactory to the Registrar. They requested an up-to-date report from his physician or a neurologist regarding the reported seizure(s)/loss of consciousness. The report would include the results of all investigations. A narrative of this and any previous seizure/syncope history was required. It was noted by the Respondent suspension applied to all classes of driver's licences.

On May 11, 2010, a letter from Dr. A.S., a university level neurologist was sent to the MTO in order to facilitate the Applicant getting back his "G" and "A" driver's licences. He was described as being 51 years old with a history of diabetes, hypertension and hypercholesterolemia with a single episode on January 10th, 2010 in which he lost consciousness shortly after getting out of bed due to a muscle cramp. The episode was unwitnessed. When his wife found him about 20 minutes later he was still unresponsive with eyes rolled back and diffusely diaphoretic. The paramedics arrived and he was found then able to sit in a chair but still not responding normally. His blood sugar was 18 mmol/L. The Applicant awoke in the ambulance and denied any further confusion or fatigue. An EEG was normal and an MRI showed only that he has an incidental venous anomaly in the pons (a part of the brain stem). He also had a cardiac workup including a 48 hour Holter monitoring and an Echocardiogram which, were both normal. He was noted to have had no further events despite not taking any medications. The doctor stated that given the fact that the Applicant has not had any events for five months she thought his risk of having further events was low and she hoped that this was sufficient for reinstatement of his driver's licences.

On July 23, 2010, a report of the MAC of the Ministry of Transportation filed in which they recommended re-instatement with downgrade, in other words a class "G" licence and offered to reconsider the Applicant's commercial licencing with a report from the driver's treating physician to confirm one year seizure free. They also asked that a current clinical assessment with respect to the driver's venous anomaly be included along with a copy of an MRI.

In their reasoning the MAC was of the opinion that the driver experienced a single seizure in January/10. Symptomatology provided 20 minutes post-event include "unconscious, unresponsive with eyes rolled back and diffusely diaphoretic". Also noted were normal cardio and neuro investigations and not on any medication.

On, July 22, 2010, the MTO wrote to the Applicant stating that Ontario Regulation 340/94 requires that his class "A" licence be changed to a class "G" due to the reported history of loss of consciousness/awareness due to a chronic or recurring condition.

A report dated January 21, 2010, MRI - head with and without IV gadolinium. Conclusion: The MRI findings not suggestive of intracranial metastatic disease. Combined CT and MRI findings highly suggest development of a pontine venous angioma since 2005 with distal thrombosis resulting in visualized pontine calcification on CT exam and vague vascular enhancement without parenchymal signal abnormality on MRI exam. As a precaution, follow up contrast – enhanced MRI of the head January 2011 suggested to ensure one year of stability.

Holter ECG Medical Report, dated March 12, 2010m findings:

> Supraventricular arrhythmias – only 29 premature atrial contractions were seen. There are 20 short runs of supraventricular tachycardia totalling 120 beats. Conclusions: no significant arrhythmia.

Eighteen channel EEG, dated, April 16, 2010:

> Interpretation – this EEG is normal. No focal or generalized epileptiform abnormalities are seen.

Electrocardiogram, dated April 26, 2010:

> Conclusion: normal.

On, September 17, 2010 the MTO wrote to the Applicant to note that while they had received the various medical reports they found that information requested previously was still lacking. They stated that it would be necessary for the Applicant's treating physician to file an assessment which confirms that you have remained free from further episodes of loss of consciousness/seizure for a period of one year and a clinical assessment referencing your recorded venous anomaly.

The next entry on the Respondent's narrative was a certified copy of the Applicant's driving record stating his suspension for medical reasons on March 14, 2010 and there were a few other minor infractions.

The Respondent entered pertinent portions of the CCMTA Medical Standards for Drivers drawing attention to section 6.3.2 – solitary seizure and it states that the individual who has suffered a single unprovoked seizure should not be considered for any class of motor vehicle licence until a detailed neurological assessment and EEG have been performed and are satisfactory. The individual whom seizure can not directly be related to a toxic illness can continue to drive safely provided full neurologic assessment is normal and EEG reveals no epileptiform activity.

Where the EEG shows signs of epileptiform activity, the patient should not be allowed to drive for a period of six months. An earlier reinstatement may be considered on a favourable recommendation from a neurologist.

The individual may be considered for a classified (1 – 4) licence after 12 months if the EEG is normal and there has been no recurrence of seizure.

In section 32(5) of the *Highway Traffic Act,* sections a, b and c indicate the options available to the Minister regarding licencing requirements which the Applicant must fulfill.

It is noted that in section 55 of the *Highway Traffic Act,* subsection (g) states that there must be no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;

The Respondent's presentation was completed by the observation that the last report available to the MTO had been filed by Dr. A.S. (neurologist) May 11, 2010, noting the absence of further events for five months and expressing the opinion that this would be sufficient for reinstatement of the driver's licences.

THE APPLICANT'S CASE

The Applicant's Agent stated that he had no questions.

The Agent drew attention to section 6.3.1 regarding seizures – epilepsy in the CCMTA document and commented that there is no proof of seizures involving the Applicant and then drew attention to section 6.3.2 – solitary seizure – and commented that subsequent neurological and cardiac factors had been investigated and no abnormalities had been found. The Agent then observed that at the time of the event in January of 2010 a random blood sugar was found to be 18 mmol/L., but did not expand on this.

The Agent introduced the Applicant's wife as a witness. She stated under direct questioning that her husband had had no other medical problems other than his diabetes and she concurred that blood sugar elevation to this level had never been observed in the various testing they have done at home and that the diabetes is treated with Metaformin (tablets).

On questioning the Applicant stated while the event had occurred in January, 2010 he received no information from the MTO until March and during this interval he did not drive at all, either at work or in his own vehicle. He stated that he had had no further problems. He regularly checks his blood sugars every morning, they are in the range of 5 to 8. He stated that he takes his Metaformin pills every morning and then always checks his blood sugar.

In the 24 hours prior to this event he described going to work on Sunday night then came home and slept for 6 hours and early Monday found that he was not needed at work until Tuesday. He did report for work on early Tuesday am, finishing at 5pm, then fainted at 9:30pm on the Tuesday. His food intake from 3:30pm on Tuesday was only chips or pop and then he had supper at 6pm. He denies any further problems since this event and sees his family doctor once every three months.

The Agent drew attention to the fact that the Ministry has acted on the basis that the suspension is because the Applicant suffered from a chronic or recurring condition as in section 17 Ontario Regulations 34/94 (g) and underlined the fact that the Applicant has only had the single event as noted.

Questioning by the Tribunal disclosed the fact no blood test had been done on the day of the event. He usually does this every day but said that his physicians stated that a daily test is not necessary.

THE RESPONDENT'S QUESTIONS

The Respondent's Representative elicited the fact that the Applicant takes his Metaformin twice daily. He then reviewed with the Applicant the events on the evening of the "seizure" and the Applicant stated that he had some memory of the event and remembers that it was quite cold and that he was led to the ambulance in his underwear. The Respondent's Representative elicited the fact that the Applicant had received the letter from the MTO explaining the downgrade of his licence to a "G" and the Applicant's wife concurred that although the MTO had asked for further details of a medical update this had not been done. His wife stated on the request of their physician a further MRI has to be done by way of follow up. The Applicant stated during this series of questions that he can recognize when his blood sugar is low and that he feels somewhat "stupid or weak", and that if the blood sugar should course higher he feels no symptoms. He stated that his diabetes was discovered in 2005 and attempts at control with diet were carried out and he has been on Metaformin since 2008. Mention of the MRI study done in 2005 disclosed it was to be sure that the pontine lesion was not a secondary from his thyroid cancer which had been treated with surgery and radiation previously.

THE APPLICANT'S AGENT IN SUMMARY

The Applicant's Agent stressed that CMTA recommends suspension on the basis of a chronic or recurring condition, and the Applicant has had only a solitary event. The Agent pointed out that the Applicant is a highly responsible individual who stopped all driving after this event. The Applicant has had no further symptoms and possibly this was only a fainting spell.

The Applicant's Agent described himself as a safety officer with the Applicant's transport company and they have no concerns about this man.

It was the Agent's observation that with time lapses between the organizing of doctors visits and reports to the Ministry and the Ministry's responses two years could elapse before the Applicant could return to work as a transport driver.

THE RESPONDENT IN SUMMARY

The Respondent stated that the MTO had no alternative but to respond as they had upon receipt of a Medical Condition Report regarding the event in January 2010. He expressed some concern over the random blood sugar finding of 18 and the fact that there is no clear explanation of why the Applicant was still semiconscious after 20 minutes from the onset of the trouble.

The Respondent admitted that all tests are negative and there is no sign of an epileptiform condition but he expressed some concern about the MRI finding of the venous anomaly which could trigger a seizure. Also the radiologist had recommended a follow up MRI in one year.

Also noted was the fact that no further medical information has been provided to the MTO since May 2010. The Respondent emphasized that the Ministry's position is that an updated medical review has not been provided and that there have been no clinical details filed with the Ministry regarding the possibility of focal activity caused by the pontine lesion. He stressed that the Registrar wants a one year seizure free period well documented, and that we are at approximately 10 months now.

He asked that the Ministry's position be confirmed by the Tribunal.

ISSUES

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

LAW

O. Reg. 340/94, section 14 states:

> 14. 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; or
>
> (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.

Sections 17 and 18 state:

> 17. (1) Qualifications required by an applicant for or 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 as measured by Snellen Rating that is not poorer than 20/30 with both eyes open and examined together and not poorer than 20/100 in the weaker eye, with or without the aid of corrective lenses; and

(k) has a horizontal visual field of at least 150 continuous degrees along the horizontal meridian and at least 20 continuous degrees above and below fixation, with both eyes open and examined together.

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

(3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1) (c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.

(4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. (1) An applicant for or a holder of a Class M, M1 or M2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50, with both eyes open and examined together with or without the aid of corrective lenses; and
(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(2) An applicant for or a holder of a Class G, G1 or G2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50 with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

Section 32 (5)(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.

(5) The Minister may require an applicant for a driver's licence or an endorsement or a person who holds a driver's licence to submit to the examinations that are authorized by the regulations at the times and places required by the Minister and to meet other prescribed requirements, and the Minister may,

(b) in the case of a person who holds a driver's licence,

(i) impose the conditions authorized by the regulations, remove any conditions or endorsements or change the class or classes of driver's licence held by the person, in accordance with the results of the examinations and other prescribed requirements, or

Section 50 states:

50. (1) Every person aggrieved by a decision of the Minister under subclause 32(5)(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 decision of the MTO to downgrade the Applicant's licence from "A" to "G" is based on section 32 (5)(b)(i) of the *Highway Traffic Act*.

For reasons still unknown it seems very likely that the Applicant did suffer a solitary seizure in January 2010. This is supported by the fact that there were probably 20 minutes of loss of consciousness (an episode caused by fainting would have seen a

more rapid recovery) and the description of the probable post ictal state mentions profuse diaphoresis.

The Applicant had a previous thyroid malignancy (generally a very low grade lesion) and there have been no problems with recurrence or metastasis.

The Applicant's only significant medical problem is his diabetes which has been controlled very well.

The MTO had no option but to react as they did on the receipt of the Medical Condition Report describing the possibility of a seizure having occurred or at least the loss of consciousness.

It is clear from the information provided today the Applicant has had no previous episodes to suggest epilepsy or episodes of loss of consciousness. He continues in excellent health at the present time.

The Ministry in their reports to the Applicant has pointed out that in certain circumstances with satisfactory and supportive reports from the doctors the interval of suspension can be shortened. In fact, while they do ask for a 12 month interval without recurrent trouble it is noted that the Applicant has now already gone approximately 10 months without further events. The Applicant's neurologist in a letter dated only four months from this event stated clearly that there was no significant further risk and that his licences should be restored.

The Applicant's Agent, an employee of the Applicant's transport company was very supportive and underscored the fact that the Applicant voluntarily ceased all driving and that he considers him to be a valued member of their firm. He went on to point out that the Ministry has erred in describing the Applicant's condition as chronic and recurring when in fact it is clear this unfortunate event in January of 2010 has never occurred before or since.

Given these facts and also considering the time that has already elapsed and the neurologist's recommended reinstatement, it also favours the Applicant that he has remained completely well for 10 months and that should be sufficient in this case.

DECISION

Upon the application by the Applicant to appeal the decision effective July 22nd, 2010 of the Registrar of Motor Vehicles (the "Respondent") to downgrade his class "A" driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having considered the evidence filed with the Tribunal and the submissions of the Respondent and of the Applicant:

It is the decision of the Tribunal pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

_____
David W. Hurst, M.D., Member

RELEASED: October 21, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6306-MED-DOWN-Downgrade of a Licence

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32(5)(b)(i)

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

TRIBUNAL: DR. DAVID HURST, Presiding Member

APPEARANCES: THE APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Minister of Transportation

DATE OF HEARING: November 18, 2010 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(5)(b)(i) of the *Highway Traffic* Act, R.S.O. 1990, c. H.8 (the "Act").

PRELIMINARY MATTERS

At the beginning of the hearing today, the Applicant provided the Tribunal with a letter from Dr. R.K. dated November 11th, 2010 containing further information pertaining to his medical difficulties and this was entered as Exhibit #3 and will be referred to later on in the narrative.

FACTS

The Applicant, a 45 year old gentleman, was diagnosed as having epilepsy years ago. His mother is also a known epileptic.

The Applicant's condition has been very well controlled over the years with various medications, albeit with an occasional event caused primarily by the Applicant's inability to pay for the required medication and therefore resulting in occasional lapses in the use of his medication. Starting with a "G" licence, the Applicant was eventually issued a medical waiver to enable him to upgrade his licence to "A" level. Unfortunately recent events resulted in the suspension of his "A" category but he remains free to drive with a "G" licence.

It is this downgrade that has led to his appearance before the Licence Appeal Tribunal today.

With the agreement of the Tribunal and the Applicant, today Mr. Biel filed documents dating back to April 5, 1993 pertaining to licencing issues where the Applicant experienced an episode of loss of consciousness consistent with a seizure.

To achieve fairness and accuracy, while these earlier documents were not reviewed in detail at the Tribunal today, it is essential that they now be reviewed in some detail.

THE SUMMARY OF EARLIER DOCUMENTS

April 5, 1993 – Dr. B.B. (neurologist) reported to the Ministry of Transportation ("MTO") that the Applicant experienced an episode of loss of consciousness consistent with a seizure while at work. He noted that he had been taking anticonvulsant medication for some time and would be followed up by his personal physician Dr. I.P.

May 15, 1993 – The MTO wrote to the Applicant indicating that his driving privilege was suspended for medical reasons.

July 2, 1993 – Dr. B.B. a neurologist, wrote "To Whom it May Concern" that the Applicant had been epileptic since childhood. He had been seen in the local emergency department on the 5th of April 1993 as a result of a seizure which occurred on the first day on a new job. The neurologist explained that the Applicant was likely under considerable stress with the starting of his new job and surmised that such matters predisposed him to the seizure. The doctor explained that this was a phenomenon that is seen on occasion. The Applicant was advised to increase his drug (Epival) to 1.5 grams daily in four divided doses.

The neurologist went on to state that these were extreme circumstances experienced by the Applicant since the penultimate seizure had occurred more than two years previously and that it was reasonable to permit him to return to driving his vehicle. He noted that there had been no further neurological events since the 5th of April and that blood levels of his anticonvulsant were being followed regularly by his physician.

August 12, 1993 – The Medical Advisory Committee ("MAC") of the MTO advised that the Applicant's licence should be reinstated with regular medical follow ups beginning in November 1993.

August 26, 1993 – The MTO restored the Applicant's class "G" licence.

December 15, 1993 – The Applicant had complied with the MTO by filling out a medical questionnaire and on December 15, 1993, a class "G" licence was approved with no follow up medical reports required.

November 20, 1996 – Dr. M.S. (neurologist) wrote to the MTO to expand on her Medical Condition Report filed November 7th, 1996. She stated that on November 7th, 1996, the Applicant suffered a generalized tonic/clonic seizure. She noted that at that time he had failed to take his anticonvulsant (Epival) due to serious financial constraints. Since then, there have been no further problems and his blood levels of his drug were within the normal range.

November 25, 1996 – The MTO wrote to the Applicant stating that his licence would be suspended under section 47(1) of the *Highway Traffic Act* for medical reasons.

February 17, 1997 – The MTO wrote to the Applicant stating that his class "G" licence had been restored. The usual stipulations regarding follow up medical review were underlined and on June 25th, 1997, Dr. M.S. (neurologist) reported no further seizures since November of 1996 and the Applicant was compliant with his medication. She said he was doing exceedingly well.

January 27, 1998 – The Applicant appeared at the local emergency department with a "known seizure disorder" and having missed two of his tablets had suffered a generalized seizure. A blood test showed that his anticonvulsant was below the therapeutic range. This event was reported to the MTO.

March 12, 1998 – The MTO wrote to the Applicant indicating that his driver's licence would be suspended once again.

March 22, 1998 – Dr. M.S. (neurologist) wrote to the MTO regarding the Applicant. This letter stressed the difficulty the Applicant was having in paying for his drugs. Attempts were being made to arrange for assistance from one of the drug firms.

July 13, 1998 – The MAC reviewed the Applicant's case and denied his request for reinstatement of his "G" licence not because of the history of noncompliance but because a more up to date report to confirm a longer period of stability was required.

August 7, 1998 – Dr. M.S. (neurologist) complied with the MTO's need for further detail regarding the seizure of January of 1998. She reported that an MRI scan was clear and the neurological examination was normal and that in the previous years whenever a seizure occurred it was secondary to failure to take medication, and this was prompted by lack of sufficient funds.

September 1, 1998 – The MTO wrote to the Applicant stating that he would remain suspended.

The Applicant initiated a Notice of Appeal to the Licence Suspension Appeal Board on September 10th, 1998. He quoted an MTO letter indicating that his driver's licence will be reinstated when he files a satisfactory Medical Report. The Applicant stated that his doctor had since sent two letters to the MTO indicating the control of the seizures and his compliance regarding medication.

September 21, 1998 – Ms. E.W., a driver review co-ordinator, wrote to the Deputy Registrar of Motor Vehicles describing her review of the medical file of the Applicant whose licence was then currently suspended. In her letter she noted that additional information had been received stating that the Applicant had been seizure free for eight months and that he was compliant with medication and had responded well to it. It was noted in her letter that unfortunately this document had not been seen by the MAC and the Applicant's driving privilege remained under suspension. Ms. E.W.'s final paragraph stated that on reviewing the Applicant's file,

> Given the fact that he has been seizure free for almost ten months and is monitored regularly by his physician (last visit September 1998, next visit January 1999), it is reasonable and in accordance with CMA Guidelines to reinstate with a follow up report confirming no further seizures and compliance with prescribed medication.

On the same date Ms. E.W. wrote to the Applicant stating that his Medical Report had been approved for a class "G" licence.

January 11, 1999 – Dr. M.S. (neurologist) wrote to the MTO regarding the Applicant and stated that he continues to have no further seizures and he is compliant with his medications. Blood levels of his anticonvulsant were in the therapeutic range.

September 17, 2002 – A Medical Report was filed by Dr. I.B. with the MTO regarding the Applicant's request for a change of class waiver. This report noted that the Applicant's first seizure occurred more than ten years before and the last seizure was approximately eight years ago (in other words 1994).

October 9, 2002 – The MTO wrote to the Applicant that the report indicated that he did not meet the legislated medical standards for a class "A" licence, but a waiver could be requested.

February 4, 2003 – A Medical Waiver Certificate signed by Dr. B.B. was filed with the MTO, with a diagnosis of seizure disorder. This form requested that it would be needed because of the Applicant's medication.

On February 5, 2003, Dr. B.B. wrote to the MTO with an enclosed copy of his consultation letter done on the Applicant in October of 2002. Dr. B.B. noted that the Applicant had had no seizures in ten years. The spells which he did have were classified apparently as petit mal. He was taking his anticonvulsant three times a day and was considered seizure free for a decade. He felt that the Applicant was medically fit for an upgrade. An EEG on November 12th, 2002 was considered within normal limits as was an MRI scan of his head on January 23rd, 2003.

April 4, 2003 – The MAC granted a waiver to class "A" with an annual neurologist's assessment to start in February 2004.

On April 16th, 2003, the application for a Waiver of the Medical Standards was approved by the Deputy Registrar of Motor Vehicles.

All remained serene and on May 10th, 2006, the MTO wrote to the Applicant indicating that his file showed there was no significant change or deterioration in his health and therefore follow up medical reports would not be necessary. He would be required to file a Medical Report Form in the regular five years cycle, a requirement for all drivers holding a controlled class of licence. His next report was due on September 17th, 2007.

Again all was well until January 4th, 2009, when a Medical Condition Report was sent to the MTO signed by Dr. R.K. ticking off the category of seizure(s) – cerebral, commenting that there had been a blackout with no warning. He also noted that the Applicant was taking an anticonvulsant for epilepsy and the blood levels were in the therapeutic range. The doctor advised the Applicant of his satisfactory blood level but also advised him not to drive.

The next entry in the MTO's file is dated February 2, 2010, consisting of a letter to the MTO regarding the Applicant and signed by Dr. M.A. (neurologist). He stated that the Applicant was seen in his clinic for seizures. The Applicant denied reporting a clouding of consciousness to his family physician which had prompted Dr. B.K.'s letter to the MTO and the referral to this neurologist's clinic. The neurologist went on to say there was no other supportive documentation confirming either an ictal or post-ictal state (i.e. emergency was not involved and he was not seen in the emergency room). His neurological exam, previous EEG and cerebral MRI had all been normal. He said that he could neither confirm nor refute the existence of an ictal event in January 2010. He remained on Tegretol 200mg by mouth three times day, (anticonvulsant).

February 11, 2010 – The MTO wrote to the Applicant indicating they had decided to suspend his driving privilege for medical reasons under section 47(1) of the *Highway Traffic Act*.

This letter went on to state that they could reconsider his case upon receipt of medical information satisfactory to the MTO, including an up to date detailed report from a physician familiar with the medical history regarding his reported blackouts/seizure. The report must include a narrative account of this event and any previous syncope history. The results of all cardiological and neurological investigations (i.e.: ECG, EEG, Holter Monitor), must be included. The report would also indicate that the cause has been determined and successfully treated.

This summary completes a review of the Applicant's past medical period regarding his seizure disorder. In essence he is a known epileptic whose condition is well controlled, provided he is compliant regarding the use of his anticonvulsants. There have been occasions when he omitted his medication (to a fair extent due to financial difficulty but occasionally due to forgetfulness).

The emphasis at this hearing today was on the events resulting from current reports from Dr. R.K. and from Dr. A. (neurologist). As a result of these documents sent to the MTO, the Applicant's class "A" privilege has been downgraded to "G".

To maintain the correct chronology of Mr. Biel's presentation, reference is made to a letter by Dr. R.K. addressed to the MTO on November 11, 2010. The letter was sent to Mr. Biel regarding the Applicant and is quoted in its entirety as follows:

> I have read the letter from the Applicant dated October 20, 2010 (the Tribunal does not have a copy of this letter). I will recount the facts of his condition as outlined in my clinical notes dated December 29, 2009.
>
> During the course of this visit he reported to me that he had two episodes in the last 12 months where he said he had something that appeared to be a blackout while he was in front of his computer. He denies any symptoms before these events that would be indicative of a more benign diagnosis. He was not able to offer any explanation to suggest a cause other than possible seizure activity. Given his past history of epilepsy I was very concerned that we were looking at epilepsy that was not being controlled by his medication. Obviously, it was my legal obligation to inform the Ministry of Transportation that I had information regarding his ability to drive. However, I was also concerned that he could come to some significant harm if he were to have a seizure in a dangerous environment. When I informed him of my legal obligation to contact the Ministry of Transportation, he became quite upset about this development. I informed him that I understood his reaction, but I really had no other choice. Of note, at this time in the conversation he still was not forthcoming with any alternative explanations for his two events. In fact, I held off the notification to the Ministry until I received the final report on his various blood tests and in particular, his Tegretol level which was normal. On the basis of these legitimate concerns, I referred him to Dr. M. A. a neurologist, to further investigate the nature of these events. I recognized the impact on the Applicant and was able to arrange an urgent consultation for February 2, 2010 whereas a normal consultation would have been in May or June of that year.
>
> I received a phone call from Dr. M.A. on the day of the Applicant's consultation because of a rather bizarre event. He accounted to me that the Applicant completely denied having any blackout spells whatsoever. I confirmed that I had concerns that there was some sort of event that resulted in a loss of consciousness. In his subsequent consultation letter to me, Dr. M.A. makes the following statement which I have quoted precisely.
>
> I found this account of his interaction with you not entirely believable. He denies having any clouding of consciousness. He denies having any symptomatology that resembles a seizure.

Later on in the letter, Dr. M.A. confirms the legal complications of all physicians to pass on concerning information. He also informed the Applicant that such information is not protected by the conventional rules of confidentiality in a doctor/patient relationship.

> If you wish, I can send on a copy of this letter provided I receive a release of information form provided from Mr. Smith authorizing the release of this information.
>
> On the visit of August 26, 2010, the Applicant came to my office requesting that I send a letter to the MTO stating that he was fit to drive. I informed him that this was beyond my level of expertise given the potentially serious nature of the problem. Later in that visit, an unpleasant interaction ensued during which it became evident that we had several serious differences of opinion. Throughout this prolonged conversation, the Applicant was not forthcoming with any new or different information that might provide an alternative explanation for his events. The

> office visit did not conclude amicably.
> Subsequent to the events of August 26, 2010, I decided that there had been a serious breech of the doctor/patient relationship. I considered this to be unfixable and I terminated our doctor/patient relationship. This was confirmed by a registered letter which he declined to pick up as well as a brief telephone conversation.

The substance of this letter is Exhibit #3.

The Respondent then directed us to a letter by Dr. M.A. dated April 27th, 2010 stating that the Applicant had been seen in his clinic for seizures. Previously he had been seen there on February 2, 2010 and a note was sent to the MTO. He had no further seizures and he remained on his anticonvulsant. An EEG was obtained and the results are included (unremarkable). A sleep deprived EEG was to be ordered.

> From a neurological perspective he remains stable from his ictal event on January 2010. I will be seeing him again after his sleep deprived EEG.

(The Tribunal notes that the event in January 2010 was not clearly identified as ictal). The EEG report described the sleep EEG as "significant depth of sleep not reached".

May 18, 2010 – The MTO requested a further assessment from Dr. M.A. He responded on June 22nd, 2010. He states that he had seen the Applicant again. He had had no further seizures and remained on his anticonvulsant. In the sleep deprived EEG there was noted an area of focal dysrhythmia but no epileptiform discharges and no sharp waves were reported. From a neurological perspective he remains stable from his event in January 2010.

August 17, 2010 – The MAC reviewed the Applicant's status and recommended reinstatement for his driving privilege with a downgrade to "G". Their reasons stated that the driver no longer meets the requirements for a commercial licence nor the waiver criteria as he had a seizure in January 2010 in spite of anticonvulsive treatment. They stated that he must establish a seizure free period on or off medication for five years to regain his "A" status.

August 17, 2010 – The MTO wrote to the Applicant stating that his medical report has been approved for a class "G" licence. They stated that they could reconsider his case upon receipt of an up to date report confirming a five year seizure free period on or off medication.

August 26, 2010 – Dr. R.K. wrote to the MTO to say that the Applicant had requested that the doctor send a letter indicating his fitness to drive. The doctor stated that he had a progress report from the Applicant's neurologist Dr. M.A. dated June 22nd, 2010 indicating that he has faxed a third letter to the MTO at which time he speaks to the Applicant's neurological stability for driving. The doctor deferred to Dr. M.A.'s judgment in that regard. He stated that he did not have any information subsequent to that visit that might indicate seizure activity. The doctor said that he was not aware of any non-seizure problems that might indicate an unsuitability to drive.

September 21, 2010 – The MTO wrote to the Applicant indicating that they would need an assessment from a neurologist confirming that he had remained seizure free for a period of five years on or off medication.

Mr. Biel then entered the CCMTA Medical Standards for Drivers document with the emphases on Seizures – (6.3.1) epilepsy. He pointed out that this document states that

> If the individual has been seizure free on or off medication for five years, he/she may be considered for any class of licence.

Mr. Biel's final presentation was a certified copy of the Applicant's driving record.

THE APPLICANT'S CASE

The Applicant explained that he had gone to Dr. B.K. on his own volition as he and his father had pondered the possibility that exposure to TV or computer screens could be an initiating factor in seizures. The possibility existed also that he might require a different anticonvulsant. He wanted Dr. B.K.'s opinion and also stated that he understood Dr. B.K.'s legal responsibility regarding reports to the MTO. He said that this was only applicable if he had had a seizure and indicated to the Tribunal that Dr. B.K. made an assumption of something for which there was no evidence (the seizure). The Applicant quoted Dr. B.K.'s question about having had a seizure and he explained to Dr. B.K. that he had no seizure and simply wanted an opinion and said that his impression was that Dr. B.K. did not believe him. Therefore the doctor erred to be on the cautious side in reporting to the MTO regarding this seizure where in fact there was no evidence, history, or proof of such an event.

The Applicant continued to state that he went to see Dr. M.A. when referred by Dr. B.K. He said that Dr. M.A. asked if there had been a seizure and the Applicant explained that this was not true. He stated that Dr. B.K. misunderstood what had happened and the Applicant could not understand why he had been referred to a neurologist. The Applicant described his first EEG on April 27th, 2010 showing no abnormalities and the sleep deprived EEG later on showed no sign of seizure activity. He reiterated that this comment about an ictal event on January 10th, 2010 was not about a seizure and the report is an error.

The Applicant stated to the Respondent there was no evidence from Dr. B.K. that he had had a seizure and that he is being described as guilty without any proof. The Applicant said that he was extremely upset about what Dr. B.K. had done taking away his livelihood. He had simply gone to the doctor for an opinion about possible causes of the events with the loss of his "A" class licence.

MR. BIEL'S QUESTIONS

He ascertained from the Applicant that he got his class "A" qualification in the "early 2000s". Questioning disclosed from the Applicant there had been no seizures. He asked if he got his class "A" licence, then what was the reason for him conceding, if Dr. B.K. was wrong. The Applicant thought he had no choice and that it was best to tell his employer in an

attempt to do the "right thing". The Respondent also ascertained that the Applicant denies ever telling Dr. B.K. of a seizure or a spell.

THE RESPONDENT'S CLOSING REMARKS

He quoted the pertinent sections of the *Highway Traffic Act* stating that a driver must not have any nervous disorder that could interfere with his ability to drive and to hold a class "A" designation. He went on to point out that the Applicant has epilepsy, chronic and recurrent although controlled intermittently. He conceded that Dr. B.K. might have misunderstood the Applicant's reason for visiting him on December 29th, 2009 but we still have the question of why Dr. B.K. decided that the Applicant had had not one but two events in the previous 12 months. He pointed out that the Registrar must act according to the CCMTA regulations on receipt of such information from Dr. B.K. He went on to stress the greater need for stringent rules regarding an "A" designation. He observed that Dr. B.K. is standing by his diagnosis and is not wavering. The doctor also requested laboratory results regarding anticonvulsants and a consultation with Dr. M.A. He again drew attention to Dr. M.A.'s comment to Dr. B.K. that he didn't find the Applicant entirely believable. Mr. Biel said the matter comes down to the credibility of either Dr. M.A. or the Applicant and notes that neither Dr. M.A. nor Dr. B.K. has backed down. Mr. Biel said that Dr. B.K. would have concluded there had been two events in 2009 if the Applicant had told him so and therefore the Applicant can only deny this. On questioning from the Tribunal it was determined that the last event prior to these supposed events in 2009 had occurred more than five years previously.

ISSUES

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

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

LAW

O. Reg. 340/94, section 14 states:

> 14. 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; or
>
> (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.

Sections 17 and 18 state:

17. (1) Qualifications required by an applicant for or 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 as measured by Snellen Rating that is not poorer than 20/30 with both eyes open and examined together and not poorer than 20/100 in the weaker eye, with or without the aid of corrective lenses; and

(k) has a horizontal visual field of at least 150 continuous degrees along the horizontal meridian and at least 20 continuous degrees above and below fixation, with both eyes open and examined together.

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

(3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1) (c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.

(4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. (1) An applicant for or a holder of a Class M, M1 or M2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50, with both eyes open and examined together with or without the aid of corrective lenses; and
(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(2) An applicant for or a holder of a Class G, G1 or G2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50 with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

Section 32 (5)(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.

(5) The Minister may require an applicant for a driver’s licence or an endorsement or a person who holds a driver’s licence to submit to the examinations that are authorized by the regulations at the times and places required by the Minister and to meet other prescribed requirements, and the Minister may,
(b) in the case of a person who holds a driver’s licence,
(i) impose the conditions authorized by the regulations, remove any conditions or endorsements or change the class or classes of driver’s licence held by the person, in accordance with the results of the examinations and other prescribed requirements, or

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS

The Applicant's seizure related illness has been thoroughly documented both by his doctors and by the events that have been dealt with by the MTO regarding his driver's licence since April 5th, 1993, when the Applicant had a tonic/clonic seizure. The Applicant maintained that that was a fainting episode while the doctor at that time pointed out that his last ictal event had been in 1991, and felt that he should be allowed to drive. The Applicant's driving privilege was reinstated in August of 1993.

On November 7th, 1996, another seizure was noted to be due to the cessation of his medication because of lack of funding to purchase the proper drugs. His licence was suspended.

In February of 1997, the Applicant's licence was restored. But unfortunately on January 27th, 1998, another seizure occurred after the Applicant had stopped his medication because of lack of funding. On March 12th, 1998, again his licence was suspended.

In early September of 1998, it is noted that the Applicant had been seizure free for almost ten months and his driving privilege was restored.

All was well until September of 2002, when the Applicant was denied an upgrade to an "A" class licence. In February 2003, the Applicant was noted to have "spells" and these were attributed to petit mal events. In fact on April 14th, 2003, the Applicant succeeded in his request for a Medical Waiver in order to obtain an "A" class driving licence.

Things went so well that by May of 2006, the Applicant was informed by the MTO that no further follow up medical reports were needed other than the standard routine medical check up every five years required of all the holders of the "A" designation.

Problems for the Applicant returned when he was seen by Dr. B.K. on December 29th, 2009 with an incorrect recording of the date. In fact he reported this event on January 4th, 2010. The event was described as a blackout with no warning.
As a result of this, in early February 2010, the Applicant was seen in consultation by Dr. M.A. who reported that the Applicant denied such an event. Dr. M.A. could find no evidence to indicate one way or the other whether an ictal event had occurred.

On February 11th, 2010, the MTO with a suspension downgraded the Applicant's "A" status to class "G".

On April 27th, 2010 and June 22nd, 2010, Dr. M.A. reported that there had been no further problems for the Applicant.

On August 17th, 2010, the MAC of the MTO recommended the downgrade to continue based on the fact that there was a probable seizure on December 29th, 2009. Dr. B.K.'s last report on August 26th, 2010 deferred to Dr. M.A.'s comments.

Mr. Biel's new information presented to the Tribunal today consisted of a letter to the MTO dated November 11th, 2010 from Dr. B.K. In this message he refers to a letter from the Applicant to the Tribunal dated October 20th, 2010 and of this I can find no record here. He stated that the Applicant told him he had suffered two episodes in the last 12 months and had something to suggest a blackout while he was in front of his computer. The doctor was quite concerned with the past record of epilepsy. He stressed his legal obligation to inform the MTO. He informed the Applicant of his obligation and the doctor/patient relationship deteriorated rapidly.

Dr. B.K. then went on to describe a phone call from Dr. M.A. who had again seen the Applicant on very short notice. Dr. M.A. said that the Applicant denied any blackouts whatsoever. Dr. B.K.'s letter went on to quote Dr. M.A.

> I found this account of his interaction with you (Dr. B.K.) not entirely believable. He denies having any symptomatology that resembles a seizure.

Certain facts emerge from this very convoluted story.

The Tribunal takes note of the fact that despite the background diagnosis of epilepsy, the Applicant has repeatedly been able to regain at least a class "G" licence after complying with the MTO's requests. He has even been able to achieve a class "A" status by winning a Medical Waiver when his seizure problems disappeared for several years. Seizures occurred on two or more occasions when the Applicant, because of financial constraints, was unable to buy the medication and his doctors have been very helpful as has Abbott Laboratories, making it a certainty that the Applicant always has medication. The type of medication has been upgraded through the years. An exception has been made on one occasion by the MTO to enable the Applicant to regain his "G" licence after a ten month interval.

Were it not for a comment by Dr. B.K. of two events in his mention of blackouts on December 29th 2009, the Applicant would be eligible to have his "A" classification reinstated.

There is insufficient evidence here today that these events referred to in 2009 by Dr. B.K. were ictal (epileptiform) in nature.

If one takes into account the fact that the Applicant is allowed to drive with a "G" licence at present and the fact that the Tribunal has not had clear evidence presented to show that there have been seizures within the last several years, on the balance of probabilities the Applicant should have his class "A" privilege restored.

DECISION

Upon the application by the Applicant to appeal the Respondent's decision, effective August 17, 2010, to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to section 32(5)(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 of Transportation be set aside.

LICENCE APPEAL TRIBUNAL

Dr. David Hurst, Presiding Member

RELEASED: *November 30, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6352-MED-CARD-Cardialogical

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32(5)(b)(i)

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

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

RUSSEL McKNIGHT, Agent, representing the Minister of Transportation

DATES OF HEARING: December 17, 2010 — Cornwall
February 7, 2011 continuation — *Teleconference*

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister of Transportation (the "Minister") pursuant to section 32(5)(b)(i) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Minister's Case

A Medical Report filed in support of an application for a Class 'A' licence was completed by Dr. S.P., a family physician on February 10, 2005.

The doctor reported:

> Myocardial infarction in 1991; has not had any recurrence of infarction or angina. He has quit smoking in 1991, takes cardio-protective medication and has favourably changed his lifestyle. A cardiological evaluation by cardiologist in 2003 was entirely reassuring.

The Registrar informed the Applicant on February 16, 2005 that he may apply for a waiver of medical standards under section 340/94 of the Act.

A cardiologist, Dr. D.Y. completed a waiver certifying fitness to drive a large truck, tractor trailer unit, bus or ambulance, on February 24, 2005.

In a cover letter Dr. D.Y. wrote:

> There was a past history of an inferior MI 13 years ago-possibly related to coronary spasm with normal angiography. Transient episodic supraventricular tachycardia on exercise ECG.
>
> Today I would recommend he be considered for a Class AZ licence.

The Medical Advisory Committee on April 21, 2005 recommended a waiver with an annual assessment from the attending physician.

On June 15, 2006 the Registrar requested an annual assessment and a signed waiver certificate.

Dr. S.P. issued a waiver certificate. There was no reported clinical change.

The Registrar informed the Applicant on October 12, 2006 that the next report would be required in October 2007.

On January 31, 2009 the Registrar informed the Applicant that the annual assessment must include a detailed assessment by his cardiologist, that he must meet NYHA standard of an ejection fraction equal or greater than 35%.

A Medical Condition Report was completed on April 7, 2009 by a hospital physician, Dr. S. pursuant to section 203 of the Act.

> Heart disease with Pre-syncope/Syncope/Arrhthmia.

The Registrar informed the Applicant on April 30, 2009 that it had been decided to suspend his driving privilege under section 47(1) of the Act.

In order to be considered for reinstatement he must arrange for a detailed up-to-date assessment from a cardiologist referencing his reported heart disease, with results of all investigations initiated, diagnosis, prognosis, treatment and current status.

He was advised that he may request an Administrative Review and of his right to appeal.

A cardiologist at a teaching hospital, Dr. A, reported to the Registrar on September 9, 2009:

> <Applicant> has a normally functioning implantable defibrillator. This was implanted for management of ventricular tachycardia. On September 8, 2009, I saw him in the Cardiac Rhythm Device Clinic at the <teaching hospital>. He had an appropriate shock for ventricular arrhythmia. This was successful. I have indicated to him that he should not be driving his vehicle until he heard from you.

The Registrar informed the Applicant on November 5, 2009 that his licence would remain under suspension. A detailed up-to-date assessment was required, confirming that the defibrillator has delivered no shock or anti-tachycardia pacing therapy and that a period of at least six months has elapsed since the last episode of ventricular tachycardia or ventricular fibrillation.

On March 15, 2010 the resident for Dr. A. reported that a new evaluation at the clinic in March 2010 showed that he did not have any further episodes of arrhythmia in the past six months. He recommended that he should be allowed to drive.

M.A.C. recommended reinstatement to Class 'G'. Consideration to reinstate to Class 'AC' would require that the annual risk of incapacitation in less than 1% and that there have been no further therapies delivered.

The Registrar informed the Applicant on May 6, 2010 that a report from his cardiologist must include the date of implantation of the ICD, and no loss of consciousness or loss of awareness at time of shock delivered in September 2009. The report must also indicate the annual risk of incapacitation is less than 1%, and no further therapies have been delivered.

The cardiologist, Dr. D.Y. wrote on May 31, 2010:

> <Applicant> has been well in the last nine months without further shocks from the ICD since beginning Amiodarone. I would suggest he has less than a 1% annual risk of incapacitation although a five-year cardiovascular risk is clearly elevated.
>
> Medications: ASA 81 mg, Ramipril 10 mg, Lipitor 40 mg, Bisoprolol 10 mg, Amiodarone 200 mg.
>
> A MUGA nuclear medicine scan on June 3, 2010 reported the left ventricular ejection fraction was 47%, representing a slight decrease compared with the previous study in September 2009 when the EF was 52%.
>
> The ICD was being followed by Dr. S. at the <teaching hospital>.

M.A.C. requested a report from Dr. S. that there was no loss of consciousness or awareness in September 2009, no additional events requiring device therapy and an opinion regarding suitability to operate a commercial vehicle.

> Generally speaking individuals with an ICD are not eligible to hold a commercial licence (CCMTA 3.5.8).

Dr. S., Director of the Arrhythmia Service at <teaching hospital> wrote to the Registrar on October 5, 2010:

> The "1%" stipulation in the CMA, CCS and CCMTA guidelines was added in recently in order to address the small group of ICD patients without structural heart disease whose risk was sufficiently low to allow safe operation of a commercial vehicle. These conditions might include LQTS, Brugada syndrome, and other inherited channelopathies where an ICD is implanted for primary prevention.
>
> As <Applicant> is a secondary prevention patient with structural heart disease, this "exception clause" ordinarily would not apply. He has an ischemic cardiomyopathy. However, having said that, his EF is in the high 40s/ low 50s by MUGA – this is unusual for an ischemic cardiomyopathy secondary prevention patient and probably means that his prognosis is far better than the usual secondary prevention patient for whom these guidelines were designed.
>
> I would suggest that perhaps this case be elevated to your MAC for further consideration. The case for his ineligibility is not as straightforward as it might seem.

M.A.C. recommendation on December 13, 2010:

> Request for commercial licence is denied. Given the permanent nature of driver's cardiac status, no reconsideration can be offered.

Reasons:

> Late post MI with documented VT treated with ICD (secondary prophylaxis) and amiodarone. Of note, in his October, 2010 report, Dr. S., driver's treating electrophysiologist, and Chair of the CCS Guidelines, notes that the "1% consideration" was not intended to apply to secondary prophylaxis patients-where the typical event rates are -30% over 5 years of follow-up.
>
> This consideration was intended to apply to patients with primary prophylaxis with a reduced ejection fraction without previous VT/VF events, where the overall event rates are -10%, per -5 years, and where a subgroup of patients might demonstrate sufficient improvement in their condition such that their individual risk might be estimated to be less than or equal to 1% per year.

The Registrar informed the Applicant on December 14, 2010 that the medical advisors had recommended that at the present time, he should not hold a licence higher than Class 'GM', due to the permanent nature of his cardiac status likely to interfere with the safe driving of a commercial vehicle.

<u>The Applicant's Case</u>

In Reasons for Appeal the Applicant stated that he had one episode of arrhythmia in 1997. He went to the local hospital, was "paddled" and released. He had an episode in 2004 and went to the hospital where his heart rate was stopped before the "paddling" procedure could be completed

Under examination he informed the Tribunal that he had a heart attack in 1991 when he was still smoking. He was defibrillated at the local hospital E.R. Five years later when he felt faint he required defibrillation again. In 2009 while driving he had a near fainting episode and he stopped his vehicle and was taken by ambulance to hospital. He was scheduled three times for an implanted defibrillator but he asked for a second opinion. He was then seen by Dr. S. who advised the ICD at the <teaching hospital> and the device was implanted in late July 2009.

Following the implanted device he had an episode of shock while working on an antique car and was assessed at the <teaching hospital>. He was started on Amiodarone sometime in October or November, 2009.

The M.A.C. report of December was not seen by Dr. S. and therefore the Tribunal was adjourned to February 4, 2011 to allow the Applicant an opportunity to examine the decisions by M.A.C. and the Minister.

The hearing continued by teleconference.

The Applicant informed the Tribunal that he had discussed the decision by M.A.C. with Dr. S. who informed him that he had nothing further to add to his letter of October 5, 2010.

Under cross examination he stated that he did not lose consciousness before the ICD was implanted or when he had a shock episode in September 2010.

He attends the ICD Clinic every six months. His family physician, Dr. S. has retired and he does not have a family physician now.

He has not been employed since his licence was suspended.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

> (1) An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical condition or disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; or

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the CCMTA Medical Standards for Drivers; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the CCMTA Medical Standards for Drivers and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the CCMTA Medical Standards for Drivers means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Sections 17 and 18 state:

17. 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. (1) An applicant for or a holder of a Class M, M1 or M2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50, with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(2) An applicant for or a holder of a Class G, G1 or G2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50 with both eyes open and examined together with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(3) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/30 with both eyes open and examined together and not poorer than 20/100 in the weaker eye, with or without the aid of corrective lenses; and

(b) a horizontal visual field of at least 150 continuous degrees along the horizontal meridian and at least 20 continuous degrees above and below fixation, with both eyes open and examined together.

Section 32 (5)(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.

(5) The Minister may require an applicant for a driver's licence or an endorsement or a person who holds a driver's licence to submit to the examinations that are authorized by the regulations at the times and places required by the Minister and to meet other prescribed requirements, and the Minister may,

(b) in the case of a person who holds a driver's licence,

(i) impose the conditions authorized by the regulations, remove any conditions or endorsements or change the class or classes of driver's licence held by the person, in accordance with the results of the examinations and other prescribed requirements, or

Section 50 states:

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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. The history of myocardial infarction in 1991 which was reported on the application for upgrade, followed by a waiver under section 340/94.

2. The period of stability ended in April 2008 when the Applicant's physician filed a Medical Condition Report under section 203 of the Act, of heart disease with near syncope due to ventricular fibrillation. The Registrar was obliged to issue a suspension of the Applicant's driving privilege under section 47(1).

3. Following the implanted defibrillator device (ICD) procedure he was advised not to drive ant type of vehicle until a period of stability without shock had elapsed.

4. The Medical Advisory Committee recommended reinstatement to Class 'G' in May 2010 following a six month period without shock.

5. Because the ICD was implanted for secondary prophylaxis, i.e. due to past history of myocardial infarction, the risk of a serious cardiac event was elevated to an unacceptable level for a commercial driver. Therefore the Registrar was justified in refusing the application for a commercial licence.

6. CCMTA Standard 3.5.9 states that a patient with ICD is ineligible for a Class 1,2,3,4 licence. May be considered for a Class 5 licence if:

    - The device was inserted as a prophylactic measure in a person without a documented episode of VT or VF and there are no other disqualifying conditions.

    - The device has delivered no shock or anti-tachycardia pacing therapy, and at least six months has elapsed since the last episode of VT or VF, or

    - Criteria for satisfactory control are met.

The Applicant relies on the advice given by the Director of the Arrhthymia Service at <the teaching hospital>, who is also a member of the Medical Advisory Committee, that "*his ejection fraction is higher than expected for his condition and that his prognosis is far better than the usual secondary prevention patient".* His risk of a serious cardiac event is therefore lower than expected.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension of the Applicant's driving privilege for Class 'G' and Class 'AC', under section 47(1) of the Act upon receipt of a Medical Condition Report of arrhythmia and near syncope.

2. The Registrar was justified in reinstating the Applicant's driving privilege for Class 'G" following successful control of the Applicant's cardiac arrhythmia by an implanted defibrillation device (ICD).

3. The Minister was justified in refusing the Applicant's request for upgrade to Class 'AC' upon advice by the Medical Advisory Committee Review of the case on December 13, 2010. This indicated that that the risk of a serious cardiac event in a commercial driver is increased in the case of ICD for secondary prevention.

DECISION

Upon the application by the Applicant to appeal the decision dated May 6, 2010 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(5)(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 Respondent be confirmed.

LICENCE APPEAL TRIBUNAL

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Kevin Flynn M.D. Presiding Member

RELEASED: February 9, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6507-MED-DOWN-Downgrade

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32(5)(b)(i)

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

TRIBUNAL: DAVID W. HURST, MD, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

KYLE BIEL, Agent Representing the Registrar of Motor Vehicles

DATE OF HEARING: March 24, 2011 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to 32(5)(b)(i) of the *Highway Traffic Act* R.S.O. 1990 c.H.8. (the "Act").

FACTS

Evidence for the Respondent

Mr. Biel for the record stated that the Applicant now has a class G driver's licence as of March 21, 2011 downgraded from F commercial classification. Mr. Biel said that the problem now is the downgrade from the commercial classification, under s. 32(5) of the Act.

On October 2, 2010, the Medical Condition Report filed by Dr. K.J. indicated that the Applicant had suffered a blackout or loss of consciousness or awareness and the possibility that sleep apnea might be a factor. His written statement described how the

patient drove off the road while driving an ambulance with a patient on board. He was described as showing dizziness/confusional state with the cause to be determined.

On October 26, 2010, the MTO wrote to the Applicant. In this report they had received they noted a possible condition impairing his ability to drive safely. The Ministry went on to explain that they could reconsider his case if a detailed report was provided to them including the results of all investigations, diagnosis, prognosis, treatment, clearance status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns. Following this, the Applicant filed a report to the Ministry explaining what happened on October 22, 2010. He said that he was including all the test results that his personal physician had recommended including an EEG, Holter monitor, blood work, CT, x-rays, hospital reports and specialist reports. He also noted the inclusion of a letter from his partner at work who was the only witness to what actually occurred that morning. He explained that he is taking diabetes education classes and dietician classes at a local diabetic clinic in a regional hospital. He also noted that he was monitoring his blood pressure and blood sugars daily. He was taking all medications as prescribed and there have been no further symptoms since that unfortunate day in October.

The Applicant went on in his letter with reference to his diet, weight loss and reduction of medication noted in the clinical notes which he felt were misrepresented. He said that after losing fifty pounds under the guidance of Dr. J.B. by exercise and strict reduction of calories, his medications were slowly weaned down to one Metformin tablet daily. He was maintaining the weight loss and recording relatively normal blood sugars and normal blood pressures. He had no explanations for the events of October 22, 2010.

The letter from his colleague from the ambulance dated November 20, 2010 is quite detailed. This Paramedic, Ms. M.E. says that she has been a partner of the Applicant for over six years and has never been concerned about his driving. When they went to work on the morning of October 22, 2010 he told her that he was tired and that he had not been sleeping well for two days. When they were summoned to pick up a patient Ms. M.E. had to recite directions to the Applicant at the wheel who seemed to be confused in that he was signalling to turn at incorrect streets on several occasions. When they picked up the patient the Applicant was driving and she felt the ambulance hit a curb and again felt another bump and she noticed that they were driving on the median with two wheels above the curb. She described yelling at the Applicant to stop the vehicle and he simply looked at her and said “ok”. She described how he drove erratically up on the median and back into different lanes and swerving between both. She ordered him to stop again and he simply looked at her and said “ok” and he did stop. At this time another ambulance was called.

Ms. E. went on to state that it was quite clear that the Applicant was confused that morning as these events were very much out of character. The confusion became even more evident when he sat in the triage chair at the local hospital.

Ms. M.E. stated that the patient was never unconscious, nor was he demonstrating any signs of seizure activity. He was never in a post-ictal phase. Ms. M.E. was present at the first doctor interview and felt that she had to help the Applicant to correct his thinking.

Mr. Biel's next entry was the consultation note by Dr. K.J., a specialist in internal medicine. Dr. K.J.'s note describes how the Applicant had a dizzy spell causing the ambulance to go off the road for a few minutes and then return to the road. He did not lose consciousness but he was drowsy. He did not have any witnessed seizure activity. There was no tongue biting or urinary incontinence. He denied chest pain, shortness of breath or sweating. His blood pressure was elevated when he came to the hospital and the Applicant said that he only sleeps two to three hours a night. The doctor also reported that he suffered from Type II diabetes, hypertension and mild sleep apnea. There was no documented history of coronary artery disease and his cardiac investigations did not reveal any objective features for underlying ischemic heart disease. He did note that the Applicant's cardiologist was considering an angiogram later. The Applicant was described as a non smoker and occasional drinker. It was noted that he had a history of non compliance with medication. He stated that he had stopped taking Ramipril that he had been taking for hypertension in the past. It was noted that he was taking one Metformin tablet per day which controlled his Type II diabetes.

Examination showed that his blood pressure on admission was 160/102 but it came down to 139/85. Temperature was normal and the heart rate was 80 beats per minute and oxygen saturation was 100%. The remainder of the physical examination was non contributory.

A review of the laboratory work up of that date showed the blood glucose was 18.6 mmols/litre. The remainder of the blood work was unremarkable.

Dr. K.J.'s impression was that this gentleman had suffered an episode of confusion and dizzy spell while driving the ambulance. He found a history of mild sleep apnea and he felt that this condition could be due to tiredness due to lack of sleep.

The Applicant was admitted for observation and monitoring and the consultations. He was restarted on his medications including Metformin, Ramipril and ASA. He advised the Applicant to take his medication to control his blood sugar and blood pressure in order to prevent complications in the future. Plans were made for a sleep study follow up with a sleep specialist.

On October 22, 2010 the Applicant was seen in consultation by Dr. B.M. a cardiologist.

His assessment disclosed that the Applicant had suffered an episode of dizziness and confusion but there were no cardiac factors involved. On October 25, 2010 the Applicant was seen by Dr. J.K. His interview stated that the Applicant had experienced a dizzy spell while driving the ambulance but there was no seizure activity, and no chest

pain with the comment that in the past year the Applicant had been seeing a physician for weight loss and in fact has not seen this doctor for several months. Dr. J.K. stated that the Applicant had taken himself off medication on the advice of this physician and he had reduced his Metformin and was cutting off his Ramipril. The Applicant's family doctor had advised him to remain on his medication but it was noted that the Applicant did not. He quotes the Applicant as saying that he was monitoring his own blood sugars and they were well controlled.

It is pertinent in this report that despite this, the Applicant was suffering from polydipsia, (taking large amounts of fluids) and polyuria (excessive amount of urination) and polyphagia (excessive eating). Over the last several weeks he has had no further dizzy episodes.

Physical examination disclosed nothing of consequence.

An EKG on telemetry revealed normal sinus rhythm. This doctor's assessment was that this 45 year-old diabetic gentleman shows symptoms of poorly controlled blood sugars, i.e. polyphagia, polydipsia and polyuria. He had strongly advised the Applicant to continue on his medication and stressed the need to monitor his blood sugar. There had been some question about problems of compliance in terms of his use of medication. He was advised to increase his Metformin to 1 gram twice a day and ½ gram at noon. He was also given Amiodipine to more satisfactorily control his blood pressure.

On October 26, 2010, a chart summary was reported by Dr. J.K. Herein he described again that for several weeks the patient had been showing increasing polydipsia, polyuria and polyphagia (all indicative for poorly controlled diabetes). He noted that the Applicant had taken himself off much of his diabetic treatment as well as hypertensive medication. The Applicant's blood pressure was poorly controlled as were his blood sugars. He noted that his Metformin was increased to one gram twice a day as well as Diamicron MR which was added to the regime, which was a better medication for his blood pressure.

On December 9, 2010, F.K. wrote to the Applicant's family doctor (Dr. M.P.) describing the Applicant as suffering from Type II diabetes for about ten years. He noted that the Applicant had recently been in hospital for hypertension and hyperglycaemia. He expressed surprise that, although the Applicant was slightly confused at that time from severe hypertension and a moderate degree of hyperglycaemia, that his licence had been downgraded or suspended. He drew attention to the fact that the Applicant had reduced most of his medications but was taking 500 mg of Metformin. Since then, having been put back on full medications he had done very well. Minor changes were made in his hypertensive medication and he expected that the Applicant would do well. On January 7, 2011, the Applicants' family doctor, (Dr. M.P.) wrote a note to the Ministry indicating that his diabetes is now under much better control and could see no reason why his licence should be restricted. This report was filed as well as a Medical Condition Report on the same date.

Mr. Biel then entered reports pertaining to further investigations of the Applicant's medical status. This included a normal EEG and normal cardiac investigations. His Holter monitor was unremarkable as was the CT of the head. Noteworthy was that the patient's lipids were all in the low normal range and very satisfactory.

On February 3, 2011, the MTO wrote to the Applicant indicating the need for an enclosed Diabetic Assessment Form to be completed by one of his doctors. He was also asked to file an assessment from a sleep disorder specialist.

The Applicant wrote to the Ministry explaining that the Diabetic Assessment form had already been completed and that a sleep disorder study was not being done because there was no history of this problem (noted on the Diabetic Assessment Form report).

However a report from a Centre for Sleep Disorders on December 13, 1996 was given today and the conclusion of that report was that there was no evidence of sleep apnea.

Mr. Biel then entered a certified copy of the Applicants' driving record and this document disclosed minor violations dating back to 2005 and only indicated that the Applicant displays a somewhat cavalier view towards driving offences.

Mr. Biel also entered the CCMTA Medical Standards for Drivers with emphases on metabolic diseases, 8.2-Diabetes Mellitus.

The Ministry presented this problem to their medical advisory committee on February 14, 2011. Their decision is quite detailed and is quoted as follows:

> Instructions:
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> Downgrade and reinstate with a follow up report (MTO Diabetic Form) in May of 2011, completed by an endocrinologist. The report must provide: 1. A careful assessment of driver's diabetic regimen in particular the use of Diamicron; 2. An increase in A1C levels; 3. Confirmation of ongoing compliance with diabetic and hypertension treatment; 4. Clarification needed: A - Was event due to LOC (loss of consciousness)?, confusion?, dizziness?, and B – Is there a history of dizziness and confusion? If yes, require a diagnosis and recommended treatment.
>
> Commercial licence to be reconsidered when follow up is received.
>
> **REASONS CLASS "G"**
>
> Reinstated as driver now said to be compliant with diabetes and hypertension treatment. However in the context of commercial driving and given the adherent stresses associated with such a profession, remain quite concerned as no definitive reason for event has been determined. Also concerned re: The use of Diamicron known to cause hypoglycaemia and the fact that his A1C level has decreased in one month from .074 to .064 – increasing risk for a hypoglycemic event. Further it remains unclear whether there was LOC or not? Initial report and diabetic form (Dr. P. February 8/11) indicate there were yet other reports stating that the event was brought on by dizziness, confusion. In addition, unclear is there a "history of episodic dizziness and confusion" as noted in Dr. M.'s report of October 22/10 or not? If yes then require a diagnosis and what preventative treatment has been initiated.

On March 21, 2011 the Ministry again wrote to the Applicant stating that he was now approved for a Class "G" licence. They stated that he would be required to file a further MTO Diabetic Assessment Form on May 8, 2011 completed by an endocrinologist. Details of the requirements were noted. The Ministry stated that they would be pleased to reconsider the Class "F" designation when they have received this follow up report.

At the Tribunal hearing, the Applicant brought a Diabetic Assessment document filed by Dr. F.K. from a regional health care facility pertaining to the Applicant's problems. This was a fairly cursory document, hand written, and indicated that the Applicant was stable regarding his blood sugar and that his diabetes should not be an excuse to suspend the Applicants' licence. This was filed as Exhibit 4.

Evidence for the Applicant

The Applicant stressed that certain misunderstandings have appeared in the doctors' documents. He began by explaining his problems with insomnia and that there was no history of sleep apnea and this was documented today. He described the events in the ambulance on October 22, 2010 and claims to have made a wrong turn and struck the curb with two wheels. He did not consider this of much importance.

He notes that the doctors' reports describe his dizziness but he denied at the hearing that there was dizziness/confusion based on his lack of sleep. This problem was aggravated by the fact that he does shift work and has trouble making the appropriate adjustments in his sleeping patterns from shift to shift. He admitted that his blood sugar was up but did not think it was enough to cause problems. Regarding his medications, he felt that he had been compliant and has been following Dr. B.'s guidelines when his weight was dropping from 285 to 230 over a year and that he had been quite compliant in the gradual reduction of his medication. He went on to explain that Dr. F.K. is now monitoring his use of Metformin and Diamicron (a long acting agent). He also was puzzled about the May 8, 2011 dateline prescribed by the Ministry when in fact he has been on this new regime since October 26, 2010. He felt that adding three months to the period of monitoring was unreasonable. He pointed out that Dr. F.K.'s comments at the present time indicate that his diabetes is stable and there is no reason why he should not regain his commercial licence.

Mr. Biel pointed out the Dr. J. saw the Applicant and had checked off the possibilities of black out and sleep apnea. It was noted that Dr. J. had in fact ticked off the category of black out or loss of consciousness or awareness. The Tribunal notes, that there might have been an error. Mr. Biel questioned the use of the expression "tired". The Applicant explained that the doctors felt that he was suffering from a combination of tiredness with a high blood pressure and slight loss of control of his diabetes. Mr. Biel reviewed Dr. J's comments about dizziness which the Applicant denied, mild sleep apnea also denied by the Applicant and non compliance regarding his medications also denied by the Applicant.

The Tribunal noted that there was only one recorded reading of an elevated blood sugar and that was a level of 18.6 mmols with the upper normal range being about 7.5 and that was on October 22, 2010.

Mr. Biel then referred to the question of loss of consciousness explained by the Applicant as an error in medical documentation and Mr. Biel accepted that.

Mr. Biel stated that there is ample medical evidence of the Applicant suffering from poorly controlled diabetes at the time of the event in the ambulance. He stated that the Ministry requires more detailed information and this has been thoroughly outlined in the MAC's extensive report (Exhibit #3). Mr. Biel stressed that there has not been a suspension but a downgrade situation as per section 32(5) of the HTA. He also noted in Ms. M.E.'s description of the event that there was something quite serious going on with the Applicant. It was also noted that diabetics can have a commercial licence if there are no other problems. He stated that the MTO wants confirmation of the Applicant's compliance with his management and that his diabetes is well controlled. He stated that in fact he has been non-compliant. Mr. Biel also drew attention to the total absence of information from Dr. B. (the weight loss doctor) regarding the reduction of medication. Mr. Biel stressed that this was quite a serious driving mishap and that a well documented three month interval ending in May, with medical details, is quite reasonable.

The Applicant stated that his partner's report is quite accurate. He recognizes the problems of diabetes and he felt that on that date there was a combination of fatigue, an elevated blood pressure and moderately blood sugar acting in combination. He pointed out that he has now been stable for five months having readjusted his medications. He denied non compliance.

ISSUES

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

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

LAW

O. Reg. 340/94, Section 14 states:

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

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

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the CCMTA Medical Standards for Drivers; and
(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the CCMTA Medical Standards for Drivers and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the CCMTA Medical Standards for Drivers means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Sections 17 and 18 state:

17. 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. (1) An applicant for or a holder of a Class M, M1 or M2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50, with both eyes open and examined together with or without the aid of corrective lenses; and
(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(2) An applicant for or a holder of a Class G, G1 or G2 driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/50 with both eyes open and examined together with or without the aid of corrective lenses; and
(b) a horizontal visual field of at least 120 continuous degrees along the horizontal meridian and at least 15 continuous degrees above and below fixation, with both eyes open and examined together.

(3) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence must have,

(a) a visual acuity as measured by Snellen Rating that is not poorer than 20/30 with both eyes open and examined together and not poorer than 20/100 in the weaker eye, with or without the aid of corrective lenses; and
(b) a horizontal visual field of at least 150 continuous degrees along the horizontal meridian and at least 20 continuous degrees above and below fixation, with both eyes open and examined together.

Section 32 (5)(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.

(5) The Minister may require an applicant for a driver's licence or an endorsement or a person who holds a driver's licence to submit to the examinations that are authorized by the regulations at the times and places required by the Minister and to meet other prescribed requirements, and the Minister may,

(b) in the case of a person who holds a driver's licence,

(i) impose the conditions authorized by the regulations, remove any conditions or endorsements or change the class or classes of driver's licence held by the person, in accordance with the results of the examinations and other prescribed requirements, or

Section 50 states:

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.

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

APPLICATION OF THE LAW TO FACTS

Certain prominent facts emerged during this hearing:

1. The letter submitted by the Applicant's partner as the only witness to the event. Ms. M.E. goes a long way to provide a detailed description of the serious medical problems at the time of this event. She describes very clearly the Applicant's poor response to her directions when he had driven the ambulance up onto the curb. He continued with reluctance or inability to take her advice.

2. The Applicant shows a cheerful disregard to various rules and regulations that we all try to follow in our daily activities.

3. This characteristic emerges again with the evidence presented here; the Applicant has been quite casual about complying with instructions given to him by a series of well trained physicians.

There is no evidence of sleep apnea and it is unlikely that hypertension would factor into the events of that day. It is a surprise to this Tribunal that only one blood sugar (18.6) was recorded to show that the Applicant's diabetes was not under control. In the narrative of Ms. M.E.'s letter it is clear this was a sick man unable to take direction. One is amazed at his statement today that this was "no big deal;" to drive the ambulance up onto the curb and probably shows a serious lack of insight. The Ministry's response to the MAC's detailed report is correct.

DECISION:

On the Application by the Applicant to appeal the decision dated October 26, 2010 of the Ministry to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to section 32(5)(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 Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

David W. Hurst, M.D., Presiding Member

RELEASED: March 31, 2011

This decision may also be available on Quicklaw.

Decisions under the Highway Traffic Act

Section 47(1)(b) - Medical

Fiscal Year 2009 - 2010, April - June

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

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- 5967-MED-PSYCH
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/apr/5967.med.pdf>
- 5956-MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/apr/5956.med.pdf>
- 5911-MED-MDIS-Mental Disorder
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/apr/5911.med.mdis.pdf>
- 6002-MED-SEIZ-Seizures
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/may/6002.med.seiz.pdf>
- 5938-MED-Medical
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/may/5938.med.medical.pdf>
- 6081-MED-ALC-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jun/6081.med.alcl.pdf>
- 6074-MED-Medical
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jun/6074.med.mdis.pdf>
- 6072-MED-MDIS-Mental Disorder
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jun/6072.med.mdis.pdf>
- 6068-MED-PSYCH-Psychiatric
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jun/6068.med.psych.pdf>
- 6054-MED-ALC-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jun/6054.med.alcl.pdf>
- 6046-MED-SEIZ-Seizures
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jun/6046.med.seiz.pdf>
- 6044-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jun/6044.med.alcl.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5967-MED-PSYCH

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID W. HURST, M.D., Presiding Member

APPEARANCES: APPLICANT, unrepresented

RUSSELL MCKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: April 16, 2010 Toronto

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" or the "Respondent") pursuant to Section 47(1) of the *Highway Traffic Act*, R.S.O. 1990 c. H. 8 (the "Act").

FACTS

The Respondent's Case

From the file summary the Respondent's Agent explained that about 18 years ago medical reports had identified the fact that the Applicant had suffered episodes of dizziness which had been diagnosed as being due to Transient Ischemic Attacks.

The Applicant recovered and there was no suspension of his driving privilege. Provisions of these medical details today were simply for completion of the Applicant's medical background.

On the 28th of December, 2009 a Medical Report by Dr. N.J.M. was directed to the Ministry of Transportation stating that for medical reasons the doctor was of the opinion that the Applicant was unfit to drive a motor vehicle safely and, as required by law, this

was to inform the Ministry of this fact. The medical condition was described as cognitive impairment. There were no other details.

On February 11th, 2010 the Deputy Registrar of Motor Vehicles thanked the doctor for this report. On the same date, the Deputy Registrar sent a letter to the Applicant indicating it had been reported that he suffered from a medical condition which could impair his ability to safely operate a motor vehicle. This report had been submitted by a doctor in compliance with Section 203 of the *Highway Traffic Act*.

The Registrar of Motor Vehicles decided to suspend the Applicant's driving privileges for medical reasons under Section 47(1) of the *Highway Traffic Act*.

The letter from the Deputy Registrar of Motor Vehicles went on to explain that the Ministry of Transportation could reconsider the Applicant's case upon receipt of medical information satisfactory to the Registrar. They asked that the Ministry of Transportation receive an up-to-date detailed assessment from a physician familiar with the Applicant's medical history, a neurologist or a physician specializing in geriatric medicine. The report was to evaluate the Applicant's cognitive functions and confirm there were no other disqualifying medical concerns. The Deputy Registrar also indicated they might require a driving evaluation of the Applicant at a Rehabilitation Centre.

The Respondent's Agent submitted a certified copy of the Applicant's driving record which indicated the suspension for medical reasons dated the 1st of February, 2010, and said that they had received no new medical information regarding the Applicant.

<u>The Applicant's Case:</u>

The Applicant's presentation did not go well. When asked his age by the Tribunal he turned to his son for confirmation of this to be 79 years. With great difficulty, the Applicant recalled that his doctor filed a Medical Report with the Ministry of Transportation, which described medical reasons that made the Applicant unfit to drive safely. There was mention of cognitive impairment in this report. (It is noted by the Tribunal that the Applicant didn't understand the meaning of this phrase). The Applicant stated he returned to see his doctor. At the time the Applicant felt he was in good health and that he was still able to drive safely.

In order to assist the Applicant with his presentation the Tribunals asked him four questions. The questions and response follow.

1. How long have you been seeing your doctor?
   A very vague and rambling answer was given by the Applicant.

2. What problems required you to see your doctor?
   "I am not certain but it might have been a check-up."
   The Applicant answered.

3. Are you still able to drive and if so how frequently and what is the locale?
   The Applicant was unable to recall the name of his home community.

4. Have you ever gotten lost or into accidents while driving?
   The Applicant responded that he had not.

The Applicant was asked about the frequency of his visits to his doctor and about his medical problems, and the Applicant was unable to give a coherent answer. He was then asked if he understood the term cognitive impairment and he admitted that he didn't understand it.

The Respondent's Cross Examination:

The Respondent's Agent explained the process of the Applicant's driver licence suspension following receipt of the Medical Condition Report from his doctor. The Agent also explained to the Applicant that to this date the Ministry has not received the Applicant's driver licence, which the Applicant is required to return as a consequence of the suspension.

The Respondent in Summary**:**

The Respondent's Agent stated the importance of the letter from the Applicant's family doctor. The letter indicated that the Applicant suffered from cognitive impairment. The Agent stated that, to date, the Ministry has received no further medical reports and therefore, is justified in applying this suspension as described in the *Highway Traffic Act* – 340/94, section 14(a).

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 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.

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

APPLICATION OF THE LAW TO FACTS

Receipt of the Medical Condition Report by Dr. N.M, dated the 28th of December, 2009, stated that the Applicant suffers from cognitive impairment. The Ministry was correct in suspending the Applicant's driving privilege.

On February 11th, 2010 the MTO sent a letter to the Applicant requesting medical information, specifically regarding an evaluation of the Applicant's cognitive function. The letter stated that he might also be required to undergo a driving evaluation at a rehabilitation centre.

The Ministry, to date, has received no further medical reports.

It is apparent to the Tribunal that the Applicant suffers from a serious degree of cognitive impairment. He was virtually incapable of presenting his case in coherent fashion. This is indeed unfortunate, but it is also clear that the Applicant could not drive a car safely.

DECISION

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

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

LICENCE APPEAL TRIBUNAL

David W. Hurst, Presiding Member

RELEASED: April 22, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5956-MED

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, Presiding Member

APPEARANCES: SEVAGE YEGOHAYAN, Counsel, representing the Applicant

VICTORIA BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: April 12, 2010 Toronto

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" or the "Respondent") pursuant to Section 47(1) of the *Highway Traffic Act*, R.S.O. 1990 c. H. 8 (the "Act").

FACTS

Respondent's Evidence

A Medical Report was sent in to the Ministry of Transportation (MTO) on December 22, 2008, in which the doctor indicated that the Applicant suffered from the medical condition of Addiction (Alcohol, sedatives, tranquillisers, narcotics, etc). The physical examination was found to be essentially normal. The History Details and Summary was largely illegible.

When the MTO received this report, a letter was sent to the Applicant informing her that she was required to file an assessment from an addiction specialist, or her treating physician.

Addiction specialist Dr. M.S. sent in a report to the MTO, dated February 2, 2010 in which she stated that the Applicant was first seen in her clinic on August 13, 2009, presenting with a history of opioid dependency and polysubstance abuse. She had been at a drug rehabilitation centre for ten weeks from November 2008 to January 31, 2009, had completed this program, but she relapsed in May 2009. At the clinic of Dr. M.S. the Applicant was started on a Methadone program in August 2009. The Applicant stopped this treatment at the end of September 2009 and restarted it on December 15, 2009. She had been doing well, and had not been using any illiicit drugs. The doctor has been seeing the Applicant twice weekly, and the doctor feels that she is well on the road to recovery and "I have no concerns with her obtaining an F Class licence while on methadone".

Two laboratory toxicology reports, one dated January 26, 2010 and the other dated January 29, 2010, indicated "negative" for opiates and five other substances.

The MAC Case Summary form was completed on March 3, 2010. The medical specialist recommended suspension of the Applicant's licence. Under the heading Instructions, it was detailed, in part, that one year of total abstinence from all mood altering substances supported by random, observed, urine drug toxicology was required. Under the heading Reasons, the doctor wrote as a summary the following:

> Thus she has remained compliant for only two months. Given her relapses following formal treatment, above period of compliance is required prior to reinstatement of driving privileges.

The MTO wrote to the Applicant on March 3, 2010 informing her that her driving privilege was suspended.

Dr. M.S. sent another report to the MTO on March 16, 2010 in which the doctor wrote that the Applicant was continuing to be seen for her opioid dependency and was stable on the methadone treatment. The doctor requested that the Applicant's licence be returned on a conditional basis, depending on immediate licence suspension if any of her twice weekly urine toxicology results were reported positive.

Dr. M.S. sent another follow up report to the MTO on April 5, 2010. The doctor stated that the Applicant was very compliant with the methadone program and that she had not used any illicit or prescription drugs at all. She ended the report by writing:

> She is clinically and functionally stable and I have no concerns with her ability to operate a motor vehicle.

Applicant's Evidence

The Applicant had a successful academic career. She earned a B.Sc. degree. She qualified as a paramedic and then worked as a paramedic from 2002 to 2008. It was in November 2008 that she self-admitted herself to a drug rehabilitation program because of an addiction. She completed this ten week course at the end of January 2009. She relapsed in May 2009 and then in August of that year started attending the drug

rehabilitation clinic she is now at. At the end of September 2009, thinking she had had sufficient treatment, she left this clinic, but felt it necessary to return in December.

She was asked how and why she got into drugs. She said that she was away from home and got into bad, drug-using company. At the time she had difficulty finding work and was finding life difficult.

The Applicant said that she is following this methadone program very conscientiously. She is submitting monitored drug urinalyses twice a week and has been doing this since December 2009. She is very determined never to relapse again. She has left the area where she was in the company of people who were abusing drugs. Additionally, she has made new friends, she is living with her parents and is active in social and sports activities such as working out in a gym, boxing and roller-skating. She feels she is a totally different person. She is on the waiting list for a paramedic job, but she needs to be able to drive for this or any paramedic position. She has never had a charge or conviction for driving under the influence.

The Applicant's mother testified also. She explained that she holds a position with supervisor responsibilities and one of her responsibilities is to discipline employees under her and, for instance, deal with individuals abusing alcohol. Her daughter, (the Applicant), is living at home with her and her husband, and she would have no compunction in reporting her daughter if she stepped out of line with the use of illicit medication of any kind.

The Applicant's mother views a large change in her daughter. She said that all the steps that her daughter has taken to never abuse drugs again, have been on her own initiative. Her daughter has broken away entirely from the friends whom she used to know and who were responsible for introducing her to drugs. If and when her daughter gets her driving licence back, she will be driving the car owned by her and her husband.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Tribunal sympathises with the wish of the Applicant to be able to return to driving, especially since she depends on this for her livelihood.

Under the heading The Effects of Drugs and Narcotics, of the Canadian Council of Motor Transport Administrators Medical Standards for Drivers, the applicable Standard (12.4) is written as follows:

> Individuals repeatedly using non-prescription narcotics may not be eligible to operate any class of vehicle, depending on degree of deliberate abuse or loss of control.

The Tribunal recognises that the Applicant has a strong determination to break her addiction to illicit drugs, notably opiates, and a commitment to comply with the advice of addiction specialist Dr. M.S. The Tribunal recognises that Dr. M.S. has expressed confidence in the Applicant's ability to do this in her present state of mind. The counsellor, Dr. M.S., has written that the Applicant "is well on the road to recovery", (February 2, 2010), and in two reports, (February 2, 2010 and April 5, 2010). The counsellor expressed the opinion that she had no concerns about the ability of the Applicant to operate a motor vehicle. The Tribunal also recognises that the Applicant has strong family support and that she has broken with the environment she was in

when she became addicted, that she is actively engaged in sports and in social affairs and that she is keenly anxious to start working again.
However, the Tribunal notes that the Applicant went through one relapse and one partial relapse in 2009, and is of the opinion that a further period of time and attendance at the rehabilitation centre she is now at is required.
The Tribunal takes into consideration, first, the fact that the applicable CCMTA Guideline Standard for Narcotics (12.4) does not specify a period of time prior to which reinstatement of driving privileges should not be given. Secondly, the Tribunal takes into consideration the favourable reports from addiction specialist, Dr. M.S. and the favourable environment which the Applicant is currently in. It, therefore, recommends that serious consideration be given to the reinstatement of the Applicant's licence, (Class 'F'), after another three months, providing that satisfactory reports continue to come in from Dr. M.S.

DECISION

Upon the Application by the Applicant to appeal the decision of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("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 that under Section 50(2) of the Act that **the decision of the Registrar be confirmed.**

LICENCE APPEAL TRIBUNAL

_____
Dr. Patrick Coffey, Presiding Member

RELEASED: April 19, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

5911-MED-MDIS-Mental Disorder

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. DAVID HURST, Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 31, 2010 Toronto

DECISION AND REASONS

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

FACTS:

The Respondent's Case

On December 8, 2007 an unsolicited Medical Report was filed with the Registrar of Motor Vehicles. Dr. M.L. a specialist in Neurology, in his optional comments stated that this 61 year-old male had Parkinsonian's Syndrome with early cognitive problems. He recommended a DriveAble Test.

The next report was the result of a Driver Assessment Test dated January 14, 2008 which had been carried out at a regional health care centre. In the summary the occupational therapist noted that "performance on the Cognitive Assessment indicates that cognitive function has declined to a level that may impact driving". It was also noted that "driving performance was observed to be within the range of healthy, normal drivers and continued driving is recommended".

Her Recommendations were that:

1. the Applicant continue independent driving as there is no evidence that medical impairment compromises the client's [Applicant's] ability to operate a motor vehicle.

2. Reassessment in one year is due to the potentially progressive nature of the client's medical condition.

Reassessment is recommended sooner than one year if there is any notable change of cognitive function.

On August 26, 2009, the Applicant's family doctor (Dr. M.R.) filed an urgent Medical Condition Report indicating cognitive impairment – Parkinson's Disease --- and enclosed a Driver's Assessment Report from the same institution as previously noted, and dated August 18, 2009. This summary of this report stated that cognitive function has declined to a level that may impact driving and driving cessation was recommended because there was evidence that a medical condition compromised the Client's ability to operate a motor vehicle. It was reported also that the Applicant's physician had asked him not to drive three to four months previously.

In the On-Road Assessment, it was reported that "the Client demonstrated errors that are consistent with difficulties in information processing and decision making". Driving cessation was strongly recommended; eleven significant driving mistakes were noted.

On October 14, 2009, the Deputy Registrar acknowledged this report and on that date wrote to the Applicant referring to the physician's report filed in compliance with Section 203 of the *Highway Traffic Act*.

The Registrar stated that suspension of the Applicant's driving privilege was carried out for medical reasons under Section 47(1) of the *Highway Traffic Act.* The Registrar also noted that reconsideration of the Applicant's case could be done upon receipt of medical information satisfactory to the Registrar.

Instructions regarding reconsideration included a request for an up to date detailed assessment from a physician familiar with the Applicant's medical history, a neurologist or a physician specializing in geriatric medication. This report would evaluate the Applicant's cognitive functions and confirm that there are no other disqualifying medical concerns. Coincident with this report, the Applicant might be required again to undergo a driving evaluation at a Rehabilitation Centre.

The Applicant ultimately contacted the MTO for a release of the medical reports under the provisions of Freedom of Information and Protection of Privacy Act.

The Applicant then appealed the decision of the Registrar for the following reasons:

1. The medication that I am currently taking has made me more stable (Levocarbs 8 tablets per day).
2. I have no tremors or involuntary movements.
3. I exercise regularly four times per week with my partner and personal trainer.
4. I am a cautious driver and not aggressive.
5. I will not drive on any major highways, however I will drive occasionally on county roads.
6. I will only drive during daylight hours and during slow traffic hours.

The Registrar's Agent in her presentation presented the Tribunal with a certified copy of the Applicant's driving record stating only a suspension for medical reasons dating October 4, 2009 with no demerit points. Also provided were sections of the *Highway Traffic Act* – 47(1) suspension Reg. 340\94 – driver's licences, Section 14(a).

The Registrar's Agent also referenced the CCMTA "diseases of the central nervous system" Section 6.6 dealing with Disorders of Coordination and Muscle Control.

THE APPLICANT'S PRESENTATION:

The Applicant informed the Tribunal that he had gone to a driving instructor for a week of lessons prior to his driving test(s), and the instructor had complimented him on his driving skills. He said he had had no convictions or tickets in forty years of driving and that he is a very careful driver. He avoids the major highways though questioning from the Tribunal indicated that this was simply a matter of comfort.

He noted that he and his partner used GPS when they are driving. He described how he exercises regularly and has improved his diet. He is taking eight tablets a day for his Parkinson's Syndrome. He noted that this drug has about a 50% success rate.

It was observed by the Tribunal that during the Applicant's presentation he was very slow and hesitant and showed frequent memory lapses and occasional confusion.

During the Applicant's presentation the Registrar's Agent elicited the fact that his annual physical exam was satisfactory and all of his medications were the same with no

changes. The Applicant also stated that he had no tremors or involuntary movements; nor was he bothered by dizziness. At this point, the Applicant stated that he needs his

licence to be independent and he is the only driver in the household. The Applicant described the driving test in which there were three other people in the car, including an intern, the instructor and an occupational therapist. The Applicant found this quite distracting. He commented that when an order was given to him for example, to turn left, he then asked for confirmation of this order, probably giving a picture of confusion to the Examiner, leading to a poorer score. He explained that many of his apparent errors were simply related to his care and caution.

The Applicant complained of his difficulty in putting his case together and the Tribunal took note of the fact that the Applicant was extremely hesitant and often very vague.

The Registrar's Agent's cross examination reviewed the Applicant's various visits to his doctors regarding this problem, his Parkinson's Syndrome, and devoted a lot of attention to explaining to the Applicant the importance of the Registrar receiving detailed reports on his condition: in particular, an updated medical reports regarding his progress. The Applicant stated that his family doctor had become very resistant to completing another medical questionnaire (as each one requires an hour and a half of his time).

The Registrar's Agent also elicited the fact the Applicant had retired three years ago on the advice of his psychiatrist regarding his disability.

The Registrar's Agent made an even greater effort to explain to the Applicant that the MTO needs further medical reports with updates. She was very patient explaining these details to the Applicant to the point where it became repetitive, with the Applicant demonstrating great difficulty assimilating this information.

The Agent summarized the events leading to suspension under Section 47(1) of the *Highway Traffic Act* with suspension occurring on August 26, 2009, due to cognitive impairment from his Parkinson's Syndrome. She stressed the fact that suspension was strongly recommended in the last DriveAble Examination report.

She observed that the MTO has received no more information about the Applicant's condition, but since, this is a progressive disease it must be reviewed by the physicians. She asked that the Tribunal confirm the suspension.

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 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.

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

APPLICATION OF THE LAW TO FACT:

The Applicant has been diagnosed as suffering from Parkinson's Syndrome and he has had this for perhaps three or four years.

It has been reported by his physician(s), that the Applicant's cognitive function problems early on in the course of this disease, have deteriorated to the point now where the

examiners advised him to cease driving and reported this to the MTO. His first DriveAble test showed that he was not at risk while the second one about a year later has now reported strongly that his driving privilege be suspended.

During the Applicant's presentation, it was clear to the Tribunal that he is ill and suffering considerably from cognitive dysfunction. He was very vague and admitted that his presentation was quite confused and rambling. He demonstrated memory lapses despite the Registrar's Agent's very gentle, kind repetitions to explain to the Applicant that the MTO has inadequate information as to his progress and needs more detailed medical reports.

The Applicant demonstrated a serious lack of understanding. The efforts by the Agent became repetitive and proved futile. The Tribunal finds that the Applicant's cognitive function has deteriorated to such a degree that it is unsafe for him to drive.

DECISION:

Upon the application by the Applicant to appeal the decision dated October 24, 2009 to the Registrar to suspend his driver's licence pursuant to Section 47(1) of the *Act,* and having considered the evidence, and the submissions of the Registrar, and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. David Hurst, Panel Member

RELEASED: April 23, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6002-MED-SEIZ-Seizures

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

TO APPEAL A SUSPENDED LICENCE

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

APPEARANCES: APPLICANT, unrepresented

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

DATE OF HEARING: May 3, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY ISSUES

The Respondent informed the Tribunal that the Alcohol Abuse Assessment Form requested of the Applicant by the Registrar of Motor Vehicles has not been received but is currently in the hands of the Applicant’s physician. The parties agreed to proceed without adjournment.

FACTS

The Respondent's Case

A Medical Condition Report pursuant to Section 203 of the Act was completed on January 28, 2010 by an Emergency Room physician at a local hospital.

The Report stated that the Applicant presented in the Emergency Department on January 22, 2010 intoxicated and had a seizure in the E.R.

The Report was received by the Registrar and a letter was sent to the Applicant informing him that it had been decided to suspend his driving privilege under Section 47(1) of the *Highway Traffic Act* effective March 19, 2010. He was requested to arrange for the ministry to receive an up-to-date detailed report from a neurologist or a physician familiar with his medical history regarding his reported seizure(s) and alcohol abuse. The report must state that he has been seizure free and abstinent from alcohol for a period of one year.

On March 23, 2010 a letter was prepared by Dr. M., a specialist in kidney diseases at a regional hospital.

> This is to certify that (Applicant) was admitted to ICU in January 2010. He had kidney failure and required dialysis for a short period. His renal failure has almost recovered and I am currently following him as an outpatient.
>
> The cause of his renal failure was unclear. According to his chart there is evidence of alcohol toxicity. Since I have seen him in the outpatient department he tells me that he has not been drinking any alcohol. I am currently seeing him for treatment of his high blood pressure.

The Registrar reviewed the medical report and informed the Applicant that it contained insufficient information. He was requested to have an Alcohol Abuse Assessment form completed. A clinical explanation must be provided for the results of any bio-chemical markers that are outside the normal laboratory range. His physician must also include details of the circumstances surrounding the reported seizure as well as details of any previous seizure whether alcohol related or not.

If the diagnosis of alcohol dependence is confirmed he must provide confirmation that he has remained alcohol and seizure free for a period of one year. This period may be reduced if his physician confirms that he has completed an alcohol treatment program and is supportive of reinstatement.

The Applicant's Case

The Applicant commenced driving in Canada four years ago and had one speeding ticket.

He has a dog training business.

On the day before admission to hospital he had no work to do and consumed six or seven Scotch whiskeys at home in the afternoon. After he had some Chinese food he felt unwell and went to bed at about 7:30 p.m. He awoke later and fell out of bed striking his head on a dresser. His wife found him unconscious and called 911. An ambulance took him to the local hospital.

His wife gave evidence.

She stated that he got up from bed at about 1:30 and she heard a crash as he struck his head on a dresser. He had a tendency to sleep walk and she thought that this was the reason for his being out of bed. She called Telehealth after half an hour and then called for an ambulance. He vomited once while waiting and was partially lucid. She went to the E.R and spoke to the doctor there. He told her that her husband had a high alcohol level. She recalls a number 40. Her husband continued vomiting and was given medication that seemed not to be working. At about 5:30 she witnessed a number of seizures. His blood pressure was about 207/130. He was put into a drug-induced coma and transferred to the regional hospital where he was admitted to ICU. He required dialysis and was given anti-seizure medication. A CT Scan was performed.

At one point he suffered a cardiac arrest and pneumonia and a blood infection.

The Applicant stated that he was not prescribed anti seizure medication on discharge. He was taking blood pressure medication.

In Reasons for Appeal he stated that he had stopped drinking but he informed the Tribunal that he had recommenced drinking, mostly on weekends.

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

<u>Submissions</u>

The Respondent relies on:

1. Section 47(1) of the Act which states that the Registrar may suspend or cancel a driver's licence for any other sufficient reason not referred to in clause (d), (e) or (f).

2. The Medical Condition Report completed by a physician pursuant to Section 203 of the Act stating that the Applicant was admitted with alcohol toxicity and had suffered a seizure.

3. In absence of a completed Alcohol Abuse Assessment, the Registrar has insufficient information on the Applicant's alcohol use or abuse, and evidence was given that he continues to drink.

4. Insufficient medical information is available to justify reinstatement.

5. CCMTA Standard 13.2 states that patients with alcohol withdrawal seizures must not drive for 12 months during which time the patient must remain seizure free and alcohol free. This period may be considered for reduction after favourable recommendation from his physician.

The Applicant submitted that he is in danger of losing his business and house if he is not able to drive. He acknowledged that he does not have a family physician but that he will ask Dr. M. to provide a detailed report as well as the Alcohol Abuse Assessment.

APPLICATION OF THE LAW TO FACTS

The Tribunal finds that the Applicant abused alcohol to the extent of suffering alcohol related seizures. His medical problems have not been reported in detail sufficient to consider reinstatement. There is insufficient evidence of alcohol dependency or addiction.

The Registrar was justified in issuing a licence suspension on receipt of a medical condition report made pursuant to Section 203 of the Act. Reinstatement is not supported by medical evidence.

DECISION

Upon the application by the Applicant to appeal the decision dated March 10, 2010 of the Registrar 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 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

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Kevin Flynn, M.D, Presiding Member

RELEASED: May 5, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5938-MED-MEDICAL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Dr. KEVIN FLYNN, Presiding Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Respondent
Representative for the Minister

DATE OF HEARING: May 7, 2010 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant (the "Applicant") respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario) (the "Act") effective August 23, 2009.

FACTS

A Medical Condition Report dated July 23, 2009, was completed by an Emergency Room physician pursuant to Section 203 of the Act.

The condition was described as:

> Mental or Emotional Illness-Unstable

The patient was not aware of the report and the physician wished to be notified if the patient requested a copy of the report.

On August 13, 2009, the Registrar informed the Applicant that it had been decided that his driving privilege was suspended under Section 47(1) of the Act.

In order to be considered for reinstatement he must arrange for the Registrar to receive a detailed up-to-date report from his physician. The report must contain:

- Results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.
- His complete psychiatric history (i.e. duration, degree, dates of hospitalization (if any), including his most recent discharge summary.
- A reference to any suicide attempts/ideation (if any).
- A narrative account of his reported anxiety/panic attacks (if applicable).
- Evidence of addiction or misuse of medication (if applicable).
- Details of his compliance and frequency/rapidity of decompensation, signs of impaired judgement, reduced concentration, reckless/aggressive behaviour and any sedation or psychomotor retardation due to medication.
- Confirmation of his mental and emotional stability and current level of function.

He was advised of his right to an Administrative Review and of his right of appeal.

Under the *Freedom of Information and Protection of Privacy Act* a copy of the Medical Condition Report was disclosed to the Applicant on December 22, 2009.

On March 9, 2010, the Registrar received a copy of a report from Dr. C., dated July 15, 2009. The report was in response to a request for consultation by the Applicant's family physician, Dr. E. Dr. C. is a specialist in Physical Medicine and Rehabilitation and the condition for which he was consulted was lumbar disc disease. The patient's chief complaint was lower back pain radiating to both legs most likely following incidents when working as a self employed landscape gardener.

A CT Scan done in May 2009 showed some disc bulging at L5S1 with evidence of neurological deficit on the left side. The specialist prescribed a course of physiotherapy to strengthen the Applicant's lower limbs.

No medical information was submitted concerning the admission on July 23, 2009.

The Registrar informed the Applicant by letter dated March 18, 2010, that this information was not in compliance with the detailed information requested on August 13, 2009.

The Applicant's Case:

In Reasons for Appeal the Applicant stated that his problems began in January 2009 when he had surgery to remove a pilonidal cyst that required him to remain prone for an extended period of time for healing to take place, with loss of income during the snow removal season. His family doctor had prescribed strong analgesic and anti-inflammatory medications. In order to continue to work he had to keep taking medication and when he was unable to see his own doctor he went to a walk-in clinic where he was prescribed a mixture of anti-inflammatory and muscle relaxants. He informed the Tribunal that he collapsed at home and became unresponsive. His parents called for an ambulance and he was taken to the Emergency Room where he regained consciousness. He denied taking alcohol with the medication. He stated that he was in hospital for three days and does not recall what specialists saw him other than a psychiatrist who looked at him very briefly. He denied that he had any suicidal ideation.

He stated that he has lost his landscaping business as a result of the suspension and has had to file for personal bankruptcy.

He stated that he did not request his hospital records and did not bring the hospital discharge summary to the Hearing. He stated that he attempted to have Dr. E. his family physician, complete the information requested by the Registrar without success.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. The Medical Condition Report by a physician pursuant to Section 203 of the Act stating that the Applicant suffered from a mental or emotional illness that may make it unsafe for him to drive.

2. Lack of the requested medical information that might assist the Registrar to determine if the Applicant's driving privilege might be restored.

3. Regulation 340/94 (14) of the Act which states:

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

The Applicant acknowledged that the information requested by the Registrar would be available in the Health Records Department of the hospital where he was treated for three days even though his family physician was not willing to assist him. He agreed to take the

letter from the Registrar dated August 13, 2009 to the Health Records Department in order to obtain this information or have a copy of the health record released to the Registrar.

The Tribunal finds that the Registrar was justified in issuing a suspension of the Applicant's driving privilege under Section 47(1)(g) upon receipt of a Medical Condition Report filed by a physician pursuant to Section 203 of the Act, that stated that the Applicant suffered from an unstable mental or emotional condition that may make it unsafe for him to operate a motor vehicle.

The Registrar was justified in continuing the suspension upon failure by the Applicant to submit the information requested by the Registrar pursuant to Regulation 340/94(14).

DECISION

Upon the application by the Applicant to appeal the decision effective dated August 23, 2009 of the Registrar 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 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

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Kevin Flynn, M.D., Presiding Member

RELEASED: May 11, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6081-MED-ALC-Alcohol

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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 and AGENT (Applicant's son), representing the Applicant

SONIA DE SANTIS, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: June 21, 2010 Toronto

DECISION AND REASONS

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

FACTS

Respondent's Evidence

Dr. D. saw the Applicant when he was brought into a hospital emergency department on November 28, 2009, and in her report she wrote "Alcohol Dependence" as the medical condition. When the Ministry of Transportation ("MTO") received this report, it was decided that the Applicant's driving privilege should be suspended.

The Substance Abuse Assessment form was completed and signed by the Applicant's family physician, Dr. L. on March 11, 2010.

In this report, under Health History it was written Gastritis or peptic ulcer disease, Nutritional deficiencies, and Hospitalisations within the last 12 months (admitted to hospital on November 28, 2009). Further information about the hospitalisation showed that he was admitted for failure to thrive, severe esophagitis and gastritis.

Physical assessment was essentially normal and both the MCV and the GGT and the liver function tests were within normal limits.

The AUDIT score was zero. Under "Diagnosis" was written Abstinence since November 2009. The recommendation was Abstain.

Dr. L., the family physician for the Applicant, sent in a medical report to the MTO on February 10, 2010, in which he said that the Applicant had abstained totally from alcohol use and that he was medically stable, which was supported by his blood work. The doctor said that he believed that consideration should be given for reinstating his driving licence.

The Applicant was seen in consultation by Dr. K on February 11, 2010. Under "Impression" the doctor said the Applicant had Type 2 diabetes, that his glycemic control was quite good on his current regimen, that he had lost a significant amount of weight since last visit, which seemed unintentional and which might have to be investigated, and that his blood pressure was quite low. The doctor described some medication changes he was going to make.

In the MTO Certified Driver Record of May 20, 2010, no convictions, discharges or other actions are shown and the demerit points are zero.

Applicant's Evidence

The Applicant retired in April 2009. He stayed at home with his mother and gradually became depressed. This sudden cessation of his usual work felt like a shock. Also, he found that his stomach was bothering him and he could not eat. He was drinking wine. He was asked how much he was drinking at that time. He replied, "four to five glasses a day". He was told by a doctor that his liver was not good. His nephew, who is a doctor, arranged for him to be taken into the local hospital emergency department on November 28, 2009. He was asked if he took any wine that day. He said that he took none and he could not eat anything either that day.

The Applicant said that he never drank and drove. He has not consumed any alcohol since he was admitted to hospital.

The Applicant's son spoke briefly. He said that his father, after retirement, mostly stayed at home and he became introspective. He drank wine and did not seem well. With the change for the better in his father's health and life-style, he wondered if consideration could be given to the return of his father's driving licence before too long.

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,
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> (a) the plate portion of a permit as defined in Part II;
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> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
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> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
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> (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 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.

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

APPLICATION OF THE LAW TO FACTS

Under the heading "Alcohol dependence and alcohol withdrawal seizures" of the Canadian Council of Motor Transport Administrators Medical Standards for Drivers, the applicable standard (Standard 13.2) is written as follows:

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

The Tribunal finds that after the Applicant retired in April 2009, he felt depressed and also, he had stomach complaints and he could not eat. Between that time and the end of November, when he was admitted to hospital, his symptoms became worse and he was probably drinking more wine than usual. He was seen in the hospital emergency department by Dr. L., who not only admitted him, but also completed the Medical Condition Report with the condition of "Alcohol Dependence" written. In hospital he was treated for gastritis, esophagitis and failure to thrive. The Applicant is feeling better and has not consumed alcohol since before he went into hospital. There has been a change for the better.

The Tribunal is favourably impressed by the following facts, although, it is aware that only six to seven months, not twelve months, has passed since the Applicant abstained from alcohol.

1. The Tribunal finds the statement of the Applicant that he has not consumed alcohol since the end of November to be credible.

2. The only Laboratory reports on file since the Applicant left hospital showed normal MCV, GGT and liver function tests (February 25, 2010).

3. The Applicant's family physician, Dr. L, who has known him for many years, finds the statement of the Applicant regarding abstinence from alcohol credible, and, in addition, stated that he is "medically stable" and recommended the reinstatement of his driving licence.

4. Good driving record of the Applicant.

Therefore, the Tribunal is of the opinion that more rehabilitation time spent under the care of the Applicant's family physician is required, but that the full twelve (12) month period since his last alcohol intake is not warranted, providing that the following recommendation is adhered to. The Tribunal recommends that serious consideration be given to the reinstatement of the Applicant's driving privilege after another two months, provided that during that time, favourable reports, including MCV, GGT and liver function tests are received from family physician, Dr. L.

DECISION

Upon the application by the Applicant to appeal the decision effective December 12, 2009, 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: *June 29, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6074-MED-MEDICAL

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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, self-represented

VICTORIA BEDROSSIAN, Representing the Registrar of Motor Vehicles

DATE OF HEARING: June 21, 2010 Toronto

DECISION AND REASONS

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

FACTS

Respondent's Evidence

Dr. W. sent in a report on November 11, 1998 regarding the Applicant, writing as follows:

> This patient was brought in by ambulance to the emergency department of X Hospital on November 4, 1998 with a hypoglycaemic reaction. He was comatose when the ambulance picked him up and was treated with Glucagon. Medical records at the hospital showed him to have had a similar episode on November 2, 1998. He is an insulin dependent diabetic.

On receipt of this report, the Ministry of Transportation (MTO) wrote to the Applicant informing him that it had been decided that his driving privilege should be suspended.

Internist Dr. S. saw the Applicant in consultation and wrote to the MTO on January 12, 1999.

The doctor wrote that he was asked to review the Applicant in order to assess whether the Applicant was "suitable to drive". The doctor described the problem of the Applicant as being "nocturnal hypoglycaemia with diabetes mellitus of longstanding duration".

The doctor described the two episodes of hypoglycaemia which took the Applicant to an emergency department in November 1998. He went on to report that stresses from marital breakdown led to recreational use of cocaine requiring hospital admission and counselling and that the Applicant had not taken any cocaine in the previous three months. The doctor said that the Applicant had been managing his diabetes very well over the previous 10 years, and his assessment was "Suitability to drive". He believed that it was reasonable to allow the Applicant to drive under the following circumstances:

1. Three months follow ups for one year by myself.
2. Regular glucose monitoring.
3. Glucagon in the house.
4. Anti-hypoglycaemic agents available in the motor vehicle.
5. Abstinence from cocaine completely. This will be monitored at q3 monthly intervals by urine testing for one further year.

The MTO wrote to the Applicant on July 14, 1999 stating that the last medical report had been approved for class 'D' licence with certain conditions, including regular reports from internist Dr. S.

The Applicant continued to be reviewed regularly by Dr. S. who found that his diabetes was under good or reasonable control, but on January 3, 2010 the Applicant had to be taken to a hospital emergency department because of a severe hypoglycaemic reaction and Dr.L. wrote the following report:

> Hypoglycaemia (uncontrolled). Insulin dependent diabetic. Had increased physical Activities, (cleaning snow), today and forgot to take his snacks this evening.

When the MTO received this report it was decided that the Applicant's driving privilege should be suspended.

In the Case Summary of MTO's Medical Advisory Committee ("MAC"), dated April 10, 2010, the Instructions were to "Remain suspended", the Reasons being:

> MAC is requesting a longer period of stability to ensure driver is no longer at risk for further severe hypoglycaemic events. Driver had two, possibly three episodes within three weeks. MAC is concerned considering severe hypoglycaemia resulting in LOC and confusion. Driver indicates he "forgot" to take his medication on two to three occasions. Requires six months free of severe hypoglycaemic event.

The Certified MTO Driver Record of June 4, 2010 for the Applicant showed a conviction for speeding 111 KMH in 80 KMH zone on March 3, 2008 and Current Demerit Points were zero.

Applicant's Evidence

The Applicant referred to the MAC report of April 20, 2010, in which it was mentioned that the Applicant had suffered severe hypoglycaemic episodes in January 2010 and "the driver indicates that he forgot to take his medication". The Applicant stated that he did not forget his medication and never does. The factors that came into play in relation to these episodes were first, that he forgot to take his snacks and, secondly, he had to exert himself unduly shovelling snow at that time.

The Applicant said that all these hypoglycaemic events happen at home and nearly all are at night. He tests his blood sugars at least four times a day. He uses his cell-phone alarm to wake him up day and night. At night he sets the alarm for 2.30 a.m. and 2.40 a.m. The Applicant has found that unusual physical activity can lower his blood sugars, and after the two episodes of January 2010 he arranged for someone to do his snow shovelling for him.

The Applicant drew attention to his observation that his blood A1C reports in the latter part of 1999, when his licence was reinstated, were worse than they have been recently.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Tribunal notes that the Applicant has had brittle, difficult to control Diabetes for at least 20 years. In spite of very careful work on the part of the Applicant and his medical advisors he had his driver's licence suspended on two occasions, in 1999 and in 2010, (due to hypoglycaemic reactions resulting in coma) His hypoglycemic episodes are almost entirely nocturnal.

The Tribunal is of the opinion that the time has arrived when the Applicant should have his driving privilege reinstated for the following reasons:

1. It is probable that two factors came into play in the causation of the two severe episodes suffered by the Applicant in January 2010, namely unaccustomed physical exercise, (snow shovelling), accompanied by the Applicant not taking his usual snacks. (It should be added that in the MAC Report of April 20, 2010, it was written that the Applicant neglected to take his medication on two occasions, but the Applicant has stated that it was his snacks he did not take and he would definitely never miss his medications.)

2. The Applicant's very careful and intelligent application to his illness and that of his medical advisor. The following details apply, namely - the Applicant monitors his blood glucose at least four times a day, has an alarm system to wake him at certain times, glucagon in the house, anti-hypoglycaemic agents in his car, and the recent acquisition of someone to help with heavy physical work.

3. It is now almost six months since the Applicant's last severe hypoglycaemic episode, (January 26, 2010). In the last MAC Report of April 20, 2010 it was written that six months free of a severe hypoglycaemic event was required.

DECISION

Upon the application by the Applicant to appeal the decision effective February 19, 2010 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 set aside.

LICENCE APPEAL TRIBUNAL

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Patrick Coffey, M.D., Presiding Member

RELEASED: *June 25, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6072-MED-MDIS-Mental Disorder

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. GARRY FISHER, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE M. BIEL, Respondent
Representative for the Minister

DATE OF HEARING: June 2, 2010 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").

PRELIMINARY MATTERS

The Tribunal was conducted as a telephone hearing with the Applicant and the Respondent. The Applicant was sworn at the inception of the hearing.

FACTS

The Applicant is a 75 year old man who was assessed by Dr. L., a geriatrician, on Dec 17, 2009. With this assessment, a notice was forwarded to the MTO in compliance with section 203 of the *Highway Traffic Act*.

Several boxes were checked: “Dementia or Alzheimers likely to interfere with driving”, “situation is serious road safety risk”, and “patient is aware of this report”.

On January 22, 2010, the MTO notified the Applicant of his licence suspension**.** Reconsideration of the suspension hinged on medical evaluation of cognitive function and “perhaps“ the need for driving evaluation at a rehabilitation centre.

Dr. G., family doctor, wrote on February 17, 2010, that the Applicant had three different MMSE tests and that the results “were not terrible”. His opinion as to driver licence was that the Applicant was “borderline at worst” and “able to function safely” at best.

On March 2, 2010, the MTO notified the Applicant of the need for a satisfactory driver evaluation from a rehabilitation centre. He was provided with a list of approved Ontario centres.

An appeal was started, but dismissed when the Applicant failed to submit the necessary fee.

A new appeal was launched. Dr. G. referred the Applicant to driveABLE in a nearby city and testing was carried out May 8 2010. Testing took the form of In-office cognitive evaluation followed by road evaluation. The Applicant clearly failed both of these assessments.

The recommendation therefore was that “driving cessation is strongly recommended”

The Applicant did not present well at the hearing. He failed to call in as requested to join the conference. The Tribunal contacted him, having to sleuth out his phone number when he had made errors on his forms. Then he couldn’t recall receiving packages from the LAT (May 31) or the MTO (June 1) although we knew he had signed for both. We waited while he found the material.

His driving test had been stopped abruptly, when it was deemed unsafe to continue and when asked about it, he had no insight into the problem.

The Applicant is of the opinion that there is nothing wrong with his driving. “I have been driving 52 years with no accidents”

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

APPLICATION OF THE LAW TO FACTS

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;

Section 6.8 of the Canadian Council of Motor Transport Administrators (CCMTA) Medical Standards for Drivers states:

> STANDARD: MEMORY IMPAIRMENT OR MILD DEMENTIA – ELIGIBLE FOR CLASS 5 LICENCE, SUBJECT TO SATISFACTORY DRIVING ASSESSMENT. ANNUAL REASSESSMENT IS RECOMMENDED.

The Applicant fits in to the mild dementia category. He has been tested objectively and failed both the cognitive and physical driving tests. Driving cessation has been recommended.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel
(g) any other sufficient reason not referred to in clause (d), (e) or (f).

DECISION

Upon the application by the Applicant to appeal the decision dated January 22, 2010 of the Registrar 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 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

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Dr. Garry Fisher, Presiding Member

RELEASED: *June 21, 2010*

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

6068-MED-PSYCH-Psychiatric

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: GARRY FISHER, M.D., Member

APPEARANCES: RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: June 15, 2010 *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* (the "Act").

PRELIMINARY MATTERS

The hearing was held by teleconference. The Applicant was directly contacted by the Registrar's Agent and by staff of the Tribunal within the week prior to this hearing. The Applicant failed to call in as instructed, and the Tribunal was unable to contact him, in spite of numerous attempts over more than thirty minutes.

After the thirty minute grace period, the hearing commenced and the Tribunal then proceeded to hear the Registrar's case.

FACTS

The Applicant is a 36-year old man who presented in a nearby city hospital Emergency Room ("ER") on September 23, 2009. He is described as exhibiting bizarre behaviour, being agitated and rambling.

He was initially seen by Dr. W., an ER doctor, who completed a Form 1 – an involuntary admission form for psychiatric reasons, and with that, a Form 203, wherein the Ministry of Transportation ("MTO") suspended his driver's licence.

Dr. W. checked off "blackout or loss of consciousness or awareness", and wrote in "psychosis". He added in the comments area "schizophrenia" and "hallucinating".

At admission, the Applicant was seen by Dr. N., a psychiatrist, who treated him during his stay in hospital. Within the first 72 hours of admission, a second psychiatrist saw the Applicant and completed a second form, thus extending the involuntary admission to two weeks.

The Applicant was an in-patient from September 23, 2009, to discharge on October 9, 2009.

The agitated bizarre behaviour apparently settled quickly in the hospital. A final diagnosis was Psychosis NOS. The Applicant was discharged on Risperidone 2 mgm at bedtime, with an appointment to see another psychiatrist, Dr. J., who was to monitor the Applicant and his medication.

The Applicant had one follow-up with the psychiatrist, Dr. N., on October 19, 2009. At that time he was advised to continue his medication, attend the follow-up clinic and become involved in counselling. So far as the Tribunal is aware, the Applicant has done none of the above.

However, it was Dr. N.'s opinion that his patient was "psychiatrically stable to drive a motor vehicle".

The Applicant had one former admission to the same hospital in March 2007, with the same diagnosis and recommendations – discharged on Risperidone.

A letter was received from the Applicant that was long, rambling and repetitive. It stated clearly that he was perfectly alright and that the ER doctor, Dr. W., was wrong to sign an MTO Form 203. The letter failed to deal with the issue of the failure to have a formal follow-up, as requested.

A Medical Advisory Committee report to the MTO, filed January 8, 2010, recommends that the Applicant keep his appointment, as arranged with Dr. J., and to have a detailed report of his status prepared and submitted to MTO.

The Applicant had a speeding ticket in March 2010, while his licence was suspended.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
> (b) a driver's licence; or
> (c) a CVOR certificate,
>
> on the grounds of,
>
> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
> (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
> (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

> 50 (1) Every person aggrieved by a decision of the Minister 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

Regulation 340/94, section 14, states that a holder of a driver's licence must not suffer from a mental illness that might interfere with the safe operation of a motor vehicle.

In this instance, Standard 11.4 of the Canadian Council of Motor Transport Administrators ("CCMTA") Medical Standards for Drivers describes the need for attending a psychiatric follow-up, as requested by MTO.

The Applicant has provided a brief note from his family doctor, but it does not satisfy the requirements of the CCMTA guidelines or the requests made by MTO for detailed information.

The Registrar's Agent noted that if the Applicant wished to contact the Registrar's office, he would be given assistance in how to take the appropriate steps to regain his driver's licence.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective October 5, 2009, 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

_____

Garry Fisher, M.D., Member

RELEASED: June 23, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6054-MED-ALC-Alcohol

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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, self-represented

RUSSELL McKNIGHT, Representing the Registrar of Motor Vehicles

DATE OF HEARING: June 9, 2010 Toronto

DECISION AND REASONS

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

FACTS

Respondent’s Evidence

Dr. G. sent in a Medical Condition Report to the Ministry of Transportation (MTO), dated August 12, 2009, which indicated that the Applicant suffered from Alcohol Dependence and Seizure(s) – Alcohol related.

When the MTO received this report, it was decided that the Applicant’s driving privilege should be suspended. The MTO also required that the Applicant provide an up-to-date, detailed report from his treating physician and arrange for the Substance Abuse Assessment form to be completed.

Neurologist Dr. B. sent a report concerning the Applicant to the MTO, dated November 10, 2009, which reads, in part, as follows:

> This 41 year old self-employed man collapsed while at work on August 10, 2009.There were premonitory features such as to suggest a faint. He sustained head trauma and lacerated or bit the side of his tongue. His neurological investigations have included a CT of head which showed mild, general atrophy. An EEG revealed mild dysrythmic features right frontal area, "not definitely epileptogenic".
>
> I assessed X on October 23rd and no abnormalities were detected of a neurological nature. There is no indication that this man is at risk for seizures. We discussed seizure precipitants at length and he was given a list of these triggers which does include sleep deprivation, which had been something he was having trouble with. We do not know the identity of the event. There was a fairly long prodrome and he did sustain head trauma when he fell.
>
> As his EEG was not substantially abnormal and a CT scan was unremarkable, it would seem reasonable to consider reinstatement of his driving privileges now that more than three months has passed with no further events.

The MTO wrote to the Applicant on November 30, 2009, requiring him to provide an up-to-date assessment from his treating physician or by a physician specialising in addictions medicine.

Laboratory tests were carried out on the Applicant on December 15, 2009. The pertinent reports showed that the MCV level was within the normal range at 91.5, and the GGT was raised at 106 (normal range 5 – 50).

The Applicant's family physician, Dr. M. wrote to the MTO concerning the Applicant on January 18, 2010, as follows:

> X's blood work has shown that he has occasional beers, but he does not drink alcohol while he drives. His GGT remains at 106 and his MCV is normal at 92.1. His driver's licence should be reinstated immediately.

Dr. M. wrote again to the MTO on March 12, 2010, as follows:

> X is not alcohol dependent and has totally stopped drinking alcohol since September 10, 2009.

In the MTO Certified Driver Record of the Applicant, dated May 20, 2010, Demerit Points were Zero, and the only offence mentioned is:

> No Driver's Licence or Improper Class of Licence. Date: October 2, 2007.

Applicant's Evidence

The Applicant described the episode that occurred on August 10, 2009, when he was taken into a hospital Emergency Department. That morning, which was a Tuesday

morning, he felt ill. He felt weak and nauseated and did not want to eat anything. He stood up at his desk and then collapsed, striking his head against something as he fell. He found later that not only had he injured his head, but had also lacerated or bitten his tongue. An ambulance was called and he regained consciousness in the ambulance on the way to the hospital. He was only in the Emergency Department for about one hour and a half. The examination by the doctor seemed to take about 10 minutes. He has not suffered anything like this since then.

The Applicant was asked about his alcohol consumption immediately before he was taken into the hospital. He testified that the last time he consumed any alcohol before this episode was on the Saturday before. That is three days before. He was also asked what made the hospital doctor who examined him believe him to be an alcoholic. He replied that his estranged wife learnt that he had been taken into the hospital, followed the ambulance and spoke to the doctor. He described his wife as “mean” and made a big fuss over the small to moderate amounts of alcohol he sometimes drank. She had been particularly incensed because on the Saturday before he had drunk two or three beers while he was mowing the lawn.

He described his drinking habits prior to this event. He said that he usually consumed about 12 beers a week. This was usually at the week-ends and mostly on Saturdays, and also often on Tuesdays when he was accustomed to coach hockey and baseball. The Applicant stated, at first, that the last time he drank alcohol was September 10, 2009, and later, he stated, that it was August 10, 2009.

The Applicant runs his own small business. He usually employs four men, but with his present inability to drive, his business has slowed down and he has had to let one or two of his employees go. He is finding it very “tough” trying to manage his business and not being able to drive.

He was asked if he received the MTO Substance Abuse Assessment form. He replied that he did and showed it to his family physician, but did not clearly explain why it was not completed and sent in.

The Applicant asserted that his neurologist, Dr. B. told him that in his opinion the episode of August 10, 2009 was not a seizure.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The MTO had no option but to suspend the driving privilege of the Applicant after receiving the medical report from Dr. G. of the hospital Emergency Department.

The Tribunal has tried to study and weigh the conflicting evidence, and has especially tried to see if the evidence pointed in any particular direction as to the likeliest cause for the loss of consciousness suffered by the Applicant on August 10, 2009. The Tribunal notes the following.

First, the strong inclination of Dr. G. of the hospital Emergency Department was that this episode of August 10, 2009 was a seizure caused by or related to alcohol. But, secondly, neurologist Dr. B.did not incline towards a diagnosis of seizure and wrote that the Applicant was "not likely to have a seizure in the future". The Tribunal note, with surprise, that Dr. B. did not mention alcohol in his report of November 10, 2009. Then, thirdly, the Tribunal finds that the Applicant's testimony attests to only a moderate intake of alcohol shortly before the episode and a moderate to high consumption in the past.

The Tribunal notes that the Laboratory reports of December 15, 2009, (markers for alcoholism), showed that the MCV was normal and the GGT was moderately raised at 106 units. Also, Dr. M.'s letter of January 18, 2010 reported that the MCV was at that time normal and the GGT still at 106 units. The file contains no Laboratory reports since then.

In a difficult decision with conflicting opinions and a lack of recent reports, the Tribunal finds it difficult to ignore the following:

1. The report of the neurologist, Dr. B. who in his report of November 10, 2009 wrote, "It would seem reasonable to consider reinstatement of his driving privileges now that more than three months has passed with no further events."

2. The opinion of Dr. M., the family physician of the Applicant, who strongly advocated licence reinstatement in his two letters.

3. The good driving record of the Applicant.

4. The time period, ten months, since the August 10, 2009 episode suffered by the Applicant, with no recurrence.

5. The evidence of the Applicant that he has not consumed alcohol since either August or September 2009.

Therefore, the Tribunal has decided that the Applicant's driving privilege should be reinstated.

DECISION

Upon the application by the Applicant to appeal the decision effective October 10, 2009 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 set aside.

LICENCE APPEAL TRIBUNAL

_____

Patrick Coffey, M.D., Presiding Member

RELEASED: *June 15, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6046-MED-SEIZ-Seizures

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: GARRY FISHER, M.D., Presiding Member

APPEARANCES: CLIFF LEWIS, Agent, representing the Applicant

RUSSELL McKNIGHT, Agent, representative for the Minister

DATE OF HEARING: June 2, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

The Applicant was accompanied by his spouse/partner. Both were sworn. They testified separately. The Respondent agreed with the approach.

FACTS

The Applicant is a 53 year old tool and dye worker who presented in a hospital Emergency Room (ER) on May 24, 2009, with a history of a witnessed, full blown, tonic/colonic epileptic seizure that had lasted about two minutes.

It was his one and only history of seizure activity. There was none before that date and none since. It is now over a year since the incident.

A Form 203 was submitted to the MTO. The Applicant's driver's licence was duly suspended as of June 30, 2009.

On May 20, 2009, the Applicant was in the same ER complaining of sinusitis and ear infection accompanied by dizziness. A zealous doctor whose handwriting is illegible filled out a form 203 citing "vertigo" as a reason for driving suspension.

On May 24, 2009, the Applicant was seen by Dr. F. a neurologist. It was noted that the Applicant had been drinking an excessive amount of beer in the previous two to three weeks. Liver enzyme tests were elevated above normal in keeping with "mild alcoholic hepatitis". Dr. F's diagnosis was "alcohol withdrawal seizure". He advised the Applicant to "cut down on his drinking", and, further, to be followed up by a neurologist and have appropriate tests including EEG, MRI and CT scan.

The Applicant and his partner testified that during this period the Applicant was under a great deal of pressure from family matters. Both of his parents had been recently diagnosed with cancer (his father died a few months later). The Applicant had taken a leave from work and he was drinking a great deal more beer than his usual pattern of one or two bottles after he was home from work.

On November 12, 2009 he was seen by another neurologist, Dr. C. His opinion agreed with Dr. F. Again the advice was to "taper down on alcohol consumption". He reviewed the EEG and MRI – both were normal. Follow up with the Applicant's family doctor was recommended.

The MTO requested all of the tests thus far completed and fresh blood tests as well. Liver enzymes recently done remain just above normal.

Abstinence from alcohol was requested. The Applicant and his partner are clear that he continues to have the odd beer after work.

The family doctor, Dr. S. has filed a supportive note.

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

APPLICATION OF THE LAW TO FACTS

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.

The question here seems to be "alcohol dependence" and what constitutes dependence. In the view of the Tribunal the Applicant does not appear to be "dependent". If one is not dependent, one is not addicted and hence, an addiction specialist isn't needed.

The seizure seems to be a solitary episode. He has taken the advice of his doctors to "cut down" or "taper" consumption.

The Applicant and his partner appear to be responsible persons. The Tribunal does not find the evidence that the Applicant's medical condition is likely to significantly interfere with his ability to drive a vehicle safely.

DECISION

Upon the application by the Applicant to appeal the decision effective, April 5, 2010 of the Registrar 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 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

_____
Garry Fisher, M.D.

RELEASED: June 17, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6044-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID W. HURST, M.D., Presiding Member

APPEARANCES: APPLICANT, self-represented

SONIA DE SANTIS, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: May 3, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

At the commencement of the hearing the Applicant provided a note from her family doctor, which was entered as Exhibit #3, and laboratory reports, which were entered as Exhibits # 4 and #5.

FACTS

The Respondent’s Case

The Respondent reported that the Ministry of Transportation (“MTO”) received a Medical Condition Report by Dr. M.F. dated March 9, 2008, and the only information was that was there is that she suffered from alcohol dependence. The Deputy Registrar of Motor Vehicles replied to Dr. M.F. on April 8, 2008, and wrote to the Applicant outlining their

receipt of this medical report, indicating that she suffered from a medical condition which might impair her ability to safely operate a motor vehicle. A decision was made by the Registrar of Motor Vehicles to suspend her driving privileges for medical reasons under Section 47 (1) of the *Highway Traffic Act*. The Registrar's letter explained that reconsideration of her case could be given upon receipt of medical information satisfactory to the Registrar. The letter also advised that an enclosed Alcohol Assessment Form should be completed and returned to the Ministry. The completed Form must indicate if the disease of alcoholism is present, and if so, outline the recommended form of treatment. An interpretation of bio-chemical markers (MCV and GGT) is also required.

On April 25, 2008, a completed Alcohol Assessment Form was received by the MTO indicating that the Applicant suffered from an addiction. A review of the remaining details of this document disclosed that the Applicant's use of alcohol was rather limited. A laboratory evaluation disclosed a GGT of 16 and an MCV of 91.8, both well within the normal range.

A description of the Applicant's history of alcohol use indicated that she began to drink at the age of 15, with regular use at the age of 16. The reasons for drinking included "to fit in with an older crowd" and also cope with grief and depression over the demise of her husband. The Applicant also stated that she had stopped drinking because it was a threat to her children and her own life. The Applicant also commented that her drinking in no way had interfered with her close relationship with family members. A note was included indicating that the Applicant had maintained complete abstinence for a period of seven months with one very brief relapse.

The treatment program was described a phase 2 intensive treatment program lasting 21 days in October 2007, and the relapse was described as owing to the death of her daughter's father, but the Applicant was also struggling at the time with the separation from her new partner, who is the father of her other two children.

The ultimate diagnosis on this survey showed that she suffered from neither alcohol dependence nor fit the category of hazardous or problem drinker.

Her recommended goal was listed as abstinence and she was continuing under a program with a centre for addiction and also making random visits to AA meetings approximately once a week. This survey form had been completed by her family physician Dr. H.Z.

On May 13, 2008, the MTO again wrote to the Applicant stating that she should remain under suspension and that the MTO needed a detailed up-to-date assessment that would confirm that she had remained abstinent from alcohol for a period of six months. A favourable recommendation from an addictionist and test results of suitable bio-chemical markers (MCV & GGT) were also requested.

The Respondent submitted a letter written by the Applicant to the MTO asking that her licence suspension be lifted. In that letter she described how she had been abstinent from alcohol for 10 months and that she had never operated a motor vehicle while she had been drinking. She described the difficulty in bringing order to her life in that two of her children were living in an adjacent city.

In the Applicant's letter, she wrote that she recognized the concern of the Ministry, and therefore, she included reports of hair and urine samples done by the Catholic Children's Aid Society, which she was attending on a weekly basis. Random blood screens were noted as well.

Random screenings indicated that she was positive for opioids (Tylenol 3) prescribed after she had been a passenger involved in a motor vehicle accident on February 10, 2009. She explained that this could be the only reason for this positive finding. A review of these detailed laboratory reports failed to show any other sign of abuse of drugs and was negative for alcohol. The only remaining problem was the issue of the opioids.

On November 12, 2009, the MTO wrote to the Applicant stating that a previous request for detailed information was still outstanding. MTO stated that the Assessment Report must confirm that the Applicant had remained abstinent from alcohol for a period of one year. They said this period could be reduced if she provided information that she had successfully completed an Alcohol Treatment Program, plus the usual request for bio-chemical markers (MCV & GGT).

The Respondent submitted a letter, dated February 24, 2010, from an addiction treatment centre stating that the Applicant had participated in a patient program with many visits. It described the Applicant's abstinence from alcohol since March 1, 2009.

On February 24, 2010, the Applicant wrote to the MTO stating that she had already complied with their request with family physician Dr. H.Z.'s report dated April 25, 2008. She drew attention to the GGT and MCV both in the normal range and also to the fact that her doctor had written "neither" regarding the diagnosis about alcohol dependence and hazardous or problem drinker. The Applicant also stated that she was being treated unfairly due to the fact that she had simply used her driver's licence as a form of identification when taken to a hospital by ambulance after she had indulged in heavy drinking. She had never been under the influence of alcohol while driving; nor has she ever had a DUI charge.

On February 24, 2010, the Medical Advisory Committee of the MTO reviewed the Applicant's case. A request for further information asked for confirmation that the driver was no longer using opioid analgesics and continued to remain abstinent from alcohol, and that she provide random supervised urine toxicology screening and bio-chemical markers (MCV, GGT, ALT and AST).

The Medical Advisory Committee's stance was based on the report to the Ministry on account of alcohol dependence on March 9, 2008. Again, they referred to the occasional use of Tylenol 3 by the Applicant for pain sustained in a car accident which had occurred on February 10, 2009. (There was no mention of the Applicant's actual prescription used to help her through periods of frequent problems with dysmenorrhea). On April 22, 2010 the Ministry wrote to the Applicant indicating their acceptance of correspondence from the addiction centre, but they still needed an assessment from her treating physician. They stated that this report must confirm that she was no longer using opioid analgesics and was continuing to remain abstinent from alcohol.

The Respondent completed its presentation by drawing attention to the pertinent portions of the *Highway Traffic Act* regarding the licencing of drivers with addiction issues.

The Applicant's Case

The Applicant described the initial episode when she had been to a bar drinking with friends, became quite drunk, and passed out on the sidewalk. She was taken by ambulance to a tertiary care medical centre which resulted in the emergency room physician sending a Medical Condition Report to the Ministry regarding her alcohol dependence. The Applicant described that she had been abstinent from alcohol for 6 months at that time and that she has now been completely abstinent from alcohol for 15 months.

She described the crisis in her life in 2008 with the demise of the father of her daughter and then a separation from her partner and father of her second daughter and a son. Separation resulted in two of her three children living in a city 45 miles away, causing her great difficulty getting her family together now she has no driver's licence.

She described how her family had been under close supervision by the Catholic Children's Aid Society with very strict laboratory monitoring of any sign of habituating drugs and the recurring use of opioids, which she explained were due to the fact that Tylenol 3 had been prescribed for her dysmenorrhea. She explained that her initial 5 month interval of total abstinence had occurred after the Children's Aid Society advised her to abstain from the use of alcohol.

The Respondent's Questions

The Respondent elicited the fact that the Applicant had been at CAMH and was being helped with her problems by the social workers. She has been a patient of Dr. H.Z. for 13 years and described her physician as very supportive. Under questioning, she explained the matter of her intermittent use of Tylenol 3. She also noted that she had suffered a miscarriage at the time of her car accident and 6 months ago underwent a D & C.

Questions about her relationship with the AA organization indicated she would go to open meetings, but was not a full fledged member. She had been attending on an intermittent basis with this organization for 4 years. The Applicant also explained that on March 25, 2010, the Catholic Children's Aid Society informed her that they had closed her file and sent her a congratulatory card. Also she has now reunited with her estranged partner and a marriage is planned in October.

The Respondent's Summary

Referring to the Medical Condition Report received by the Ministry on March 9, 2008, the Respondent's Agent noted that this doctor had labeled the Applicant as alcohol dependent and that licencing was forbidden because of this under the *Highway Traffic Act*. In addition, she submitted the Ministry's concern about the continued use of opioids. She recognized the fact that the Applicant was doing well, had a good support system, but said that the MTO still needs documentation of these happy events with confirmation that she is abstinent from alcohol and that this should be reported to the Ministry by one of her medical specialists. She indicated that such a letter from her family physician would help immeasurably, in restoring her licence.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Ministry's decision to suspend the Applicant's licence is based on section 47(1) of the *Highway Traffic Act*. The Applicant's status regarding possible habituation (alcohol and opioids) has been under detailed review since the initiating episode March 9, 2009, when she arrived in an emergency department under the influence and was promptly labeled as alcohol dependent. This report gave no further details, and in fact, was simply a tick mark on a form.

The Applicant has been using alcohol on a regular basis since the age of 16, and it is clear that there has been abuse. She has been through a very rough passage with the demise of the father of her first child and the separation from her partner and father of her other two children. She used alcohol to ease the anguish she suffered during this very difficult period.

The Applicant says she has "come a long way" from her initial low spell and has described the support of close friends, family and care and guidance provided by the Catholic Children's Aid Society, and also the assistance from the social workers in an addiction centre as well as the assistance and encouragement of a kindly family doctor. During this difficult passage she has been under the constant scrutiny not only of the Children's Aid

Society, but of the MTO with relentless requests for further medical information. The Applicant has complied with the instructions of her various medical counsellors, and in fact, has fulfilled all MTO's requests for medical facts.

It is noteworthy that the Ministry of Transportation Alcohol Assessment Form, a very searching document, again with a tick mark, labelled the Applicant as suffering from addiction, but has otherwise failed to show how this is so. The Applicant passed this examination easily.

The Applicant has demonstrated that she has now been totally abstinent for 15 months and has recognized the error of her ways and the hazards to her if she should begin to use alcohol again. She has presented the Tribunal with a note from her family physician stating she uses Tylenol 3, on a once a month basis, only for dysmenorrhea and liver function tests reported that there were no abnormalities and that the Applicant has been abstinent from alcohol for 15 months.

The Applicant demonstrated very good insight into her problems and deserves great credit for turning her life around with the help of an excellent support system including family, friends, physicians and social workers. The MTO is being somewhat pedantic in continuously dwelling upon the Applicant's use of opioids (Tylenol 3), but the Applicant now realizes that it is a good idea to abandon the use of this drug.

The Applicant has complied almost perfectly with the requests of the MTO regarding her licence problems.

While there likely was misuse of alcohol in this case in the past, ample evidence has been provided to this Tribunal that the Applicant does not suffer from alcohol addiction.

DECISION

Upon the application by the Applicant to appeal the decision of the Registrar 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

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David W. Hurst, M.D.
Presiding Member

RELEASED: June 1, 2010

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

Decisions under the Highway Traffic Act

Section 47(1)(b) - Medical

Fiscal Year 2010 - 2011, July - September

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

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- 6135-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jl/6135-MED-ALCL.pdf>
- 6122-MED-Substance Abuse
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jl/6122.med.subst.abuse.pdf>
- 6120-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jl/6120.med.alcl.pdf>
- 6114-MED-PSYCH-Psychiatric
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jl/6114.med.psych.pdf>
- 6097-MED-NEUR-Neurologic
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jl/6097.med.neuro.pdf>
- 6079-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jl/6079.med.alcl.pdf>
- 6170-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6170.med.alcl.pdf>
- 6163-MED-PSYCH-Psychiatric
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6163.med.psych.pdf>
- 6155-MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6155.med.reinstated.order.pdf>
- 6142-MED-PERC-Perceptual Problems
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6142.med.perc.pdf>
- 6140-MED-NEUR-Neurological
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6140.Med.Neur.pdf>
- 6138-MED-SEIZ-Seizure
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6138.med.seiz.pdf>
- 6129-MED-NEUR-Neurological
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6129.med.neur.pdf>
- 6120-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6190.med.alcl.pdf>
- 6027-MED-SEIZ-Seizures
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/aug/6027.med.seiz.pdf>

- 6207-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/sep/6207-MED-ALCL-Alcohol.pdf>
- 6206-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/sep/6206-MED-ALCL-Alcohol.pdf>
- 6199-MED-DRUG-Drug/Medication
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/sep/6199-MED-DRUG-Drug_Medication.pdf>
- 6197-MED-ALC-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/sep/6197-MED-ALCL-Alcohol.pdf>
- 6189-MED-PERC-Perceptual Problems
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/sep/6189-MED-PERC-Perceptual%20Problems.pdf>
- 6186-MED-NEUR-Neurological
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/sep/6186-MED-NEUR-Neurological.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6135-MED-ALCL-ALCOHOL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: July 23, 2010 *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

The Respondent’s Case

A Medical Condition Report dated August 5, 2008 was filed by Dr. A., a medical specialist, with the Registrar of Motor Vehicles pursuant to Section 203 of the *Highway Traffic Act.*

The report based on examination on July 27, 2008 stated the condition as:

> Seizure(s)-Cerebral.

The patient was aware of the report.

A consultation report by Dr. A. to the Applicant's family physician, Dr. T. dated July 27, 2008 was forwarded to the ministry.

The consultation report described a number of grand mal seizures commencing in January 2008, in a foreign country. He was seen by a physician and a brain CT Scan was normal. He was given a sedative and he saw his family physician on his return to home.

In March 2008, he took the same injection at his home, an intramuscular injection of a veterinary steroid. He was seen in the local Emergency Room. He was prescribed Tegretol but this was discontinued by the Applicant because he felt unwell. An EEG was reported normal. A referral was made to a neurologist but the appointment was cancelled when the tests were normal and he felt well.

In July 2008, his wife awoke at 05:30 when he had a grand mal seizure lasting 30-40 seconds. Seizures occurred again at 07:45 and 09:45.

Dr. A. stated in his letter:

> He consumes alcohol excessively. Approximately 12 ounces of hard liquor per day or perhaps he'll mix a few beer and whiskey. Two nights ago he was social. He drank very heavily, much more than he normally would. He says that he was hung-over yesterday. However he did have several drinks, the last beverage around 1800 hours.
>
> He would normally start drinking at noon hour and continue until 2100 hours. He has never previously experienced withdrawal symptoms, nor has he been diagnosed with withdrawal seizures.
>
> I am reluctant to attribute these seizures to alcohol withdrawal. Alcohol withdrawal can be a precipitating factor. However, I wonder about an underlying CNS pathology. According to the son, the seizure starts with twitching of the right side of his face suggesting a left hemisphere focus. I did speak to the radiologist. She agrees that an MRI would be the best next step. However she states that for seizures MRI would be obtained on an elective basis. I think perhaps that is a reasonable decision.
>
> He was discharged with the following instructions:
>
> 1. He is not to operate a motor vehicle. He is to avoid situations that might place him at risk in the event of recurrent seizures. For example he is not to be swimming.
> 2. He will start Dilantin 300 mg per day. He will require a Dilantin level in 5 days from now. Given his alcohol consumption Dilantin levels will have to be followed closely.
> 3. He will be scheduled for an outpatient MRI scan.
> 4. I have asked that he severely curtail the alcohol consumption and that he not to stop "cold turkey". To help minimize withdrawal symptoms I have prescribed him Ativan 1 mg q.4h.prn (supply of 30). I have asked him to follow up with Dr. T. as soon as possible with respect to managing this concern.
> 5. I would ask that he reactivate his consultation with Dr. F. (the neurologist).

On August 27, 2008, the Registrar informed the Applicant that his licence to drive was suspended under Section 47(1) of the *Highway Traffic Act*.

In order to be reinstated he must arrange for an up-to-date report from a physician familiar with his medical history or a neurologist regarding his reported seizures, This report must provide the results of all investigations initiated by his physician, prescribed treatment and cause for the seizures, and a narrative of this and any previous seizure history. He was informed of his right to request an Administrative Review and of his right to appeal.

A report was received from Dr. F. a neurologist, dated September 12, 2008.

The history was described, including reference to the use of veterinary testosterone injection, and alcohol binge drinking.

Investigations included normal CT Scan of the brain. MRI of August 21, 2008, showed no cause for the seizures, and an EEG in April 2008, showed no definite seizure activity.

His impression:

> Drug (veterinary dose testosterone) and alcohol induced seizures. He has removed both of these potential triggers from his lifestyle. Therefore, I think his risk of a recurrence seizure is low. He would like to taper off his Dilantin, and I agree with this approach.
>
> If he has another seizure that is not related to drug or alcohol use, he would need to be restarted on an anticonvulsant.
>
> He knows that he is not allowed to drive for now, but I think if he remains seizure free for three months off Dilantin, it would be reasonable to have his privileges reinstated providing that he continues to abstain from alcohol.

The Registrar reviewed this report and on September 29, 2008. The Applicant was asked to file an up-to-date assessment regarding his consumption of alcohol, including an interpretation of bio-chemical markers (MCV & GGT).

The Applicant's family physician, Dr. T. wrote on October 7, 2008:

> (Applicant) has been investigated and reviewed by the neurologist. Both of us agree that as long as (Applicant) avoids these substances it is extremely unlikely that he will have another seizure.
>
> (Applicant) has been successful in modifying his ingestions of alcohol and he no longer makes use of testosterone.
>
> I hope this information is of use in re-instating his licence to operate a motor vehicle.

The Registrar informed the Applicant by letter on October 23, 2008, that his case had been reviewed in light of the doctor's report of October 7, 2008. He was advised that some of the previously requested information remains outstanding, namely the Alcohol Assessment Report. If a diagnosis of alcohol or drug dependence was made, confirmation was required that he has remained abstinent from alcohol for a period of one year, plus results of MCV & GGT.

An Alcohol Assessment Form was completed by Dr. T. on December 18, 2008:

Physical assessment = normal

GGT = 42 in December 2008
MCV = 92.6 in December 2008
Drinks Two to four times a month

- On a typical day when drinking has 1 drink
- Never has five or more drinks at one occasion
- Not able to stop drinking once started less than monthly in the last year
- Never during the past year has he failed to do what was normally expected because of drinking
- Never in the past year has needed a first drink in the morning after a heavy drinking session
- Had a feeling of guilt or remorse after drinking less than monthly in the past year
- Never has been unable to remember what happened the night before because had been drinking
- Never has he or someone else been injured as a result of his drinking
- A doctor or other health worker has been concerned about his drinking or suggested that he cut down but not in the past year

DSM-IV Criteria for Alcohol Dependence: 3 or more occurring at any time in the same 12 months period or withdrawal:

1: **Tolerance**: not checked
2. **Withdrawal**: Checked re sweating, seizures
3. **Taking larger amounts than intended**: not checked
4. **Unsuccessful efforts to reduce alcohol use**: not checked
5. **Preoccupation with drinking**: not checked
6. **Reduces important activities because of alcohol**: not checked
7. **Continued drinking despite knowledge of alcohol related physical or psychological problems:** not checked

History of Alcohol Use:

Age of first use:16
Age of First Regular use: 19
Last use Glass of wine: December 12
First intoxication: 16
Quantity over past month: 3 drinks
Who do you drink with? Anyone or alone before now. Friends on occasion
Where do you drink: anywhere
Reasons for drinking: now – socially
Reasons for stopping: I had a hangover seizure

Consequences of Drinking:

Legal: Alcohol related driving convictions/outstanding charges/prison time/probation: None
Interpersonal: Has drinking ever affected relationships with spouse or family member: No
Vocational: Has drinking ever affected work performance/caused job loss or demotion: No
Medical: Positive responses from page one should be reported here: No significant withdrawal symptoms related to alcohol (signed by Dr. T.)

A second Alcohol Assessment completed on December 16, 2008 was received on January 16, 2009.

Medical consequences related to alcohol use: *seizures* and *morning shakes*.
Diagnostic criteria for Alcohol Dependence or Hazardous or Problem Drinker: no comment.

Recommended Goal for Alcohol Consumption:

> -recommend pt to limit alcohol consumption to less than 3 drinks/week.
> -No history of street drug use.

Notes added by the Applicant:

> I am not dependent on drugs or alcohol.
> I enjoyed drinking and drank regularly for decades, many times to excess.
> I experienced frequent hangovers.
> I never drank to end a hangover, nor could I. Drinking before noon would make me sick.
> When I had a seizure from alcohol withdrawal, I stopped drinking to excess.
> I now have an occasional glass of wine with dinner.
> I do not require any treatment or commercial rehabilitation program.

Laboratory report dated December 19, 2008 was negative for common drugs abuse.

The Registrar wrote on January 15, 2009, requesting a further report from his treating physician or addictions medicine specialist, confirming his continued abstinence from alcohol and drugs and confirmation that he has completed a recommended alcohol/drug treatment program and confirmation that he has remained seizure free.

On April 15, 2010 Dr. T. wrote:

> (Applicant) did have seizures related to supplemental use of a non-prescription hormone. The last episode occurred in 2008. He has not used any of this substance since his last episode in July 2008. He has been off Dilantin for 18 months and has continued to be seizure free. He has no issues with alcohol misuse.
>
> I am confident that (Applicant) is not at risk of experiencing a recurrence of his seizures. This opinion is consistent with that of Dr. F. in his consultation from 2008. Dr. F. is a neurologist.

The Registrar informed the Applicant by letter dated May 17, 2010, that it was necessary to file an up-to-date assessment which confirms successful completion of an alcohol treatment program and including an interpretation of biochemical markers (MCV, GGT, AST and ALT) with an explanation for any results that are outside the normal range.

<u>The Applicant's Case</u>:

The Applicant informed the Tribunal that he took injections of a veterinary testosterone while in a foreign country in January 2008, in order to improve his athletic performance. A few days later he had a seizure and he was seen by a local physician and a CT scan was arranged. It was reported normal. He was given a sedative.

In March, he took the injection again and was treated for seizures at a local hospital Emergency Room. The seizure was a grand mal type accompanied by tunnel vision and speech deficit. He did not connect the seizures with the steroid until the second episode.

He was prescribed an anti-convulsant, Tegretol, but discontinued it when he felt unwell.

In July 2008, he had been drinking more than usual and had three seizures during the early morning hours and he was taken to the Emergency Room. He was seen by an Internist, Dr. A. and was prescribed Dilantin 300 mg daily, was told to stop driving, to curtail his alcohol consumption, to have an MRI and to see the neurologist, Dr. F.

He acknowledged driving his car while under suspension and states that he does not need to be in an alcohol relapse program. Since July 2008, he has limited his drinking to an occasional glass of wine with dinner.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. A Medical Condition Report of seizures, filed in July 2008, by a physician pursuant to Section 203 of the *Highway Traffic Act.*

2. The reporting physician's letter dated October 7, 2008 that described a series of seizures beginning while on vacation in January 2008, then in March 2008 and July 2008. The first two seizures followed self injection with a steroid and the third following heavy drinking.

3. The Applicant has reduced his alcohol consumption, but not completely controlled it.

4. The Applicant has been seizure free since July 2008 and has been off Dilantin for approximately 18 months.

5. That an up-date report of biological markers and confirmation that he is not misusing alcohol is required.

6. Regulation 340/94, Section 14 that states:

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

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

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

6. CCMTA Standard 13.2:

> Patients with a diagnosis of alcohol dependence, including those with alcohol withdrawal seizures should not be allowed to drive any type of motor vehicle.
>
> 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 relies on the letters by his family physician stating that he is seizure free and has modified his consumption of alcohol. He does not intend to stop drinking entirely.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension of the Applicant's licence to drive under Section 47(1)(b)(g) of the Act upon receiving a Medical Condition Report filed by a physician pursuant to Section 203 of the Act.

2. The Tribunal notes that a Medical Condition Report was not filed pursuant to Section 203 of the *Highway Traffic Act* following the seizures in January or March 2008.

3. Evidence described in the letter by Dr. A. dated October 7, 2008, and by the Applicant, of seizures occurring following heavy use of alcohol is indicative of alcohol withdrawal seizures on July 27, 2008, despite reluctance by Dr. A. to say so.

> I am reluctant to attribute these seizures to alcohol withdrawal.

4. The Respondent is justified in requesting an up-to-date report from the Applicant's physician confirming that he has successfully completed an alcohol treatment program or a reason why this is not necessary, and including up to date original copies of laboratory results of biochemical markers (MCV, GGT, AST and ALT) with a clinical explanation for any results that are outside laboratory range.

DECISION

Upon the application by the Applicant to appeal the decision effective August 27, 2008, 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

_____
Dr. Kevin Flynn, Presiding Member

RELEASED: *July 27, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6122-MED-Substance Abuse

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID HURST, M.D., Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: July 16, 2010 Toronto

DECISION AND REASONS

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

FACTS

The Applicant is 40 years of age. His licencing problems developed after a doctor filed a Medical Condition Report on October 24, 2009. That same day the Applicant had been driven to a local hospital by his uncle. The October 24, 2009 report indicated that there was alcohol dependence and drug dependence – cocaine. Optional comments included the following:

1. Found unconscious after two weeks of cocaine and alcohol use.
2. His cocaine abuse 20 years ago for 3 years.
3. Drug screen positive for cocaine
4. Admitting for detox.

This report was signed by Dr. A.S.

On October 29, 2009 the Ministry of Transportation ("MTO" or the "Ministry") wrote to the Applicant indicating that he had a condition which impairs his ability to safely operate a motor vehicle, specifically:

1. Substance abuse
2. Syncopes/loss of consciousness

Licence suspension was carried out under Section 47(1) of the *Highway Traffic Act*.

This letter went on to explain that consideration for reinstatement could occur upon receipt of information satisfactory to the Registrar. The MTO asked that they receive a detailed up-to-date report from the Applicant's doctor. This report would include:

> The results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.

The letter also stated that:

1. If a diagnosis of drug dependence is made, the report must confirm that you have remained abstinent from all mind altering substances for a period of one year. This period may be reduced upon the successful completion of a treatment program and a favourable recommendation from your physician.

2. Recent urine drug toxicology screening.

3. A narrative of this and any previous syncope/loss of consciousness history, and confirmation that there have been no further episodes.

A second Medical Condition Report dated October 24, 2009 and signed by Dr. N.V. was submitted by the Respondent. This report noted that there was drug dependence. Under the optional comment section the single word "temporary" was used and likely is reference to instructions in this optional section "whether or not the condition is a serious risk to road safety, is unknown or condition is temporary". Dr. N.V. noted that he had known the Applicant for one day.

These Medical Condition Reports were sent to the MTO by mail.

Hematology reports of February 28, 2010, were then submitted disclosing nothing of consequence. There were no abnormalities of the liver function tests.

The next submission by the Respondent was a report dated March 17, 2010 by the founder and executive director of a foundation which is not for profit organization providing a continuum of health services relating to the treatment and rehabilitation from drug and alcohol abuse. This institution's philosophy was described as holistic in nature.

In this report the Applicant was described as very remorseful for the incident which led to charges against him. He was living with his father and hoped to return to his wife and children. He has been married since 1992 and was employed fulltime. He had abstained from the use of any mood altering substances since he began one to one counseling sessions in January of 2010. He had undergone random urine tests, and abstinence had been maintained; all tests have proven negative. The author of the report did not believe that a similar incident will reoccur. Toxicology reports were included with this letter and all were negative.

On April 1, 2010 the Ministry wrote to the Applicant stating that there was still insufficient information for any possible reinstatement of his licence. The Applicant was advised to provide an up-to-date assessment from his treating physician or by a physician specializing in addiction medicine. It would include a complete alcohol and drug use history, a diagnosis and recommendations for treatment. If, as a result of this assessment, his physician confirms a diagnosis of alcohol and/or drug dependence alcohol and/or drug dependence, the Ministry will require confirmation that he had remained abstinent from alcohol and/or drugs for a period of one year. This letter went on to state that the one year interval could be reduced if his physician confirmed that he had successfully completed an alcohol and/or drug treatment program and is supportive of the reinstatement of his driving privilege. Details of biochemical markers were required (MCV, GGT, AST and ALT).

The Applicant was in receipt of MTO's Substance Abuse Assessment Form which, when returned to the Ministry, was found to be only partially completed with very little added information and signed by Dr. M.S. This report was dated April 26, 2010. This report did state that the Applicant was advised to seek a drug rehab program. It is also apparent from the presentation today that page 3 of this report is missing.

On May 17, 2010 the Ministry wrote to the Applicant stating that they had received insufficient information to determine if his licence could be reinstated. They again outlined the requirements in detail in order for reinstatement to be considered. .They also enclosed another copy of the MTO Substance Abuse Assessment Form, which was completed.

On March 3, 2010, Dr. M.S. reported that the Applicant had had sessions with him since January 27, 2010, and has agreed to continue sessions to assist him better with behaviour, handling life issues such as anger, and drug issues. Detailed blood work about that time including liver function tests showed no abnormalities; no urine toxicology tests were reported.

On June 21, 2010, the Ministry again corresponded with the Applicant indicating they had once again received insufficient information to determine if his licence can be reinstated. Again, they informed the Applicant that the required Assessment must confirm that he had remained abstinent from both alcohol and drugs for a period of one year.

The next submission by the Respondent was a certified copy of the Applicant's driving record indicating only suspension for medical reasons on November 8, 2009. Also introduced at this time were the pertinent sections of the 2008 annotated Ontario *Highway Traffic Act* and also the CCMTA Medical Standards for Drivers.

This completed the Respondent's submission.

The Applicant's Case

The comments of the Applicant showed a marked difference between the information filed on the Medical Condition Reports and his own recollections. This, out of necessity, required multiple questions from the Tribunal. Referring back to the initial Medical Condition Report dated the October 24, 2009, the Applicant completely denied the first statement that he was "unconscious after two weeks of cocaine and alcohol". The Applicant also completely denied the comment on this report about previous cocaine abuse 20 years ago for 3 years. He stated that he almost never uses alcohol and that alcohol was not a factor on that date. He explained that he was driven to the hospital by his uncle because his face had become "bloated", and on further questioning he attributed that to his use of cocaine. The Applicant stated that he was fully conscious and recalls the nurse taking his blood pressure and starting an intravenous and he also noted that the nurses had given him pills which "nearly killed him". He was also told that his blood pressure (systolic) was 245.

Further questioning by the Tribunal disclosed that the Applicant had been using cocaine for 1 – 1½ days. He also stated that he had taken cocaine a month previously, three or four "fixes" in one day. He stated that there was absolutely no truth to the comment on the Medical Condition Report about the use of cocaine 20 years previously. In fact, he said that his first use of cocaine occurred just prior to this hospital incident in October of 2009.

The Applicant also claimed that he never saw Dr. A.S., who had filled out this form. He described having his blood pressure taken, then stepping outside for a cigarette after taking the pills provided by the nurse. He was "out of it" for at least a day. When he awakened, he was given food and drink and stayed for three or four hours, and then was released going to his father's home, where he stayed for two or three days before returning to his own quarters. Since then, he had lived with his father for about two months. He then voluntarily went to a Centre devoted to rehabilitation from drug and alcohol abuse by strict measures, whose executive director had written on March 17, 2010, as noted above. During that period of treatment it was disclosed that he was using cocaine once every 10 – 14 days, and admitted that on the day of his visit to hospital he had taken 5 doses. He said that his problems had developed over a period of several months due to marital difficulties. He described his periodic visits to this holistic centre and stated that he has not used cocaine since January 2010. Regarding alcohol, he said that he would only drink on special occasions. He reiterated that his first use of cocaine was in March or April of 2009.

When questioned about failure to complete the MTO Substance Abuse Assessment Forms, he claimed that the doctor provided incorrect information and he has now developed a conflict with Dr. M.S. He took strong exception to the doctor's statement that he is still using cocaine, which he says is simply not true.

The Respondent questioned the missing page 3 in the Abuse Assessment Form. The Applicant stated that he has this missing page at home, in which Dr. M. S. says the Applicant is abusing cocaine and not seeking help and he says, in fact, the opposite is the case. The Applicant also referred back to the initial visit to hospital, at which time the doctor said that they did not really need to take his licence. The Applicant stated that his wife, with whom he was incompatible, had forced the issue and persuaded the medical people to have his licence suspended.

The Respondent in Cross Examination

On questioning Ms. Bedrossian again elicited the fact that the Applicant has been abstinent regarding cocaine since January 2010, and also that he has not been attending any sessions at any detoxification centre. She elicited the information that after being released from the hospital in late October, the Applicant had used no cocaine through November and December but did so in early January to be followed by a course of rehab treatment for five months. The Applicant also stated that his family had been helping him and he has been living with his parents.

The Respondent explained to the Applicant that the MTO has been presented with this problem and so far has been unable to acquire adequate information in order to reassess the case. She stressed the importance of having a physician provide a completed Assessment Form to be done by any physician and that generally the MTO requires medical documentation that he has been abstinent from cocaine for 12 months.

The Respondent in Summary

Ms. Bedrossian underlined the fact the MTO still had insufficient information to enable them to make a rational decision for restoration of the Applicant's licence. Therefore, the suspension must continue for the present.

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 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.

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

APPLICANT OF THE LAW TO FACTS

One must assume that the Applicant was suffering significant medical problems on the October 24, 2009, when his uncle in his wisdom took the Applicant to hospital to seek help. From that time forth there is very little information available to the Tribunal regarding the Applicant's stay at the hospital and very little documented information has been forthcoming since that time. The Ministry is compelled by law to act on the receipt of such medical condition reports and in this case they indicated alcohol dependence and drug dependence.

Given the Applicant's submissions today, plus the laboratory work available (liver function tests) it is fair for the Tribunal to assume that there is no alcohol problem.

The matter of cocaine dependence has not been fully established with the information presented.

The Tribunal has been told by the Applicant that he was under severe stress due to failure of his marriage and had begun using cocaine to seek solace. On the day that his uncle took him to the hospital, it is assumed that he had taken a large amount of this highly addictive substance.

The Tribunal is handicapped by the very scanty information provided by his doctors, reasons for which are not entirely clear. The Applicant's own acknowledged problems with anger management could be a factor, and most of the doctors' initial comments on their Medical Condition Report on October 24, 2009, are almost totally contradicted by the Applicant's sworn testimony.

The statement that the Applicant had abused cocaine over a three year period 20 years ago does not hold up very well, given the further evidence provided today. The Applicant's use of cocaine in all likelihood has been caused by his recent marital discord and the Tribunal has sworn testimony that he used very little cocaine after the brief hospitalization and has been cocaine free since January 2010, (supported by totally negative findings on urine toxicology tests). It is still not clear whether the Applicant has a significant addiction to cocaine. He has done well with the rehabilitation efforts that have been made.

It is not clear why the Applicant has not been able to obtain full reports on the substance abuse forms from his doctor(s).

The Tribunal finds that alcohol is not a factor. The interval during which the Applicant is documented as having used cocaine is relatively short. It is clear that during this relatively brief interval cocaine has not been a factor in his driving abilities.

Having considered rather conflicted evidence presented to the Tribunal, on the balance of probabilities, the Applicant's driving privilege should be restored. There is insufficient evidence as to the existence of an addiction or medical condition that is likely to interfere with his safe operation of a motor vehicle.

DECISION

Upon the application by the Applicant to appeal the decision effective October 29, 2009, to suspend his driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

David Hurst, M.D., Member

RELEASED: July 22, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6120-MED-ALCL-Alcohol

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: July 13, 2010 Toronto

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* (the "Act").

FACTS

The Registrar's Evidence

The Applicant was suspended from driving in March 2001 as a result of an intracranial haemorrhage and was subsequently reinstated. In January 2002, he was again the subject of a Medical Condition Report, pursuant to section 203 of the Act, as a result of alcohol abuse. The reporting physician reported that the Applicant's liver function tests had significantly improved, but confirmed that his GGT was elevated at 209 and may remain elevated indefinitely. The doctor also stated that the risk of relapse was significantly reduced.

The Applicant was reinstated in 2003 following successful rehabilitation at a regional

hospital substance abuse clinic. An Alcohol Assessment Form completed by his physician, Dr. M., in January 2002 stated that the Applicant "does NOT meet criteria for alcohol dependence".

In August 2008, the Applicant had a single seizure believed to be related to alcohol withdrawal. A Medical Condition Report was filed by an Emergency Room physician. As a result, he voluntarily attended a program offered through the Centre for Addiction and Mental Health ("CAMH"), and successfully completed the 21-day program in September/October 2008. An Alcohol Assessment Form completed by his family physician in August 2009 did not identify alcohol dependence. In July 2009, his GGT was 65 (range <60) and MCV was 87 (range 80-97). His blood film showed evidence of anaemia.

The Applicant's driver's licence was reinstated on September 8, 2009. He was requested to file a follow-up report on January 8, 2010. A letter from the Registrar, dated December 8, 2009, required the Applicant to file an up-to-date assessment by February 2, 2010, which would need to include confirmation that he has remained abstinent from alcohol, seizure free and include results of MCV and GGT tests, with a clinical explanation if the results were outside the normal range.

On January 4, 2010, the Applicant wrote to the Registrar from his winter home outside of Canada, stating that he had received the above letter the day before leaving for his winter home. He stated that he did not bring the letter with him and that he would not be home in Ontario until the end of March 2010. He requested a deferment of the compliance date to mid-April 2010.

On April 26, 2010, the Applicant's family physician, Dr. S., sent a letter to the Registrar stating:

- Recent GGT: 143 (normal <59.99) and MCV: 104 (normal 80-97) done March 31, 2010. These are out of normal laboratory range, can be due to chronic alcohol consumption.
- Patient does not report of any seizures recently since August 2008.
- Patient has not been completely abstinent from drinking but has reported to cut down.
- He does not have any other significant medical problems which can affect his driving.

On May 11, 2010, the Registrar wrote to the Applicant as follows:

> The ministry has received a subsequent report indicating that you suffer from a condition which may impair your ability to safely operate a motor vehicle.
>
> After considering all relevant facts available, the Registrar of Motor Vehicles has decided to suspend your driving privilege for medical reasons under Section 47(1) of the *Highway Traffic Act*. An official notice of suspension will be mailed to you under separate cover. This will replace the suspension now in effect for failing to file a satisfactory medical report.
>
> Therefore you must file an up-to-date, detailed assessment by your treating physician or by a physician specializing in addictions medicine. The report must confirm that you have remained abstinent from alcohol for a period of one year. This period may be reduced if your physician confirms that you have successfully completed a recent alcohol treatment program and is supportive of the reinstatement of your driving privilege.
> A clinical explanation must be provided for the results of any bio-chemical markers (MCV,

GGT, AST and ALT) that are outside the normal laboratory range.

The Applicant's Evidence

The Applicant stated that he had complied with all the requirements of the Registrar up to the letter of January 4, 2010. He left for his winter home outside of Canada the day following receipt of the letter and did not take this letter with him. He stated that he telephoned the Ministry of Transportation from his winter home and asked for a deferral until his return to Canada at the end of March 2010. He stated that he was informed that a deferral was not possible.

The letter from his family physician, dated April 26, 2010, was as a result of a visit to the doctor on his return to Canada. He stated that he was open and honest with his physician regarding his consumption of alcohol. While at his winter home, he would drink two pre-dinner cocktails five days out of seven, with two or three glasses of wine during dinner. At home, he would drink mostly shandies consisting of half a beer and half ginger ale, three days out of seven, and wine with dinner.

The Applicant stated that his social alcohol consumption was declared at the time of the Alcohol Assessment.

The bio-chemical markers were only slightly elevated, and in the statement of the reporting physician in 2002, it was noted that these markers may remain elevated indefinitely.

The Applicant decided to voluntarily take the CAMH program in 2008 following the single seizure, in order to see if total abstinence would have any effect on his potential for seizure and he was advised that this was not a risk.

The Applicant noted that he requires a driver's licence in order to supplement his retirement income (which has shrunk), to pursue personal errands and to perform volunteer work. Local public transportation in his town is non-existent outside of peak hours. The Applicant's wife is outside of Canada winding up the affairs at their winter home. He expects to surrender his licence to drive in the next ten years, depending on his general health. He takes medication for Type 2 Diabetes and mild hypertension, and also takes an anti-depressant. The Applicant's family doctor has advised him to reduce his intake of alcohol.

An updated laboratory report, dated July 5, 2010, shows GGT 56 (normal <59.99), AST 20 (normal <36.99), ALT 7 (normal <45.99) and MCV 102 (normal 80-97). Hemoglobin was 102 (normal 135-170).

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
>
> (b) a driver's licence; or
>
> (c) a CVOR certificate,
>
> on the grounds of,
>
> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
>
> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
>
> (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
>
> (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

> 50 (1) Every person aggrieved by a decision of the Minister 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.
>
> (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 relies on:

1. Section 47, which states:

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

The Registrar interprets the letter dated April 26, 2010, from the Applicant's family physician, as having the same intent as a Medical Condition Report under section 203 of the Act. The elevated levels of GGT and MCV as well as the physician's comments are indications of continued use of alcohol by the Applicant. The Registrar requires evidence that a period of abstinence of one year must elapse with a reduction to the one-year period, if the physician confirms that the Applicant has successfully completed a recent alcohol treatment program and is supportive of the reinstatement of the Applicant's driving privilege. A clinical explanation must be provided for the results of any bio-chemical markers that are outside the normal laboratory range.

2. Regulation 340/94, section 14, which states:

> An applicant for or a holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

The Applicant relies on the evidence given by him during examination and cross-examination. The onus is on the Registrar to prove the grounds for suspension of the licence.

The Tribunal finds:

1. The letter by the Applicant's physician on April 26, 2010, does not meet either the content or the intent of a Medical Condition Report under section 203 of the Act, which states:

> Every legally qualified medical practitioner shall report to the Registrar the name, address and clinical condition of every person sixteen years of age or over attending upon the medical practitioner for medical services who, in the opinion of the medical practitioner, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle.

2. The Registrar had reinstated the Applicant's driver's licence on September 8, 2009, subject to the receipt of a follow-up report by February 2, 2010. This report was required to include confirmation that the Applicant has remained abstinent from alcohol, seizure free and include results of MCV and GGT tests with a clinical explanation if the results were outside the normal range.

3. The Registrar refused to extend the Applicant's filing date from February 2, 2010, until his return to his Ontario home from his winter home at the end of March 2010, for no apparent reason, given the history at this date.

4. The Applicant had previously disclosed his social consumption of alcohol in the Alcohol Assessment of August 2009, and a physician had previously stated in 2002 that the GGT may remain elevated indefinitely. The Tribunal notes that the blood smear on July 5, 2010, shows mild macrocytosis and low hemoglobin, which may account for some increase in MCV.

5. The Applicant had successfully completed a 21-day program at CAMH in September/October 2008.

On the basis of this history and the evidence provided at the hearing, the Tribunal concludes that the Registrar has not proven that the Applicant has alcohol dependence or addiction to an extent likely to significantly (emphasis added) interfere with his ability to drive a motor vehicle safely. Therefore, Regulation 340/94 does not apply in this case.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective May 11, 2010, 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

_____

Kevin Flynn, M.D., Member

RELEASED: July 21, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6114-MED-PSYCH-Psychiatric

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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., Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: July 8, 2010 Toronto

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* (the "Act").

FACTS

The Registrar's Evidence

Dr. M. sent a Medical Condition Report to the Ministry of Transportation of Ontario ("MTO"), dated March 15, 2007. In this report, he noted that the pertinent medical condition of the Applicant was "Mental or emotional illness – unstable".

When MTO received this report, it was decided that the Applicant's driving privilege should be suspended.
Dr. T., who became the family physician of the Applicant in 2007 when the Applicant moved to a different province, wrote a letter to the Emergency Department of a hospital requesting

an appointment for the Applicant with a psychiatrist. In this letter, the doctor wrote, in part, that the Applicant had been diagnosed in the past with Bipolar Disorder and noted that the Applicant had some concern with his safety, and wanted to protect himself from the family, as he felt some threat from them. The doctor wrote down the details of his examination of the Applicant, which showed entirely normal characteristics.

Dr. T. sent a copy of some of the notes he wrote when the Applicant came to see him. In the note of May 19, 2007, the doctor explained that he had sent the Applicant to a hospital for psychiatric assessment. The Forensic Psychiatrist spoke to Dr. T. on the telephone and stated that he had not "found anything certifiable" and that he was sending the Applicant back to Dr. T.

Dr. S. wrote to MTO on August 1, 2007, writing, in part, as follows:

> He, <the Applicant> had his licence in Ontario suspended, as we understand it at the request of an Emergency Room physician. He has a previous and contentious diagnosis of Bipolar Disorder. It is noteworthy that even during previous psychiatric hospitalizations his Attending Psychiatrists did not feel that revoking his licence was necessary. Additionally, when the patient visited the emergency room voluntarily at <name removed> Hospital (on recommendation of general practitioner Dr. T.), to accelerate his psychiatric review, the on-call psychiatrist did not support a bipolar diagnosis.

The Applicant was sent to a Driving Assessment Centre for a driving assessment. This was done on September 28, 2007, and both the Cognitive Assessment Report and the On-Road Evaluation were favourable for driving.

The Applicant was examined by psychiatrist Dr. P. on November 13, 2008, who wrote the following in her report:

> The above named patient <Applicant's name removed> was seen in this office for a psychiatric assessment. My opinion is that he has a diagnosis of Bipolar Affective Disorder 1.

The Applicant went through an assessment by a psychologist, Dr. M., on September 1, 2009. Under the assessment results, the doctor wrote, in part, as follows:

> Mr. <the Applicant's name> was interviewed and tested for the purpose of ascertaining whether he met diagnostic criteria for any form of bipolar disorder, depressive disorder or manic disorder. The interview inquiry was conducted in accordance with diagnostic designations provided in the Diagnostic and Statistical Manual IV. Diagnostic criteria for the above-referenced disorders were <u>not</u> met. Mr. <Applicant's name removed>, by his report, has no history of bipolar disorder, no cyclical mood swings; he denies having had depressive or manic episodes. As noted above, his conduct throughout the interview was consistent with these statements; he was stable, composed, articulate and manifested no disturbance of thinking. He is not now, nor has he in the past, taken any form of psychotropic medication. So on the interview basis there is clearly no evidence of any of these disorders, nor of any other symptom disorders within the range of mental illness.

The recommendation of the Medical Advisory Committee, dated May 26, 2010, was "Request further information". The reasons for this were:

> Need clarifying information as Dr. M. does not mention Dr. P.'s 2008 assessment which confirmed the diagnosis of bipolar disorder and recommended treatment with a mood stabilizer.

Dr. G., family physician for the Applicant in Ontario, wrote a letter to MTO on May 31, 2010, as follows:

> The above-named (the Applicant) is requesting reinstatement of his driver's licence.
>
> I have reviewed all the previous documents (see enclosed copies) regarding his mental status and his ability to drive a motor vehicle.
>
> On re-examination at this time, it is my opinion that he can safely operate a motor vehicle.

The Applicant's Evidence

The Applicant explained the events of March 15, 2007, when he was taken into the hospital emergency. He was living in a house together with friends who had come with him from his home country in 1989. He had been the chief bread-winner for this group of friends, and, in fact, had gone further than that and had even paid for one of his friend's college fees. An argument arose that day in the house to the extent that one person called the police. When the police arrived, they told the Applicant that he could either go and take a quiet walk and come back or be taken to the hospital emergency. He went to the hospital.

In the Emergency Department, the Applicant was kept for a while and stayed there for the night. In the morning, the Applicant saw Dr. M., a physician from this department. The Applicant was somewhat upset because he learned that the doctor had already been talking to his friends from the house. At first, the Applicant was reluctant to talk to Dr. M., but then there was a very brief conversation (just a few minutes). They did not have a proper dialogue. The Applicant was then told he could leave, but was not given any advice or instructions. It was then that the Applicant lost his licence.

The Applicant decided to move to a province in the West. Actually, he had been planning this for a while. There, he got a responsible job at the airport and the doctor working for the airport (Dr. S.) got to know the Applicant. Dr. S. was very supportive and urged the Applicant to try and get an appointment with a psychiatrist (a long waiting list), and also to get a driving assessment report, all to further his chances of having his driver's licence reinstated. Also, his family physician, Dr. T. was very supportive. The Applicant was examined by a psychiatrist who told him, "You are not bipolar".

The Applicant's interview with a psychiatrist, Dr. P., was not a peaceful one. He found it very difficult. In his words, "She even yelled at me".

The Applicant attained a B.Sc. Degree in Electrical and Computer Engineering from a university in 2002. But, his main interest is in coaching soccer. He has a good driving record, and noted that he once drove cars for a living.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
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> (b) a driver's licence; or
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> (c) a CVOR certificate,
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> 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 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

The Tribunal notes that a great deal of the evidence consists of medical reports with differing opinions regarding the Applicant. First, there are reports that the Applicant has Bipolar Disorder or some other serious psychiatric disorder. Then, there are reports that he has no such disorders. The Tribunal is aware, nevertheless, that some individuals who suffer from Bipolar Disorder or from any psychosis may not be safe drivers, but others are.

In the first category are:

1. Dr. P., Psychiatrist, wrote on November 13, 2008, that the Applicant had a diagnosis of Bipolar Disorder.

2. Dr. M., a physician in a hospital emergency department, wrote on March 15, 2007, as a diagnosis: Mental or emotional illness – unstable.

In the second category are:

1. Psychologist Dr. M. wrote on September 1, 2009, that he did not consider the Applicant suffered from Bipolar illness, “nor of any other symptom disorders within the range of mental illness”.

2. Dr. S. wrote on August 1, 2007, that the on-call psychiatrist whom the Applicant was referred to “did not support a bipolar diagnosis”.

3. Dr. T., in his letter of May 19, 2007, did not make an actual diagnosis, but detailed numerous favourable mental characteristics of the Applicant and did not mention any unfavourable ones.

4. Dr. G., who has been the family physician of the Applicant since he arrived in Canada in 1998, except when the Applicant was living in another province, did not write a diagnosis in his report of May 31, 2010, but wrote, “…it is my opinion that he (the Applicant) can safely operate a motor vehicle”.

The Tribunal, at the hearing (which was lengthy), heard the Applicant being cross-examined and also heard the Applicant speak on his own. The Tribunal formed a favourable impression of the Applicant.

The Tribunal concludes that there is serious doubt that the Applicant suffers from Bipolar Disorder or any other significant mental disorder. It is the opinion of the Tribunal that the Applicant does not suffer from a medical condition that is likely to significantly interfere with his ability to operate a motor vehicle safely. The Tribunal has decided that the Applicant's driving privilege should be reinstated.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective April 27, 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., Member

RELEASED: July 14, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6097-MED-NEUR-NEUROLOGICAL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID W. HURST, M.D., Presiding Member

APPEARANCES: APPLICANT, self-represented

VICTORIA BEDROSSIAN, Representing the Registrar of Motor Vehicles

DATE OF HEARING: June 29, 2010 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 "Registrar") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario) (the "Act" or the "HTA").

FACTS

Respondent's Evidence

The Applicant is a 62-year-old consultant who was informed by the Ministry of Transportation ("MTO") on October 21, 2008 that her driving privilege would be suspended for medical reasons under Section 47(1) of the *Highway Traffic Act*. This initial notification enclosed an Alcohol Assessment Form to be completed by the Applicant's treating physician and required verification if a diagnosis of alcohol dependence was present. This report also requested details of the Applicant's recent hospital visit on September 26, 2008.

In addition, the MTO requested an up-to-date vision report from an eye specialist which would indicate that the Applicant's vision met the legislated requirement.

The MTO received a Medical Condition Report on the Applicant dated November 4, 2008 and signed by Dr. E.

This report noted:

1. The presence of respiratory problems (asthma).
2. Diseases of senses (deafness, vertigo, visual deficiencies).
3. Neurological diseases.

Physical Examination:

Blindness in left eye due to corneal damage. Tests met standards defined by the HTA, and the neurological exam showed discoordination of movements of the left hand and left leg.

History Details and Summary:

1: No vision left eye,
2: No hearing left ear,
3: Mild allergic asthma,
4: She has a left facial nerve paralysis due to acoustic neuroma surgery, and
5: She has a slight ataxia as a result of her brain damage following surgery.

As part of the Respondent's presentation, the Respondent's agent submitted a report from S/Sgt R.L. sent to the MTO on October 21, 2008.

The narrative of this report describes the events leading to the Applicant's licencing problems.

Synopsis:

On Friday September 26, 2008, regional police were dispatched to investigate the possibility of an impaired driver. At the scene the police officer observed a vehicle parked on the west shoulder of the road with a female in the passenger seat. The constable met with two witnesses, W.K.W. and T.M., who advised that they had been following the vehicle for some time and stated that the vehicle in question was going very slowly. Under observation this vehicle veered onto the right shoulder and then back into line. The vehicle continued to swerve right to left and then went right towards a guard rail on the right side almost striking it. The vehicle then made a hard left turn back into oncoming traffic causing an oncoming school bus to take to the shoulder to avoid a head-on collision, with the vehicle.

This witness and the driver of another vehicle were able to stop the vehicle and take the

keys from the female driver. Both witnesses spoke with the driver and stated that she appeared to be impaired.

The police officer said that he could detect an odour of alcohol coming from the female's breath. With the witness statements and the odour, the police officer placed the Applicant under arrest for impaired driving and placed her in the rear of the police vehicle. The Applicant advised the officer that she was paralyzed on the left side of her face and blind in the left eye. She also stated that she was unsteady on her feet due to her medical conditions.

When taken to a neighbouring hospital the police officer requested a breath technician.

The police officer advised that he was unable to get a breath sample from the Applicant due to the paralysis of her mouth. In fact despite several attempts, while the Applicant could push some air through her mouth, there was not enough for the instruments to register a sample.

The Applicant admitted that her driving was bad but felt that this was due to the serious fog condition present.

The police officer felt that there were insufficient grounds to proceed with the impaired driving charge due to the neurological medical condition of the accused. He then charged the Applicant with dangerous driving under the Criminal Code based on evidence provided by the witnesses.

Dr. E. completed and filed a Ministry of Transportation Alcohol Assessment Form on November 20, 2008. While this very searching document disclosed that the Applicant had significant neurological problems due to left facial nerve paralysis and ataxia with left hand in coordination (post-op surgery for an acoustic neuroma with craniotomy) nothing was found in this assessment to indicate that the Applicant had an alcohol related problem. The laboratory markers – GGT and MCV were within normal limits. Dr. E. recommended no treatment.

Dr. E. did note the neurological problems which were likely to significantly interfere with driving:

1. She suffers from post-operative ataxia secondary to an acoustic neuroma surgery.
2. She has very poor vision in the left eye due to corneal scarring.

The doctor went on to state that the threat to road safety is unknown:

1. Generally she is able to get around with only slight unsteadiness when walking and there does not seem to be any problem when manipulating the controls of a vehicle.

2. She has accommodated to the lack of vision and seems to manage driving by being extra cautious and moving her head around.

On November 27, 2008, the MTO wrote to the Applicant stating that her driving privilege

would remain under suspension. They asked for an up-to-date detailed assessment from a neurologist or treating physician which would make special reference to her reported acoustic neuroma, current status, treatment, details of any residual deficit (physical, cognitive, perceptual) and prognosis.

This letter also stated that the MTO required an up-to-date vision report from her eye specialist.

On April 1, 2009, Dr. E. wrote to the MTO stating that the Applicant had been treated with gamma-knife surgery for an acoustic neuroma with subsequently an open craniotomy. She developed dense left facial nerve palsy with inability to close her left eye with left facial paralysis. The surgery for this was done in 1999. She developed left corneal scarring with blindness and in addition has complete deafness in the left ear. She was also left with some ataxia causing her to be unable to do heel to toe walking and also showed some unsteadiness on Rhomberg testing. Some dysmetria is noted in the left arm and leg although she is able to walk without a cane. It was noted that she was being followed by Dr. B. (neurologist). Dr. E. noted that despite these medical problems she has generally been able to manage and has been able to drive her car without incident until the recent traffic violation. She has no problem manipulating the controls of the car and has no ataxia when seated. She does not suffer from vertigo. She compensates for her visual loss by being extra careful and by using extra head movements to survey her visual field.

She had recently been assessed by Dr. W., an ophthalmologist, and is due to have her routine follow up with Dr. B. (neurologist) next month. Dr. E. stated that the Applicant is able to safely drive a motor vehicle.

On April 16, 2009, the MTO wrote to the Applicant once again asking for an assessment from an eye specialist.

On April 20, 2009, Dr. B. (neurologist) wrote to the MTO and filed a report on the Applicant describing surgery for a benign brain lesion in 1994 – 5. Her neurological condition was described as perfectly stable, with a confirmatory MRI scan indicating neurologic stability.

The doctor said that in his opinion the Applicant posed no threat with regards to driving ability and that there was no significant visual impairment.

On May 12, 2009, the MTO wrote to the Applicant stating she must have an assessment from an eye specialist filed with specific reference to her visual field.

On May 5, 2009, Dr. W. filed a report on the visual function of the Applicant. Dr. W. described the Applicant's significant medical history the most pertinent problem being the resection of an acoustic neuroma from the left side of her cranium 10 years previously. This lesion was described as a benign slow growing tumour which grows on the vestibular segment of the auditory nerve and that it usually involves the facial nerve as well. The Applicant was described as being left with a left facial droop with inability to close the left eye. This led to scarring of her left cornea. She was also noted to have poor balance for

walking because the vestibular nerve helps with balance. When sitting, caused no nerve issue problem.

The Applicant was noted to have compromised vision of the left eye but this is a fairly common problem for any number of reasons and most patients do learn to compensate for this. The Applicant's vision with current correction in the right eye is 20/20. There was no cognitive impairment and there was nothing apparent in the way of a physical problem with the operation of a motor vehicle. An Estermann Driving Binocular Visual Field Test was satisfactory. She was able to see to 60 degrees on either side of the horizontal midline. There was no significant scotoma (blind spot).

The Applicant was described as meeting the visual criteria for driving. Dr. W. noted that she did discuss the matter with the Applicant's regular ophthalmologist and found that her situation had been stable for many years and the latter ophthalmologist was surprised that there was an issue with her driver's licence at all.

On May 11, 2009, Dr. E. sent to the MTO a copy of the neurologist Dr. B.'s report dated April 28th, 2009. This report was summarized as stating “I do not detect significant deficits that would impair this patient's ability to drive”.

On June 2, 2009, the MTO wrote to the Applicant describing the vision report indicating that her visual field does not meet the standards for a class “G” driver's licence. They stated that this report indicated that she did not meet the horizontal visual field requirement of 120 degrees that is required in Regulation 340/94.

They did note that there was a provision under Section 21.2 of the Regulation 340/94 that allows for a waiver of the horizontal visual field standard for class “G” licence holders and applicants.

The Ministry enclosed a class “G” Vision Waiver Applicant Package to enable her to make an application for a waiver.

This application form was completed with the help of Dr. E. and a note by the Applicant that the only reason her licence was suspended was because there was heavy fog on that day and she was pulled over for driving too slow.

In mid 2009, there was series of exchanges between the Ministry and the Applicant regarding details of vision examinations and concerns as to reports, that many of these reports were incomplete, missing or reproduced on photocopying.

On October 28, 2009, the MTO wrote to the Applicant stating that her Vision Waiver Application Package had been approved and that she could now proceed to stage 2 of the assessment process. The second stage consisted of a formal driving evaluation conducted by an occupational therapist.

Ultimately on November 30, 2009 a functional driving assessment was completed by a

Registered Occupational Therapist.

In this report a clinical assessment disclosed a good functional report but with some negative comments under the categories “target manoeuvres” and “driver instructor's tests score”. This had to do with observing a speed bump and such things as a delay in signalling a lane change and also failing to yield to a pedestrian at a cross walk and failing to proceed at an advanced green light.

The examiner recommended that the Applicant participate in Driver Rehabilitation to attempt to correct driving errors and improve compensatory strategies.

On December 15, 2009, the MTO advised the Applicant of a Notice of Reinstatement to her class “G” licence valid until March 13, 2010. This licence was valid only for the purpose of receiving remedial lessons with an occupational therapist at an Ontario Rehabilitation Centre.

On February 16, 2010, the Occupational Therapist L.H. filed a report on the Applicant regarding a functional driving evaluation on November 30, 2009. It was recommended that the Applicant complete driving lessons to correct driving errors and to improve compensatory strategies. The driving instructor reported that during the fourth hour of lessons on February 10, 2010, the client completed a significant error as she failed to respond to a red light. The driving instructor intervened by braking.

The therapist contacted the Applicant and explained that the lessons were discontinued and a final on-road evaluation would not be completed as a significant error was completed during the fourth hour. The therapist reported to the Ministry of Transportation, stating that the lessons must be discontinued if a significant error is completed during or after the fourth hour of lessons.

On February 17, 2010, the Medical Advisory Committee of the MTO (“MAC”) in their report indicated continued suspension. The reasons were that the driver failed the functional driving assessment and subsequent lessons were discontinued due to a critical error. The Vision Waiver requirements had not been met and she is deemed to be unsafe to operate a motor vehicle.

On March 29, 2010, the MTO wrote to the Applicant indicating that she is not a suitable candidate for the Vision Waiver program.

MTO stated that her case could be reconsidered for a Vision Waiver upon receipt of a satisfactory driving evaluation from a recognized Driver Assessment Centre. (At the hearing the Agent later expanded on this stating that the Functional Assessment Test must be passed by the Applicant to prove to the MTO that she can drive safely and then she could be reassessed).

With the presentation of the certified copy of the Applicant's driving record, pertinent

segments of the CCMT Medical Standards for Drivers, and the 2008 annotated Ontario *Highway Traffic Act*, the Agent completed the presentation.

The Applicant's Evidence:

She presented her appeal under the following categories:

1. She could not understand her failure of the visual field tests that had been described as satisfactory by her physicians.

2. Two ophthalmologists and a neurologist have indicated that she does not represent a driving hazard.

3. She has had no accidents in her later years.

4. She found that she can not insure her car for someone else to drive if she has no licence

5. Public transport is not available to her.

6. She noted that in the police report filed on the day she was driving in the fog no one questioned her in any detail.

7. She notes that it has taken a year to get suitable copies of her reports, and mitigating factors in her favour indicated that the tests were very strenuous and exhausting and held in strange locales.

She outlined in some detail difficulties during the road tests. She went on to suggest that she might possibly abandon the whole matter and revert to the situation of a 16 year old applying for their first driving licence after having taken driving lessons.

The Respondent in cross-examination:

The Applicant explained that in taking driving lessons at an examining centre there have to be dual controls so that normal lessons would not be allowed. She stressed that the Ministry's position is that the Applicant has to pass a functional assessment.

The Respondent referred to the second assessment with an error concerning a red light. The Applicant replied that she was instructed to turn right on the next red. She replied she misunderstood the examiner's instruction to turn right on the red light. She interpreted this as referring to a red light further ahead, hence the error.

The Applicant also pointed out the serious financial factor involving the fee of $600.00 for driving lessons.

The Respondent summarized the requirements of section 47(1) of the HTA and the

importance of the failure to pass a functional assessment. The Applicant must pass this in order to be eligible for a waiver for reinstatement. She stated that the Applicant has an option of taking another functional assessment test. She again underlined the significant of the failure to respond to a red light during the driver test, the necessitation of braking by the examiner.

The Applicant inquired whether a full clinical assessment would have to be repeated for further testing. The Agent explained that this might be waived but the MTO would have to rule on this.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The decision of the MTO to suspend the Applicant's licence is based on section 47(1) of the *Highway Traffic Act*.

The Applicant had the misfortune to develop a benign but serious tumour (acoustic neuroma) situated on the vestibular segment of the auditory nerve in an area near the brain, which is difficult to access. The surgery had unavoidable sequelae with partial paralysis of the left facial nerve resulting in corneal damage to the left eye, motor deficit on the left side and mild problems of balance.

The Applicant, in essence, has a monocular condition, which usually does not result in loss of driving privilege.

The Applicant had driven successfully for several years since her surgery, but on the day of her driving difficulty developed serious problems in maneuvering her car, leading to intervention from other motorists who were on the scene. Their record indicates their impression was that the Applicant was impaired and the police called to the scene could smell alcohol on her breath. At the local hospital, a breathalyzer test was applied and failed to register because of the Applicant's partial facial paralysis making it impossible to blow sufficient amounts of air into the device to take a legitimate reading. The initial charge of driving while impaired was changed to that of Dangerous Driving.

Subsequent investigations indicate that the Applicant has no problem with alcohol. The Ministry has maintained the suspension of the Applicant's driving privilege because of her visual deficit involving the left eye and her failure to pass the functional assessment examination during her driving test, which was carried out with the objective of acquiring a functional waiver regarding her visual deficit.

It is documented that the Applicant drove safely for many years following her surgery with subsequent left eye blindness and some ataxia. The event of September 26, 2008 leading to the Applicant's suspension resulted in a very extensive review of the Applicant's medical status (left eye blindness and motor instability and ultimately a detailed driver re-examination). What has not been given consideration is the fact that the driver has performed satisfactorily following her major surgery for years except for the unfortunate

events on the above-mentioned date. The Applicant has described her considerable tension and anxiety during her driving assessment and those factors, in fairness, should be part of these deliberations.

Alcohol may have been a contributing factor to the driving events leading to the suspension, but this was not proven. The Applicant pointed out that she was driving very slowly because of poor visibility and fog. She had already learned, because of her disability, to drive more slowly and carefully in such conditions.

An inordinate amount of effort and time has been expended reviewing the Applicant's driving ability while, in fact, her successful driving record since her surgery speaks for itself.

Also the MTO seems almost obsessed with the Applicant's vision problems. There are many licensed drivers with unilateral blindness. The Tribunal finds no problem here. Also in her favour is the fact that three well qualified medical consultants indicated in their reports that it is safe for her to drive.

The Applicant displayed one lapse in her driving skills in September 2008, but there have been no other problems. The relentless review of her driving ability, and her monocular vision, by the Ministry, is serving no practical purpose, and does not establish that she has a medical condition that is likely to significantly interfere with her ability to drive safely.

DECISION

Upon the application by the Applicant to appeal the decision effective October 21, 2008 of the Registrar 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

David Hurst, M.D., Presiding Member

RELEASED: *July 8, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6079-MED-ALCL-Alcohol

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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

VICTORIA BEDROSSIAN, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: July 5, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

The Applicant submitted an additional document, namely a medical report from Dr. Q, dated June 30, 2010. The Respondent agreed to the admission of this report in evidence, and it was marked as Exhibit # 4.

FACTS

Respondent's Evidence

Dr. P, an Emergency Room Physician, sent in a Medical Condition Report on September 14, 2009 in which he reported "Alcohol Dependence" and "Motor Function/Ability Impaired"

as the pertinent medical conditions the Applicant presented with. He added, under Optional, the clinical condition of “Ataxia due to Chronic alcohol toxicity”.

When the Ministry of Transportation (MTO) received this report from Dr. P, it was decided that his driving privilege should be suspended.

Another Medical Condition Report was sent in by Dr. K, (the family physician of the Applicant at the time), dated October 24, 2009. In this the doctor reported “Alcohol Dependence” and “Possible Seizure – alcohol related” as the pertinent medical conditions the Applicant presented with, and he further added as follows:

> Binge drinking. Last admission for withdrawal September 12, 2009, also admitted August and February 2009. Continues to drink since. ?Seizures. Medical problems due to alcoholism -1. Cardiomyopathy. 2. Elevated liver function tests. 3. Peroneal palsy right leg.

Certified Driver Record for the Applicant, dated May 27, 2010 showed the following:

> Driving with more than 80 mgs alcohol in blood on January 26, 1979 and on August 18, 1981.
>
> Impaired Driving on August 4, 1982.
>
> Current Demerit Points – zero.

Dr. Q, (the present family physician for the Applicant), sent in the following report concerning the Applicant, dated June 30, 2010:

> Please be advised that this patient was examined and there are no physical contraindications to his having his licence reinstated. He assures me that he is NOT imbibing alcohol.

Applicant’s Evidence

The Applicant said that 2009 was a terrible year for him. As a result, he resorted to alcohol as a crutch, which he regrets; and he will not do it again. He was drinking heavily at times and had withdrawal symptoms. This was what took him to the hospital emergency on September 12, 2009, when he wanted to be admitted so he could be helped. He was in hospital for two weeks at that time. He also was admitted to hospital for alcohol withdrawal problems in February and August 2009. Since this hospital admission of September 2009 he has not taken alcohol.

He was asked if he had a seizure during any of these episodes when he went to the hospital emergency. He said that he was not sure, but at those times he did have instability when he was standing, and he was told by the doctor that he probably had a type of seizure.

Going further into the more distant past, he admitted he had been drinking heavily. When he was convicted of impaired driving in August 1982, he was determined to give up alcohol, and, in fact, he did not touch alcohol for over 25 years, until life became extremely difficult

for him in 2009. Any time he was drinking in the past, he would never even think of driving. He considers himself a good and careful driver.

The Applicant exercises every day. He cycles great distances. He said that although he is now 70 years old, he is fitter than an average 40 year old, and he would not be as fit as he is if he was still using alcohol.

He was asked why he did not have the Substance Abuse Assessment form filled in. He said that he understood he had two options, one being to fill out and sign the Notice of Appeal form in which there was a check list of requirements without any mention of the Substance Abuse Assessment form. So, it was this Notice of Appeal form that he decided to sign.

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

APPLICATION OF THE LAW TO FACTS

Under the heading "Alcohol Dependence and alcohol withdrawal seizures" of the C.C.M.T.A. Medical Standards for Drivers, the applicable standard (Standard 13.2) is written as follows:

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

The Tribunal sympathises with the Applicant's wish to be able to resume driving.

The Tribunal recognises that the Applicant made a very determined effort to abstain completely from alcohol after his September 2009 admission to hospital, and regards his statement that he has done so as credible.

The Tribunal also recognises that the Applicant pays a great deal of attention to his health and that he keeps himself very physically fit.

Therefore, the Tribunal notes that the Applicant is to be regarded as being alcohol and seizure free for about 10 months. However, the Tribunal notes that there is no evidence that the Applicant hast kept in close touch with an addiction specialist or his family physician for monitoring of his progress, that he has not attended any rehabilitation program and there is no evidence of any laboratory results, showing the present state of his liver function or the absence or presence of any alcoholism. The Tribunal recommends that the Applicant arrange to see his family physician and that laboratory results of liver function tests, GGT and MCV be sent to the MTO. If they are favourable, then, serious consideration should be given to the reinstatement of his driving privileges.

DECISION

Upon the application by the Applicant to appeal the decision effective October 10, 2009, 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: *July 12, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6170-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 18, 2010 Toronto

DECISION AND REASONS

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

FACTS

The Registrar's Case

A Medical Condition Report was completed by Dr. T., a family physician on April 21, 2010, pursuant to Section 203 of the Act.

> *Alcohol Dependence*
> *Neuropathy secondary to alcohol.*

The Applicant was a patient of Dr. T. for 21 months and was stated to be aware of the report. The Registrar informed the Applicant by letter on June 23, 2010, that it had been decided to suspend his driving privilege under section 47(1) of the Act.

In order to be considered for re-instatement, he was required to have his physician complete a Substance Abuse Assessment form. If, as a result of this assessment, a diagnosis of alcohol dependence was confirmed, he must provide confirmation that he has been alcohol-free for one year. This period may be reduced if his physician confirms that he has completed an alcohol treatment program and is supportive of reinstatement. A clinical explanation must be provided for the results of any bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

In addition, he must file an up-to-date assessment referencing the reported neuropathy with the results of all investigations his doctor has initiated, the diagnosis, treatment, current status and prognosis. He was advised of his right to request an Administrative Review and of his right to appeal.

The Registrar received no further medical information. The Applicant did not request an Administrative Review.

The Applicant's Case

The Applicant stated that he has been attending Dr. T. once a month, mostly for repeat prescriptions and management of his anti-coagulant. He has atrial fibrillation and also attends a cardiologist twice a year. His medications are: Warfarin, Crestor, metoprolol, digoxin, ramipril and allopurinol.

He stated that he does remember his visit to the doctor on April 21, 2010 but does not remember being informed that a report was to be sent to the Ministry of Transportation.

He stated that he does not have a problem with alcohol but that he does have a drink of wine occasionally and has never been advised to stop drinking. He stated that he knows nothing about the reported neuropathy and denies having neurological symptoms.

He retired from his job with the electrical department of the Ministry of Transportation after twenty years and has never had a problem driving for over sixty years. Since retirement, he has done volunteer work, mostly with seniors. He has received many complimentary character references since the suspension.

After he received the notice of suspension, he saw Dr. T. who made copies of the Registrar's letter of June 23, 2010 together with the Substance Abuse Assessment form. After two weeks, he saw the doctor again and was told that the medical report required had not been completed. No laboratory tests were ordered other than his regular test for anticoagulation.

He changed doctors and now sees a Dr. S.

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
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> (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 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.
>
> (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 relies on:

1. The Medical Condition Report of alcohol dependence and neuropathy secondary to alcohol, filed by a physician pursuant to section 203 of the Act, on April 21, 2010. This required the Registrar to issue a suspension of the Applicant's driving privilege under section 47(1)(b)(g) pending receipt of a detailed medical report.

2. Regulation 340/94 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.

The Applicant has failed to arrange for the Registrar to receive an up-to-date detailed medical assessment with reference to his reported alcohol dependence, including a completed Substance Abuse Assessment and bio-chemical markers. Further, the Applicant has failed to arrange for a report referencing the reported neuropathy.

3. The Registrar does not have medical evidence that would either refute or support the reported alcohol dependence.

4. CCMTA Standard 13.2 states that patients with a diagnosis of alcohol dependence may not drive any motor vehicle for twelve months during which time the individual must remain seizure-free and alcohol-free.

The Applicant acknowledges that he has failed to arrange for the Registrar to receive the requested assessments and undertakes to arrange with his new family physician to complete the requested reports.

The Tribunal finds:

` 1. The Registrar was justified in issuing a suspension of the Applicant's driving privilege under section 47(1) of the Act, effective July 3, 2010 upon receipt of a Medical Condition Report of alcohol dependence from a physician pursuant to section 203 of the Act.

2. The Registrar was justified in continuing the suspension of the Applicant's driving privilege under Regulation 340/94 of the Act upon failure by the Applicant to arrange for the Registrar to receive a detailed medical assessment and

Substance Abuse Assessment regarding the reported alcohol dependence and neuropathy secondary to alcohol.

3. In these circumstances, the onus is on the Applicant to provide medical evidence that he is not dependent on alcohol to an extent likely to significantly interfere with his ability to drive a motor vehicle safely.

DECISION

Upon the application by the Applicant to appeal the decision dated July 3, 2010 of the Registrar 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 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

_____

Dr. Kevin Flynn, Presiding Member

RELEASED: *August 31, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6163-MED-PSYCH-Psychiatric

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. DAVID W. HURST, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 16, 2010 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by (the "Applicant") respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

PRELIMINARY MATTERS:

Mr. Biel, Agent for the Registrar, explained that his file summary included details of the events of a Tribunal hearing held on May 3rd, 2005, involving the Applicant and a second Tribunal hearing held on June 26th, 2008, conducted by this Member.

Mr. Biel requested that proceedings of today's Tribunal begin with consideration of the events since the last Tribunal hearing held on June 26th, 2008.

This Tribunal today concurred with Mr. Biel's request.

FACTS:

In the 2008 Decision, specifically the Application of the Law to Facts, the Tribunal held:

There is one medical report from Dr. M., which reviews the Applicant's entire history of mental

> problems (bipolar disorder), including a detailed review of the Applicant's treatment with various mood altering drugs. The Applicant's bipolar disorder has proved to be serious, with difficulty in achieving a stable mental state, particularly with the Applicant's consistent lack of compliance. The Applicant with his presentation shows remarkably little insight into his problem with numerous paranoid statements, and it is clear that with his record of multiple driving offenses, at the present time he should not have his driving privileges restored. He needs very close medical supervision, with good compliance. Satisfactory reports to the Ministry of Transportation (the "MTO"), will be needed for them to consider reinstatement. Part of the Applicant's present difficulties consists of the fact that there have been almost no medical records provided to the MTO for 2½ years; nor does the Applicant demonstrate any plans to co-operate in this regard. This situation leaves the Tribunal with no alternative in the interest of maintaining safe driving standards, but to agree with the MTO's position.

Mr. Biel then referred to a brief letter from Dr. R.S. dated April 5th, 2010. It was addressed "To Whom It May Concern", re: the Applicant.

> This man is my family practice patient. He has asked me to write to you on his behalf, to effect a reinstatement of his licence to drive. He states that his licence was pulled because he is bipolar, and needs to show adequate treatment for bipolar disorder before reinstatement is possible. Can you please inform me, what does the Ministry actually need to effect a reinstatement? Is there anything I can be doing that would be helpful to my patient? Signed Dr. R.S.

This doctor also included a family history of the father with a CVA, mother with rheumatoid arthritis and the diagnoses for the Applicant:

1. hypertension
2. diabetes
3. elevated LFTs (liver function tests) – excessive alcohol intake

His medications included:

1. Amlodipine besylate
2. Multi-vits

The doctor noted that the Applicant needs a blood pressure check and that he has been consuming 12 alcoholic drinks per week.

On May 15th, 2010, the MTO wrote to the Applicant acknowledging their receipt of the letter from Dr. R.S. dated April 5th, 2010. The MTO stated that it will be necessary to file an up to date assessment from the Applicant's treating physician or psychiatrist. The MTO went on to state that this assessment must confirm 6 months of stability since post-discharge, current treatment, and hospital discharge summary of most recent events. It must also make reference to the following details:

> Details of ongoing compliance and frequency/rapidity of decompensation, signs of impaired judgment, reduced concentration, reckless/aggressive behaviour and any sedation or psychomotor retardation due to medication. Confirmation of mental/emotional stability and current level of function is also required.

Upon receipt of the assessment, the MTO stated that the Applicant's case will be considered for reinstatement.

On June 22nd, 2010 Dr. R.S. corresponded with the MTO for the Applicant. He stated that he found this man physically and emotionally able to drive an automobile.

> "I have not prescribed him Lithium, nor do I anticipate doing so."

No other details were presented.

On July 23rd, 2010, the MTO again wrote to the Applicant indicating in their letter that the June 22nd, 2010 report by Dr. R.S. provided insufficient information in order to determine if the Applicant's licence could be reinstated. They asked for a further detailed assessment from his treating physician.

They went on to state that the assessment must indicate the Applicant's current status, treatment, current level of function and the discharge summary from his recent hospitalization and the Applicant's psychiatric condition. The report would include the reason for the discontinuation of Lithium. In addition, the report must provide details regarding the Applicant's compliance, frequency of appointments, signs of impaired judgment, frequency/rapidity of decompensation, reduced concentration, reckless or aggressive behaviour and any sedation or psychomotor retardation due to medication. Confirmation of a minimum 6 months period of ongoing mental and emotional stability was also requested.

Mr. Biel indicated that the Ministry has received no further information since July 23rd, 2010. He pointed out that the Applicant's file with the Ministry contains no added information on the Applicant's progress for 5 years and that they need more medical details.

Mr. Biel went on to review the pertinent segments of the 2009 annotated Ontario *Highway Traffic Act*, and then reviewed the Applicant's driving record.

Also included was the pertinent section of the CCMTA Medical Standards for Drivers, in particular sections 11.1, 11.2, and 11.3 dealing with mental disorders in driving, emotional disorders, and personality disorders.

Mr. Biel then entered a certified copy of the Applicant's driving record. This showed a multitude of infractions and he specifically drew attention to page 8 of the record stating that since May 3rd, 2005, there had been many offenses, such as driving with no insurance, driving while suspended, driving without a "valtag" (licence plate sticker), and driving with an unpaid fine. Mr. Biel emphasized that the Applicant has been driving without a licence.

THE APPLICANT'S CASE:

The Applicant stated that he didn't have much to add to his story. He described the multiple traffic infractions due to speeding in his "early days" when he was a delivery man

for a pizza firm. He stated that he was “stupid”. He then underscored the fact that his doctor says he is fit to drive and therefore he can drive. He described his medication as that of blood pressure pills only. When asked by the Tribunal why he was not taking Lithium, he stated that he never was bipolar.

Recently, while drinking with friends, they decided that he was quite drunk and should be taken to hospital. He described no other reasons for the hospitalization. He disputed the diagnosis of diabetes, indicating that it was a one time blood reading only (7.1) and that he is not being treated for diabetes. He went on to complain that he cannot even get on a waiting list to see a psychiatrist and now his doctor has advised him to get a lawyer. He complained that the MTO has refused his driver’s assessment test.

Mr. Biel at this point carefully explained to the Applicant that eligibility for such a test is not established, the important criteria being that his doctor advises it. There also must be satisfactory medical details provided to the Ministry. Mr. Biel went on to advise the Tribunal that no such medical information has been provided to the MTO.

In reviewing the MTO file, Mr. Biel pointed out 5 years have elapsed since the Ministry received any significant medical information regarding the Applicant. He questioned the Applicant as to whether any hospitalization ever occurred in the interim and the Applicant indicated that there were “a few”.

The Applicant testified as to the recent drinking events with friends. His “drunken” friends were not hospitalized but the police felt the Applicant should be taken to hospital. Mr. Biel then questioned why the Applicant failed to comply with the Ministry’s requests on May 15th and June 23rd of this year for further medical details and asked whether these requests had been taken to his doctor. Mr. Biel also pointed out that the Applicant’s doctor had not responded to any letters from the MTO. The Applicant had no explanation, but stated that he is prone to losing his temper with his doctor. Mr. Biel then questioned the Applicant as to whether he ever felt bipolar; his answer was no and that he only suffered from depression.

MR. BIEL IN SUMMARY:

Mr. Biel pointed out the criteria for suspension of the Applicant’s driving privilege listed in the section 47(1) of the HTA with emphasis on clause 47(1)(g). He reviewed medical suspensions that had been applied in 2000 up to 2004, and the significant history of mental illness. He reviewed the Applicant’s record of poor or reckless driving. He reviewed the Applicant’s failure to obey medical advice and drew attention to item 24 in his summary (Medical Condition Report) dated January 6th, 2005, with the history of substance abuse disorder and a history of non-compliance with treatment for bipolar disorder. Mr. Biel underscored the fact that the Applicant had taken no treatment for his bipolar disorder since 2005.

Mr. Biel reviewed the pertinent section of the HTA submitting that there must be no mental,

emotional, or any psychiatric disability to interfere with safe driving. He then underscored the fact that the Applicant has appealed twice to the Licence Appeal Tribunal and on both occasions the Ministry's position has been confirmed. He then went on to summarize the Applicant's 22 driving infraction convictions, including speeding, careless driving, driving with no insurance, unsafe movements on the highway, driving under suspension and two collisions. He then noted that in the Applicant's last appeal, he showed his lack of insight into the problem. Mr. Biel noted that the Applicant's family doctor's reports were very sparse and the replies to the MTO at times were "one liners only". Mr. Biel explained that to drive safely one needs emotional stability and good judgment and that in this case the Applicant is a poor driver with lack of insight. He indicated that the Applicant is noncompliant and still has a significant medical psychiatric disorder.

At this point, questions from the Tribunal disclosed that the Applicant no longer uses marijuana and has not done so for the past 8 years. He has not taken any pills for pain control for 3½ years and is only on blood pressure medication. The Applicant admits to using alcohol every week, usually on weekends with friends. He is a non-smoker.

THE APPLICANT IN SUMMARY:

He stated that his doctor assures him that he is being discriminated against by the Ministry but that he will once again try for the doctor to provide further medical details.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The decision of the MTO to continue the suspension of the Applicant's licence is based on section 47(1) of the *Highway Traffic Act*.

This hearing was conducted electronically, making it difficult for the panel to assess the Applicant's current mental status without actually conversing with him in person. As well, not only is the Ministry unable to accurately assess the current medical/mental status of the Applicant, no updated information has been provided at today's Tribunal hearing. The Applicant's doctor has not explained why Lithium has been discontinued.

The Applicant has twice previously appealed to the Tribunal to have his driving privilege reinstated and on both occasions the position of the Ministry has been confirmed. The Applicant has provided no further convincing evidence of a satisfactory mental status and at the same time has again displayed lack of insight into his problem and a tendency to noncompliance (e.g. driving while licence is suspended).

The Registrar today has provided:

(1) a detailed review of the Applicant's driving offenses,

(2) clear evidence that the Applicant has been unable or unwilling to comply with the Ministry's repeated requests for further information (no further details for 5 years), and
(3) sufficient evidence of mental health issues to support the suspension.

Nothing has been presented today by the Applicant to convince the Tribunal that he no longer suffers from a mental, emotional and medical disability likely to significantly interfere with his driving safely.

DECISION:

Upon the application by the Applicant to appeal the Ministry's current position of the Applicant's licence suspension pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

It is the decision of the Tribunal pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

_____
Dr. David W. Hurst, presiding Member

RELEASED: *August 25, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6155-MED

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID HURST, M.D., Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 5, 2010 Toronto

ORDER

At the outset of the hearing, the Agent for the Registrar informed the Tribunal that based on medical evidence received the previous afternoon, the Applicant's licence had been reinstated earlier in the day. As there is no longer a suspension to be appealed, the proceedings before the Tribunal are concluded and the matter is closed.

LICENCE APPEAL TRIBUNAL

David Hurst, M.D., Member

RELEASED: August 5, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6142-MED-PERC-Perceptual Problems

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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., Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: July 27, 2010 Toronto

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* (the "Act").

FACTS

The Registrar's Evidence

Psychiatrist Dr. L. sent a Medical Condition Report to the Ministry of Transportation ("MTO") on November 19, 2007, in which she reported that the Applicant suffered from the medical condition of Dementia or Alzheimer's Disease. The doctor elaborated as follows:

> Mr. X <the Applicant> has had a diagnosis of mild cognitive impairment and has been functioning well. However, with significant stressors in recent months he has started to deteriorate.

> On the TRAILS B test his score is significantly impaired. The level of impairment he shows is predictive of driving problems. The history of his driving that we have received recently, (from sources other than the patient), suggest that he is having difficulties with driving. I am advising that he have an on-road test. In the interim he has been advised to refrain from driving.

When MTO received this report, it was decided that the Applicant's driving privilege should be suspended.

The Applicant saw neurologist Dr. T. #1, who sent a consultation report to the Applicant's family physician, Dr. T. #2, on January 25, 2008. In the early part of this report, the doctor commented that there had been some concerns about cognition over the past couple of years. The doctor found the neurological examination to be essentially normal. The doctor wrote, in conclusion, that the main issue was the patient's cognitive status and noted that he intended to arrange for a cognitive assessment.

A Cognitive Evaluation was carried out at a hospital out-patient department by Occupational Therapist Mr. M. on April 18 and 23, 2008. In conclusion, it was written:

> Evidence of cognitive impairment represents a potential challenge to this gentleman's driving capacity. A formal driving evaluation is recommended.

Driving evaluation testing was carried out on July 31, 2008. In the report, it was written that the assessors felt the Applicant's performance in the on-road assessment was inadequate to safely and independently operate a motor vehicle. It was recommended that the Applicant take 12 hours of in-vehicle driver improvement sessions.

An MRI test of the brain was carried out on the Applicant on September 13, 2008. The "Impression" section of the medical report states:

> Nil acute MR brain

A consultation examination was carried out on the Applicant on March 16, 2009, at a Geriatric Centre by Dr. P. In the report, the doctor reviewed the medical history of the Applicant and described the examination. The doctor decided to change some of the medications of the Applicant, and under "Impression" concluded that she was not convinced the Applicant had a true diagnosis of dementia.

The Applicant attended another driver assessment on October 30, 2009. The following was written, in conclusion:

> Mr. X's <the Applicant> driving errors were outside the range of normal, healthy drivers and beyond reasonable road safety as defined through research. Driving cessation is strongly recommended.

Dr. R. examined the Applicant and sent a report to MTO on May 21, 2010, writing as follows:

> Mr. X <the Applicant> don't have any cognitive deficit or psychiatric disorder which limits his ability to drive a car in his NEIGHBOURHOOD.
>
> (*sic*)

The Applicant's Evidence

When the Applicant was asked what he wanted to say for the record, he was articulate and fluent, yet somewhat rambling. From this and from what he had written, it was clear that he has had a distinguished career in the Canadian Armed Forces during and after World War II, rising to the rank of Major. He has been a member of the Canadian Legion for over 65 years.

The Applicant has been driving cars for many years and considers that he drives as well as anyone else. If he was to regain his driver's licence, he would not drive after twilight and not in densely congested areas. When he was being evaluated at one of the driving centres, there was some concern that he was using both feet for the brake and the gas pedal instead of only one. He stated he was used to doing this for many years and he finds no difficulty with doing this. He also stated that his eyesight and hearing are fine.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
>
> (b) a driver's licence; or
>
> (c) a CVOR certificate,
>
> on the grounds of,

(d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

(e) conviction of the holder for an offence referred to in subsection 210(1) or (2);

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

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

Section 50 of the Act states:

50 (1) Every person aggrieved by a decision of the Minister 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.

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

APPLICATION OF THE LAW TO FACTS

The Tribunal sympathizes with the Applicant's wish to be able to return to driving.

The Tribunal notes that the diagnosis of "Dementia or Alzheimer's" or "Cognitive Impairment" has been made on several documents, namely those of Dr. L. (November 19, 2007), Dr. T. #1 (January 25, 2008) and Mr. M. (May 2, 2008). On the other hand, somewhat inconclusive opinions were expressed by Dr. P. (March 16, 2009) and Dr. R. (May 21, 2010). Nevertheless, the Tribunal is aware that individuals suffering from these conditions may be safe drivers, while others may not.

The Tribunal notes that the Applicant had driving evaluations carried out at two centres. At the first one (July 31, 2008), the report read:

> Mr. X's <the Applicant> performance in the on-road assessment was inadequate to safely and independently operate a vehicle.

At the second centre (October 30, 2009), the final report read:

> Driving cessation is strongly recommended.

In view of the recommendations and opinions of the two driving assessment centres, the Tribunal has decided that the decision of the Registrar should be upheld.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective December 15, 2008, 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., Member

RELEASED: August 11, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6140-MED-NEUR-Neurological

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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 representing the Registrar of Motor Vehicles

DATE OF HEARING: July 27, 2010 Toronto

DECISION AND REASONS

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

FACTS

Registrar's Evidence

Dr. S, (Psychiatrist) sent a Medical Condition Report to the Ministry of Transportation (MTO) on July 23, 2009 in which she reported that the Applicant suffered from the medical condition of Stroke/TIA or head injury, "which may make it dangerous for the person to operate a motor vehicle". The doctor further elaborated as follows:

> Fell down a flight of stairs resulting in brain injury with cognitive deficits.

When the MTO received this report it was decided that the Applicant's driving privilege should be suspended.

The Applicant's family physician, Dr. M, sent a report to the MTO, dated June 1, 2010 in which he wrote the following, (not all legible):

> I saw X (the Applicant) on April 18, 2010. She had some residual right-sided weakness but was? well on her own and walking?.Her BP was 140/100. She states no longer?. I felt she was fit enough to go for road testing to assess her ability to return to driving.

The MTO wrote to the Applicant on July 6, 2010 informing her that a satisfactory driving evaluation from a rehabilitation centre was required.

In the Certified Driver Record for the Applicant, dated July 2, 2010, there are no convictions, discharges or other actions. The Current Demerit Points are zero.

Applicant's Evidence

The Applicant stated that she fell down some stairs in April 2009 and was taken into a hospital and was seen and examined by a doctor for about five minutes and then put into a rehabilitation hospital, which she felt she did not need.

On questioning, she said that she was in this rehabilitation hospital from the time she was admitted in April until July 1, 2009, that is over two months. She was asked whether she had made a request to her physician for arrangements to be made for a driving test, and she said that she had not.

She said that when she went home from the hospital she was driving her car, (until she was not allowed), just as well as before, and had no problems. She has a "Five Star" rating for driving from her Insurance Company. She lives 18 Kms from the nearest town and badly needs to drive, since she has to rely on kind friends and neighbours for getting her groceries etc, and the friends and neighbours are not always available, and also she does not like bothering them.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Tribunal recognises that the Applicant has an excellent driving record and that she has the strong feeling that she can drive as well now as she used to before she fell down a flight of stairs.

The Tribunal notes that, after she presented to the hospital in April 2009, after falling, she was required to stay over two months in a rehabilitation hospital. The Tribunal also notes that in Dr. M's report of June 1, 2010, he wrote that there was "some residual right sided weakness." Also noted is that the MTO has informed the Applicant that a satisfactory driving evaluation is required, but that this has not been done.

The Tribunal considers that a satisfactory assessment from a neurologist and a satisfactory driving evaluation from a rehabilitation centre are of great importance before consideration can 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 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 confirmed.

LICENCE APPEAL TRIBUNAL

Patrick Coffey, M.D., Presiding Member

RELEASED: *August 11, 2010*

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

`Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6138-MED-SEIZ-Seizures

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: SISTER OF APPLICANT Agent for Applicant

VICTORIA BEDROSSIAN, Respondent
Representative for the Minister

DATE OF HEARING: August 4, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

An interpreter was sworn on behalf of the Applicant. The Applicant was represented by his sister.

FACTS

The Respondent's Case:

A letter dated March 20, 2010 was sent to the family physician, Dr. S. and copied to the Registrar, by a neurologist, Dr. M. pursuant to Section 203 of the Act.

> Thank you very much for referring this gentleman to see me.
>
> He is a truck driver who has had a couple of seizures, one six years ago and one in December.

> On both occasions he had been at parties and had drunk a little bit too much alcohol.
>
> He has never had seizures before these two.
>
> He drinks two or three glasses of whiskey per night.
>
> His CT scan of the head is normal.
>
> I am getting an MRI of the brain as well as an MR angiogram because his seizures are preceded by headache.
>
> Physical Examination: on examination cranial v=nerves are normal. Motor examination is normal. Sensory examination is normal Reflexes are equal and symmetric. Cerebellar examination is normal.
>
> I told him and his wife that in this country as in the United States where he used to work just before moving here he cannot be a truck driver nor even drive a car if he is seizing and he should completely stop drinking if he wants to be a truck driver because there is no way he would be allowed to drive a truck if he is someone who occasionally seizes following drinking.
>
> His wife and he swear that he will stop drinking but unfortunately we have to report him to the Ministry of Transportation which I am doing with this letter.
>
> I hope over time that his promise of not drinking will actually be real in which case he should be able to drive even a truck considering that he seizes so very infrequently and that invariably it is a bit too much alcohol that drives his seizures.
>
> I will write to you again after the MRI and the EEG.

On May 25, 2010 the Registrar informed the Applicant that his driving privilege was suspended under Section 47(1) of the *Highway Traffic Act* due to:

> Seizure(s) – Alcohol Related

The Registrar further informed the Applicant that In order to be considered for reinstatement he must arrange for an up-to-date report that includes the results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other medical concerns that may impact his ability to safely operate a motor vehicle. An Alcohol Assessment Form must also be completed. If his physician confirms a diagnosis of alcohol dependence and/or that he has experienced an alcohol withdrawal or alcohol related seizure, the assessment must confirm that he has remained both seizure free and abstinent form alcohol for a period of one year. A clinical explanation must be provided for the results of any bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

An Alcohol Assessment Form was completed on June 16, 2010 by the Applicant's family physician, who has known him since October 2006.

Health History:

Seizures ? questionable

According to patient, he never had seizures. On December 22, 2009 he took three drinks (usually takes 1-2 on weekend). And drink was mixed and after 3 drinks, he does not know what happened, probably he lost consciousness. However there was no convulsion
Investigations, i.e. MRI & EEG results are not here (waiting).

Physical Assessment:

Blood pressure, liver exam, Neurological Exam: Normal

MCV, GGT, AST ALT: all within normal range.

History of Use;

First use: 23 years
First intoxication; He states that he was never intoxicated but on December 22, 2009 he took 3 drinks & drink was mixed and that is when the incident occurred.
Normally uses 2 drinks
Largest period of absence in last 2 years. Never drinks regularly
Age of first regular use: only on weekend
Frequency of Use; On weekend
Most recent use; April 20, 2010
Date of Reduction or Absence: April 20, 2010

Treatment:

Never used Alcohol on regular basis.
No previous treatment
No period of abstinence following treatment
12 Step Program not used
No participation in Relapse Prevention

Audit:

Two or four drinks a month
Has 1-2 drinks when drinking
Never five or more drinks on one occasion
Never has been unable to stop drinking once started
Never in the past year has been unable to do what was expected
Never in the past year has needed a first drink in the morning to get started.
Never In the past year had a feeling of guilt or remorse after drinking
Never in the past year has been unable to remember what happened the night before because of drinking
Never has or someone else been injured as a result of his drinking
Never has a relative or friend or other health worker been concerned about his drinking or suggested that he cut down.

Total Audit Score: 3

Diagnosis:

> Does not drink regularly
> Has already stopped even on weekend
> Stopped 2010/04/06
>
> Laboratory results dated June 4, 2010: MCV, GGT, ALT, AST all within normal range.
> CT of Head dated December 27, 2009: normal
> EEG dated March 26, 2010; Normal

A letter dated June 18, 2010 signed by the neurologist, Dr. M. received by the Registrar stated:

> This gentleman has now had his EEG and it is completely normal.
>
> As you know his CT scan of the head is also normal.
>
> Given these results, I can say now that he does not have epilepsy.
>
> As you know he had alcohol-related seizures and his family doctor is documenting that aspect. My own impression is that he has learned an important lesson in drinking. I do not expect this is a problem anymore.

MAC CASE SUMMARY: dated July 14, 2010-08-05

> Medical Advisory Committee: Request an assessment from a physician specializing in Addictions Medicine. The report must provide a complete medical assessment and a full alcohol use history. Furthermore the report must indicate if the disease of alcoholism is present, and if so what is the recommended form of treatment. The report must also include an interpretation of bio-chemical markers (MCV, GGT, ALT & AST) with a clinical explanation for any level outside the normal laboratory range. Report to comment on driver two seizures alcohol related.
>
> Reasons: MAC notes discrepancy in amount of alcohol consumed. Treating physician states 1-2 drinks per weekend and neurologist states 2-3 drinks of whiskey per night. Driver has had two seizures both alcohol related. Despite the serious medical consequences the driver continues to consume alcohol above minimal risk level (2-3 drinks per night). Request assessment from an addictionist.

The Registrar informed the Applicant on July 18, 2010 of these requirements.

The Applicant's Case**:**

The Applicant through his interpreter stated that he was employed as a long distance truck driver with a co-driver driving regularly to the U.S. On the night of December 22, 2009 he was not working and he had one beer at his home and then had a drink of rum at a relative's house nearby.

He awoke next morning with a severe headache and the next day went to his family doctor with his wife. He did not have a seizure, did not bite his tongue or wet himself. He did not lose consciousness. A physical examination was not performed. Dr. S. referred him to a neurologist whom he saw in March. He was accompanied to the appointment by his wife who spoke in English to the neurologist. He states that the information on the neurologist's report of March 22, 2010 was based on what his wife told the doctor.

He informed the Tribunal that he had an arranged marriage and that his wife arrived from abroad about six months previously and wished to end the marriage, claiming that he was not educated enough for her. He states that she told the neurologist that he had a previous seizure and that he had a drinking problem. Later he learned that she claimed that he was an alcoholic and that she was preparing a case for divorce and for the Immigration authorities. She moved out of the house on June 22, 2010 and returned on July 9 with a police officer to collect her belongings. He provided the police occurrence number to the Tribunal.

He states that he never had a seizure in the past and that he did not have a seizure on the December 2009 occasion. He began to consume alcohol six years previously. The quantity of alcohol as stated on the neurologist's report was stated incorrectly based on misinformation provided by his wife. He does not drink 2-3 glasses per night as stated by the neurologist because he has to work next day. On the second visit to the neurologist in June 2010 he was accompanied by his sister and was then made aware of the contents of the letter of March 20, 2010. His sister informed the neurologist that the information given by the wife in March was incorrect but he (the neurologist) did not wish to be involved in the domestic situation.

He gave the family doctor his history of alcohol use as stated in the Alcohol Assessment Form. He stopped drinking completely in the first week of April 2010 on the advice of both doctors. He is currently employed in a non-driving capacity by a different employer until he regains his licence.

His sister, who also acted as agent at the hearing, was sworn as a witness. She informed the Tribunal that the Applicant has lived in the basement of her house prior to and during the marriage and still lives there. She has not observed excessive drinking by him in the past and she would know if he continues to drink. She corroborated his statement that he stopped drinking in April.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. The information provided by the neurologist's letter of March 2010, pursuant to Section 203 of the Act, reporting a history of seizures related to alcohol use on December 22, 2010 and also in the past. This was sufficient reason for the Registrar to issue a suspension under section 47(1) of the Act

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2. Discrepancy between the quantity of alcohol used as stated by the neurologist and in the Alcohol Assessment Form suggesting under-reporting by the Applicant. Section 14 of regulation 340/94 justified continuation of the suspension based on the history of previous seizure related to alcohol as reported in the neurologist's letter of March 2010.

3. The Medical Advisory Committee recommended continuation of the suspension pending receipt of a report from an addictionist.

4. It would be irresponsible to re-instate the Applicant's driving privilege without new evidence of absence of seizures and abstinence from alcohol for a period of one year or upon a recommendation by an addictionist.

The Applicant relies on:

1. Normal CT scan, MRI scan, EEG, bio-chemical markers that failed to show evidence of epilepsy or continuing alcohol use.

2. Misleading information given by his wife, now estranged, to the neurologist during the consultation in March 2010. This information formed the basis for the neurologist's report to the Ministry.

3. Corroboration by his sister with whom he lives that he does not have a history of alcohol misuse or seizures and that he has stopped drinking completely since April 2010 on medical advice.

4. The neurologist in his report on June 18, 2010 is supportive that the Applicant does not have a condition that may significantly interfere with his ability to safely operate a motor vehicle.

The Tribunal finds:

1. The Registrar was justified on issuing a suspension of the Applicant's driving privilege under section 47(1) on June 4, 2010 upon receipt of a letter by a neurologist dated March 20, 2010 pursuant to section 203 of the Act.

2. Based on the negative results of CT and MRI scans, EEG, and bio-chemical markers there is no evidence of epilepsy as confirmed by the neurologist's report of June 18,2010.

3. Due in part to the language barrier between the Applicant and the neurologist, and also to a suspicion of misleading information given to the neurologist by the wife of the Applicant, now estranged, the information upon which the section 203 report was made is not reliable.

4. Evidence by the sister of the Applicant, with whom he lives since prior to the incident of December 22, 2009, is credible.

5. The Applicant does not have a medical condition that may significantly interfere with his ability to safely operate a motor vehicle.

DECISION

Upon the application by the Applicant to appeal the decision dated June 4, 2010 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 set aside.

LICENCE APPEAL TRIBUNAL

_____

Dr. Kevin Flynn, Presiding Member

RELEASED: August 6, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6129-MED-NEUR-Neurological

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID W. HURST, M.D., Presiding Member

APPEARANCES: DON CARMICHAEL, Agent representing the Applicant

KYLE BIEL, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: August 3, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

Because of traffic problems the Applicant arrived a few minutes late and we had already begun the hearing and took a few minutes to inform the Applicant of how the presentation had proceeded.

FACTS

The Applicant is 74 years old, living in retirement in a remote area.

Two years ago his wife unfortunately died leading to some reactive depression for which his family doctor prescribed two psychotropic drugs – Zyprexa and Prozac.

The Applicant began to realize that he was not feeling mentally as alert as he used to be and went to see a geriatrician, Dr H.D. to try to determine the cause. This consultant questioned the need for the above mentioned drugs which were discontinued. His initial Medical Condition Report dated February 24, 2009, mentioned dementia or Alzheimer's disease in the tick off column.

On March 11, 2009, the Ministry of Transportation ("MTO" or the "Ministry") wrote to the Applicant indicating their receipt of the report stating that he suffered from a medical condition which could impair his ability to safely operate a motor vehicle. The Ministry asked that the Applicant arrange to send an up-to-date detailed assessment from a physician familiar with his medical history, a neurologist, or a physician specializing in geriatric medicine. They said this report would evaluate his cognitive functions and confirm that there are no other disqualifying medical concerns. Once this report had been reviewed and approved by the Ministry, the Applicant might be required also to undergo a driving evaluation at a rehabilitation centre.

In August of 2009, Dr. H.D. wrote to the MTO stating that he initially suspected the presence of early Alzheimer's disease and felt that a driving test was warranted to sort out the problem. The Applicant was described as 70 years of age and a retired boxer. There had been a previous myocardial infarction and also depression.

His current medications include:

Lipitor, Aspirin, Eltroxin, Altace, Proscar, Prevacid, Metoprolol and Aricept

He mentioned the previous use of Zyprexa and Prozac and felt that they were negatively influencing his cognition. It caused increased sedation and drowsiness. The doctor stated that since February these two drugs had been stopped and the Applicant was doing "exceedingly well". At the same time he was continued on Aricept, which is a cognitive enhancer, taking 10mg a day.

The Applicant's initial mini-mental status examination showed a score of 24/30 in February. This doctor reassessed him three more times and his most recent mini-mental status score was 27/30. He did have difficulty with the date, the day of the week and on delayed recall, he could remember two or three words. While stating that he was pleased with his patient's progress he felt that the best way to determine his fitness to drive a motor vehicle would be a driving evaluation. The prices for various driving rehab services were provided to him. He found that the Applicant would rather avoid the $600.00 charge and preferred to be examined by the Ministry. This doctor stated that he would leave this decision up to the Ministry.

On September 9, 2009, the MTO corresponded with the Applicant once again stating that they would require a satisfactory driving evaluation from a rehabilitation centre.

On November 4, 2009, the Applicant replied to the Ministry refusing a driving evaluation test. Herein he described his management by his geriatrician and pointed out that after

eliminating the unnecessary medications (Zyprexa and Prozac) and with the dramatic improvement in his cognitive ability, that the geriatrician felt he should have his driver's licence returned.

The Applicant went on to describe his vigorous fitness program with daily 3 mile runs and bicycling. He also stressed the excellence of his driving record.

On March 1, 2010, the MTO again wrote to the Applicant stating that they required a satisfactory driving evaluation from a rehabilitation centre.

Mr. Biel drew attention to Dr. H.D's report (geriatrician) dated August 6, 2009, stating that the best way to determine the Applicant's fitness to drive would be a driving evaluation.

On March 22, 2010, the Ministry again wrote to the Applicant stating that to determine whether he can safely operate a motor vehicle he must have a satisfactory driving evaluation from a rehabilitation centre.

Mr. Biel completed the Ministry's presentation drawing attention to pertinent sections of the *Highway Traffic Act* and the deliberations of the CCMTA. He pointed out that these standards allow licensing where memory impairment or mild dementia is present if the driver's evaluation test is satisfactory.

The Applicant's Case
(Presented by his Agent – Mr. Carmichael)

The Applicant indicated that he had no questions and stated that he understood the position of the MTO. He then presented documents pertaining to his problems, listed as Exhibit #3. The initial page of these documents explained the reason for the Applicant's appeal. His licence suspension was dated March 11, 2009.

He stated that he felt unfairly penalized and his problems began when he was prescribed two psychotropic drugs for his reactive depression by his family doctor. The Applicant stated that he had voluntarily gone to a geriatric specialist, Dr. H.D., and with the elimination of these two drugs (Zyprexa and Prozac) there was a dramatic improvement in his cognitive ability. This was documented in a letter by Dr. H.D.

The Applicant then sought help from a consulting neurologist Dr. D.K. This specialist concurred with the geriatrician's findings of the dramatic improvement in cognitive function when the above mentioned two drugs were discontinued. He found that there was no dementia but a mild case of cognitive impairment was considered possible.

The Applicant went on to explain that on his very limited pension income he could not afford the fee for a Driver's Evaluation Test.

At this point questions by the Tribunal disclosed that the Applicant had suffered some

degree of depression with the unfortunate loss of his wife two years previously. He described how the drugs made him “stupid”, sleepy, and that he could not think well and he noticed his diminished mental capacity. He said that his family doctor had sent him to the geriatrician and that his depression has now pretty well subsided and his mental capacity has increased markedly since discontinuing the two drugs.

The Applicant described his driving record since the age of 16 including multiple tickets for minor speeding offences but none in his later years. He says that he has no demerit points on his licence.

Mr. Biel for the Ministry in Cross-Examination

On questioning he reviewed the fact that the Applicant’s family doctor had sent him to the geriatrician and that his family doctor is still looking after him. The Applicant said he is seeing his family doctor once a year, but could not clearly explain how his renewal of prescriptions was handled. He did comment that Mr. Carmichael was able to look after this problem for him.

Further questioning by Mr. Biel disclosed that the Applicant had become somewhat at odds with his geriatrician, and that he lost patience with him. The doctor said things about the Applicant that he did not consider to be accurate. He indicated that the geriatrician had recommended pills that made him confused and he thought these two suspect drugs were only discontinued on the second visit. There appears to be confusion in his testimony here. On further questioning by the Agent the Applicant stated that during his August visit with the geriatrician he did not recommend a driving test. It was pointed out by Mr. Biel that he had given the Applicant a list of centers where he could obtain the driving test and there was a discussion about cost. Questioning of the Applicant disclosed that he was not at all in favour of a driving evaluation test as requested by the geriatrician. He knew with certainty that he is safe to drive. Mr. Biel then pointed out that the geriatrician very clearly wanted the Applicant to have a driver evaluation test. The reason for this could not be explained by the Applicant. When asked directly why the Applicant was refusing to comply with this request for a driving evaluation he simply stated that it was because of the high cost. He was then given the hypothetical situation wherein the test could be done with no charge and the Applicant said no because of the time delay. He did concede that if he could have the driving test with no charge today or tomorrow he would agree to that.

The Applicant was then questioned about his boxing career with the possibility that there might have been brain injuries. While conceding that he did have blows to the head the Applicant said that had never been knocked down. The Applicant stated that his geriatrician did not incriminate his boxing career as a possible initiating factor in his cognitive difficulties.

Mr. Biel in Summary

He quoted from the *Highway Traffic Act* the criteria for suspension under the section 47(1) G, items 1 and 1a. He underlined the fact that the geriatrician had felt he should report this matter to the MTO. He quoted regulation 340/94 of the *Highway Traffic Act* in particular section 14(a) which states that to hold a licence the driver must not suffer from any mental, emotional or physical condition impairing his driving ability, and any report indicative of such problems mandates suspension.

Mr. Biel described the first Medical Condition Report ticked positive for dementia/Alzheimer's disease.

Attention was drawn to the geriatrician's report of August 2009, indicating improvement but that he still felt a driving evaluation was required. Mr. Biel pointed out that it is now one year since the doctor's last report and no driving evaluation has been done. He referred to Dr. K's report which gives very sparse information and no opinion regarding the need for a driving evaluation test. Mr. Biel did indicate that mild cognitive impairment was not incompatible with the driving privilege. He observed that the geriatrician Dr. H.D. still states that an evaluation test would be very helpful. He also underlined that with mild cognitive impairment or mild dementia a Driver's Evaluation Test is required by the Ministry. Mr. Biel informed the Tribunal that the stumbling block in any re-licencing of the Applicant is simply his reluctance to undergo a driving evaluation test said to be due to the high cost. With this comment he indicated the Applicant is not proactive in trying to find a suitable place to have this driving evaluation at possibly a lesser cost. He closed his summary by pointing out that Dr. K. mentioned the possibility of mild dementia, difficulty with memory, but also that there had been cognitive improvement. A Driver's Evaluation Test would be extremely valuable in helping to solve these difficulties.

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

APPLICATION OF THE LAW TO FACTS

The decision of the MTO to suspend the Applicant's licence is based on section 47(1) of the *Highway Traffic Act*.

It is clear today that the Applicant suffered a reactive depression with the unfortunate loss of his wife and also it seems likely that his family doctor's prescription of two psychotropic drugs (Zyprexa and Prozac) led to drowsiness and reduction of cognitive function.

His improvement with the cessation of these two drugs has been extremely satisfactory as noted by his geriatrician and also by a neurologist. The doctors, however, have not clearly stated in writing that the Applicant should automatically have his driving privilege restored. They have avoided such comment by indicating that a Driver's Evaluation Test

would resolve any lingering questions. The Applicant's presentation today as a witness was quite satisfactory. He is alert, pleasant and co-operative and shows a clear understanding of the issues involved. He appeared a little confused at times on cross-examination by Mr. Biel, but not in any critical way.

The Applicant's resistance to the repeated request by the Ministry for a Driver's Evaluation Test raises concern for this Tribunal. He simply states that he cannot afford the cost but was cautious of detailed questioning by Mr. Biel with little enthusiasm for taking the test if it were free. The Applicant's persistent reluctance to make any effort to comply with this request raises concerns. It may be that he suspects that he may not do very well.

It is noteworthy that both of the medical consultants have not stated categorically that the Applicant is fit to drive safely at the present time. They indicated that a Driver's Evaluation Test could help to clarify situation. These facts cause concern to this Tribunal which concurs that a Driver's Evaluation Test is necessary in order to eliminate any lingering doubts about the restoration of the Applicant's driving privilege.

The Tribunal notes that the MTO has dropped its request for up-to-dated medical reports. Its insistence on a driver evaluation test is reasonable.

DECISION

Upon the application by the Applicant to appeal the decision effective March 21, 2009 of the Registrar of Motor's Vehicles (the "Respondent") to suspend the driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

It is the decision of the Tribunal pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Dr. David W. Hurst, Presiding Member

RELEASED: August 11, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6120-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID W. HURST, M.D., Presiding Member

APPEARANCES: MIKE PACZEK, Paralegal, representing the Applicant

VICTORIAN BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 25, 2010 Toronto

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* (the "Act").

FACTS

The Registrar's Evidence

The Applicant is a 35 year old butcher. His licensing problems began on the evening of January 21st, 2010. His wife came home to find him in an alcoholic stupor/coma and a 911 call resulted in him being transferred to hospital. This generated a Medical Condition Report signed by Dr. N.S. and the information provided was a tick mark in the box for alcohol dependence. This report was forwarded to the MTO who wrote to the Applicant on January 22nd, 2010 indicating their receipt of a report stating that he had a condition which impairs his ability to safely operate a motor vehicle. It described the Applicant as suffering from alcohol dependence under section 47(1) of the *Highway Traffic Act*, which required the suspension. In this letter the MTO offered to reconsider the Applicant's case for reinstatement upon receipt of information satisfactory to the Registrar. The Applicant was told to arrange for the MTO to receive a detailed up-to-

date report from his doctor which would include:

1: The results of investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.

2: Completion of the enclosed Substance Abuse Assessment Form by his treatment physician or a physician specializing in addiction medicine.

3: A clinical explanation to be provided for the results of any biochemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

On the 4th of February, 2010 the Substance Abuse Assessment Form was completed by Dr J.R. in combination with the Applicant and then returned to the Ministry, and of course, it is a very detailed and searching document.

Summary of the findings is as follows:

1: Heath History: Psychiatric disorders and hospitalization within the last 12 months are noted.

2: Medical: Admitted to a regional hospital on January 21st, 2010 for alcohol induced coma and discharged 5 hours later. Depression was noted and Cipralex prescribed and used for 6 months.

The remainder of the medical examination was unremarkable. The age when the applicant first used of alcohol was 20 years old and first regular use was from the age of 27 when he was drinking every second day, consuming 8oz of Rye on each occasion. On the date of this coma he had consumed 26oz.

3: Treatment: The Applicant did not receive medical treatment but the Applicant was currently attending the AA on a regular basis. He was scheduled to start a rehab program through his place of employment.

4: Audit - Alcohol Use Disorders Identification Test: In summary this detailed part of the questionnaire displayed some very alarming findings. He was consuming 8 or more ounces on a typical drinking day (every 2 days), showed remorse after drinking about once a week, had suffered one black out (loss of memory of the previous evening's activity), and medical workers were advising him to cut down.

5: Diagnosis: Misuse

6: Recommendations: Abstain, and recommended course of rehabilitation and continuing with the AA.

Biochemical markers included with this part of the presentation showed no abnormalities of the critical liver function tests.

On March 11th, 2010 the MTO wrote to the Applicant acknowledging their receipt of the Substance Abuse Form and stated that it would be necessary for the Applicant to file an assessment from a physician familiar with his medical history, or a psychiatrist. They asked for a complete psychiatric history, provide a diagnosis, current treatment, date of hospitalization(s) (if any), including a discharge summary if any. It would also make reference to the following: details of compliance and frequency/rapidity of decompensation, signs of impaired judgment, reduced concentration, reckless/aggressive behaviour and any sedation or psychomotor retardation due to medication. Information of mental/emotional stability and current level of function was also required. They said that after receipt of such an assessment they would consider him for reinstatement.

On April 29th, 2010 Dr. J.R. (family physician) wrote to the Ministry indicating his understanding that it was now necessary to file an assessment in light of the Substance Abuse Form dated February 4th, 2010. The doctor included a diagnosis of depression with anxiety and the current treatment was counselling, with a prescription of Cipralex 20mg once daily. He described the Applicant's visit to the local emergency department on January 21st, 2010 for 5 hours due to an alcohol induced coma. He described that the Applicant was a confessed alcoholic but stated that he had not had any alcohol since the emergency room visit. He indicated that the Applicant had no psychomotor retardation due to medication, no reckless/aggressive behaviour, no sedation from medication, no reduced concentration, no signs of impaired judgment, and no signs of non-compliance, (e.g. he takes his medication properly, he has stopped drinking alcohol and he attends AA three times a week).

He described the Applicant as mentally and emotionally stable. He is active around the house and has a full time job with no work issues at all. He asked that the Ministry please consider this case for reinstatement.

The Medical Advisory Committee of the MTO reviewed a report on the Applicant that they had received on the 3rd of May 2010 regarding substance abuse. They advised that he remain suspended but will reconsider reinstatement after a report from the driver's treatment physician or a physician specializing in addictions medicine confirming one year abstinence from alcohol supported by biochemical markers. Earlier re-licensing could be considered upon favourable recommendation from a physician specializing in addiction medicine and the successful completion of an alcohol treatment program.

They describe the driver as a self-reported alcoholic who claims cessation of alcohol since his hospitalization in January 2010 for alcohol induced coma. The MAC asked for a longer period of stability pointing out that the driver has not successfully completed a substance abuse treatment program.

Again on June 3rd, 2010 the MTO wrote to the Applicant noting that the MAC had decided that his driving privilege should remain under suspension. Again they asked that he file a satisfactory medical report with all of the usual details requested.

In this letter they specifically pointed out that re-licensing could be considered upon favourable recommendation from a physician specializing in addiction medicine and successful completion of an alcohol treatment program.

On June 23rd, 2010 Dr. J.R. (Applicant's family physician) wrote to the Ministry that he had reviewed the Applicant several times since he lost his licence. He described his attendance with the AA three times a week and abstinence from alcohol for six months. Appropriate blood tests (markers for liver function) confirm his abstinence from alcohol and enclosed current reports. The doctor would not consider the Applicant to be a danger on the road and felt that his licence should be reinstated. He said the Applicant does not need to see an addiction specialist because "he was only addicted to alcohol" and was then attending the AA three times a week.

On August 5th, 2010 the MTO wrote to the Applicant stating that his driving privilege would remain under suspension. Again they asked for a detailed up-to-date report from his treatment physician or one specializing in addiction medicine, and confirmation of one year of abstinence from alcohol supported by biochemical markers.

The Agent then entered a certified copy of the Applicant's driving record showing two entries for minor events including the medical suspension and two current demerit points.

The Agent completed her presentation by reviewing current sections of the 2008 annotated Ontario *Highway Traffic Act*, section 47(1) (g) and O. Reg. – 340/94,14(b), and also pertinent sections of the CCMTA including section 13.2 regarding alcohol dependency.

<u>The Applicant's Evidence</u>

Mr. Paczek's only question showed that the only document received by the MTO which pertained to these licensing problems was the single medical condition report of the events of January 21st, 2010 with alcohol induced coma.

Mr Paczek introduced the Applicant as his witness who then described the events of the evening of January 21st, 2010. He described his day off; his wife was still at work and he consumed 750ml of rye whisky over an eight hour period.

His wife came home, found him in coma and had him transferred to hospital. The Applicant explained that he had never done anything like this before and has never passed out while drinking. He described being apparently held at the hospital for 5 hours and then released with no instructions, medications, or follow up plans. He did state that he could not recall the events of that visit.

The Applicant described his first visits to the AA two weeks after that evening of coma and stated that he is still a regular participant with the AA. He denied receiving any other professional treatment. He stated that he plans to remain with the AA as they explained to him that he had a problem with alcohol and he denies any further plans to drink again, he described the awful experience of losing his licence which opened his

eyes. He denied any problems with his marriage and said there were no issues at work. The Applicant explained that he is well aware that he has a problem and that he is getting help and that this will not happen again. He denied having any urge to drink now and said he has sponsors with AA that are ready to help immediately if such an event should occur.

At this time questioning from the Tribunal disclosed that the Applicant is 35 years old and began to drink when he was 20, and this would be once a week at social events and always rye whisky. He then drank 2 – 3 drinks in an evening up to the age of 28 and slowly increased this volume to 4 – 5 drinks an evening perhaps twice a week.

This progression became more serious and in his early 30's he was drinking more frequently particularly when he was having some problems in his social life. He admitted that by the time he had reached the age of 35 years he was indulging in 6 -8 drinks every day.

He explained that he has not had any alcohol since January 21st, 2010.

Questioning by Ms Bedrossian for the Ministry indicated that the Applicant had taken a brief course of counselling provided by his employer, of weekly sessions over 6 weeks. Questions also disclosed that the Applicant's family doctor was only aware of the drinking problem after the events of January 21st, 2010. The doctor had advised him to seek help from the AA. The doctor did not really advise him to go through a rehabilitation program, because of his conviction that the AA offered the best help. The Applicant also disclosed that he had had no withdrawal symptoms and there is no urge to drink now. The Applicant described his marriage of 3 years that was progressing well.

The Applicant was encouraged to discuss the frequent letters from the MTO and his understanding of their offer to reconsider his situation following the completion of a treatment program. He thought that he had full marks from the MTO because the markers pertaining to his liver function are all normal.

Questions from the Tribunal disclosed that the Applicant is not aware of any family history of serious alcohol abuse. He also indicated that his employer, through their local manager, is assisting him in changing his work schedule to enable him to travel by public transit to his job as a butcher.

MS BEDROSSIAN'S SUMMARY:

She described how the solitary medical condition report had triggered all of these events, that the Applicant is currently considered to be a threat to road safety. She stated that the MTO must have current reports of evidence that the Applicant has completed a rehab program and described that the Alcohol Assessment Report clearly indicated that the Applicant is a significant alcoholic. She noted that the MAC for the Ministry has advised continued suspension and wants evidence of 12 months of abstinence and a favourable report from appropriate doctors. She described Dr. J.R.'s

letter of June 23rd, 2010 indicating that this is a good letter but drew attention to his statement describing the Applicant's problem as "only alcoholism". The Agent stressed that the guidelines of the CCMTA and the HTA spell out very clearly the matter of a 12 month period of abstinence and the importance of completing a treatment program.

MR. PACZEK FOR THE APPLICANT IN SUMMARY:

He described the incident of coma on January 21st, 2010 as a one time event but admitted that the Alcohol Assessment Form was one of the worst reports he has ever seen. In the Applicant's case he noted that the doctor is expressing no concerns about the Applicant's current ability to drive safely. He described the Applicant as now being abstinent and being well aware of the importance of sobriety in order to work with the sharp cutting equipment as a butcher.

This Agent described the events of January 21st, as a wakeup call and the time when the Applicant "hit rock bottom". He explained that the Applicant is going regularly to the AA which gives him a good support system. His wife is a non-drinker and is very supportive. He stated that the Applicant while a self-confessed alcoholic, understands that this is a life long situation and he is prepared to deal with it.

The Agent pointed out that the Applicant has now been abstinent for seven or more months and urged the Tribunal to decide in the Applicant's favour today rather than adhering to the MTO's need for evidence of 12 months of abstinence, indicating that this is supported by the Applicant's doctor. He then reviewed the *Highway Traffic Act* where the statue states that the Applicant must not be addicted to alcohol to an extent likely to significantly interfere with safe driving. He indicated that there is no evidence shown here by the MTO that the Applicant is a risk. The Act uses the word "significantly".

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

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

(a) the plate portion of a permit as defined in Part II;

(b) a driver's licence; or

(c) a CVOR certificate,

on the grounds of,

(d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

(e) conviction of the holder for an offence referred to in subsection 210(1) or (2);

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

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

Section 50 of the Act states:

50 (1) Every person aggrieved by a decision of the Minister 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.

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

APPLICATION OF THE LAW TO FACTS

The MTO acted to suspend the Applicant's licence as a result of a solitary medical condition report signed by Dr. N.S. at a regional hospital where the Applicant was taken on January 21st, 2010 suffering from alcohol induced coma. The Applicant, a self-confessed alcoholic, has described in detail the development of his serious problem with alcohol starting at the age of 20 and progressing to these events in early 2010 when he had then developed a habit of consuming 1/3 to ½ a bottle a day of rye whisky.

With the suspension of his licence the Ministry wrote letters clearly indicating that he must demonstrate 12 months of abstinence and should undergo a rehabilitation program. Their position has been reinforced by the stand taken by the Medical Advisory Committee.

As his Agent has indicated the Applicant indeed hit bottom and heard the wakeup call as a result of his alcohol induced coma. It is clear that he has not used alcohol since then and his evidence is supported by repeated laboratory markers pertaining to his liver function. As well his family doctor indicates that the Applicant has things under control and advises that he is safe to drive now.

No evidence has been provided today to suggest that the Applicant comes from an

alcoholic background. His Agent has indicated that his client was perhaps immature and acting in poor judgment but it is clear he has concluded himself that he is addicted to alcohol, and it is to be a lifelong problem. This has resulted in a terrible upheaval in his life that he has quickly recognized.

It is admirable that there is now excellent evidence that the Applicant has been abstinent of alcohol for seven months. It is also important in these deliberations to recognize that the *Highway Traffic Act* and the CCMTA medical standards for drivers, very important documents, clearly address problems of addictions and how they affect a person's driving ability. These regulations assembled by highly qualified experts state that in the case of alcohol addiction the Applicant must provide well documented evidence that he has been abstinent for 12 months and preferably take the rehabilitation program, for even reconsideration to be carried out by the MTO. It is apparent to this Tribunal that the Applicant has indeed had a significant learning experience and is progressing very well in correcting the errors of his ways. Be that as it may, and recognizing his seven months of abstinence, the 12 month interval recommended by the above mentioned regulations, an interval decided upon for very significant reasons, should be supported not only in the interests of the Applicant's health but in the interests of highway safety.

DECISION

Upon the application by the Applicant to appeal the decision effective January 22nd, 2010 of the Registrar of Motor Vehicles (the "Respondent") to suspend his driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having considered the evidence filed with the Tribunal and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

_____

David W. Hurst, M.D., Member

RELEASED: August 31, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6027-MED-SEIZ-Seizures

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 6, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

The wife of the Applicant was present at the hearing.

FACTS

The Respondent's Case

A Medical Condition Report was filed with the ministry pursuant to section 203 of the Act by an Emergency Room physician, Dr. S. on March 21, 2010.
Condition: Seizures(s) – Cerebral

"Patient is aware of this report" was checked.

On March 24, 2010 the Registrar informed the Applicant by letter that it had been decided to suspend his driving privileges under section 47(1) of the Act.

In order to be considered for re-instatement he must arrange for the Ministry to receive a detailed up-to-date report from his doctor. The report must include the results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle. Also it must make reference to the reported seizure(s), including a narrative of his seizure history, cause and confirmation that he has remained seizure free and whether a diagnosis of epilepsy has been determined.

He was informed of his right to request an Administrative Review and of his right to appeal.

A copy of the E.R. report dated. March 21, 2010 was sent to the Tribunal on April 16, 2010.

It stated that the Applicant was admitted by ambulance at 02:32 with a history of generalised seizures during sleep, lasting approximately ten minutes and witnessed by his wife. This was followed by somnolence and confusion for about twenty minutes. There was a past history of two collapse episodes three to five years ago.

A CT scan of the head was normal, vital signs were normal, and physical examination was normal.

He was directed not to drive and a referral was made to a neurologist.

M.R.I. of the head on April 6, 2010 was reported normal

On April 30, 2010 the Registrar informed the Applicant that he was required to file an assessment from a physician familiar with his history or a neurologist. The assessment must summarize the results of all investigations including an EEG, treatment and probable cause of seizure(s). Reference must be made to current status and a narrative of this and any previous seizure history and confirmation if a diagnosis of epilepsy has been determined.

On July 15, 2010 the Ministry received a copy of a neurologist consultation report prepared by Dr. L. on May 26, 2010 to the Applicant's family physician, Dr. F

> (Applicant) was at home sleeping and around 2 a.m. his wife noted he was clenching his jaw and holding one arm with the other arm and had what appeared to be a convulsive type seizure. He was unresponsive. His wife called EMS. When they arrived he was awake.. He was not confused. There was no Todd's paresis or incontinence but he had bitten his tongue. He says the evening two nights before he had a little more alcohol than usual but not anything significant and was mildly inebriated. He awoke the next morning with a hangover and then worked all day around the house and was very fatigued by Saturday night and went to bed.
> That night he had not drank any alcohol. The next day he returned to his baseline and returned home from hospital.

> A CT scan was normal. An EKG was also normal. He denies a history of febrile seizure or head injury. denies any other problems from a full neurological and general review of systems.
>
> An EEG was done prior to his visit today. It shows what appears to be an area of focal interictal epileptiform activity over the left and right frontal leads, No seizures were recorded.
>
> In summary, this 45 year old gentlemen presents with a history of a generalized seizure overnight and abnormal EEG, consistent with a possible epileptic diathesis with localized spikes coming from the frontal temporal leads. This gentleman likely has localization related epilepsy. As a consequence, I have recommended he go on an anti-epileptic medication. We discussed the many different options and we decided on Lamotrigine. The side effects were discussed, including Stephen Johnson's syndrome and a bad rash. I have given him a titration up to 100 mg b.i.d. over about a month and a half. We discussed the safety issues regarding driving, riding a bike or swimming in deep waters. I have also organized a 3T MRI to look for any focal lesion to explain his seizures. I will have him return to see me as soon as his investigations are done.

On June 23, 2010 the Registrar informed the Applicant that the information provided did not support reinstatement. He was required to arrange for a detailed report from his treating physician confirming that he has remained seizure free for a period of six months, that he is compliant with his anti-epileptic medication, that there are no side effects from the use of the medication and that there are no disqualifying concerns. Lastly this report must include his physician's opinion with respect to current alcohol consumption and its appropriateness considering his medical condition.

A letter from Dr. L. dated July 21, 2010 to Dr. F. was copied to the ministry.

> (Applicant) has been seizure free since March 20th, just over 4 months. He has not yet had his 3T MRI brain scan, but his 1.5T MRI brain was normal. He is on lamotrigine 100 mg BID without any side effects. His wife was able to give me a good description of the seizure she witnessed. There is little doubt that he had a generalized seizure. It would appear to be a localisation related epilepsy from the EEG. I suspect he has a very good chance of remaining seizure free on medication given that he had only a single seizure. The seizure was unprovoked, and not related to alcohol use, therefore he should remain on treatment.
>
> I will increase his dose of lamotrigine to 150 mg BID which is a good dose for someone his size. I will have him return to clinic in 3 months.

On August 4, 2010 the Registrar informed the Applicant that Dr. L.'s report of July 21, 2010 had been reviewed. He was advised that a **six month seizure free period** was required, and then he should arrange for an assessment by his treating physician or neurologist. This should confirm that he has been seizure free for six months and that his anticonvulsant medication levels are within therapeutic range.

The Applicant's Case:

In Reasons for appeal the Applicant stated:

1. I did not have a seizure, as alleged by the doctor at the hospital.
2. An automatic suspension without proof of the medical event is inappropriate.
3. I have undergone several medical tests to confirm there was not and there is not a medical issue (MRI, CT scan, blood tests, ECG). I am a healthy 44 year old with no medical issues or history.

4. The delay in reinstating my driver's licence pending a simple EEG test (which will take months apparently), and then delay in reporting and consideration by MTO is a significant burden and not appropriate in the circumstances.

In evidence before the Tribunal the Applicant repeated his assertion that he has never had a seizure since no medically trained person witnessed him having a seizure.

On the night of March 21, 2010 he says he had been in a deep sleep and was dreaming and awoke to find EMS, Fire and Police in his room. He was placed on a stretcher but did not want to be taken to hospital. He was given some medication by the EMS and awoke in the hospital where a doctor told him his CT scan and ECG were normal. He was asked if he used drugs and he was told not to drive until seen by his doctor. Next day he found that he had bitten his tongue.

After his discharge he saw his family doctor, Dr. F. who arranged for the MRI and blood tests. He states that he was not aware that MTO was to be notified by the E.R. physician and was surprised when he received the notice of suspension.

Regarding the reference to previous episodes he related that after his parents died about six years ago he passed out in his office. The second episode consisted of fainting in his bathroom. He did not have seizures on either occasion

The Applicant's wife was affirmed and gave evidence of witnessing her husband shaking in his sleep, grabbing his left arm which was stiff and vibrating. She was unable to wake him and she called 911. The EMS, Fire Department and police arrived in about five minutes. She did not accompany him to the hospital as she had children to care for.
She accompanied her husband to the neurologist for his second visit and described to him what she observed.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. Section 47(1)(b)(g) authorised the Registrar to suspend the Applicant's driving privilege upon receipt of a Medical Condition Report filed by a physician under section 203 of the Act stating that the condition was *seizures – cerebral.*

2. Regulation 340/94, Section 14 states:

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

The neurologist in his letter to the family physician on July 15, 2010 and received by the ministry on July 26, 2010 stated a diagnosis of epilepsy based on an abnormal EEG and on the history of seizure during sleep. As a result he prescribed anti-epileptic medication.

3. CCMTA section 6.3.1 states:

The individual with a past history of epileptic seizures should generally not hold any licence other than Class 5 or 6, and then only if he satisfies the following criteria:

a) whether the physician believes the individual is being truthful about the frequency of seizures;
b) whether the physician believes the individual to be a conscientious patient who will take medication in the manner prescribed and follow all the physician's instructions carefully;
c) whether the applicant is under regular medical supervision so that the physician will at once become aware of any further seizure;
d) whether the seizures appear to sign a statement which specifies that it is an offence to make a false declaration.

An applicant who meets all these criteria and who has been free from seizures for six months can usually operate a Class 5 or 6 motor vehicle safely, provided the medication prescribed does not cause significant side effects that would impair driving. This will require a favourable recommendation from the treating physician.

4. The Registrar requires a favourable report from the Applicant's physician confirming a period of six months seizure free, and that the Applicant is taking his medication, before consideration can be given to reinstatement.

The Applicant relies on:

1. He denies that he ever had a seizure based on the lack of evidence by a trained witness.
2. He submits that the Registrar therefore should not have issued a suspension.
3. He submits that the Canadian Medical Association Guidelines for Physicians 7th Edition section 10.4.2 states:

Patients with epilepsy who are taking anti-seizure medication should not be recommended for Class 5 or 6 licensing until the following conditions are met:

- Seizure-free period: The patient should be seizure-free on medication for not less than 6 months, unless seizures with altered awareness have occurred more than once a year in the previous 2 years, in which case the seizure-free interval should be 12 months. With certain types of epilepsy, this period may be reduced to not less than 3 months on the recommendation of a neurologist, stating the reasons for this recommendation. The seizure-free period is necessary to establish a drug level that prevents further seizures without side effects that could affect the patient's ability to drive safely. The anti-seizure medication should have no evident effect on alertness or muscular coordination.

- Patient compliance with medication and instructions: The attending physician should feel confident that the patient is conscientious and reliable and will continue to take the prescribed anti-seizure medication as directed, carefully follow the physician's instructions and promptly report any further seizures. Medication compliance and dose appropriateness should be documented with drug levels whenever reasonably possible.

4. He submits that he is a victim of the Ministry bureaucracy and that if seizures did occur it has taken too long to reach an appeal.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension of the Applicant's driving privilege under section 47(1)(b)(g) of the Act, upon receipt of a Medical Condition Report by a physician pursuant to section 203 of the Act that stated the condition to be *seizures – cerebral.*

2. The Registrar was justified in continuing the suspension of the Applicant's driving privilege under regulation 340/94 upon receipt of a report by a neurologist that the Applicant's EEG showed an epileptic abnormality that required anti-epileptic medication. Uncontrolled epilepsy presents a significant safety factor to driver and other road user's safety and the Applicant must accept that the Registrar is responsible for driver safety, despite his denial of this condition.

3. CCMTA standard under section 6.3.1 advises that a seizure free period of six months should elapse before consideration should be given to reinstatement.

4. The Tribunal recommends that the Applicant should arrange for an up-to-date report be sent to the Registrar from the attending neurologist confirming a seizure free period of six months and confirmation of compliance with anti-convulsant medication supported by therapeutic blood levels as recommended by the CMA Guidelines.

DECISION

Upon the application by the Applicant to appeal the decision dated April 5, 2010 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

Dr. Kevin Flynn Presiding Member

RELEASED: August 12, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6207-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. DAVID HURST, Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 7, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

Ms Bedrossian informed the Tribunal of recently received information which was entered today as Exhibit 3 consisting of a letter to the Ministry of Transportation ("MTO"), dated August 30, 2010 consisting of a positive testimonial, of the Applicant from one of his clients.

FACTS

The Applicant, a 45 year old truck driver first came to the attention of the MTO on an application for a Diabetes Waiver on August 12th, 2003 and signed by Dr. P.D. The next

note to the MTO was a driver's licence renewal application dated August 15, 2007 in which the Applicant stated he was not under suspension, did use corrective lenses, and was diabetic.

On January 8th, 2008, the MTO wrote to the Applicant regarding his indication of "yes" to a question relating to his medical condition (Diabetes). The MTO enclosed a questionnaire to be completed and returned.

This form on return disclosed that the Applicant was taking insulin once daily and disclosed no other important factors in the complete health history section.

October 31, 2008 – The MTO wrote to the Applicant, quoting that he was required to use insulin for his Diabetes, and advised that he could apply for a waiver of the Medical Standards. They enclosed a Waiver Application Package, Diabetic Assessment and a Vision Report Form.

The MTO pointed out that the Diabetic Assessment must be completed by his treating physician, diabetologist, internist or endocrinologist. They requested confirmation that he had not experienced any severe hypoglycaemic reaction, confirmation that his diabetic diary with blood glucose tested at least twice daily for the previous 30 days had been assessed and included the number of blood levels which were below four (4). A recently conducted HBA1C result would have to be provided with confirmation that the level is congruent with his blood logs.

The MTO asked that the Applicant sign an enclosed Waiver Certificate and give it, together with his blood logs and the Diabetic Assessment Form, to his treating physician at the time of the appointment.

The MTO asked that these details be completed and returned by December 26th, 2008. His class "D" would be changed to a class "G", which would be mailed.

In the completed driver's questionnaire and Diabetic Assessment Form, it was recorded that the Applicant was taking NPH insulin (45 – 50 units) twice a day. This was new medication and the Applicant was learning how to handle it.

Also noted on the form, that "in the past there was heavy alcohol use which would cause high blood sugars" and recently the Applicant had cut out alcohol totally. He had never used alcohol during work times but would indulge on off days (i.e. Saturday night)". A further note said:

> "the Applicant has had difficulty controlling Diabetes in the past. Part of this is because of cost of medication. He is now trying to prioritize his medical condition and trying to improve control".

This report was signed by Dr. K.G.

January 9, 2009 – The MTO wrote to the Applicant acknowledging receipt of the Medical

Waiver Certificate and Diabetic Assessment Form. They noted that the Vision Report Form in support of his application for a waiver of the Medical Standards as requested in their previous letter remained outstanding. They requested that this report be returned by February 2nd, 2009 to avoid a downgrade of his licence.

February 3, 2009 – The MTO wrote to the Applicant acknowledging receipt of the Vision Report. They stated they could not proceed with further review of his situation as the submitted visual field chart for his right eye indicated the fixation losses exceeded 15%. They asked for further studies.

July 30, 2009 – A Medical Advisory Committee ("MAC"), case summary was filed with their latest report received December 30th, 2008. A medical condition was described as insulin treated Diabetes and there was a request for a referral because of the need for a medical waiver.

The MAC requested further information. They requested an MTO Diabetic Assessment Form from the driver's treating physician to confirm that no episodes of severe hypoglycaemia had occurred and the diabetic diary or downloadable diabetic log had been assessed and it showed at least two daily blood glucose readings during the last 30 days. The report must also indicate the number of blood glucose readings below four, below three and below two and the result of a recent HB1AC confirmed as congruent with the diabetic diary. Furthermore, they required confirmation of diabetic education and/or re-education. (CCMTA 8.2).

The MAC's reasons were as follows:

> Most current diabetic assessment is stale dated (December/08). MAC notes the driver has a greater than 10% reading below four placing the driver at greater risk for hypoglycaemia. Report of December/08 indicates a follow-up warranted to insure blood sugar monitoring to see if insulin dose changes were required. Furthermore, driver has a history of non-compliance due to financial reasons.

August 6, 2009 –The MTO again wrote to the Applicant stating that his case has been reviewed and that it would be necessary to have an enclosed Diabetic Assessment Form completed either by the family physician, endocrinologist, internist or diabetologist as the previous submitted form was stale.

This letter went on to request the usual reports about his recent experience with his diabetic management.

September 28, 2009 –The MTO wrote to the Applicant stating they had reviewed his case in light of his phone call to the MTO's office. They stated that a review of his driver's record shows that the suspension was issued in error. They said they had cancelled the suspension and amended his record to reflect the changes that have been made. They enclosed a copy of the suspension cancellation notice for his records and apologized for any inconvenience.

A further Diabetic Assessment form signed by Dr. K. G. was sent to the MTO on September 21, 2009. Noteworthy comments included the presence of hypertension and some degree of nephropathy (diminished kidney function). It was also noted that alcohol had been interfering with the control of Diabetes but currently there was decreasing alcohol intake.

October 22, 2009 –The MTO again wrote to the Applicant having reviewed his case and asked for an up-to-date assessment from his physician(s) indicating if the disease of alcoholism is present and if so what the recommended form of treatment is. They asked that an interpretation of bio-chemical markers (MCV and GGT) be included. They also enclosed a Substance Abuse Assessment Form to be filled in by his physician.

November 30, 2009 – The completed Substance Abuse Assessment Form was returned to the MTO signed by Dr. K.G. This disclosed the presence of liver disease with abnormal liver function tests; GGT was elevated at 68 (5 – 50 normal range) and ALT was 52 (4 – 43 normal range).

In the category of treatment, the Applicant volunteered that he did not consider himself an alcoholic and had only been treated once in hospital because he had indulged in mixed drinks on a Saturday night and became quite ill. He stated that he never drank when driving, and said that his driving history will confirm that.

The audit section which reviewed the Applicant's drinking habits was summarized as showing the presence of alcohol abuse. It indicated that he was receiving help from social workers and had been to AA meetings.

January 26, 2010 – The MAC of the MTO reviewed the Applicant's case. They requested further information and that the Applicant be suspended. They asked for a full assessment to indicate if the disease of alcoholism is present and if so the recommended treatment. The report was to include an interpretation of bio-chemical markers and asked that an addictionist address the driver's statement of being treated in hospital due to alcohol poisoning. The MAC's reasons for the above included the fact that the driver admits to binge drinking and that he was using eight or more drinks per sitting on weekends. They also noted that the driver scored 18 on his assessment, and has three of the DSM-1V criteria. The MAC also noted that the driver has insulin dependent Diabetes and is having problems with compliance due to financial restraints. The MAC also noted the presence of abnormal liver function tests secondary to alcohol use +/- cholesterol medication. In their final statement, the MAC said it would be prudent to have this driver assessed by an addictionist.

The Registrar concurred with the MAC's decision.

March 29, 2010 – The MTO wrote to the Applicant reporting on the Substance Abuse Assessment and again asked for a further complete Medical Assessment with all details.

April 27, 2010 – Dr. K.G. faxed to the MTO details regarding the Applicant.

He began by noting that an appointment with an addiction specialist was pending. In this preliminary statement he described the Applicant as a 45 year old man with a history of problem drinking plus recreational use of marijuana. He stated that his medications included insulin, Altace, Norvasc, and Crestor (anti-cholesterol agent).

May 21, 2010 – The MTO wrote to the Applicant granting him an extension on the time limit for the next medical report.

May 25, 2010 – A fax was sent to the MTO from Dr. K.G. confirming that the Applicant was to be seen and reviewed at the Centre for Addiction and Mental Health ("CAMH") in June. Dr. K. G. included in this report to the MTO a letter addressed "To Whom It May Concern":

The doctor described himself as the Applicant's primary care physician stating the Applicant was 45 years old and drank only occasionally prior to 2003. "At that time while undergoing financial stress he began to drink alcohol as a coping mechanism." This was described as weekend drinking and never drinking while working. He drank heavily on weekends but never during the work week. On weekends he would drink one to two litres of liquor but never missed any social or work related responsibilities.

In 2008, on one occasion, he mixed various types of alcohol on a Saturday evening with friends (liquor, wine, beer). The next day in the afternoon he developed stomach pains and went to an emergency department. He was there for several hours and during that time received IV fluids.

Another event in 2008 was described as an episode of left arm weakness. This was diagnosed by a neurologist as radial-nerve palsy. It was noted to be caused in this case by an inappropriate sleeping position pinching the nerve and that this was due to excessive alcohol intake. He recovered well from this event.

Dr. K. G. went on to describe the Applicant's effort to reduce his alcohol use.

> He would stop drinking entirely for several weeks or months, but then start again. For the last three months he had not been drinking heavily, with the occasional use of wine on the weekends (three to four drinks over two days).

His wife was described as being annoyed about his drinking but was supportive in their relationship. The Applicant had felt guilt in the past about the amount of his drinking. Latterly (recent months) he came to the realization that it was not good for his overall health. The Applicant was described as never needing a morning drink or using alcohol to cover the feelings of withdrawal. In fact he has experienced no withdrawal symptoms.

The Applicant had never demonstrated periods of violence, domestic abuse, or problems with law enforcement or missed social or work responsibilities related to alcohol use. Laboratory work disclosed some abnormalities. He had a normal AST (36 but slightly elevated ALT 76). Hepatitis A/B/C are negative. Liver ultrasound showed fatty liver infiltrates which may be the cause of an elevated ALT. GGT was also elevated at 82 (normal 5 – 50) which is likely secondary to alcohol intake. Other laboratory abnormalities

were said to be related to poorly controlled Diabetes (high glucose) and elevated cholesterol. His MCV was normal at 88.3.

In summary the Applicant was described as drinking excessive amounts of alcohol in the past. The Applicant was motivated to decrease his alcohol and the doctor planned to continue his support of his patient and looking forward to an addiction specialist review of his problems and perhaps the organization of other support services.

June 18, 2010 – Dr. K.G. faxed to the MTO a report addressed (To Whom It May Concern). This note stated that the Applicant had been assessed at CAMH on June 10th, 2010. The doctor asked for a brief extension on the timeframe required by the MTO so that the completed report could be provided.

July 15, 2010 – Dr. K.G. again notified the MTO of a CAMH assessment of the Applicant by a therapist.

July 6, 2010 – The MTO wrote to Dr. K.G. quoting the Act which requires:

> "that every legally qualified medical practitioner, optometrist or police report to the Registrar the name, address and clinical condition for those individuals 16 years of age or over whom in their opinion is suffering from a clinical condition that may make it dangerous for the person to operate a motor vehicle. In addition and in order for the Ministry to accurately identify the individual being reported, we kindly ask that all other relevant information be provided and to ensure that all of the following information is included in the form.
>
> - Surname/name/initial
> - Male or female
> - Date of birth
> - Complete address
> - Driver's licence number (if available)
> - Signature, printed name and address of either doctor, optometrist, police, clinical condition."

June 29, 2010 – A fax was forwarded by Dr. K. G. to the MTO. This document provided an assessment of the Applicant done by CAMH.

This assessment was a detailed review indicating that there was abuse and included a statement giving the Applicant's episode of alcohol poisoning after an evening of mixed drinks. It described that this was his first time seeking professional help and in the past 10 months, he was no longer drinking liquor but was then using up to a litre of wine over a weekend. It stated that he would like help moderating down to two to three glasses of wine on Saturday and Sunday. He was noted to be a diabetic with hypertension and high cholesterol problems. The CAMH people transferred him to a similar institution closer to the Applicant's home for further management.

July 23, 2010 – The MAC held a further review. They requested further information of the Applicant. They wished to receive a report from the new counselling centre to which the Applicant had been referred by CAMH. It should provide a diagnosis and treatment plan with respect to the driver's ongoing alcohol consumption and provide an opinion if reduced

drinking is appropriate in this case.

In their section on reasons they said that while the driver has been diagnosed with abuse of alcohol and advised to abstain, this has not been done. There was no report yet from the new counselling centre.

July 30, 2010 – The MTO wrote to the Applicant and confirmed to him they had decided to suspend his driving privilege for medical reasons under section 47(1) of the Act.

Their letter went on to offer reconsideration of the Applicant's case in September 2010 upon receipt of medical information satisfactory to the Registrar. They wanted an up-to-date detailed report from a treating physician at his new counselling centre giving a diagnosis and treatment plan with respect to his ongoing alcohol consumption and use of THC and stated that this notice of suspension was to replace the previous suspension for failure to give medical reports.

The Agent then submitted a certified copy of the Applicant's driving record with several minor infractions leading up to the suspension for medical reasons on the 30th of July, 2010.

Also submitted at this time were the pertinent sections of the Act and of the CCMTA document applying to the use of alcohol and drugs. At this time, the Agent referred to Exhibits, a letter addressed "To Whom It May Concern" by a client of the Applicant describing him as a valued member of society.

At this time, the Applicant's wife who had presented his case produced new material (Exhibit 4) dated the 10th of June, 2010. This document gave no indication of its origin but possibly may have come from the Applicant's new centre for counselling. The combined efforts of the Tribunal and the MTO's agent failed to glean significant further information.

On page 8 of Exhibit 4, a question and answer series, question 10 said "I plan to go through with the treatment program because not abusing alcohol and drugs is a choice I really want to make", and with this the Applicant was in strong agreement.

August 30, 2010 – The MTO in a letter to the Applicant acknowledged their assessment of results from this document and stated that the assessment requested in their previous letter remained outstanding. They again said it would be necessary to file an assessment from a physician specializing in addictions medicine, or Dr. K.G., which would provide a diagnosis and treatment plan regarding the Applicant's consumption of alcohol and marijuana. The report would also indicate if reduced drinking is appropriate.

THE CASE FOR THE APPLICANT: (presented by his wife)

Her preliminary comments disclosed that the Applicant had been driving in Canada for 19 years and had been a courier for 18 of those years, working 10 hours a day. He had never

had an accident due to any medical problems or substance abuse.

She reported that in 2008 the MTO wanted a Driver's Medical Report reporting eye examinations and numerous tests. She said that her husband the Applicant, while drinking vodka (40% alcohol) at a Saturday night event, added other forms of alcohol and had to visit the hospital the next day with abdominal pains.

At that time he stopped using vodka and switched to red wine. She said that socially her husband will smoke marijuana. She said the suspension was hasty and not valid, but admitted that when Dr. K.G. asked her what she would like in this regard, she acknowledged that she wished her husband would stop drinking because even with wine he would drink as much as was available on any occasion.

She pointed out that no doctors have advised her husband to stop drinking and that this advice only had come from her. She then referred to tab 9 of the MTO's presentation, a letter dated March 29th, 2010, when the Ministry asked for conclusion and interpretation of bio-chemical markers. She explained that to have these done they could only be done by physicians who are not available at CAMH or any other counselling centre. She stated that the MTO had suspended her husband as they had not received bio-chemical markers (and with this the MTO's agent agreed). She also lamented that there had been no report on this matter from any doctor who had treated him. Ms Bedrossian agreed that the suspension had been carried out without these bio-chemical markers.

The Applicant's wife noted that in talking with Dr. K.G., she had difficulty getting any useful explanation of the liver function tests (markers) or other "undercurrent" factors such as Diabetes or of Crestor (cholesterol lowering drug) or concerning the report that there was fatty infiltration on the liver.

The Applicant's wife observed that her living with her husband shows that he is not alcoholic and that in fact he can take it or leave it. She stated that since July 30, 2010, he has had no alcohol whatsoever. She continued by informing the Tribunal that her husband is now attending a new counselling centre and he is under severe financial strain from his inability to work and is very worried about providing for his family. She re-stated the confusion surrounding the bio-chemical markers.

THE APPLICANT SPEAKING ON HIS OWN BEHALF:

The MTO's agent did not really know when Dr. K.G.'s letter was reviewed by the Ministry and agreed that it could take a few weeks – hence some of the debate as to whether the markers were considered in his suspension. The Applicant stated that in conforming with the MTO's request, he has gone even further than what they have asked in order to be compliant. Ms Bedrossian stated that in the MTO's letter of March 29th, 2010, they wanted a medical assessment that would indicate if alcohol was still a factor and if the disease of alcoholism is present. She did find that Dr. K.G. didn't fully explain the various factors that could act on the bio-chemical markers, e.g. was it alcohol or was it Diabetes?

The Applicant summarized his presentation and said that his health is paramount and he will do whatever is needed to support his family and will continue with counselling sessions at his new centre near his home. He also offered to go to an addiction specialist as planned for September 13, 2010. His final statement was “he will do all it takes”.

The Agent for the MTO summarized, stating that the MTO needs more information. She noted that a score of 18 in the Alcohol Assessment Form is high and that the DSMIV criteria Alcohol Assessment Form showed that three of the four elements were ticked as indicating possible dependence. This factor plus the high score of 18 underlies the MTO’s concern.

She noted that the bio-chemical markers are significantly elevated, emphasizing the MTO’s concern about dependence or addiction.

She encouraged the Applicant to have further bio-chemical markers sent directly to her in order to expedite this matter.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Applicant's licencing problems began with his completion of a driver's licence renewal application dated August 15th, 2007 in which he answered yes to a questionnaire about having to use corrective lenses while driving. This had already been disclosed in a waiver application in 2003 when it was stated by an optometrist that he must wear glasses for driving "Class A".

The MTO ultimately asked that the Applicant complete a Driver's Medical questionnaire regarding the presence of Diabetes requiring insulin. More and more requests from the MTO for medical details ultimately disclosed that the Applicant had problems with hypertension and neuropathy being related to his Diabetes.

Comments about the Applicant's heavy use of alcohol were made by his doctor, stating that this could adversely affect his control of his Diabetes with insulin. At one point, (September 28th, 2009), the MTO wrote to the Applicant admitting that they had issued a licence suspension in his case, in error. His suspension was cancelled. The MTO continued their concern with another request for a Diabetic Assessment Form on August 6th, 2009. By October 22nd, 2009, in the MTO's letter to the Applicant, they were expressing concern about his consumption of alcohol. With the disclosures in a completed Substance Abuse Assessment Form and the negative report from the MAC, the Applicant's licence was suspended on July 30th, 2010.

Ultimately the Applicant had to be taken to hospital after a very heavy Saturday night episode of drinking assorted types of alcoholic beverages leading to a serious case of

abdominal distress. The MTO today demonstrated to the Tribunal their continued concern about the Applicant's abuse of alcohol which is inconsistent with the provisions of the Act and the CCMTA document. There is an added factor of marijuana use as well.

There has been considerable discussion today about the disturbing findings in the review of the bio-chemical markers stated by the MTO (GGT, MCV and AST as well as the ALT). It is the position of the Applicant that these liver function tests could be out of line because of his Diabetes, hypercholesterolemia and fatty liver infiltrates seen on the ultrasound. At least however, the Applicant's family physician has indicated that his considerably elevated GGT (82 – with a normal range of 5 – 50) is secondary to alcohol intake and with this the Tribunal concurs.

It is the Tribunal's observation that the Applicant lacks sufficient insight into his problem with alcohol abuse or dependence, (he simply wants to be a more moderate drinker of wine instead of liquor). He has developed a serious problem of dependence and total abstinence is the correct management. The minimal requirement as spelled out in the Act and also mandated by the MTO is that the licencee show with medical documentation that he has completely abstained from alcohol for a period of 12 months. It is noted that he has now been abstinent during these recent weeks.

A serious problem has developed here and although for the record, the Applicant never drinks and drives, the facts are clear that the Applicant should continue on his present course of total abstinence with full documentation and follow up by his medical advisors. The 12 months of abstinence prescribed in the Act are clearly applicable in this case.

DECISION

Upon the application by the Applicant to appeal the decision effective July 30th, 2010 of the Registrar of Motor Vehicles (the "Registrar") to suspend his driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "Act"), and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. David Hurst, Presiding Member

RELEASED: *September 23, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

6206-MED-ALC-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. IAN TURNBULL, Presiding Member

APPEARANCES: APPLICANT, unrepresented.

RUSSELL MCKNIGHT, Agent, representing the Registrar of Motor

DATE OF HEARING: September 10, 2010 London, ON

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").

INTRODUCTION

What could possibly go wrong with a stroll through your neighbourhood on a mid-summer afternoon? As it turns out, there were consequences unforeseen by the Applicant.

EXHIBITS

1. Notice of Suspension from MTO, July 27, 2010.
2. Notice of Appeal filed by Applicant, August 19, 2010.
3. MTO’s Submissions, August 20, 2010.

FACTS

1. The 56-year-old Applicant was walking through her neighbourhood on a hot, mid-July afternoon and while admiring a neighbour's garden, and just three doors from home, turned her ankle and fell.

   Neighbours came to her aid and went to her house, and found nobody home.

   Although the applicant did not lose consciousness, the neighbours were concerned about her condition and called for EMS assistance. The Applicant was brought to a local hospital Emergency Department.

2. The Applicant says she was only brought to hospital because of an elevated blood pressure measurement by EMS personnel on the scene.

3. During her two-hour Emergency Room (ER) visit, the Applicant had three to four brief interactions with the ER physician. She told the physician she had consumed a bottle of wine before her walk in the 32◦C heat.

   When the physician asked if she had a driver's license, the Applicant explained she had declined an ignition interlock device, but was not driving.

4. The ER physician reported the Applicant to the Registrar (Exhibit 3, Tab 1), under Section 203 of the Highway Traffic Act, indicating "alcohol dependence".

5. The Applicant has a May 5, 2008, Criminal Code of Canada conviction for Impaired Driving (Exhibit 3, Tab 3).

6. The Applicant had a 90-day ADLS (Administrative Driver's License Suspension), February 17, 2010 (Exhibit 3, Tab 4).

7. Also in Exhibit 3, Tab 4, a driver's license suspension for failure to complete a remedial program.

8. The applicant has not responded to the (July 20, 2010) request for information (Exhibit 3, Tab 2), specifically the Substance Abuse Assessment Form asked for in the MTO's Letter of Suspension.

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 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.

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

APPLICATION OF THE LAW TO THE FACTS

The Tribunal finds the Registrar has made the case that the Applicant's driving privileges should remain suspended. The MTO has proceeded correctly, and without "a detailed, up-to-date" medical report, cannot consider reinstatement of the Applicant's driving privileges at this time.

The Registrar acted correctly when it suspended the Applicant's driver's license (Exhibit 1), upon receipt of a physician's report (Exhibit 3, Tab 1) citing alcohol dependence.

The Registrar also acted correctly in asking for a detailed, up-to-date report from her doctor (Exhibit 3, Tab 2), including completion of the 10-point Substance Abuse Assessment Form.

The MTO states it would be "negligent" to reinstate driving privileges because of Regulation 340/94:

> "an applicant for, or a holder of, a driver's license must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

The Registrar cites the recommendations of the CCMTA (July 2006) Council of Canadian Motor Transport Administrators, P43-Section 13.2: "Alcohol Dependence and Alcohol Withdrawal Standards":

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

The Registrar also refers to (Exhibit 3, Tab 2) the 6th Edition of the CMA's (Canadian Medical Association) "Guide for Physicians in Determining Fitness to Drive" ~~ Section 5 ~~ "Alcohol".

In the absence of the Applicant's response to the MTO's request for "detailed, up-to-date medical information", the Tribunal has the following evidence on which to assess whether or not the Applicant has an addiction which is likely to significantly interfere with her ability to drive safely:

(i) the report of the ER physician.
(ii) the Applicant's "Notice of Appeal" (Exhibit 2)
(iii) the Applicant's testimony at the hearing.
(iv) the Applicant's driving record (Exhibit 3, Tab 3)

The following are the facts that are most relevant to the issues before the Tribunal. Firstly, the resident ER physician checked off a box pertaining to "alcohol dependence". This is defined in the SSA Form (Exhibit 3, Tab 2A, Page 5) as "the repetitive inappropriate use of alcohol associated with loss of control, inability to abstain, a pre-occupation with obtaining alcohol and withdrawal symptoms."

When the Applicant told the physician that she had been drinking and that she required an ignition-interlock device to drive (but did not), the Tribunal agrees with the ER physician's decision to report the Applicant to the MTO (Exhibit 3, Tab 1).

Secondly, Exhibit 2 (Notice of Appeal), in the Applicant's August 9, 2010 letter, she outlines her costs-to-date around her May 2008 conviction for Impaired Driving. At no point does she indicate any appreciation of the costs or risks for others due to her driving after drinking.

The Applicant further stated she has every right to drink alcohol, and nobody ever told her that she could not. The Applicant stated that the "Back on Track" program does not mention abstinence from alcohol. Successful completion of this program is mandatory for consideration of reinstatement of driving privileges. The Tribunal has reviewed the MTO publication, "Impaired Driving: Alcohol Education and Treatment Program: Back on Track" and the Applicant is correct that the word "abstinence" does not appear in the text. While the Applicant may well have the right to consume alcohol, a driver's license is a privilege.

Thirdly, in testimony, the Applicant does not appear to be aware of the implications of the difficulties facing her neighbours who found her on the street after her tumble, or the risks of consuming a bottle of wine. She refers to a "panic attack" after she had fallen. Most responsible people being unable to assess her condition would have had reason to call "911". The Applicant says she was dehydrated on her walk because "wine is not water". This evidence indicates an incomplete assessment of her own condition.

The Applicant has completed the "Back on Track" program. The Tribunal notes (Exhibit 3, Tab 3, Page 2) a now out-of-date May 22, 2009 license suspension extension for "failure to complete remedial program".

The Applicant repeatedly asserts that she is not an alcoholic, and on July 16, 2010, she was not driving a car, and not even near a car. She did not present any evidence at the hearing because "there is no evidence". She has no understanding that her addiction manifests itself, whether or not she is driving, and is such that she cannot judge the appropriateness and risks of the act of walking after consuming a bottle of wine on a hot, humid summer day.

Finally, the Tribunal is concerned about the Applicant's driving record (Exhibit 3, Tab 3):

(i) A Criminal Code of Canada conviction on May 22, 2008, regarding an Impaired Driving accident on December 21, 2007, and

(ii) A suspension on May 22, 2009, for failure to complete a remedial program.

(iii) An ADLS (Administrative Driver's License Suspension), February 17, 2010. This is an administrative 90-day suspension for failure to provide a breath sample for analysis by an approved screening device.

This record supports the ER physician's conclusion based on the definition of alcohol dependence referred to above. The record indicates long-term, inappropriate consumption of alcohol and the Applicant's inability to make good decisions as to the outcomes and risks of her consumption of alcohol for the safety of the public.

As of the hearing date, the Applicant has not complied with the MTO's request for medical information. Without this information, the MTO and the Tribunal are not able to consider re-instatement of the Applicant's driving privileges.

The Tribunal is concerned that the Applicant is possibly alcohol-dependent and lacks insight into the problem. Given the substantial evidence of alcohol dependence, the Registrar has proven on the balance of probabilities that the Applicant is 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. The Applicant failed to provide any medical information on which, any other conclusion can be drawn.

DECISION

Upon the application by the Applicant to appeal the decision dated July 27, 2010 of the Registrar 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 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

D. Ian Turnbull, Presiding Member

RELEASED: September 27, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6199-MED-DRUG-Drug/Medication

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. GARRY FISHER, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 1, 2010 *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").

PRELIMINARY MATTERS

The Tribunal was convened as a teleconference.

FACTS

The Applicant is a 55 yr old woman who describes herself as “a single parent”. She has three children, one in the late teens and the others in their twenties. She separated from her husband and that domestic difficulty led her to attempt suicide on April 25 2010. A friendly neighbour kept watch on her and went into her house to find her

comatose. An ambulance was called and she was taken to a nearby hospital ER where she was assessed, treated, and admitted to hospital.

The ER Dr. filled out a form 203 and wrote in “COMA” and “POLY-DRUG INGESTION”.

> The Applicant was admitted to hospital where she stayed 12 days – 10 days active ward and 2 days rehabilitation. She apparently signed herself out of hospital. She was used to using a sleeping pill on occasion and had a supply of a diazepam. In addition she had some Oxycocet left over from past knee surgery and added an over the counter sleep medicine. The mixture induced a “coma” and she was found and survived.

In July, she moved from the small town she was in to a similar town three hours away. Presently she stays with friends and has a new family doctor, Dr. W. He has given her an anti-depressant drug and she testifies that she is doing well.

The Applicant drove for two months after her release from the hospital in the spring before a letter arrived from the Ministry of Transportation (“MTO”), advising that her driver licence was suspended. With her change of address, she failed to get the second, more specific letter from the MTO. It clearly requests an up to date medical assessment and urinary toxicology reports.

The Tribunal and the MTO have no medical reports, save the form 203.

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 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.

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

APPLICATION OF THE LAW TO FACTS

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.

In this instance, the Applicant did have a significant mental and emotional problem and it was related to a drug overdose. The Tribunal agrees with the MTO that it requires as a minimum a report from the Applicant's Dr. W., accompanied by urine toxicology testing. The Applicant was encouraged to get these reports and to submit them to the MTO. The Registrar's agent will work with the Applicant to help her process her application for reinstatement.

DECISION

Upon the application by the Applicant to appeal the decision dated July 8, 2010 of the Registrar 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 confirmed

LICENCE APPEAL TRIBUNAL

_____

Dr. Garry Fisher, Presiding Member

RELEASED: *September 10, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6197-MED-ALC-ALCOHOL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. DAVID W. HURST, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 7, 2010 *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

The Applicant is a 76 year old farmer whose family doctor of at least 10 years duration on November 12th, 2009 on his own volition, filed a Medical Condition Report with the MTO. In the section of the report concerning common medical conditions the doctor ticked off

1: Alcohol dependence
2: Mental or emotional illness – unstable
3: Dementia or Alzheimer's

In his optional comments he stated that the Applicant was a non-compliant alcoholic with increasing mental and physical disability. He stated in his report that he had been

looking after the Applicant for 20 years. He noted that the Applicant was aware of hir report.

On November 23rd, 2009 in a letter from the Ministry to the Applicant they noted that this Medical Condition Report mentioned his alcohol dependence, psychiatric condition, and cognitive impairment.

The Applicant was informed in this letter that under section 47(1) of the *Highway Traffic Act* an official notice of suspension would be mailed to him. It was effective as of December 3rd, 2009.

The Ministry went into great detail to describe the requirements for them to reconsider his case for reinstatement:

- Completion of the enclosed Substance Abuse Assessment Form by his treating physician or a physician specializing in addiction medicine.
- If a diagnosis of alcohol dependence is made, a recommended form of treatment must be indicated including confirmation of abstinence from alcohol for a period of one year. This period may be reduced upon the successful completion of an alcohol treatment program and a favourable recommendation from a physician.
- Recent bio-chemical markers (MCV & GGT) with a clinical explanation if any results are outside the normal laboratory range.
- Complete psychiatric history (i.e. duration, degree) dates of hospitalizations (if any), including the most recent discharge summary.

Other points were mentioned and in their final instructions the Ministry stated that a clinical evaluation of the Applicant's cognitive functions was required. They went on to say that once this report has been reviewed and approved by the Ministry, the Applicant might be required to undergo a driving evaluation at a rehabilitation centre.

The Agent for the Ministry referred to a Substance Abuse Assessment Form with its preamble and drew attention to the fact that, although this had been forwarded to the Applicant the Ministry had not received a completed form.

The Agent then presented a certified copy of the Applicant's driving record which disclosed the suspension for medical reasons on the 3rd of December, 2009 and also stated that the Applicant had no current demerit points.

The Agent's final submission was the pertinent section of the CCMTA Medical Standards for Drivers concerning psychiatric disorders and the effects of alcohol.

The Agent said that he had checked the MTO file on the Applicant as recently as the hearing day and informed the Tribunal that no new information had been received regarding the Applicant.

THE APPLICANT'S CASE:

The Applicant told the Tribunal that he is now "off alcohol", and he had consumed no alcohol for nearly 10 months. He went on to inform the Tribunal that he was looking for a new doctor having recently fired his doctor of many years standing (he claims that it is 10 years) as he is "a druggie and a liar".

The Applicant stated that his health is perfect. He had discontinued all his pills (was taking 17 pills a day while in hospital). When questioned, he stated that he was in hospital in mid October of 2009 when he injured his ankle, having upset a skid on his farm. He was hospitalized for 3 weeks. He denied any other hospitalizations in the last several years. He had returned to work on his farm a week previously. The Applicant described his disappointment in his doctor regarding this suspension and stated that he had seen him in March to ask to have his licence returned. He claimed that his doctor told him he did not need a licence and again stated that the doctor appeared to be on drugs on that occasion.

The Applicant described going to the local OPP office for advice about the licence problem and that he had also seen a lawyer about this matter and was informed by the lawyer that he had lost his licence due to his drinking. He then described his drinking habit as that of three 26oz bottles of rye a week, a habit that had been in place from a steady build up from his previous baseline drinking habit over a period of 2 – 3 years. He described the suspension as "unfair". On questioning, he stated that he never used any drugs. He described himself as being totally abstinent for nearly 10 months. He further remarked on the amount of money he was saving as a result of this. He said that he had moved into a nearby town and moved into a nursing home because of the loss of his licence and described the significant costs while there. With further encouragement from the Tribunal he described his perfect driving record and also noted that he has lost his car insurance on his personal car and also on his antique car. He described the designation in the Medical Condition Report of mental illness as a lie and also noted that the social worker when he was in hospital was a liar. He disclosed that he didn't think any other of the hospital personnel were liars, but he said the designation of possible Alzheimer's disease was also a lie. Questioned as to whether anyone else had noted that his doctor might be on drugs the Applicant informed the Tribunal that numerous people in his nursing home referred to the doctor as a druggie and wondered about how he could institute having the doctor's licence suspended.

THE AGENT FOR THE MTO'S QUESTIONS:

On questioning the Applicant insisted that he had been with his doctor for 10 years although the doctor mentioned 20 years in his Medical Condition Report. The Applicant said that the doctor is lying about that. Questioning of the Applicant about his doctor's awareness of the drinking problem disclosed that he never mentioned alcohol to his doctor. He also stated that the farm accident that injured his ankle did not involve alcohol because he was "an evening drinker". He stated that his doctor never advised him to reduce his alcohol intake because he didn't know that he was drinking. He went

on to explain that he had stopped drinking nearly 10 months ago voluntarily without any help. The Applicant also stated that he had been looking for a new doctor for months. He indicated his understanding of the Ministry's need for detailed medical information.

In this questioning by the Agent it emerged that the Applicant is living alone and that his wife had suffered a nervous breakdown in August 2009 but he assured the Tribunal that his wife had no problems with his drinking. The Applicant volunteered that his wife's lawyer had contacted him demanding money for her and stated that this lawyer did not refer to his drinking habit. He said that the lawyer's letter was full of lies about the money that he had. He stated that his wife had not lied but that certainly her lawyer, his doctor and the social worker were, and in fact he felt that all lawyers are liars.

The Applicant stated emphatically that he wanted his licence back.

THE MTO'S AGENT IN SUMMARY:

Mr. Biel underlined the criteria used by the Registrar for the suspension specifically section 47(1)(b). He reiterated the Applicant's family doctor's comments in the Medical Condition Report about alcoholism and increasing mental instability with cognitive impairment which can seriously affect a driver's judgment in the safe operating of a motor vehicle.

The Agent pointed out that they have received no medical information whatsoever up to this date regarding the Applicant. He stated that the HTA requirements indicate that the driver must not suffer serious alcohol dependence nor have any mental or cognitive problems and that these are all mentioned in the Medical Condition Report. The Agent went on to state that this evidence is un-contradicted and pointed out that the Applicant has chosen not to have the Alcohol Assessment Form completed.

The Agent then completed his summary by pointing out that in the CCMTA document there is a requirement that individuals with alcohol dependency must complete a rehabilitation program and 12 months of abstinence. (There is no evidence of that now).

The Agent described the total absence of any medical update reports and that there is no medical information to stand against the one document they have and that is the Medical Condition Report. He asks that the suspension be upheld.

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

APPLICATION OF THE LAW TO FACTS

This Tribunal hearing is remarkable for a serious lack of information on which the Tribunal can make a ruling. It is noteworthy that the Applicant's family doctor (of 10 or even 20 years duration) took it upon himself to file a Medical Condition Report informing the Ministry that the Applicant suffered from alcohol dependence, mental or emotional

illness – unstable, and Dementia or Alzheimer's disease. The only written note that we have from the doctor states that the Applicant is a noncompliant alcoholic with increasing mental and physical disability.

Presented with such a document the Ministry acted properly in suspending the Applicant's driving privilege and to date they have received no medical updates on the Applicant to suggest that they should change their stance.

It is difficult to appraise the Applicant's mental status during an electronic hearing. The Tribunal has only the Applicant's testimony that he has been abstinent for nine months or so without any medical documentation to support this.

A significant part of the Applicant's presentation was devoted to disparaging the doctor's reputation and also to consistently describe him and others with whom he is involved as liars, suggesting to the Tribunal the possibility that paranoia may be present. The Applicant in his final statement indicated that he plans to get back and forth driving his tractor because no licence is required.

The MTO has acted correctly on the receipt of a solitary Medical Condition Report. The Applicant in response has to date failed to complete the Alcoholic Assessment Report, and has dismissed and possibly defamed his doctor. At the hearing he has indicated to the Tribunal no grasp of what has happened to him and why.

DECISION

Upon the application by the Applicant to appeal the decision effective December 3rd, 2009, of the Registrar of Motor Vehicles to suspend his driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. David W. Hurst, Presiding Member

RELEASED: *September 15, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6189-MED-PERC-Perceptual Problems

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 2, 2010 *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

Respondent's Evidence

Dr. T sent a medical report to the Ministry of Transportation ("MTO") on April 28, 2008 concerning the Applicant, writing as follows:

> Mrs. X (the Applicant) had a left middle cerebral artery stroke on April 11, 2008. Has cognitive-perceptual deficits that could potentially adversely affect her ability to safely drive. She has therefore been advised not to drive.

The MTO wrote to the Applicant on May 12, 2008 informing her that it had been decided to suspend her driving privilege.

Dr. Z sent in a Medical Condition Report to the MTO, dated May 16, 2008, concerning the Applicant. In this he indicated the following:

> Stroke or head injury with significant deficits.
> Situation is a serious road safety risk.
> Patient is aware of the report.
>
> Comments: Right sided neglect, constructional apraxia, aphasia since left sided parietal stroke.

Dr. E, family physician of the Applicant, sent a medical report to the MTO concerning the Applicant. The report was undated, some of it was illegible and in some of it, the meaning was not clear. Under Complete Health History, the doctor indicated in a positive manner to all nine of the disease groups. He also indicated that the vision in both eyes was good, the patient's Diabetes was treated by diet alone, that she suffered from Psychosis, Alcoholism and Drug Habituation and that the Applicant had been his patient for 25 years.

Consulting physician Dr. R sent a report to Dr. E, family physician of the Applicant, on March 25, 2009, writing, in part, as follows:

> I thank you for the opportunity of seeing this 77 year old patient who had a stroke from which she had a good recovery. She was evaluated by Dr.Z in May of 2008 and she had significant cognitive difficulties. She would really like to get back to driving. She was here alone. No family member accompanied her.
>
> IMPRESSION: This lady certainly has evidence of cognitive deficits. I have told her that if she really wishes to drive, the next step is to have a driving assessment done.

The Applicant had a Driver Evaluation done on October 8, 2009. The Comments are written as follows:

> Client is found unsafe to drive. She shows difficulty with the following abilities: poor judgement and decision making, difficulty in appropriately scanning her environment to assess risks, difficulty with multi-tasking and shifting attention. Feedback provided to client.

The Certified Driver Record, dated August 9, 2010, showed that the Applicant "Disobeyed traffic signal light – red" on February 4, 2009 and that the Current Demerit Points were 3.

Applicant's Evidence

The Applicant said that she lives alone in a Church Senior Home. She has two sons and one daughter who help her, but the daughter is sick a fair amount of the time. She said that she had a stroke but "it did not last long". She takes medication for high blood pressure. She explained that when she took the driving test she was nervous having to drive a different car to the one she was used to. She admitted she made a mistake.

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 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.

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

APPLICATION OF THE LAW TO FACTS

Under the heading “Strokes” of the C.C.M.T.A. Medical Standards for Drivers, the applicable standard (Standard 4.2.2) reads:

> Individual who has suffered a CVA may operate any motor vehicle if a complete neurologic assessment has disclosed no residual loss of functional ability.
>
> Operators of any Class may be required to complete a road test and consent to an annual medical follow-up in case of residual defect.

The Tribunal notes that the Applicant suffered a stroke on April 11, 2008. The Tribunal notes that the following medical practitioners described the Applicant’s significant cognitive deficits, namely, Dr. T in his report of April 28, 2008, Dr. Z in his report of May 16, 2008 and Dr. R in his report of March 25, 2009. The Tribunal also notes that in the Driver Evaluation, done on October 8, 2009, under Comments, it was written, “Client is found to be unsafe to drive”.

Because of the foregoing reports, and especially because of the assessment of the Driving Evaluation centre, the Tribunal has decided that the decision of the Registrar should be upheld.

DECISION

Upon the application by the Applicant to appeal the decision dated May 22, 2008 of the Registrar 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 confirmed.

LICENCE APPEAL TRIBUNAL

_____

Dr. Patrick Coffey, Presiding Member

RELEASED: *September 13, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6186-MED-NEUR-Neurological

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. GARRY FISHER, Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 1, 2010 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS

None

FACTS

The Applicant is a 61 yr old self-employed man of Italian descent, who had a stroke (CVA) on Feb 26 2009. He was taken to a large regional health centre where it was observed that he had left arm and leg weakness and right gaze preference. A diagnosis of right internal carotid occlusion was made, TPA was instituted and within an hour his symptoms were greatly improved. He did have sufficient left-sided residual symptoms that he required

Physio therapy, occupational therapy and speech therapy for dysarthria. He was in the initial teaching centre for a month then a rehabilitation centre another two months until he was discharged on May 29 2009.

He received a letter on July 27, 2009 from the Ministry of Transportation Office (MTO) notifying him that his driver's licence was suspended. This was two months after leaving hospital and he had been regularly driving during that time.

Medical opinion is divided on whether he is fit to drive. The rehab doctors – Dr. N. and Dr. C. were opposed to his driving and filled out a form equivalent to a 203 – undated – but with a note that the recommendation was made March 29 2009. The MTO got that note on July 24 2009.

The rehab doctors note that "unfortunately" the Applicant was driving "apparently at the blessing of his family physician and an 'unidentified' consultant at the Health Centre.

The "unidentified" consultant was Dr. J., a neurologist, who on Jun 3, 2009, wrote a long, complete, elegant note to Dr K., the family physician. She wrote that "so long as his visual fields tested normally- (and they did) - she could see no reason why he shouldn't drive.

On Aug 29, 2009, Dr. C. sent another form 203 to the MTO noting the discrepancy of medical opinion and recommending that it be resolved at an authorized driving centre.

On May 11, 2010, the Applicant was assessed at DriveABLE. He failed completely, making seventeen errors during the test; straddling the center line; speeding; improper lane changes; following too close etc.

The Applicant admits that "maybe" he has some bad habits after his many years of driving.

A Jun 2, 2010, letter to the Applicant from the MTO restated the need to continue the suspension until two things happen:
One – an update confirming the stability of his health from his "attending physician".
In this case Dr. K., and his opinion is essential.
Second – The Applicant needed to repeat the drive test, but needed to bone up on his skills if he wants to pass.

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

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 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.

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

APPLICATION OF THE LAW TO FACTS

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

The CCMTA 4.2.2 is concerned with stroke and residual symptoms. The Applicant did have a CVA and does have residual left-sided physical deficits.

That is clear. But medical opinion is divided as to his driving skills.
The problem for the Applicant is that the drive test needs to be passed in order to satisfy guidelines. The Tribunal encouraged him to bone up on the test requirements before attempting it again.

DECISION

Upon the application by the Applicant to appeal the decision dated August 6, 2010 of the Registrar 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 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

_____
Dr. Garry Fisher, Presiding Member

RELEASED: *September 9, 2010*

This decision, may also be available on Quicklaw.

Decisions under the Highway Traffic Act

Section 47(1)(b) - Medical

Fiscal Year 2010 - 2011, October - December

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

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- 6274-MED-NEUR-Neurological
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oct/6274-med-neur-Neurological.pdf>
- 6272-MED-ALC-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oct/6272-med-alcl-Alcohol.pdf>
- 6255-MED-ALC-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oct/6255-med-alcl-Alcohol.pdf>
- 6234-MED-PSYCH-ALCL-Psychiatric and Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oct/6234-med-psych-alcl-Psychiatric-Alcohol.pdf>
- 6218-MED-PSYCH-Psychiatric
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oct/6218-med-psych-Psychiatric.pdf>
- 6196-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oct/6196-med-alcl-Alcohol.pdf>
- 6309-MED-SEIZ-Seizures
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/nov/6309.med.seiz.pdf>
- 6284-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/nov/6284.med.alcl.pdf>
- 6282-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/nov/6282.med.alcl.pdf>
- 6290-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oec/6290.med.alcl.alcohol.pdf>
- 6314-MED-NEUR-Neurological
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oec/6314.med.neur.pdf>
- 6333-MED-ALCL-DRUGS-Alcohol and Drugs
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oec/6333.med.alcl.drugs.pdf>
- 6342-MED-NEUR-Neurological
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oec/6342.med.neur.pdf>
- 6344-MED-DIAB-Diabetes
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oec/6344.med.diabetes.pdf>
- *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-47(1)(b)-October-December.aspx>* 6356-MED-PSYCH- Psychiatric
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/oec/6356.med.psych.pdf>

- 6358-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/dec/6358.med.alcl.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6274-MED-NEUR-Neurological

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 14, 2010 Toronto

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* (the "Act").

PRELIMINARY MATTERS

The Applicant submitted a letter from his family physician, Dr. K., dated October 1, 2010, stating:

> Please be advised that <the Applicant> had no seizures since February 20, 2010. He is safe to drive, and is able to do so immediately.

FACTS

The Registrar's Evidence

On February 20, 2010, a letter was sent to the Ministry of Transportation ("MTO") by a neurologist, Dr. W., pursuant to section 203 of the Act. The letter states as follows:

> This gentleman reports episodes where he would awaken having bitten his tongue, feeling weak and dizzy. He would recover gradually throughout the morning. He has had 6 episodes in the last 3 years. There have been no witnessed convulsions. His neurological examination is normal.
>
> He has been investigated with an MRI and EEG. The MRI was essentially normal. The EEG showed focal slowing over the left temporal lobe and intermittent spike/spike wave activity in the same area. This is epileptogenic.
>
> This gentleman more than likely has recurrent generalized seizures (i.e. epilepsy) which have all occurred out of sleep. I have started him on Keppra.
>
> He has had nocturnal seizures. This pattern has been observed over the last 3 years with no daytime seizures. I would recommend his driver's license not be suspended.

On April 13, 2010, the Registrar informed the Applicant that it had been decided that his driving privilege would be suspended under section 47(1) of the Act. In order to be considered for reinstatement he must submit an up-to-date report from a physician familiar with his medical history or a neurologist with results of all investigations (Waking EEG, CT Scan), prescribed treatment, current status and cause for the seizures. A narrative of this and any previous seizure history and confirmation that there have been no further episodes since the last event was also required.

On May 25, 2010, Dr. W. wrote to the Registrar. The letter states in part:

> He has not had any further seizures. He is tolerating the medication well with no significant side effects. His neurological examination is normal.
>
> …I would recommend his driver's license be reinstated. The CMA recommendations state that "patients with epilepsy whose seizures have only occurred while they were asleep or immediately after wakening for at least 1 year can be recommended for private license no less than 12 months after the initial seizure and with therapeutic drug levels". Levels of Keppra are not available commercially.

The Medical Advisory Committee ("MAC") reviewed the Applicant's case on July 5, 2010.

Recommendation:

> Remain suspended. Reconsider with a detailed neurologist's assessment confirming driver has remained seizure free for one year.

Reasons:

> Said to have had recurring seizures in the last three years. Now diagnosed with Epilepsy and has an abnormal EEG. Given the significant driving risk posed by seizures, it is concerning that these have not been previously reported. Acknowledge that thus far the episodes have been nocturnal, however, the CCMTA Standards and CMA Guidelines are very clear in this regard. As such, a one year seizure free period is required before reinstatement can be considered.

On July 15, 2010, the Registrar informed the Applicant that following the review of the recent report, it had been decided that his suspension would continue, as the medical evidence does not support reinstatement. An up-to-date report was required from a neurologist confirming that the Applicant has remained seizure-free for one year.

A letter dated May 27, 2010, from a neurologist, Dr. E., to the family physician, Dr. K., was received by the Registrar. The letter states:

> The patient reports that he has had episodes of generalized weakness that lasts ten to fifteen minutes. He has had six episodes in the last several months. He also reports on one occasion that his wife noticed that he was staring. He had mouth salivation. He has also noticed blood on his pillow.
> …
>
> The patient has a positive family history for epilepsy in his mother.
> …
> **Comment:** This patient's history is suggestive of a seizure disorder. I have advised him to remain on Keppra. I will reassess him in six months.

The MAC again reviewed the Applicant's case on September 17, 2010.

Recommendation:

> Remain suspended. Reconsider with a detailed report, from the treating neurologist, confirming that driver has remained free of any seizures for one year and a clear explanation for discrepancy as to history, type of seizures and date of last one.

Reasons:

> It is concerning that the two Neurologists (Dr. E. and Dr. W.) provide a different history of driver's seizure disorder: Dr. W. states all episodes have been nocturnal with last one in January 2010. Dr. E. indicates last seizure was in November 2009 and one [witnessed] episode was diurnal complex partial seizure. Wife noticed he was staring.

The Registrar informed the Applicant on September 21, 2010, that it had been decided to continue the suspension on the basis of the MAC recommendation.

In order to be considered for reinstatement, the Applicant must arrange for a detailed report from his treating neurologist which confirms that he has remained seizure-free for one year. This report must also include an explanation for the discrepancy in the histories and description of the seizures from Dr. E. and Dr. W. The report must indicate the types of seizures experienced and indicate the date of the last episode.

The Applicant's Evidence

The Applicant is an advisor in cardiology for an insurance company.

In his Reasons for Appeal, the Applicant stated that he has had six episodes in the last three years. He would wake up at night to go to the washroom and would feel weak and dizzy. He saw his family doctor and a number of tests were done, including cardiac echo, stress test, Holter monitor and cardiac ultrasound, all of which were normal.

His family physician referred him to a university hospital where he had a normal CT Scan of the brain. An appointment was made for a neurologist sometime in the future. He returned to his family physician and was referred to Dr. W. in February. An MRI was normal. Dr. W. prescribed Keppra due to focal slowing over the left temporal region on the EEG.

Dr. W. wrote to the Registrar on February 20, 2010, stating:

> This gentleman more than likely has recurrent generalized seizures (i.e. epilepsy) which have all occurred out of sleep.
> …
>
> This pattern has been observed over the last 3 years with no daytime seizures. I would recommend his driver's license not be suspended.

The Applicant was seen by Dr. B., a second neurologist, at the university hospital on April 30, 2010. Dr. B. reported:

> It is difficult to say whether or not he has had an actual seizure.
>
> I have arranged for a sleep-deprived EEG in order to see if we can confirm slowing of the left temporal lobe and an epileptogenic focus again after sleep deprivation. I have ordered another brain MRI… with gadolinium in order to look for subtle structural lesions.

On August 24, 2010, Dr. W. again wrote to the Registrar, as follows:

> He has been seizure free for more than 6 months. All his seizures have occurred out of sleep. There is no motor, visual or cognitive impairment that would prevent <the Applicant> from operating a motorized vehicle safely. I would recommend his driver's license be reinstated.

He was referred by his family physician to a third neurologist, Dr. E., who wrote on May 27, 2010:

> …he has had episodes of generalized weakness that lasts ten to fifteen minutes… He also

> reports on one occasion that his wife noticed that he was staring. He had mouth salivation. He has also noticed blood on his pillow… This patient's history is suggestive of a seizure disorder. I have advised him to remain on Keppra.

On August 16, 2010, Dr. E. wrote to the Registrar:

> I write on behalf of <the Applicant> to request that his driving privileges be reinstated… I have attached copies of my report to his family doctor including EEG report and MRI scan.

On cross-examination the Applicant stated that his last seizure was on January 7, 2010. This led to his referral to Dr. W.

The Applicant also stated that he has never had a diurnal seizure. The incident referred to by MAC in its reasons of September occurred at night when his wife noticed the staring.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
>
> (b) a driver's licence; or
>
> (c) a CVOR certificate,
>
> on the grounds of,
>
> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
>
> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

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

Section 50 of the Act states:

50 (1) Every person aggrieved by a decision of the Minister 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. Section 47(1) of the Act required the Registrar to issue a suspension of driving privileges upon receipt of a letter from a neurologist pursuant to section 203 of the Act, with a diagnosis of nocturnal seizures.

2. The Applicant was started on medication that has controlled the nocturnal seizures and there has not been a seizure since January 7, 2010.

3. The Canadian Medical Association Guidelines for “patients with epilepsy whose seizures have occurred while they were asleep or immediately after wakening for at least one year can be recommended for a private licence (Classes 5 and 6) no less than 12 months after the initial seizure and with therapeutic drug levels”.

4. Canadian Council of Motor Transport Administrators (“CCMTA”), Medical Standards for Drivers, Standard 6.3.4, which states that:

   The individual with a history of seizures solely when asleep or immediately after awakening may be considered for a Class 5 or 6 licence provided he has satisfactory waking EEG’s and is subject to regular medical review.

The Applicant relies on the recommendations by three neurologists and his family physician of 20 years that he is fit to be reinstated. He has been conscientious in attending his neurologist and remains on the prescribed medication without significant side effects. As a cardiologist, he is conscious of his responsibility to ensure his driving is safe.

The Tribunal finds that:

1. The Registrar was justified in issuing a suspension of the Applicant's licence to drive under section 47(1) of the Act upon receipt of a neurologist's letter pursuant to section 203 of the Act, stating that the Applicant suffered from nocturnal seizures.

2. The medical evidence of the Applicant's neurologist is supportive of reinstatement as he has not had a seizure since January 7, 2010, and has not had a diurnal seizure.

3. The Applicant has remained on the prescribed medication under supervision. There is no drug monitoring available for the prescribed medication.

4. The CCMTA Medical Standards for Drivers is supportive of reinstatement.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective April 23, 2010, 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

Kevin Flynn, M.D., Member

RELEASED: October 19, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6272-MED-ALC-ALCOHOL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, Presiding Member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 18, 2010 *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

Respondent’s Evidence

On September 18, 2007 the Applicant completed a Ministry of Transportation’s Driver’s Licence Renewal Application in which he wrote that he suffered from the medical condition of Diabetes. When the Ministry of Transportation (MTO) received this piece of

information a letter was sent to the Applicant telling him that the enclosed driver's medical questionnaire had to be completed. Because of the failure of the Applicant to submit this questionnaire, the MTO wrote again requiring the Applicant to submit an enclosed medical report from a physician familiar with his medical history.

This medical report was completed on May 4, 2009 by Dr. F, the Applicant's family physician. In this the doctor indicated that the Applicant suffered from Metabolic Disease – Diabetes and also Addictions. The doctor stated that the Diabetes was Type 11 and was treated by diet alone. No abnormalities of significance were found in the physical examination. There was no instability, neurosis or psychosis found but alcoholism was present. In the Summary Dr. F wrote:

> 1. Dr. B (Optometrist) recommends a more detailed optometry test.
>
> 2. Alcohol use reviewed with patient; states does not affect work performance.
>
> 3. Currently – good control of blood glucose.

The Substance Abuse Assessment form was completed by Dr. A on November 19, 2009. Under Health History, headaches or blackouts and insomnia were indicated. The doctor further explained that the blackouts were only for the period during intoxication; no spontaneous blackouts. With Laboratory evaluation, the MCV was normal at 91 and the GGT level was not reported. Under Treatment, it was written that treatment was completed in the Spring of 2006, and this was followed by two months of abstinence from alcohol. The AUDIT score was 13. The Recommendations of the doctor was, to suggest an alcohol treatment program.

On March 8, 2010 the MTO wrote to the Applicant informing him that it had been decided that his driving privilege should be suspended.

The Applicant was admitted on January 9, 2010 and discharged on February 5, 2010 at X Centre for a chemical dependency program. It was recommended that he return in three to twelve months for Family Program Stage 2.

Dr. F wrote the following report on May 26, 2010 as follows:

> Mr.X (the Applicant) has been a patient of mine for nine years. He reports week-end alcohol use, with meticulous avoidance of driving while intoxicated. He is certain that this alcohol use pattern will not interfere with his ability to safely drive trucks for his job. There are no current symptoms or signs indicating risk of dangerous driving related to alcohol use. His increased liver function tests are very likely related to alcohol consumption, but are attributable to his week-end use. Laboratory testing on May 18, 2010 showed a slightly raised GGT of 98 and a normal MCV of 91.

In the Ministry of Transportation's Medical Advisory Committee "MAC" Case Summary, dated July 19, 2010, the recommendation of the Medical Advisory Committee was "Remain Suspended". The Instructions were:

Remain suspended. Will reconsider reinstatement with a report from the driver's

treating physician to confirm that the driver has remained free of alcohol for a sustained period of 12 months supported by bio-chemical markers,(MCV,GGT,ALT & AST).

The Reasons of the MAC were:

> Licence suspended for medical reasons on March 18, 2010. Medical report completed by Dr. F on 7th May 2009 had identified that individual suffers with addiction. Dr. A completes Substance Abuse Assessment form on November 19, 2009, recording AUDIT score of 13 with suggestion that individual attend alcohol treatment program. Individual completed Chemical Dependence program on February 5, 2010. Dr.F authors a letter on May 26, 2010 stating that individual consumes alcohol on week-ends. A GGT estimation on May 18, 2010 is elevated at 98 u/L which is attributed to the driver's alcohol consumption on weekends. There is inconsistency between the recommendations of the treatment program that individual remain abstinent, and to attend a recovery home if experiencing difficulty; yet, alcohol continues to be consumed on weekends. Driver has relapsed post treatment and is not following aftercare plan.

The Certified Driver Record for the Applicant, dated September 24, 2010 reported the following pertinent facts:

> Speeding 135 KMH in 90 KMH zone on December 1, 2008.
>
> Fail to lower headlight beam – 150 metres – approaching.
>
> Demerit points total – 6.

Applicant's Evidence

The Applicant found difficulty in stating his case spontaneously, so most of the information he gave at the hearing was in the form of answers to specific questions.

He does not drink and drive. Mostly he drinks at the week-ends. He may drink on a week day in the evening provided he is not on call for work at the time or for the immediate future. His usual habit on days when he is drinking is to go to the beer store and buy six cans of beer and consume them that night. The last time he took a drink was "last Saturday", (two days prior to the day of the hearing).

The Applicant did not attend the 12 Step Program because in the town he is in, far from a large centre, he finds this impossible. He completed a 30 day program at the rehabilitation but has no wish to go back there for any more treatment.

His goal is to return to full duties at work.

APPLICATION OF THE LAW TO FACTS

The Tribunal notes that the Applicant attended an alcohol rehabilitation course in 2006, following which he abstained from alcohol for two months; and he attended a 30 day program in early 2010, but he is still consuming alcohol, probably in the same fashion as he has done for many years.

The Tribunal recognises the following points in favour of the Applicant returning to driving:

1. The Applicant states that he does not allow alcohol to interfere with his driving. This is supported by the statements in the May 26, 2010 report of Dr. F in which she wrote, regarding his alcohol intake, “with meticulous avoidance of driving when intoxicated”. Further in this report Dr. F wrote, ”There are no symptoms or signs indicating risks of dangerous driving related to alcohol use.”

2. In the Substance Abuse Assessment form of November 19, 2009, the Diagnosis that was written was “Substance Abuse”, not “Substance Dependence”.

3. In the Laboratory reports on file the MCV was normal on two occasions and the GGT raised only slightly on one occasion.

4. In the Driving Record for the Applicant there are no reports of driving while impaired.

The Tribunal is aware of the fact that many drivers do consume alcohol to excess on certain occasions, but are careful never to be driving after drinking, and such drivers can be regarded as safe drivers. However, the alcohol consumption of the Applicant was sufficient to alarm Dr. F into calling it an addiction, (May 26, 2010), for Dr. A to recommend an alcohol treatment program, (November 19, 2009), and for the MAC to recommend that the Applicant remains free of alcohol for a trial period of 12 months, (July 19, 2010).

Therefore, the Tribunal is of the opinion that a further period of time should elapse before any consideration is given to the reinstatement of the Applicant’s driving privilege, during which time he should be followed by his family physician, Dr. F and receive close monitoring of the biochemical markers GGT, MCV and liver function test levels with reports to the MTO.

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

LICENCE APPEAL TRIBUNAL

_____
Dr. Patrick Coffey, Presiding Member

RELEASED: October 28, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6255-MED-ALC-ALCOHOL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Dr. KEVIN FLYNN Presiding Member

APPEARANCES: APPLICANT, unrepresented

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

DATE OF HEARING: October 8, 2010 Electronic

DECISION AND REASONS

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

FACTS

The Respondent's Case

On January 11, 2010 the Registrar received a letter dated January 11, 2010 from a family physician, Dr. B. pursuant to Section 203 of the Act.

> *This is to inform you that the above named patient (Applicant) should not be driving due to a medical condition.*

The Registrar wrote to the Applicant requesting a medical report from the Applicant's physician.

On March 15, 2010 Dr. B. completed a medical report form. This showed that the Applicant had 3+oedema and an enlarged liver four fingerbreadths below the rib margin and protein in the urine. He reported evidence of alcoholism.

> *Stopped alcohol four days ago and feeling more energetic. Has Hepatitis C.*
> *Hgb 115.*
> *MCV 106.6*
> *On Synthroid 88 mcg*
> *Protein and blood in the urine. Am referring to a Urologist.*
> *Attached lab results re alcohol.*
>
> *Has been his patient for 4 1/2 years.*

The attached laboratory report showed a blood alcohol level of less than 2.3 ordered by Dr. B. and collected on March 15, 2010.

Also attached was a laboratory report collected on January 5, 2010, ordered by Dr. B.

Alcohol (ethanol)	*32.2 m mol/L.*
Toxic level	*11-22 mmol/L*
Depression of CNS:	*>22 mmol/L*
Fatalities reported:	*> 87 mmol/L*

GGT	*227 (range 5-64)*
SGOT	*160 (range 9-43)*
Alk phosphatase	*210 (range 41-114)*
Amylase	*152 (range 30-81)*

On May 12, 2010 the Registrar informed the Applicant that it had been decided to suspend his driving privilege under Section 47(1) of the Act.

In order to be considered for reinstatement he must arrange for an up-to-date assessment from his physician or a physician specializing in addictions medicine. This assessment must confirm that he has remained abstinent for 12 months. This period may be reduced if his physician confirms that he has completed an alcohol treatment program and is supportive of reinstatement. A clinical explanation must be provided for the results of bio-chemical markers (MCV, GGT, AST, ALT) that are outside normal laboratory range.

He was informed that he may request an Administrative Review and of his right to appeal.

On September 2, 2010 Dr. B. wrote to the Registrar.

> *This letter is in support of (Applicant's) plan to regain his driver's licence in a short time. He works in a rural area. Because he can not work without making house calls without his equipment he is motivated to do whatever is necessary to get his licence back in short order. A weekly blood level at the lab, and a device in his vehicle which must be used to prove sobriety before the motor will start should be a satisfactory guard for the public.*
>
> *I hope you will agree.*

Also submitted were supportive letters from the Applicant's customers.

The Registrar acknowledged receipt of the supportive letters and informed the Applicant on September 15, 2010 that the suspension would continue and that in information requested previously remained outstanding.

The Respondent filed the Driver's Record that showed a conviction for impaired driving in 1984.

The Applicant's Case:

The Applicant now age 56 is self employed living alone in a small community. His nearest hospital is about one hour away. He drove to the Emergency Room in January 2010 because of fluid in his legs and swelling in his body. He was placed on intravenous antibiotics after some blood tests were taken. He was allowed home and was seen daily by a visiting nurse for management of the intravenous antibiotics. He was seen by his family physician about a week later on January 11, 2010 and was told that his blood alcohol level was very high and that the Ministry of Transport would be notified.

He was vague about the actual date he attended the emergency room but he acknowledged that it would have been January 5 when his blood alcohol level was 32. He acknowledged that he drove himself to the E.R.

His normal consumption of alcohol was about 4-5 beers a day and about 10 beers a day on weekends. He was told by Dr. B. that he must stop drinking. His last drink was on August 15, 2010. He submitted the request for Appeal on September 3, 2010.

He was told by his doctor that he had cirrhosis of the liver and he acknowledged that he had previously been advised by family to stop drinking.

In Reasons for Appeal he stated that he needed his truck for work and that loss of his licence for 12 months would be a disaster. He stated that only he could control his drinking and not a clinic. He acknowledged that he had not sought help from Alcoholics Anonymous.

He suggested that if his licence were reissued on a probationary basis and that blood alcohol tests done on a weekly or bi-weekly basis would show his sincerity. He stated that he has a perfectly clean driving record.

He submitted laboratory tests that showed a blood alcohol level of 2.3 on August 23, 2010 and a letter from Dr. B. dated October on October 1, 2010 that stated:

> *(Applicant) is having weekly blood tests which show no trace of alcohol since he stopped taking alcohol on Alcohol on August 15, 2010. His liver tests are not normal due to chronic hepatitis C. The MCV or the RBC, and the GGT are continuing to improve with the abstinence.*

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 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.

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

The Respondent relies on:

1. The report by his family physician on January 11, 2010 reporting the Applicant unfit to drive. He was found to have a blood alcohol of 32.2 mmol/L on January 5, 2010 when he drove himself to the Emergency Room.

2. The Applicant has cirrhosis of the liver with impaired liver function and has been advised by his family physician to stop drinking. He stated that he stopped drinking on August 15, 2010.

Regulation 340/94 14(b) of the Act states:

> An applicant for or a holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

3. CCMTA Section 13.2 states in part:

> Persons habitually dependent on alcohol should not drive until evidence of alcoholism is no longer a problem. These patients must complete a recognized rehabilitation program for substance dependence and remain alcohol free 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.

4. The Applicant has continued drinking 4-5 drinks a day and 10-12 on weekends until August 15, 2010 and while he may be motivated to quit drinking he has not sought help from a relapse prevention program.

The Applicant relies on his decision to stop drinking since August 15, 2010 on advice from his family physician and in light of the diagnosis of cirrhosis of the liver and threat to his livelihood. He acknowledged that he must take part in an alcohol treatment program.

APPLICATION OF THE LAW TO FACTS

The Tribunal rules that:

1. The Registrar was justified in issuing a suspension of the Applicant's driving privilege under Section 47(1) of the Act upon receipt of a medical condition report of alcoholism and impaired liver function, pursuant to Section 203 of the Highway Traffic Act.

2. The Registrar was justified in continuing the suspension under Regulation 340/94 4(b) upon confirmation that the Applicant has continued to consume alcohol and has failed to comply with an up-to-date assessment confirming abstinence for 12 months.

3. The Applicant showed poor judgement when he drove to the emergency room on January 5, 2010 with a blood alcohol level of 32.2 mmol/L.

4. The Applicant has shown poor motivation to change when he failed to seek help to prevent relapse from a recognized alcohol treatment program.

DECISION

Upon the application by the Applicant to appeal the decision dated May 22, 2010 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

Kevin Flynn M.D., Presiding Member

RELEASED: October 13, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6234-MED-PSYCH-ALCL-Psychiatric and Alcohol

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 5, 2010 Kitchener

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* (the "Act").

FACTS

The Registrar's Evidence

On September 23, 2009, a Medical Condition Report was completed by an Emergency Room ("E.R.") physician, Dr. W., pursuant to section 203 of the Act, and the following was noted:

> Blackout or Loss of consciousness or Awareness
>
> Psychosis
>
> Schizophrenia

> Admits to driving irrationally while hallucinating
>
> Patient is aware of this report.

The Registrar wrote to the Applicant on September 25, 2009, regarding the reported:

> Syncope/Loss of Consciousness
> Psychiatric Condition

The Applicant was informed that it had been decided to suspend his driving privileges under section 47(1) of the Act.

In order to be considered for reinstatement the Applicant was advised that he must arrange for a detailed up-to-date report to be submitted, to include:

- The results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.
- A narrative of this and any previous syncope/loss of consciousness history and confirmation that there have been no further episodes.
- His complete psychiatric history (i.e. duration, degree), dates of hospitalizations (if any), narrative account of his reported anxiety/ideation/panic attacks (if applicable).
- Evidence of addiction or misuse of medication (if applicable).
- Details of his compliance and frequency/rapidity of decompensation, signs of impaired judgment, reduced concentration, reckless/aggressive behaviour and any sedation or psychomotor retardation due to medication.
- Confirmation of his mental and emotional stability and current level of function.

He was advised that he may request an Administrative Review and of his right to appeal.

The Applicant's family physician, Dr. C., wrote to the Registrar on November 20, 2009:

> This is to advise that my patient, <the Applicant>, who has been under my care since October 2006, was examined in my office today. He was also seen in consult by Dr. N., psychiatrist on October 19, 2009.
>
> Currently, he is found to be physically and mentally fit to drive. He never did have any syncopal episodes.

The Registrar responded to the Applicant in light of this letter. He was informed that he must file an assessment that must include the items requested on September 25, 2009.

Dr. C. wrote to the Registrar on January 7, 2010, attaching the consult note and discharge notes. According to Dr. C., the psychiatrist, Dr. N., was of the opinion that the Applicant was stable to drive. The Applicant was also found to be physically fit on a physical exam on November 20, 2009.

The psychiatrist, Dr. N., wrote a discharge note at the Psychiatric Unit of the hospital on October 19, 2009, which summarized the following:

- Admitted September 23, 2009 on a Form 1.
- Reported to have been driving recklessly, confused at times and reported feeling suicidal. Staff in the E.R. concerned about his safety when he went outside for a smoke and he was escorted back to the E.R. by security. Appeared agitated, unpredictable and having auditory hallucinations.
- When seen by Dr. N. on September 23, 2009, he was drowsy. Later during his stay in hospital, he was guarded about why he came to the hospital. He stated that he just wanted to rest after a domestic disagreement.
- Past hospitalization for four days in 2007 for psychosis.
- Discharged on Risperidone on October 9, 2009.
- Seen by Dr. B., a psychologist, during his stay in hospital and diagnosed with narcissistic personality traits and delusional disorder. No suicidal ideas, no homicidal ideation, no impulsive or aggressive behaviour.
- No history of alcohol or substance abuse.
- Referred on discharge to see Dr. J. at the psychiatry follow-up clinic for monitoring of his medication.
- When assessed on October 19, 2009, he was alert and oriented with clear speech and no suicidal or homicidal ideation. No evidence of psychosis and no depression.
- He was advised to continue with Risperidone 2 mg at bedtime with periodic medication assessment. He was informed about available group outpatient services.

At the conclusion of the discharge note, Dr. N. wrote, “In my opinion, <the Applicant> is psychiatrically stable to drive a motor vehicle”.

The Applicant’s case was reviewed by the Medical Advisory Committee (“MAC”) at the Ministry of Transportation on February 8, 2010.

Recommendation:

> Remain suspended. Reconsider with a detailed report from Dr. J., in medication clinic, confirming six months of stability, current symptoms, comments on any psychosis or residual symptoms, medications, doses, compliance, frequency of appointments, level of attention, concentration, sedation, psychomotor function and ability to drive.

Reasons:

> Given recent admission and reckless driving, needs a longer period of stability as noted above. To reconsider would like updated letter from psychiatrist that driver was supposed to follow-up with.

The Registrar informed the Applicant of the above and requested an up-to-date report from Dr. J., addressing the issues listed by MAC.

On March 30, 2010, the Registrar wrote to the Applicant in light of the correspondence from the family physician, Dr. C., and the psychiatrist, Dr. N., and a lengthy letter from the Applicant that outlined his explanation for many of the issues listed by Dr. N.

The Applicant was advised that some of the issues previously requested by the Registrar remained outstanding:

- Assessment by Dr. J. confirming that he has remained stable for a period of six months;
- Current symptoms;
- Comments on any psychosis or residual symptoms;
- Medication, doses, compliance;
- Frequency of appointments;
- Level of attention, concentration, sedation, psychomotor function; and,
- Ability to drive.

The Registrar made reference to an earlier Tribunal Decision, dated June 23, 2010, that confirmed the suspension under section 50(2) of the Act. The Applicant did not appear at the electronic hearing. He informed the Tribunal's Registrar that his reason for failing to appear was incarceration with the local police service. He was then allowed to make application for a new hearing.

On August 13, 2010, the Applicant's psychiatrist, Dr. S., who has known him for a number of years, wrote a letter on his behalf:

> When I enquired about the reasons for this (for the suspension) he mentioned that one day he asked the police to help him because he was unable to sleep at his home and police took him to the emergency room where he slept off but during that time, the doctor informed the Licensing Board to hold his Licence because he complained of dizziness. As far as we could see physically he is in fit condition. I did not see any danger of him driving outside now. I sent him for a blood work to understand how his internal system is. I added CBC and Liver function test GGT, AST, ALT, Bilirubins direct and indirect. After the results are back I might write a letter to the Licensing Board regarding his fitness.

Laboratory results performed on August 10, 2010, showed the following:

- GGT 34 (range less than 60)
- MCV 100 (range 80-97)
- AST 19 (range less than 37)
- ALT 35 (range less than 46)

Dr. S. wrote a second letter to the Registrar on August 18, 2010:

> I am satisfied with his GGT which is 34, AST 19, MCV 100, hence I warned him that he has to totally stop alcohol for next 6 months and by that time his GGT will come down (84 to 94 normal, however I did not see a need to stop his driver's licence and I warned him enough that he has to remain 100% away from alcohol and behave good for which he agreed.

> There is no indication for medication and I will see him when he comes according to the appointment.

On August 19, 2010, the Registrar wrote to the Applicant referencing the letter from Dr. S. on August 18, 2010. Again, he was informed that he must file an up-to-date assessment from a psychiatrist or his treating physician referencing the items listed previously on March 30, 2010. It also noted:

> In addition, it will be necessary to file an assessment from a physician familiar with your medical history or a physician specializing in addiction medicine regarding your consumption of alcohol.

He was provided with a Substance Abuse Assessment Form to give to his physician and was informed that if the assessment confirmed a diagnosis of alcohol dependence, he must provide confirmation of abstinence for a period of one year which may be reduced with confirmation that he has successfully completed an alcohol treatment program and is supportive of reinstatement of his driving privilege. Also required is an explanation of any of the bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

The Registrar filed the Applicant's Driver's Record that showed, in addition to the suspension effective October 5, 2009, an offence of Speeding 84 Kmh in 60 Kmh Zone on March 7, 2010 (i.e. while his licence was under suspension).

The Applicant's Evidence

The Applicant stated that his arrival in the E.R. on September 23, 2009, was prompted by a domestic dispute that led him to having no place to sleep. He called the police and was advised to go to the E.R.

While there, he referred to suicide in the context of some people talking very loudly in the building next door. This was causing him more stress and he jokingly suggested a roof-top view.

He stated that he has never had suicidal ideation. He also has never driven recklessly.

When he went outside the E.R. in order to smoke, the nursing staff asked the hospital security to bring him back.

He stated that he has never had an attack of syncope.

In regard to the advice to see Dr. J. at the outpatient medication monitoring clinic, he stated that he visited the doctor's office and waited for 40 minutes, but the doctor was not there and he was advised by the receptionist to telephone for an appointment. He stated that he did so and spoke to Dr. J., who asked him some questions regarding his reasons for seeing the doctor and was told by the doctor that he saw no reason for the Applicant to be seen by him.

The Applicant denied that he has had an alcohol problem.

He acknowledged having a hospital admission in 2007 for possible delusional behaviour, but has not been on anti-psychotic medication since. The Risperidone prescribed on discharge was discontinued as his psychiatrist, Dr. S., saw no reason for medication.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
>
> (b) a driver's licence; or
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> (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 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.
>
> (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 relies on:

1. The Medical Condition Report filed by a physician pursuant to section 203 of the Act, stating that the Applicant suffered from Blackout or Loss of consciousness or Awareness, Psychosis, Schizophrenia, and admits to driving irrationally while hallucinating.

2. A history of previous admission under Form 1 in 2007.

3. Failure to follow-up directions to see Dr. J. for monitoring of medication.

4. Driving while under suspension.

5. Failure by his psychiatrist, Dr. S., to make reference to the discharge summary and recommendation in his letters to the Registrar.

6. Reference by Dr. S. to the Applicant's alcohol use and his interpretation of the laboratory results.

7. Lack of follow-up confirmation of compliance.

8. Canadian Council of Motor Transport Administrators ("CCMTA"), Medical Standards for Drivers, Standard 11.1, which states that:

   > In examining a patient with a mental disorder the diagnosis is less important than the degree to which it affects the ability to drive safely.

9. CCMTA Standard 11.2, which states that:

   > If the physician believes that a patient's judgement or psychomotor activity has been severely affected by his or her emotional state, the patient should be advised not to drive any type of motor vehicle until sufficiently recovered.

The Applicant relies on:

1. The advice by his own psychiatrist and his family physician, and the hospital psychiatrist who treated him for 14 days, who all state that he is fit to drive.

2. Alcohol has never been an issue with him and the fact that the information provided by the psychiatrist, Dr. S., to the Registrar in the letter of August 18, 2010, was a misinterpretation of the laboratory results.

The Tribunal finds that:

1. The Registrar was justified in issuing a suspension under section 47(1) of the Act, in response to the Medical Condition Report filed by a physician pursuant to section 203 of the Act, listing medical conditions that may make it dangerous for the Applicant to operate a motor vehicle.

2. The Applicant demonstrated poor judgement when he drove while under suspension and at excessive speed.

3. The Applicant has provided credible reasons for many of the issues surrounding his admission to the psychiatry ward on a Form 1. Most of these issues have been detailed at length by his treating psychiatrist, Dr. N., who at the end of his assessment on October 21, 2009, stated, "…no suicidal or homicidal ideas, denying auditory or visual hallucinations. There was no evidence of perceptual disturbances or psychosis".

4. On October 19, 2009, the psychiatrist Dr. N. stated, "In my opinion <the Applicant> is psychiatrically stable to drive a motor vehicle".

5. The Applicant's family physician, who has known him since October 2006, stated on November 20, 2009: "Currently, he is found to be physically and mentally fit to drive. He never did have any syncopal episodes".

6. The psychiatrist, Dr. S., who arranged the laboratory tests on August 10, 2010, misinterpreted the MCV result, which was 100 in a range of 80-97, when he stated in his letter to the Registrar on August 18, 2010 as follows:

   > I am satisfied with his GGT which is 34, AST 19, MCV 100, hence I warned him that **he has to totally stop alcohol for next 6 months and by that time his GGT will come down (84 to 94 normal** (emphasis added by the Tribunal), however I did not see a need to stop his driver's licence and I warned him enough that he has to remain 100% away from alcohol and behave good for which he agreed. There is no indication for medications and I will see him when he comes according to the appointment.

   This created the false impression that the Applicant had an alcohol problem and led to the request by the Registrar for a Substance Abuse Assessment.

7. There is no medical evidence that the mental condition that led to the suspension of the Applicant's driving privilege currently presents a disability likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely.

8. Since the date of suspension twelve months have passed, and therefore, the required period before reinstatement has been met.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective October 5, 2009, 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

Kevin Flynn, M.D., Member

RELEASED: October 13, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6218-MED-PSYCH-Psychiatric

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. GARRY FISHER, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 5, 2010 *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*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

Evidence of the Registrar

The Ministry of Transportation ("MTO") notified the Applicant in a letter of March17, 2010, that his licence to drive was suspended under Section 47(1) of the Highway Traffic Act. Dr. H., an Emergency Room (ER) physician in a peripheral hospital, examined the Applicant on March 9, 2010 and filed a form 203, noting "mental or emotional illness – unstable".

The letter from the MTO detailed the reasons for suspension – "psychiatric condition" and requested information from the Applicant, to include: results of medical examinations and detailed psychiatric assessment.

Dr C.B. saw the Applicant on March10, 2010 noting that the hospital visit was the third in as many days. The Applicant was under a great deal of emotional distress related to domestic issues with his wife. The consultation with Dr C.B. and admission to hospital followed a motor vehicle accident ("MVA") on March 9, 2010. After a second ER visit (of three), he had taken a prescribed anti-depressant plus some alcohol and ran his van off the road on the way home.

Dr C.B. describes the Applicant as 33 yrs of age – a large strong man who has been a body builder. In conjunction he has used steroids, but denies "steroid rage".

A psychiatry consultation was arranged with Dr. A.C. He found very little wrong and described "a situational crisis" in need of marital counselling.

Nurse K.G., a mental health therapist, wrote an encouraging note on July 20, 2010.

August 20, 2010 - the MTO wrote the Applicant requesting follow up from his treating physician regarding psychiatric problems and possible substance abuse.

The Applicant's evidence

The Applicant wrote on August 16, 2010, outlining the circumstances of his MVA and is indeed remorseful over his actions. He clearly acknowledges that sedatives and alcohol led to his MVA on March 9, 2010 and because of that, police charged him with Dangerous Driving and Driving Under the Influence ("DUI"). The case was recently heard and at the advice of his lawyer, he pleaded guilty to the (lesser) charge of DUI. That in turn has led to a prolonged licence suspension.

Follow up reports from the Applicant's treating physician as requested from the MTO have not been received. He needs to attend to the matter of follow up reports and settle the medical suspension before the DUI suspension runs its course. The Applicant and the Registrar are working in a friendly and co-operative manner and should be able to resolve the medical issues.

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 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.

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

APPLICATION OF THE LAW TO FACTS

Clearly the Applicant did have a drug-alcohol related MVA. He did have a period of emotional instability. His licence will be suspended for some time yet due to the DUI conviction. The MTO Agent and the Applicant have undertaken to work to get appropriate medical reports from attending doctors and resolve the issues related to Section 47(1) to the satisfaction of the MTO.

DECISION

Upon the application by the Applicant to appeal the decision dated March 27, 2010 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

Dr. Garry Fisher, Presiding Member

RELEASED: *October 14, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6196-MED-ALCL-Alcohol

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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., Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 27, 2010 *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* (the "Act").

FACTS

The Registrar's Evidence

Dr. P. sent a Medical Condition Report to the Ministry of Transportation ("MTO") on July 23, 2010. In this report, he wrote that the Applicant suffered from the medical conditions of Alcohol Dependence, Seizure(s) – Alcohol related, Blackout or Loss of consciousness or Awareness, and Mood Disorder (depression). The doctor wrote the following (not all of the handwritten notes on the Report are legible):

> <The Applicant's name> had a recent fall due to alcohol intoxication @ home; was referred to Addiction Assessment and referral service @ <city> Regional Hospital. She just recently

> finished management at Detox/ awaiting a placement @ <name removed> residential treatment program in <city>/ AA meetings. She had willingly discontinued Ativan, Immovane and Tylenol 3 medications and alcohol.
>
> She is cooperative. She was initially reluctant to be referred to a psychiatrist, but later agreed. She ? at <name removed> Hospital and was concerned on any medical information to be sent there but she was referred to a new psychiatrist in town who works at <name removed> Hospital only.

The Applicant was assessed from the addiction viewpoint at the <name removed> Hospital on July 5, 2010. Pertinent findings and history are as follows:

> Substances used by the Applicant: alcohol, Benzodiazepines and codeine.
>
> In the past suffered from Depression after the death of her brother, Arthritis of hip and neck, Cancer of uterus, and head injury from a fall.
>
> Prescribed medications: Prozac, Ativan, Tylenol 3 and Immovane.
>
> Referral suggested: Residential program at <name removed> Treatment Centre.

Laboratory Report, dated August 6, 2010: In the Immunoassay RDM of urine, Benzodiazepines, Cocaine, Cannabinoids, Oxycodone, Ethanol and Opiates were found negative.

The Program Director of the <name removed> Treatment Centre wrote the following report, in part, on September 17, 2010:

> <The Applicant's name> entered the rehabilitation program for the treatment of Substance Dependence on August 30, 2010. She completed the residential portion of this two-part treatment program on September 17, 2010. In order to fully complete her treatment she will have to attend our Aftercare program for a period of six months. In our opinion, she will continue to remain abstinent as long as she applies herself to the community-based self-help program which was introduced to her during her stay at <name removed> and regularly attends the Aftercare program available to her.

A Substance Abuse Assessment form was completed by the Applicant's family physician on September 21, 2010. Under the heading "Medical", the doctor wrote that the Applicant had gone through some traumatic events in recent years, that her brother had passed away from cancer in 2002, and that the Applicant, herself, was diagnosed with endometrial cancer in 2009. The doctor described the Applicant as being stable, very cooperative, and calmer since her abstinence from alcohol. He also noted that she is following the advice and treatment provided to her. The details under the heading "Physical Assessment and Laboratory Evaluation" are largely illegible, but it is noted that the MCV, GGT, AST and ALT were reported normal. The "AUDIT" score was 13. What is written under the heading "Diagnosis" is largely illegible.

The MTO wrote to the Applicant on September 22, 2010, informing her that it would be necessary for an assessment form to be filed from an Addictions Specialist or from a physician familiar with the Applicant's medical history. Also, MTO noted that this report should confirm that the Applicant had been abstinent from alcohol for one year. The MTO also required that an explanation be provided for any abnormal MCV, GGT, AST or ALT reports.

In a report on September 24, 2010, Dr. P. wrote the following:

> <The Applicant> has never seen a psychiatrist, nor been under psychiatric care, and has never been hospitalized for any psychiatric problems, and is mentally and emotionally stable, since becoming my patient in my practice since October 2007.

The Applicant's Evidence

The Applicant stated that she had completed the 19-day residential program at the <name removed> Treatment Centre and has received the papers indicating this. She understands that the Aftercare program is not mandatory, but she intends to attend this anyway. She is going to "AA" meetings.

The Applicant stated that it was reported that she had a seizure when she was in her twenties, but she asserted that there was never any medical confirmation of this. She also stated that it was reported in Dr. P.'s report, dated July 23, 2010, that her fall on June 30, 2010, was due to inebriation from alcohol, but actually the main cause of this fall was that she tripped over her dog when she entered her house.

Since July 13, 2010, the Applicant has abstained from alcohol, Benzodiazepines and codeine.

The Applicant has a good driving record. She has never driven after drinking. She has a full-time job and would like to be able to drive in order to get to work.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

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

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

Section 47(1) states:

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

(a) the plate portion of a permit as defined in Part II;

(b) a driver's licence; or

(c) a CVOR certificate,

on the grounds of,

(d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

(e) conviction of the holder for an offence referred to in subsection 210(1) or (2);

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

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

Section 50 of the Act states:

50 (1) Every person aggrieved by a decision of the Minister 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.

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

APPLICATION OF THE LAW TO FACTS

Under the heading "Alcohol dependence and alcohol withdrawal seizures" of the Canadian Council of Motor Transport Administrators Medical Standards for Drivers, the applicable standard (Standard 13.2) is written as follows:

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

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

The Tribunal sympathizes with the Applicant's desire to be able to drive again.
The Tribunal recognizes that the Applicant has not consumed alcohol since July 13, 2010, that she is attending "AA" meetings, that she has successfully completed the 19-day residential program at the <name removed> Treatment Centre, that she is enrolled to complete the rehabilitation program for another six months, that the urine immunoassay report of August 6, 2010 was negative for alcohol and other substances, and that the September 21, 2010 Laboratory Report showed normal results for the GGT and MCV. The Tribunal also recognizes that the Applicant has been under much stress in the last several years, first with the death of her brother in 2002, and secondly, with the fact that she was diagnosed with and treated for uterine cancer in 2009.

However, the Tribunal notes that it is only about three months since the Applicant last consumed alcohol, and that according to the July 5, 2010 Assessment Report from <name removed> Regional Hospital, her intake of alcohol was high to very high prior to July 13, 2010, when she stopped. The Tribunal also notes that the Applicant is only part way through her rehabilitation program at the <name removed> Treatment Centre and still has six months of the Aftercare program.

The Tribunal has decided that the Applicant should complete the rehabilitation program in its entirety and then obtain a report from her family physician confirming that she has been abstinent from alcohol for one year (supported by bio-chemical markers), before consideration can be given to the reinstatement of the Applicant's licence.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective August 6, 2010, 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 confirmed.

LICENCE APPEAL TRIBUNAL

_____
Patrick Coffey, M.D., Member

RELEASED: October 8, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6309-MED-SEIZ-Seizures

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID IAN TURNBULL, M.D., Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: November 19, 2010 Hamilton

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* (the "Act").

INTRODUCTION

The 33-year-old Applicant had a neurosurgical procedure for epilepsy in April 2010. She has been seizure-free since surgery. Should her driving privileges be restored prior to the one-year seizure-free period required by the Registrar?

EXHIBITS

1. Notice of Suspension – effective March 21, 2009
2. Notice of Appeal form – dated October 6, 2010
3. Tabbed Submissions of the Registrar – dated November 3, 2010

4. Letter of the Applicant's Employer – dated November 8, 2010

THE EVIDENCE

Following the suspension of the Applicant's driving privileges for a nocturnal seizure in March 1999 (Exhibit #3 – Tab 1), her privileges were restored in April 2000 (Exhibit #3 – Tab 5).

Her oral testimony was that she drove from 2000 until 2007, when she voluntarily stopped driving because of a recurrence of symptoms. Despite many interactions with the health care system, she was surprised that her driving privileges were not formally suspended until March 2009.

Because of an episode of status epilepticus in February 2009, the Applicant was reported to the Ministry of Transportation of Ontario ("MTO") (Exhibit #3 – Tab 6). Her driving privileges were suspended on March 21, 2009 (Exhibit #3 – Tab 7), requesting medical information from her neurologist.

Anti-convulsant drugs failed to completely control her seizures and caused side effects (skin). The Applicant attended the Epilepsy Clinic at a teaching hospital to be evaluated for a neurosurgical procedure – temporal lobectomy – in hopes of eradicating her seizures.

Following subdural electro-encephalography in January 2010, she was deemed a candidate for a right temporal lobectomy. The procedure was performed on April 8, 2010 (Exhibit #3 – Tab 10).

On August 30, 2010, the Applicant's neurologist copied the MTO (Exhibit #3 – Tab 10) supportive of her returning to work. He stated that the Applicant had been seizure-free since March 10, 2010, and expected her to continue to be seizure-free because of the surgery.

The MTO replied to the Applicant on September 23, 2010 (Exhibit #3 – Tab 11) stating that consideration would be given to restoring her driving privileges after establishing a one-year, seizure-free period (i.e. March 10, 2011).

On October 22, 2010, the Applicant filed a Notice of Appeal (Exhibit #2) with the Tribunal. A hearing was set for November 19, 2010.

ISSUE

Should the decision of the Registrar to suspend the Applicant's driving privileges 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.

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> Subject to section 47.1, the Registrar may suspend or cancel,
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> on the grounds of,
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> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
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> (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
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> (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 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO THE FACTS (ANALYSIS)

The Tribunal finds that the Registrar has not made its case that the Applicant's driving privileges should remain suspended.

The Tribunal has reviewed the following sources of information:

1. The Applicant's Notice of Appeal (Exhibit #2)

2. The Applicant's testimony

3. The Applicant's Driving Record (Exhibit #3 – Tab 13)

4. Guidelines provided by the MTO (Exhibit #3 – Tabs 15 and 16)

5. Letter from the Applicant's Neurologist (Exhibit #3 – Tab 12a)

6. The Act – section 47(1)

The Applicant is a credible witness grateful for the surgical treatment of her epilepsy. She has returned to work (Exhibit #4) and is supported by her manager. She expects to be seizure-free the rest of her life and doesn't see why she should wait until March 10, 2011, to have her driving privileges restored.

Nobody knows whether the Applicant will ever have another seizure. The fact is, she may have a seizure in January 2011 or after March 2011, or never.

The Applicant's driving record only goes back three years (Exhibit #3 – Tab 13). Currently, the Applicant has no demerit points. Her driving privileges were suspended for medical reasons on March 21, 2009.

The Registrar relies on two sets of guidelines to insist that the one-year, seizure-free period be adhered to (Exhibit #3 – Tabs 15 and 16).

Firstly, Exhibit #3 - Tab 15, the Canadian Council of Motor Transport Administrators ("CCMTA") Medical Standards for Drivers, July 15, 2006.

In Chapter 6, "Diseases of the Nervous System", Standard 6.3.1. - Epilepsy (Page 22 and 23), Paragraph 2 on Page 23 states that:

> A patient who has been seizure-free on medication for 1 year and whose seizures have recurred after medication was stopped for a trial period on the physician's instructions may drive after resuming medication. A patient who stops taking antiseizure medication against the physician's advice should not be allowed to drive until the physician feels confident that he or she has resumed regular drug therapy and will conscientiously follow advice in the future. (CMA 5.4)

The Applicant has only been seizure-free since March 2010. But the preceding paragraph states:

> An applicant who meets all these criteria and who has been free from seizures for six months can usually operate a Class 5 or 6 motor vehicle safely, provided the medication prescribed does not cause significant effects that would impair driving. This will require a favourable recommendation from the treating physician.

The Tribunal believes that the October 10, 2010 letter from the Applicant's Neurologist (Exhibit #3 – Tab 12a) supports the Applicant's case (i.e. Consideration of reinstatement after being free of seizures for six months).

There is nothing in the CCMTA Guidelines, which mentions driving after temporal lobe surgery.

Regarding the Canadian Medical Association ("CMA") Guidelines (Exhibit #3 – Tab 16), 7th Edition, Section 10 – "Nervous system" – Pages 38-40. The Guidelines are presented in both a tabular and text format – Section 10.4.1, Table 2, Page 38:

> After diagnosis of epilepsy, private drivers can drive if:
>
> - 6 months seizure free on medication
> - Physician has insight into patient compliance
> - Physician cautions against fatigue, alcohol

However, in the text, Section 10.4.2 (Page 39) states:

> **Private drivers**: *Seizure-free period*: The patient should be seizure free on medication for not less than 6 months, unless seizures with altered awareness have occurred more than once a year in the previous 2 years, in which case the seizure-free interval should be 12 months.

The Applicant did have seizures on a monthly basis between 2007 and 2009, and regularly sought medical assistance in physicians' offices and hospital Emergency Rooms. During this time, she voluntarily stopped driving. The Tribunal can only surmise that the physicians thought the Applicant wasn't driving because her privileges had already been suspended.

Table 2, Page 39:

> **Private drivers:** "After surgery to prevent epileptic seizures":
>
> - Resume driving if 12 months seizure free after surgery with therapeutic drug levels. (Recommendations for individual patients may differ on an exceptional basis)

The Guidelines are somewhat contradictory, but the Tribunal believes that they provide an alternative to a 12-month seizure-free period required by the Registrar.

The Tribunal relies on the two reports from the Applicant's Neurologist to shorten the seizure-free requirement to six months:

- Exhibit #3, Tab 10, and
- Exhibit #3, Tab 12a

The Tribunal has considered all of the evidence and applied the law to the facts. After careful consideration, the Tribunal finds that the Applicant does not (re: Regulation 340/94, section 14(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.

The Tribunal is concerned about the safety of both the Applicant and the public. Guided by the strong recommendation of her Neurologist, the Tribunal believes a seizure-free period of six months is sufficient.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective March 21, 2009, 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

_____

David Ian Turnbull, M.D., Member

RELEASED: November 30, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6284-MED-ALC-ALCOHOL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID W. HURST M.D.

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 27, 2010 Toronto

DECISION AND REASONS

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

FACTS:

The Applicant who is a 35 year old architect, received a letter from the MTO on July 21st, 2010 stating they had received a report indicating that he had a condition which impairs his ability to safely operate a motor vehicle. The report had been submitted in compliance with the *Highway Traffic Act* regarding his reported "seizure(s) – alcohol related." After considering all relevant facts available, the Registrar of Motor Vehicles had decided to suspend his driving privilege under section 47(1) of the *Highway Traffic Act*

This letter from the MTO went on to explain that they would be pleased to reconsider the Applicant's case for reinstatement upon receipt of information satisfactory to the Registrar. Therefore, they asked that he arrange for the MTO to receive a detailed up-to-date report from his doctor which would include the following:

> The results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.

In the MTO's letter there was a reference to the Applicant's reported seizure(s). As the seizure appeared related to alcohol misuse, "the enclosed Substance Abuse Assessment Form must be completed by the Applicant's treating physician or a physician specializing in addiction medicine".

Further, if as a result of the assessment,

> "the Applicant's physician confirms a diagnosis of alcohol dependence and/or that you have experienced an alcohol withdrawal or alcohol related seizure, this assessment must confirm that you have remained both seizure free and abstinent from alcohol for a period of one year. This period may be reduced if the Applicant's physician confirms that he has successfully completed an alcohol treatment program and is supportive of the re-instatement of his driving privilege".

The letter went on to ask for a clinical explanation to be provided for the results of any bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

The letter asked for details of the circumstances surrounding the reported seizure as well as details of any previous seizure whether alcohol related or not.

This action by the MTO occurred as a result of a Medical Condition Report sent to the MTO on May 20th, 2010. In a list of common medical conditions Dr. T.L. had identified alcohol dependence and seizure(s) – alcohol related. The MTO's requested Substance Abuse Assessment Form regarding the Applicant's problems was filled out by the Applicant's family physician Dr. M.S. on August 4th, 2010. In the form he had itemized that the Applicant had been hospitalized in the last 12 months for alcohol withdrawal symptoms. In the positive response section the doctor indicated that the Applicant had promptly and consciously agreed to attend a program at a regional health centre. He has diligently and regularly continued to attend AA meetings, and totally abstained from the use of alcohol. The doctor expressed his belief that the Applicant clearly recognises that he is a reformed former alcoholic and his doctor stated that he deserved to have his driving privileges restored.

The narrative indicated that he had suffered an alcohol withdrawal seizure 12 – 72 hours after cessation of drinking. At that time all liver function tests were normal.

The Applicant's history disclosed that he first consumed alcohol at the age of 15, to the point of intoxication. He became a regular drinker at the age of 20 and the amount consumed on each occasion would be 6 beers, and 3 shots of brandy and 1 glass of wine. His most recent use of alcohol had been May 18th, 2010 and this report indicated that the Applicant has been abstinent since May 20th, 2010, the date on which he went to hospital because of a withdrawal seizure.

This report disclosed that the Applicant had diligently pursued a 12 step program over a period of 36 weeks. It was also noted that his current participation with sponsors diary, meditation, exercise, diet, avoidance of “slippery” places was going very well.

The Applicant was diagnosed as suffering from alcohol dependency and the recommended goal was abstinence. His ongoing treatment program at the regional centre included regular visits, 6 days a week, including an appearance daily with the AA organization. This had been ongoing for 36 weeks. Dr. M.S. had been looking after the Applicant since his birth, 35 years before.

This form went on to summarize the fact that the Applicant suffered from alcohol dependence, with the appearance of withdrawal problem (seizure).

The audit regarding his current activities disclosed that the Applicant had attended and completed treatment at a regional addiction service centre from June 29th, 2010 to July 29th, 2010 and he has been totally abstinent since May 20th, 2010.

The only other medical problem of any significance is the fact that the Applicant is taking Warfarin for an ongoing management of chronic deep vein thrombosis (Lupus related).

The Respondent then entered a report consisting of the discharge summary from the regional addiction centre indicating that the Applicant lived at home with his wife (there are no children), is self employed and was diligently attending AA meetings. He is meeting with sponsors and had completed the Phase 3 program at this regional centre. He has also continued with regular appointments with his family doctor.

Ninety visits in ninety days were recommended and the Applicant has complied.

It was also noted that the Applicant was following a daily structured routine with three regular meals, snacks, diary, meditation, exercise, relaxation, etc. He was also being observed regarding any possible relapse and the plan was to continue as an outpatient with follow up visits. Laboratory reports for the 4th of August, 2010 showed normal liver function test and this has been the case throughout the months following the alcohol related seizure in May of 2010.

Another Medical Condition Report from Dr. I.C. was received by the MTO on August 17th, 2010 and this referred also to the events of May 20th with a diagnosis of alcohol dependence and a note that there had been an alcohol withdrawal seizure.

The Medical Advisory Committee of the MTO reviewed the Applicant’s progress on August 12th, 2010. They requested further information. They asked for a report from the driver’s treating physician to confirm ongoing abstinence from alcohol supported by bio-chemical markers (MCV, GGT, ALT and AST). They went on to state that a clinical explanation would be required for any level outside of the normal laboratory range. Furthermore they asked for confirmation of absence of further seizures.

The MAC went on to state that if a favourable report was received they could reinstate to Class "G" with a six months (post-report) follow up to include bio-chemical markers (MCV, GGT, ALT, and AST).

The MAC observed that the driver has completed a substance abuse treatment program at a well recognised institution and is enrolled in the phase 3 after care program scheduled to be completed in 36 weeks. They asked for a longer period of stability after post-alcohol withdrawal seizure on May 20th, 2010.

On September 22nd, 2010 the MTO wrote to the Applicant stating that his case had been reviewed in light of the Substance Abuse Assessment Report dated August 10th, 2010. The Applicant was required to file a further report from his treating physician in December 2010 confirming his ongoing abstinence from alcohol supported by bio-chemical markers (MCV, GGT, ALT and AST). A clinical explanation would be required for any levels outside the normal range. They also requested confirmation that there have been no further seizures.

Upon receipt of these assessments the MTO indicated that his case will be considered for reinstatement.

A certified copy of the Applicant's driving record was filed and there were no offenses and simply a medical suspension.

The Agent then entered pertinent sections of the 2009 Annotated Ontario *Highway Traffic Act* and also the pertinent portions of the CCMTA Medical Standards for Drivers.

THE APPLICANT'S CASE:

He had no questions of the MTO's Agent and presented (Exhibit #3) recent blood tests stated October 22nd, 2010 indicating that all his liver function tests were normal.

The Applicant went on to express his appreciation for this Tribunal hearing, and said that there were two issues:

1: The main issue as he saw it was his recovery. He pointed out that he is doing everything that the MTO has requested. The problem is that to be compliant in this regard he has serious difficulty getting to the rehab centre on a daily basis but has done so in fact daily except for Sundays for 90 days. He found that this time frame was very difficult for him and also extremely stressful. He acknowledged that a driving licence is a privilege but is very concerned about his ability to maintain his follow up care and sessions with the AA without the use of a car. He underlined carefully the stress that this situation causes him and is under extreme pressure.

2: Not having a licence has caused him serious financial difficulties. His income source is that of working with his father and this is now interfering with his father's

activities. He went on to describe how he has recently married and now has mortgage problems.

Questioning by the Tribunal confirmed that he had begun to drink at the age of 15 and indicated that this early start on his drinking career maybe partly due to his European heritage. The use of alcohol isn't frowned upon so much and there could be an hereditary factor with an alcoholic uncle in his background.

He described his drinking then as mostly beer with high school friends.

When he went to University the drinking became a daily event. He admitted that his mother was "on his case" indicating her concern about his excessive drinking habits. In fact the Applicant acknowledged that he knew he was drinking significantly and consuming more than his friends.

He described the day of his seizure which had resulted in a period of withdrawal caused by having started a new job keeping him very busy and the drinking had ceased for approximately two days. He was taken to hospital following this withdrawal seizure and spent three days as an inpatient.

He denied craving alcohol now and stated that he knows that if he starts to drink again he will die. He explained how he has been taught during his treatment to visualize the scene with him on a hospital stretcher if he had begun to drink again.

He went on to explain that after graduation from university at the age of 26 he was certainly a social drinker but he had also developed into a solitary drinker using various measures to hide his abuse of alcohol. He admitted that he had even reached the stage where he was using "eye-openers" by day.

THE RESPONDENT IN CROSS-EXAMINATION:

The Applicant testified that he became a regular daily consumer of alcohol at the age of 20. He had reached the alarming amount of an average of 6 beers, 3 shots of liquor (brandy) and a glass of wine daily and that alcohol was certainly in his blood stream when he was working. He also admitted that he had been drinking the night before, there certainly would be some alcohol in his circulation when driving the next day. He admitted that as well his mother noted his drinking habits and had been on his case for quite sometime. The Applicant observed as well that perhaps 8 – 9 years ago his liver function tests were abnormal and he did see a liver specialist.

He stated that he had never tried any previous interval of abstinence but now has been totally abstinent for five plus months. He stated that there is no alcohol in his house. He observed that his follow up outpatient 36 week program with the addiction centre and the AA will be completed in April.

He also observed that he saw his family doctor a week ago who is now quite ready to give a further supportive report at the present time and he is in touch with him every couple of weeks. He also continues his regular visits with the AA and sponsors.

THE AGENT IN SUMMARY:

He reviewed the findings indicating that the Applicant suffers from alcohol abuse and has had one withdrawal seizure and pointed out that the MTO's decision in this case is appropriate.

He commended the Applicant's excellent approach to the problem and stressed that his position is that of an obligation to uphold the guidelines. He pointed out that the Applicant is now only a month away from fulfilling the MTO's requirement. His only requirement at the present time is that he obtain an up-to-date Medical Review Report. Until that time the position of the Ministry is that the Tribunal should confirm their position.

THE APPLICANT IN SUMMARY:

He expressed his thanks for this Tribunal meeting and indicated that he is well aware of the risk that he poses to himself and others if he starts to drink again and knows that he will succeed in managing this. He stressed that time is a very big issue and the stress of getting back and forth to continue his therapy is real and that he needs his licence.

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 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.

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

APPLICATION OF THE LAW TO FACTS:

From the age of 15 the Applicant began to use alcohol and by the age of 20 this had become a regular daily event. The fact is that 8 – 9 years ago liver disease was noted and he continued with his habit and certainly had become dependant. Only with the almost inadvertent two day withdrawal period when he took on a new job assignment did he turn up at an emergency department having had an alcohol withdrawal seizure which has led to the serious situation in which he finds himself now regarding his driver's licence.

The presentation today demonstrates the Applicant suffers from chronic alcoholism, a lifelong affliction.

The Applicant, a highly intelligent individual, very quickly realized the seriousness of his problem and his compliance with the treatment program and the requirements of the MTO has been very diligent doing every step of his treatment, and has done his best to comply with every request from the Ministry.

It is noteworthy that the Ministry's MAC, with the Applicant's efforts to comply, is now working on the six month period of abstinence with detailed documentation as a requirement for them to consider the Applicant for relicencing. The Ministry's attitude is very encouraging.

The Tribunal recognizes as well that the Applicant has excellent insight into his problem and also notes the documented notes of his response to solve his problem.

Review of requirements of the *Highway Traffic Act* and of the CCMTA document underscores that both of these publications require a well documented full 12 months period of abstinence of alcohol substance abuse. These requirements are logical in that the completion of a 12 month period of abstinence indicates that an Applicant is capable of complying with the requirements. The Tribunal is impressed with the positive nature of the MTO's presentation underscored by the fact that their Medical Advisory Committee is also willing to accept a well documented 6 month period of abstinence. This is probably because of the Applicant's positive response to this crisis.

The matter of chronic alcoholism must be considered realistically. In the interest of safety on the highway and for the Applicant's own health, it is essential that he comply with the MTO's position which in fact now comes down to approximately another month of well documented abstinence. To shorten this interval further would render the regulations redundant. The Tribunal notes that the Applicant is being treated quite fairly by them as well.

DECISION:

Upon the application by the Applicant to appeal the decision effective July 21st, 2010 to suspend the driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having consider the evidence filed with the Tribunal and the submissions of the Respondent and of the Applicant;

It is the decision of the Tribunal pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

_____
David W. Hurst, M.D., Member

Released: *November 4, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6282-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. DAVID HURST, Presiding Member

APPEARANCES: APPLICANT, unrepresented

RUSSELL MCKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 27, 2010 *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* (the "Act").

FACTS

The Applicant, who has had licencing problems previously, was notified by the Ministry of Transportation ("MTO") that her driving privilege had been suspended on the 28th of September, 2010.

The Applicant's current problems date back to May 4th, 2009 and at that time her family physician Dr. C.M. sent a letter to the MTO which stated:

> Please be aware that this patient has been to my office to seek counselling for substance abuse problems. She states that she is not drinking prior to driving, but in the past has driven under the influence.

This letter was acknowledged by the Deputy Registrar.

On June 10th, 2009 – a letter was sent to the Applicant stating that the MTO had received a report indicating that she suffered from a medical condition, which may impair her ability to safely operate a motor vehicle. This report was submitted by a physician in compliance with section 203 of the *Highway Traffic Act.* Accordingly, the Registrar had decided to suspend the Applicant's driving privilege for medical reasons under section 47 (1) of the *Highway Traffic Act*.

The MTO asked that an enclosed Alcohol Assessment Form be completed by the Applicant's treating physician. The physician was to indicate if a diagnosis of Alcohol Dependence was present, and, if so, what is the recommended form of treatment. If a diagnosis of Alcohol Dependence was made, this assessment was to confirm that the Applicant had remained abstinent from alcohol for a period of one year. The MTO stated that this period could be reduced if information was provided indicating that the Applicant had successfully completed an alcohol treatment program and upon a favourable recommendation from her physician. The report would include the result of bio-chemical markers (MCV & GGT) with a clinical explanation if any results were outside of the normal laboratory range.

June 23, 2009 – Dr. C.M., the Applicant's physician wrote,

> To Whom It May Concern: Please be aware that this patient has been to see me in the office on a regular basis. She has been attending regular AA meetings as well. She has also been to see a counsellor at a regional substance abuse clinic. She has had blood work indicating normal GGT and MCV. She had previously attended an inpatient treatment facility from January 26th to February 13th, 2009. She has not driven under the influence and is trying to remain abstinent. I will continue to see her on a biweekly basis and monitor blood levels randomly.

June 23, 2009 – the MTO received a completed Alcohol Assessment Form, and on July 16th, 2009, the Registrar wrote to the Applicant stating several pages of the assessment were illegible. They asked that the form be resubmitted.

July 21, 2009 Dr C.M. wrote:

> To Whom It May Concern: Please be aware that the Applicant has been abstinent since June 13th, 2009. She completed her inpatient program at a regional centre February 13th, 2009. Also please be aware that I have updated the classification form Alcohol Dependence to Problem Drinker because she was experiencing social consequences of her drinking but none of the "major" medical consequences listed on the previous page. She is seeing me on a regular basis, attending AA almost daily and has been very responsible in this her first serious attempt to stop all drinking. She clearly is not a hazard driving at this point.

July 21, 2009 – the Medical Advisory Committee ("MAC") of the MTO filed a report indicating that the Applicant should remain suspended. They offered to reconsider her suspension with a detailed assessment from a physician specializing in addictions medicine. The report must confirm a 12 month period of abstinence and indicate whether further formal treatment is recommended, in which case this must be completed before

reinstatement can be considered. Additionally, the physician must comment/state if participation in relapse prevention is required. Abstinence must be demonstrated by normal bio-chemical markers (MCV & GGT).

The Committee's reasons were as follows:

> Known to be alcohol dependent and admits driving while impaired; although she sought counselling and attended an inpatient treatment facility from January 26 to February 13, 2009, she subsequently relapsed. Dr. C.M.'s report on June 23, 2009 states driver is now seeing a counsellor at a regional centre and attending AA. However, current attempt at abstinence has only been confirmed for one month. Given recent relapse following treatment, a one year period of abstinence should be demonstrated as well as compliance with any recommendations by the physician before a request for reinstatement is considered.

September 10, 2009 – the MTO wrote to the Applicant indicating that her driving privilege should remain under suspension. They stated that a longer period of stability was necessary to ensure that her condition had been adequately controlled. Again the MTO offered to consider her case provided that they receive a detailed, up-to-date assessment from a physician specializing in addictions medicine. They stressed that the report must confirm that the Applicant had remained abstinent from alcohol for a period of 12 months. They did state that this period could be reduced upon receipt of a favourable report from the addictions specialist, which indicates that she is compliant with the physician recommendations.

September 14, 2009 – a regional treatment centre wrote to the MTO regarding the Applicant stating that an assessment interview had been carried out on November 19th, 2008. Her attendance since June 2009 had been as follows:

June 22, 2009	attended case management appointment
July 13, 2009	appointment rescheduled due to family vacation
August 14, 2009	attended case management session
September 14, 2009	attended case management session

This letter went on to explain that the Applicant had been reported as abstinent since June 13th, 2009. The Applicant had been an active participant in the sessions and appeared to be focused and committed to maintaining her goal of abstinence. The current plan was for her to attend regular case management sessions and regular attendance at Alcoholics Anonymous meetings. Her next appointment was slated for October 13th, 2009.

September 17, 2009 – a letter was sent by the Applicant's physician Dr. C.M., in which she stated that the Applicant had been abstinent since June 2009 and is being reviewed regularly for medical assessment and by a counsellor for ongoing counselling. GGT levels were reported as normal. The doctor felt that she was not at risk of drinking and driving. She stated that if the Applicant was still strongly motivated by alcohol she would have been driving without a licence, to acquire alcohol, and her behaviour and lab tests suggest that she is not. Consequently she has been home over the summer with her children and if she had been driving, they or her husband would have reported this behaviour since the family had been to see the doctor regarding her previous abnormal behaviours. The doctor hoped

that this information would be considered when deciding whether or not to reinstate her licence.

November 24, 2009 – Dr. C.M. in a letter stated that she had made a referral for the Applicant to the Centre for Addiction and Mental Health in Toronto. Enclosed was a laboratory report of the GGT which was low normal. The MCV and MCH were also in the normal range.

September 14, 2009 – the MAC for the MTO filed a further report on the Applicant stating that she should remain suspended. Again they stated they would reconsider their position based on the receipt of information from the treating physician confirming abstinence from alcohol for a sustained period of 12 months supported by bio-chemical markers. Consideration for early reinstatement could be given with a report from the Substance Abuse Treatment Program to confirm successful completion of a substance abuse treatment program with relapse prevention. The Committee's reasons were as follows:

> Driver has been diagnosed as alcohol dependent and has attended substance abuse treatment at local centre from January 26/09 to February 13/09. The driver subsequently relapsed achieving abstinence in June/09 and a further period of abstinence is required, and the MAC recognizes the driver has started treatment and in light of her recidivism will require a relapse prevention program.

October 27, 2009 – the MTO wrote to the Applicant indicating that it had been decided that her driving privilege should remain under suspension. The requirements for reinstatement were described once again.

November 3, 2009 – the Applicant filed a letter listing in detail why she should appeal her licence suspension, and on December 11, 2009 her appeal was heard by the Licence Appeal Tribunal. The decision of this Tribunal was as follows:

> More time should elapse before consideration can be given to the reinstatement of the Applicant's driving privilege, during which time the Applicant should be encouraged to continue with her AA meetings and her appointments with her family physician. When a satisfactory report is received from the Addiction's Specialist, whom the Applicant is scheduled to see on December 18th, 2009, then, serious consideration should be given to the reinstatement of the driving privilege.

December 18, 2009 – a consultation report was sent to Dr. C.M. by Dr. M.Z., a specialist at a mental health program in which he explained to the patient that he was not an addiction specialist but is a psychiatrist doing a psychiatric assessment. He noted that the Applicant was a recovering alcoholic with no alcohol consumption since June 2009 but her licence was still suspended. Dr. M.Z. reviewed the Applicant's drinking habits and noted her sobriety since June of 2009 and also that she sees the AA people three times a week. He noted that she was receiving counselling for the past 12 months or so. Relapse was noted after a three week treatment centre session ending in February 2009. His diagnosis was that there was alcohol abuse in remission since June of 2009 and she was psychiatrically stable and did not need any medications. He recommended that she remain abstinent from alcohol and was to continue to go to AA and see her counsellor regularly.

January 18, 2010 – the MTO once again wrote to the Applicant indicating that her driving privilege should remain under suspension. They again described their requirements for reconsideration for relicensing.

March 18, 2010 – a report was filed from another treatment centre by an addiction counsellor confirming that the Applicant had been a resident at this centre for treatment between March 1, 2010 and March 18, 2010.

March 22, 2010 – the MTO acknowledged this report and indicated the Applicant must file a further assessment as this report did not fully address the concerns requested by them previously.

March 23, 2010 – Dr. C.M. wrote again regarding the Applicant's abstinence and was in support of licence reinstatement effective as soon as possible. Laboratory work on that date showed a GGT in the low normal range.

March 23, 2010 – the MTO wrote to the Applicant indicating that her medical report had been approved and a notice of reinstatement would be mailed. They requested a further assessment on September 23, 2010 from her treating physician confirming her continued abstinence from alcohol supported by bio-chemical markers (MCV & GGT).

Unfortunately following the reinstatement of her driving privilege, Dr. C.M. reported to the MTO on July 14th, 2010 stating:

> It has come to my attention that this patient is drinking again to excess. Family reports her being drunk during daytime hours several times this month. No clear indication that she is driving at present, however it is reported by family that during the last suspension she was driving without any insurance intermittently. She has not come to see me in the office so I can not provide any definitive evidence that she is driving while she is impaired nor can I indicate that she denies it. In the past she had admitted to me she was driving while intoxicated.

August 4, 2010 – Dr. C.M. wrote,

> To Whom It May Concern: – the Applicant has been abstinent from alcohol since July 2010. She denies driving under the influence of alcohol. I have extensively questioned her family and they adamantly deny any driving while under the influence. She reaffirms today that prior to her last suspension she had driven after drinking but this has never recurred. She now has a job during daytime hours which requires her to drive on a daily basis and I feel strongly that having this employment would be very helpful for her. I sincerely hope that you are not forced to suspend her licence based on the last information that I provided to you. She will be having GGT testing today and on a regular basis and will see me in the office in regular follow up.

September 18, 2010 – the MTO wrote to the Applicant indicating that as a result of these recent reports they have decided to suspend her driving privilege for medical reasons under section 47(1) of the *Highway Traffic Act*. Again they outlined their requirements for reconsideration of this stance. The Agent for the MTO submitted a certified copy of the

Applicant's driving record which simply showed suspensions for medical reasons on the above mentioned occasions. The Agent then referred to the pertinent sections of the CCMTA medical standards for drivers as it applies to people suffering from substance abuse.

The Applicant's Case

She stated that the letter by her doctor resulting in her second suspension was not accurate. She felt that she had been wrongly judged by her family and in fact was not driving while intoxicated. When questioned by the Tribunal as to how this might have happened, the Applicant stated that her husband may have expressed some concern about her driving. She described this episode as a miscommunication and explained that she has now been abstinent since July, 2010. She stated that her longest period of abstinence had been between 8 and 10 months at the time when her licence had been reinstated. Referring to the setback she suffered in July of 2010, she described it as having occurred for only two or three days, when friends came to visit and drinking occurred. Unfortunately her friends were not aware of her personal drinking difficulties.

The Agent's Questions Of The Applicant

Questioning regarding Dr. C.M.'s letter in July, concerning the relapse ascertained that all of the information in that letter was third party information and none of it had been directly confirmed by the doctor. Again under questioning the Applicant indicated that the drinking episode might have lasted three days when she had friends visiting at their cottage. Her husband was aware of the drinking on this occasion and spoke to her about it , and when she saw her doctor (Dr. C.M.) in August she was abstinent again. Questioning disclosed that the Applicant is continuing to see her doctor on a regular basis and has attended once since August 4, 2010. At that time, she said her doctor advised her to continue to go to AA regularly or as much as she can. She is following this policy at the present time. The Applicant again stated that other than two or three days in July, she has been abstinent now since November, 2009. Questioning of the Agent by the Tribunal at this time indicated that there is no other information with the MTO for this July, 2010 episode.

The Agent explained that the MTO was obliged to act on the reports from the Applicant's family doctor and that the suspension was correct. He pointed out that the regulations that a licencee must not be addicted to an extent to cause a risk on the highway. Tabs 1 to16 of his submissions today demonstrate that such a risk exists. The Agent reviewed the documented evidence that the Applicant had been abstinent for nearly a year and then suffered a three day set back in July of 2010 causing her current re-suspension. The Agent felt that Dr. C.M.'s report leading to this suspension indicated the relapse was a significant one. He pointed out that Dr. C.M. has filed two Medical Condition Reports regarding the Applicant's drinking in the past year. The Agent also stated that it is now 2½ months since the last letter by Dr. C.M. and no new information to recommend reinstatement and no further bio-chemical markers have been provided. He noted that the MTO must have complete information to consider reinstatement and it needs to be updated to the present time.

THE APPLICANT IN SUMMARY:

She stated that the episode in July was a very short interval of moderate drinking and not to excess as indicated in the doctor's letter. She also stated that she is not driving at the present time.

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Applicant admits that she is an alcoholic and has stated so at her AA meetings. There is a profusion of evidence here that she has been very compliant seeking help with her alcohol problem, and has had considerable success and at all times her bio-chemical markers have been well within the normal range.

The MTO has been correct in the application of the initial suspension and then again correct with re-suspension as a result of the information provided to them, regarding the short relapse by the Applicant in July 2010. This Medical Condition Report filed by Dr. C.M. was based on third party information as has been pointed out by the Applicant. The doctor was not at hand at that time to carry out any further detailed questioning or examination.

On the occasion of the Applicant's first appeal to the Licence Appeal Tribunal, a Member in support of the MTO's position stated that the Applicant by complying with their request would be able to regain her licence, and the Applicant in fact has complied very well with the requirements. Were it not for the 2 – 3 days drinking episode with her friends last July, she now would have exceeded the required 12 month period of abstinence and is now approaching five months of sobriety since the July, 2010 set back.

The MTO's requirement for a detailed medical assessment review of any abnormal bio-chemical markers could be easily remedied and for this reason the Applicant's position, in fairness would be considered.

It is noteworthy that all of her physicians have recommended reinstatement.

DECISION

Upon the application by the Applicant to appeal the decision dated September 28, 2010 of the Registrar 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

Dr. David Hurst, Presiding Member

RELEASED: *November 9, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6290-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID HURST, M.D., Member

APPEARANCES: RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: November 9, 2010 Toronto

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* (the "Act").

PRELIMINARY MATTERS

Despite communication by the Tribunal with the Applicant on November 8, 2010, and the understanding that this hearing would rely on the presence of the Applicant, he failed to be present at the appointed time of 1:00 p.m. on November 9, 2010. Accordingly, the Tribunal allowed a postponement of 30 minutes, at which time the Applicant had failed to appear and as well the Tribunal could not reach him by telephone.

The hearing proceeded in the Applicant’s absence.

FACTS

The Registrar's Evidence

The Applicant is a 45-year old gentleman who has worked in the insurance industry but recently was unemployed. As will become apparent, it seems likely that his deteriorating health is alcohol related.

The Ministry of Transportation's ("MTO") position was presented by Mr. McKnight, Agent for the Registrar, beginning with a Medical Condition Report, dated January 2, 2009, in which a tick mark had been placed by the category "seizure(s) – alcohol related".

Optional comments disclosed that the Applicant had suffered a generalized tonic/clonic seizure. This was considered likely to be due to alcohol withdrawal. The report had been filed by Dr. A.

On January 26, 2009, MTO acknowledged receipt of this report to the physician.

On January 26, 2009, the MTO also corresponded with the Applicant stating that he suffered from a medical condition which may impair his ability to safely operate a motor vehicle. They stated that the Applicant would be suspended of his driving privilege for medical reasons under section 47(1) of the Act.

The letter stated that the Applicant must provide an up-to-date detailed report from his treating physician or by a physician specializing in addictions medicine regarding his reported seizure. As the seizure appeared related to alcohol misuse, the Alcohol Assessment Form must be completed. The physician must indicate if a diagnosis of alcohol dependence is present, and, if so, what is the recommended form of treatment.

This letter from MTO indicated that if the diagnosis of alcohol dependence was made, and/or that the Applicant had experienced an alcohol withdrawal seizure, the assessment must confirm that he has remained seizure free and abstinent from alcohol for a period of one year. This period may be reduced if he provides confirmation that he has successfully completed an alcohol treatment program, and upon a favourable recommendation from his physician. It must also include the results of bio-chemical markers (MCV and GGT) with a clinical explanation if any results are outside the normal laboratory range.

On March 20, 2009, Dr. K. wrote to MTO regarding the Applicant as follows:

> …had a generalized tonic clonic seizure on the 1st of January 2009. He has had no further seizures since then. Head CT and 2 EEGs are unremarkable and his neurological exam is normal. Therefore there is no evidence of seizure disorder.
>
> However, there was evidence supportive of alcohol withdrawal as being a cause; information provided by his wife and the alcohol withdrawal symptoms he had when he presented after the seizure to the local hospital. The patient denies any problems with alcohol and disputes this history. In view of this new information, please reassess the status of this patient's driver's licence.

Dr. K. also sent along a copy of a follow-up consultation letter by Dr. W. This report stated that the Applicant had been seen in follow-up for an alcohol withdrawal seizure. He stated that the Applicant denied alcohol was an issue any longer (if ever). There have been no seizures.

Examination showed a mild intention tremor and normal neurological exam.

The results of two EEGs were normal and a head CT was unremarkable. The doctor's opinion was that there was no evidence of epilepsy to account for the seizure. The possibility of alcohol withdrawal seizure could not be ruled out.

A CT report done on January 1, 2009, with examination of the head showed only mild cerebral atrophy.

An EEG examination on February 25, 2009, showed a normal EEG in the awake state, and a Deprived EEG Study was booked for ten days later.

A Deprived EEG Study was done on March 4, 2009, and was described as a normal EEG in the awake, drowsy and sleeping states.

The next documentation relied on by the Agent for the Registrar was a consultation report dated January 2, 2009, and carried out by Dr. K. (neurologist).

In his narrative, the neurologist described a past medical history significant for cardiomyopathy (grade III to IV - expected to be due to alcohol). Medications at home included Enalapril, Spironolactone, Carvedilol, Lasix and Atavan. The Applicant was thought to show a longstanding history of possible essential tremor. No family history of epilepsy. Smoking - two cigarettes a day. He drank every day and admitted to drinking two or three beers a night and slightly more on the weekend. His wife however indicated that he drinks much more than this. The family has also noticed increasing tremor, especially in the arms, marked in the morning when he gets up. No history of seizure disorder and no past history of head trauma. He denies using any illicit drugs.

The Applicant's last alcoholic intake was on January 1, 2009. On that evening at about 5:00 p.m., he was feeling quite shaky and went upstairs to his bedroom where he collapsed on the bed and had a generalized tonic/clonic seizure, witnessed by his wife and lasting about two minutes. He bit his tongue. When he awoke after several minutes, he was confused and did not know his age, although he was able to identify his address and identify his wife. He seemed confused at times, for example mistaking his finger oximeter for a glass of orange juice and he tried to throw his oximeter in the garbage can. He was oriented, however, as to day, month and year. Examination was fairly routine although he was described as quite tremulous with postural and action tremor. Head CT was unremarkable. Sodium was 133 and Potassium 2.9. Fasting glucose was normal. Calcium was slightly low at 2.04 with normal phosphate and magnesium. Both phosphate and magnesium were low when he originally was admitted. CK was elevated at 826. Troponin was 0.04. AST was 112 on admission and had decreased to 86.

Otherwise, transaminases were unremarkable. Alcohol level was 0. Benzodiazepines were noted on the drug screen. Hemoglobin was 112 with a high MCV of 99. Cardiomyopathy, which is being followed, now thought to possibly be secondary to alcohol. Presents with a generalized tonic clonic seizure in the setting of excessive daily alcohol intake, although he has not had a drink in the past 24 hours. Neurological exam was significant for a postural and action tremor of the upper and lower extremities, and also, there is mild confusion as exhibited by misinterpretation of physical stimuli. CT is unremarkable.

It was thought that the chance of finding any other explanation for the seizure was unlikely, given the clinical history and setting. The Applicant was advised not to drive, and was told to abstain from alcohol. Anticonvulsive medication was not considered necessary, unless evidence of epilepsy was found.

The next document relied on by the Agent for the Registrar was the MTO Alcohol Assessment Form, in which there were significant variations and discrepancies that caused concern for the MTO and also for this Tribunal.

On the first page of this document the tick off questions for "medical consequences related to alcohol use", described the following consequences as <u>not present</u> (emphasis added): memory problems, seizures, blackouts, morning shakes, concentration, delirium tremens, liver disease, and neuropathy/cerebral dysfunction.

The section described as "Audit – Alcohol Use Disorders Identification Test" indicated that the Applicant was a very mild user of alcohol. Blood markers were not recorded. The score was not filled in on this part of the questionnaire involving 10 questions, and the answers given in these questions by the Applicant indicated that he was a very infrequent user of alcohol. The ongoing review of this document showed that there were no real problems with alcohol use or abuse, and this was followed up with no recommendation goal regarding alcohol consumption. A hand-written note in the section on diagnosis described how the patient denies that there is an alcohol issue and that he is only having one drink per day. This was signed by Dr. W. The form was dated March 24, 2009.

On March 30, 2009, the MTO wrote to the Applicant indicating that the medical evidence submitted to date did not support the reinstatement of his driving privilege. They explained in considerable detail the requirements in order to have him reconsidered for reinstatement.

A consultation note by Dr. M. (cardiologist) was carried out at the request of Dr. W. This was performed on April 19, 2009. The Applicant was described as 44-years of age and had presented to the cardiologist a few years ago with congestive cardiomyopathy. He was described as an on and off patient. Sometimes he was compliant with medication, and sometimes he was not. The cardiologist confessed that they had found no real cause for the cardiomyopathy. He presented to their hospital with a seizure in January 2009, and it was probably related to alcohol withdrawal. His wife stated that the Applicant "drinks a lot".

These new details indicated that the Applicant likely had alcoholic congestive

cardiomyopathy. He was noted to be on Coreg 25mg b.i.d., Vasotec 10mg b.i.d., Lasix 80mg b.i.d. and Aldactone 25mg a day.

The Applicant was stated as claiming that he had "just passed out". This cardiologist stated that if this was the case, then it would be in his ball park, as syncope in a patient who has a congestive cardiomyopathy is usually ominous and implies an arrhythmia. But clearly that day the Applicant had a seizure and he had a very high alcohol level in his blood stream.

Regarding the state of the myocardium, the cardiologist called his ventricle grade II – III, not any worse, which is actually not bad. He had done a MUGA Scan a few weeks before and it demonstrated an injection fraction of 35%. The cardiologist did not feel this needed to be pursued. This doctor reassured the Applicant that he was stable from a cardiac perspective.

On May 13, 2009, the MTO wrote to the Applicant acknowledging this latest medical evidence, which did not support the reinstatement of his driving privilege. To reconsider his case, they asked for satisfactory medical information. It would have to confirm that he had remained seizure free and abstinent from alcohol for a period of one year.

On July 6, 2009, Dr. W., the Applicant's family doctor, wrote to MTO stating that he had known the Applicant for two years. He described the seizure on January 1, 2009, which was thought to be due to alcohol withdrawal and said that there had been no seizure since, and that his head CT and two EEGs have been normal. The Applicant was not enrolled in an alcohol treatment program, but he and his wife have assured the doctor that he is not drinking except for a single glass of wine with Sunday dinner. He has done blood work, which shows an MCV of 97.1 and an GGT of 109. (The doctor had no explanation as to why the GGT was elevated). AST and ALT were in the normal range, which he thought indicated the Applicant was not drinking heavily. He stated that he was writing to MTO in support of the reinstatement of the Applicant's driver's licence.

The MTO again wrote to the Applicant on July 31, 2009, indicating that the medical evidence submitted to date did not support the reinstatement of his driving privilege. They asked for a detailed up-to-date report from his treating physician or someone specializing in addictions medicine, confirming that he had remained seizure free and abstinent from alcohol for a period of one year.

On February 19, 2010, Dr. W. wrote a "To Whom It May Concern" letter that the Applicant was his patient and confirmed that the Applicant had been seizure free for over a year.

MTO wrote to the Applicant on March 5, 2010, confirming that he had been seizure free for over a year, but restated the fact that they needed an up-to-date assessment from the Applicant's treating physician or a physician specializing in addictions medicine, which confirmed that he has been abstinent from alcohol for a period of one year. They also requested a review of the bio-chemical markers (MCV, GGT, AST and ALT).
On May 11, 2010, Dr. W. again wrote "To Whom It May Concern", stating that the Applicant had been seizure free for well over a year.

MTO acknowledged to the Applicant their receipt of this information on June 1, 2010, confirming that he was seizure free for a year. They stated that they needed information from the appropriate doctors of the Applicant's abstinence from alcohol for one year.

The Agent for the Registrar then reviewed the Canadian Council of Motor Transport Administrators, Medical Standards for Drivers, Standard 6.3.6 – Alcohol and Seizure. He stated that the last medical report to MTO was in May 2010, which confirmed that the Applicant was seizure free then but provided nothing about his use of alcohol. Mr. McKnight re-iterated that MTO must be provided with more information. They must have information that the Applicant has stopped drinking and also that he has undergone a treatment program.

The Agent for the Registrar in Summary

He pointed out the fact that the two consultants involved here (neurologist and cardiologist) indicated that the Applicant suffered an alcohol withdrawal seizure and also stressed that the Applicant's wife contradicts the Applicant's statements about his sparse use of alcohol.

The Agent reviewed the fact that MTO requires documented evidence that the Applicant is seizure free and also has not used alcohol for a one year period. He noted that the family doctor's cursory reports are silent about the Applicant's use of alcohol, and he thought this omission speaks volumes.

The Agent concluded the Registrar's case by pointing out that there is not enough information to consider the possibility of reinstatement. He asked that the Tribunal confirm the MTO's position.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

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

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

Section 47(1) states:

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

…

(b) a driver's licence; or

…

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 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.

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

APPLICATION OF THE LAW TO FACTS

There is no dispute that the Applicant is suffering from alcohol related cardiomyopathy, and has had an alcohol withdrawal seizure while showing some significant elevations of the pertinent liver enzymes.

He has a major problem with alcohol abuse.

The documentation filed on the Applicant's behalf is inadequate, and the MTO Alcohol Assessment Form information is totally inadequate.

There is information that the Applicant has not had a seizure for a year but his alcohol use during that interval is not shown in any detail, and in fact, the best information we have is his wife's repeated statement that her husband is drinking a lot more than that to which he admits.

This is a sick man and it behoves his doctors to clearly explain to the Applicant that he must comply with all of the requirements emphasized by MTO, both in the interest of the Applicant's health, and for safety on the highways. The Applicant needs to attend both the Alcoholics Anonymous program, as well as other documented treatment programs, which may assist him in his recovery.

It does not speak well for the Applicant's understanding of the serious situation he is in and his own responsibilities that he failed to inform the Tribunal that he would not attend the hearing, and also that he could not be reached at the commencement time of the hearing.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective February 5, 2009, 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;

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

LICENCE APPEAL TRIBUNAL

_____

David Hurst, M.D., Member

RELEASED: December 1, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6314-MED-NEUR-Neurological

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID W. HURST, M.D, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: November 24, 2010 Guelph, Ontario

DECISION AND REASONS

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

FACTS

The Applicant is a 76 year retired health food store proprietor who has lived in a very small community, then moved to a larger centre to be near family and better medical care. Despite his current licencing problems he and his wife have been world travellers. The Applicant has been driving rental cars in European countries including England and also in New Zealand until as recently as two years ago, therefore showing considerable ability, driving on the left hand side of the road.

In June of 2010 a Medical Condition Report was received by the MTO signed by Dr. S in which dementia or Alzheimer's disease had been ticked off. The date of the examination upon which this report was based was entered as 2010/04/29. The patient was not noted to be aware of this report.

On July 9th, 2010, the MTO wrote to the Applicant referring to this report which indicated that he had a condition which could impair his ability to safely operate a motor vehicle. Cognitive impairment was listed as the problem. The Registrar after considering all relevant facts had decided to suspend his driving privilege under section 47(1) of the *Highway Traffic Act.* This message from the Ministry stated a willingness to reconsider his case for reinstatement upon receipt of information satisfactory to the Registrar. Requested was a detailed up to date report from his doctor. Also needed were the results of all investigations, diagnosis, prognosis, treatment, current status, and confirmation that the condition was controlled and the absence of further disqualifying medical concerns that could impact his ability to safely operate a motor vehicle. Also requested was a clinical evaluation of his cognitive functions.

On October 8th, 2010, a letter was received by the Licence Appeal Tribunal from the Applicant's occasional family doctor, Dr. R, who is the spouse of Dr. S, who had sent the Medical Condition Report to the Ministry. Dr. R's letter stated that the Applicant and his family "have asked me to provide additional details of his medical history in the hope that he may have his driver's licence reinstated". Dr. R confirmed that the Applicant has enjoyed excellent physical and mental health in the past. In 2004 he did mention some transient unexplained episodes of memory impairment. In 2008 he was beginning to experience more frequent but still minor problems with forgetfulness. Possible explanations included depression, mild cognitive impairment (MCI) or even early stages of a dementing illness such as Alzheimer's. The doctor noted reassuring initial cognitive testing.

Memory problems were noted to be continually progressing, although slowly. The Applicant was reassessed in early 2009 and showed an MMSE score of 23/30 which is considered not good. On another occasion he achieved 26/30 which is considered average. He scored 24/30 on his MOCA test. A Kingston Cognitive Score was reported to be 88/94, considered to be respectable. It was noted that in these tests most of the points were lost on memory testing.

Most likely diagnoses were considered to be either MCI or early Alzheimer's, and by the fall of 2009 memory problems were more noticeable, with dependence on his wife for daily routine. The Applicant retained excellent visual spatial skills and continued to drive. He was warned that with progression of these difficulties he must give up driving.

The doctor said he would support the Applicant undergoing a full functional driver's evaluation at an approved testing centre, stating that reinstatement of his driving privilege would be conditional on a passing grade in such an evaluation.

On October 28th, 2010, the MTO wrote to the Applicant saying that they would require a satisfactory driving evaluation from a rehabilitation centre, in order to determine if he can safely drive.

Mr. Biel, Agent for the Ministry, then entered a very comprehensive list of suitable driver assessment centres. He also provided the Tribunal with a certified copy of the Applicant's driving record which was very brief with one speeding infraction and then his suspension for medical reasons on the 19th of July, 2010, and no demerit points.

Appended by Mr. Biel was a copy of the 2009 annotated Ontario *Highway Traffic Act* pertaining to the Applicant's difficulties and also filed was a copy of the CCMTA Medical Standards for Drivers, with special emphasis on item 6.8 – Dementia.

THE APPLICANT'S CASE

The Applicant's wife, with the agreement of the Tribunal represented her husband. She began by drawing attention to the CCMTA which in page 27 states:

> "once an individual has progressed to moderate dementia e.g. difficulty with basic activities of daily living such as eating, dressing and hygiene, OR severe cognitive impairment on formal testing such as MMSE score less than 15, the degree of cognitive impairment is sufficient to preclude safe operation of any motor vehicle".

Her point was that this document uses a much lower number, 15, than that quoted (23/30 in Dr. R's letter submitted by the Agent).

The Applicant's wife then presented what she described as her "story". She described her husband as an appealing, good, safe, and alert individual who had suffered an unfair penalty because of a second hand report. She described how her husband had gone downtown in this very small community to a hardware store only to find that he could not locate it as it had moved to another building. Ultimately he was unable to recall where he had parked his car. As it transpired at that time the receptionist from the medical clinic where he only rarely found need to appear, came by, noticed his confusion and assisted him.

The Applicant's wife thought that events that had occurred in this tiny community were a factor (elderly couple killed in car accident, and an Alzheimer's victim lost in the country side and never found). As it turned out, the receptionist, she surmises based in local gossip, described this event to Dr. S who then filed a Medical Condition Report based on this hearsay and forwarded it to the Ministry without informing the Applicant and also without having actually examined him. Date of examination upon which this report is based is stated to be 2010/04/29 but there had been no examination.

She went on to explain her understanding that her husband, the Applicant, has mild dementia and because of this she had asked for professional help from a lady doctor in a somewhat distant large centre to consult regarding her husband's cognitive difficulties. As it transpired this consultant came many times

over a period of two years and her medical investigations showed that there was short term memory loss. The Applicant was noted to be forgetful about names and faces but has other great skills including the ability to count backwards in sevens from a hundred. The wife stated that this consultant's last score using the Kingston Cognitive Score was 88/94 and she felt that this indicated a stabilized condition and that there was no ramped up brain problem. She described this as a satisfactory score and stated that her husband had suffered no deterioration of visual and spatial skills.

She stated that she had obtained assistance from the Alzheimer's society where another study was carried out stating that the Applicant was not failing rapidly. The written reports from this study were not provided to the Tribunal.

The Applicant's wife then expanded somewhat on the Applicant's driving skills. As recently as 2008 he had been driving on the autobahns in Germany and also in England on the left side of the road. Questioning from the Tribunal at this point disclosed that the Applicant's last driving efforts were in Toronto in early summer of this year.

At this point with the suggestion by the Tribunal that the Applicant speak on his own behalf, he stated simply that he had owned and operated a health food store and had acquired extensive medical connections and information during those years. It was apparent in his comments that he was inclined to ramble and mentioned his difficulties due to his membership in an organization in the past, unrelated to current matters. He stated that he would be very keen to have further tests taken to assess his impairment. He also volunteered to do a driver's test. He then stated that his mind was functioning well and he was not quite sure why he was at this gathering today.

THE AGENT'S QUESTIONS

Mr. Biel cross examined the Applicant's wife confirming that all of the information came from the receptionist whose comments had led to the Medical Condition Report. In fact the Applicant's wife had not talked to the receptionist regarding her husband's difficulties. She did remember a phone call from the receptionist to ask if her husband had gotten safely home that day. She admitted that he was confused at that time. The Applicant's wife agreed that she was under the assumption that the receptionist had described this scene in the village to Dr. S but she had no personal knowledge. The Applicant's wife volunteered that it was she who had requested cognitive testing as she began to realize that her husband had problems. Mr. Biel suggested that Dr. R was "in the loop", receiving reports from the other doctors and with this the Applicant's wife complained that she was never able to see such reports. Mr. Biel then questioned why a consultant from a fairly distant centre would be coming to see her husband as frequently as every six weeks if the Applicant's problems were

not that severe. The Tribunal today agrees that this makes no sense, if the problems were not of concern.

Mr. Biel pointed out the visits from the regional consultant and the fact that none of their reports which must have been going to Dr. R are available to the Tribunal. It does emerge today from the Mr. Biel's questioning that Dr. R has suggested a driver evaluation test frequently.

THE AGENT IN SUMMARY

Mr. Biel stated that the suspension was necessary, underlined in section 47(1) of the HTA, based on the initial Medical Condition Report and that the MTO acted correctly. He stated that there was insufficient evidence for reinstatement at the moment. He pointed out that O. Reg. 340/94 section 14(a) of the HTA states that the Applicant must have no mental, emotional or physical disability, and dementia, even mild, which has the potential to put the driver at risk. He pointed out that all of the information presented by the Applicant's wife today is "word of mouth". Mr. Biel also observed that Dr. R indicated that he wants a driver evaluation test and is therefore demonstrating his concern and that this request is completely inline with the MTO's position.

He closed by underlining the fact that the Applicant's wife's testimony today is entirely hearsay. "She gives medical comments which are based on only her own opinions". He asked that the Tribunal confirm the Ministry's position, and that the Ministry would await the results of a driver's evaluation test.

THE APPLICANT'S WIFE IN SUMMARY

She pointed out that Dr. R's letter is a result of one Medical Condition Report which had been filed by this doctor's wife as a result of a word of mouth story provide to them by the receptionist. The receptionist had inadvertently come across the Applicant on the day when he appeared lost on the main street. She lamented that she was unable to obtain any medical reports coming from the expert(s) from the somewhat distant regional centre. She again pointed out that this is not a case of rampant deterioration. On questioning by the Tribunal as to whether the Applicant's condition was the same as in 2004, his wife said the answer was no but that he is now stable.

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,

…

(b) a driver's licence; …

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 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.

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

APPLICATION OF THE LAW TO FACTS

It is indeed unfortunate that the Medical Condition Report was filed on the basis of what appears to be hearsay evidence by "the receptionist". It is clear that this report although stated to be based on an examination on 2010/04/29 was nothing of the sort. Much of the testimony of the Applicant's wife was hearsay and not supported by written documents.

Dr. R's letter of October 8, 2010 to the Licence Appeal Tribunal provides us with the only documented medical information. It does indicate that the Applicant has cognitive problems understood by his wife and family. Dr. R has expressed support for the idea that a full functional driver's evaluation at an approved testing centre be carried out and this is the position of the Ministry today. Such a test has not yet been carried out.

It is apparent to the Tribunal that the Applicant has cognitive difficulties and he appears to be in early stages of some degree of dementia. His visual and spatial skills are impressive and the Tribunal gives credit to his adventures driving in foreign lands. But further studies are clearly required.

As requested by the MTO, detailed medical reports are now mandatory concerning the Applicant's cognitive function and it would help a lot to determine his eligibility for restoration of his driving privilege to have a functional driver's evaluation at an approved centre. Only then can a fair and accurate decision be made regarding re-licencing.

DECISION

Upon the application by the Applicant to appeal the decision effective July 19th, 2010 of the Registrar of Motor Vehicles (the "Respondent") to suspend his driver's licence pursuant to section 47(1) of the *Highway Traffic Act* (the "HTA"), and having considered the evidence filed with the Tribunal and the submissions of the Respondent and of the Applicant;

It is the decision of the Tribunal pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

_____

Dr. W. Hurst, M.D., Member

RELEASED: December 8, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6333-MED-ALCL-DRUGS-Alcohol and Drugs

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: MARK REYNOLDS, Paralegal, representing the Applicant

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: December 8, 2010 Toronto

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* (the "Act").

PRELIMINARY MATTERS

The hearing commenced at 9:30 a.m. but due to a scheduling misunderstanding by the Applicant, it was adjourned with consent of the Registrar's Agent to 11:30 a.m.

The Applicant submitted laboratory reports dated December 6 and 7, 2010. With consent, these were entered as Exhibits #4 and #5, respectively.

FACTS

The Registrar's Evidence

A Medical Condition Report was completed by a family physician, Dr. R., on April 24, 2010, pursuant to section 203 of the Act. It stated:

> This patient has just reported that over the last year he has driven while seriously under the influence of alcohol. He continues to have problems with substance abuse although he is applying to get help with the problem. At present, however, he still has a significant problem that may very well interfere with his judgement and ability to drive safely.

On June 30, 2010, the Registrar informed the Applicant that it had been decided to suspend his driving privileges under section 47(1) of the Act. In order to be considered for re-instatement, he must arrange for a Substance Abuse Assessment Form to be completed by his treating physician. If this assessment confirmed a diagnosis of alcohol dependence, the Ministry of Transportation of Ontario ("MTO") would require confirmation that he has remained abstinent from alcohol for a period of one year. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of reinstatement. A clinical explanation must be provided for the results of any bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

The Applicant was advised that he may apply for an Administrative Review and of his right to appeal.

The Substance Abuse Assessment Form was completed by Dr. R. on July 9, 2010. The following was noted:

> Medical:
>
> Job stressors – demands; learning to delegate.
>
> Physical Assessment:
>
> Normal
>
> History of Use:
>
> Age of first use - 13 years old
>
> Age of first regular use: 16 (cannabis), 20 (cocaine)
>
> History of first intoxication: 13 years old. Frequency of Use: alcohol weekend binge; Cocaine monthly
>
> Amount used on each occasion: Alcohol 3 drinks (max of 4)
>
> Most recent use: Alcohol – mid January/10; Cocaine – March/10
>
> Longest period of abstinence in last 3 years: 30 months. Date of Reduction: March 2010

Current medications: nil

Treatment:

Previous treatment: Hospital Substance Abuse Program

2006 – 21 days
2002 – 21 days

Period of abstinence following treatment:

2006 – 3 years
2002 – 2 years

Use of 12 Step Program: Narcotics Anonymous – 2010 – home group

Other Participation in Relapse Prevention: Psychologist S.A.

Substance Dependence:

Substance is often taken in larger amounts or over longer period than intended

Audit:

1. How often do you have a drink? Never
2. How many drinks on a typical day? Nil
3. How often do you have five or more drinks on one occasion? Nil
4. How often in the past year not able to stop drinking once started? Twice in 12 months
5. How often in past year failed to do what was normally expected because of drinking? Never
6. How often in past year needed a first drink in the morning after heavy drinking session? Never
7. How often in past year had feeling of guilt or remorse after drinking? Once in past year
8. How often in past year been unable to remember what happened the night before because of drinking? Never
9. Have you or someone else been injured as a result of your drinking? No
10. Has a relative or friend or a doctor or other health professional been concerned about your drinking or suggested that you cut down? Yes during the past year.

Diagnosis:

Abuse especially cocaine.

If patient has already reduced consumption or become abstinent: date advice given: 2010-04-24

If patient has already reduced consumption or become abstinent: date 2010-04-17

Other Treatment Recommended: Narcotics Anonymous, Seeing Dr. W. re plan (referral)

A letter dated July 9, 2010, was received from S.A., a psychotherapist:

Since April 1, 2009, I have been meeting with <the Applicant> on a weekly basis to address psychological issues and behaviours related to addiction and substance abuse.

> Generally speaking he is making great strides toward full recovery.

On August 6, 2010, the Registrar informed the Applicant that in light of the letter from S.A., it would be necessary to file an assessment from his physician, with reference to his reported drug abuse (cocaine). The assessment must provide a diagnosis and recommend a form of treatment. The results of a physical examination, complete drug use history, and random observed urine toxicology screen would also be required.

On September 13, 2010, Dr. R. submitted a letter to MTO:

> <The Applicant> has been working hard and has not had any contact with cocaine since mid-March and alcohol since mid-January. He is seeing a substance therapist weekly and attends NA weekly. He exercises and has made significant adjustments to his lifestyle. I would recommend that his licence be reinstated.

Dr. R. attached a report of an annual physical examination dated August 19, 2010.

CPP Review:

> The patient's current ongoing problems were reviewed. Current problems are:
>
> SUBSTANCE ABUSE
> OBESITY
> ALCOHOL DEPENDENCE 2002
> COCAINE ABUSE, CONTINUOUS
>
> Re the history of substance abuse, he began to use alcohol when he was 13 y.o. Going on weekend binges at 16. He began to use cocaine (smoking) monthly and cannabis up to 1 GM of cocaine at a time. He attended the treatment programme at a community hospital in 2002 and again in 2006. The last time he used cocaine was in March of this year and alcohol in mid-January. He denies cannabis use since 2000.

The physical examination was normal.

Assessment:

> He is attending NA once a week and he sees a psychotherapist (S.A.) once a week.
>
> There are no physical abnormalities. He does smoke cigarettes.

Attached Laboratory results dated August 17, 2010, showed normal liver function tests, and negative drug screen.

In response, the Registrar informed the Applicant on September 29, 2010, that a longer period of recovery was required and that he must arrange to submit an up-to-date assessment by his physician that confirms a period of abstinence from alcohol of one year. This period may be reduced if his physician confirms that he has successfully completed a substance abuse program and is supportive of reinstatement.

On October 20, 2010, the psychotherapist S.A. submitted a letter:

> My first encounter with <the Applicant> was on April 1, 2009, when he sought out my professional services to help him deal with a past cocaine addiction. At that time, he had already undergone extensive rehabilitation and with the exception of one relapse he was essentially 'clean' and had been for over one year. His desire to work with me was both to have on-going support in his efforts to stay far and clear from cocaine but also to try and understand the unconscious psychological issues that may have led to his addictive behaviour. In other words he was taking serious preventative measures to address the core issues that might ultimately lead to other addictions and/or continuous relapses. I consider this to be a very responsible decision on his part, which, as it turns out is totally in character and consistent with everything I have come to learn about this exceptional individual. Not only is he a highly productive, upstanding entrepreneur with a number of people in his employ he is also an extremely generous, responsible and helpful friend to many.
>
> I have been meeting with him on a regular basis for 18 months now and during that time he has relapsed and used cocaine on 3 occasions, each time for the duration of one evening. His usage pales in comparison to the crowds of adults using cocaine recreationally in the city. In the realm of addictions and mental health with regard to average rates of relapse and full recovery he is considered highly successful. His past cocaine addiction is no longer an issue. I would not consider him a threat to anyone anywhere anytime soon.

On October 23, 2010, S.A. wrote an addendum:

> I have been meeting with <the Applicant> on a regular basis for 18 months now and see no reason at this point why he should not have his driver's licence re-instated.

Laboratory results on October 18, 2010, showed negative drug screen.

The Registrar informed the Applicant on November 16, 2010, that his driving privileges would remain under suspension.

A longer period of abstinence was required and he was requested to submit a detailed up-to-date assessment **by a physician** (emphasis by the Registrar), confirming abstinence from alcohol and drugs for one year, completion of a substance abuse treatment program and a favourable recommendation for re-instatement.

The Applicant's Driver's Record was submitted. This showed an administrative driver's licence suspension on October 1, 2009, for an alcohol level over 0.05 mg.

<u>The Applicant's Evidence</u>

In the Reasons for Appeal, the Applicant's Agent stated:

1. <The Applicant> has shown that he is not at risk to drive a motor vehicle.

2. <The Applicant> has supplied documentation to MTO with written support from his treating physician.

3. <The Applicant> attends Narcotics Anonymous regularly.

4. <The Applicant> is aware of his illness, and has taken appropriate steps to address it.

5. Continued suspension of the Applicant's driver's licence is unwarranted.

In evidence, the Applicant stated that following a lengthy period of abstinence, he relapsed and because he was scared he approached his family physician who has known him for 20 years. He informed the physician, Dr. R., that he had driven after drinking and this led to the Registrar being informed. He had been "going through a rough patch" in his business. He owns a heating company and because the work load had increased during the winter, he felt under a lot of stress. He was attending the 12-step program with Narcotics Anonymous and referred himself to the psychotherapist, S.A., with strong support from his wife and family. He has attended S.A. weekly since April and is aware that Dr. R. and S.A. have communicated.

Dr. R. had referred him in the past to the Substance Abuse clinic at the community hospital in 2002 and 2006. Dr. R. completed the Substance Abuse Assessment Form, which indicates that he is not dependent on alcohol.

He has strong support from his wife, his parents and siblings. He believes that he has learned to cope with the stressors that caused his relapse. All the laboratory results done under Dr. R. since April have confirmed abstinence.

Exhibits #4 and #5 submitted by the Applicant showed a negative drug screen on December 6, 2010, and normal laboratory results on December 7, 2010.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

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

(a) the plate portion of a permit as defined in Part II;

(b) a driver's licence; or

(c) a CVOR certificate,

on the grounds of,

(d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

(e) conviction of the holder for an offence referred to in subsection 210(1) or (2);

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

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

Section 50 of the Act states:

50 (1) Every person aggrieved by a decision of the Minister 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.

(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 relies on:

1. The Medical Condition Report filed by the Applicant's family physician pursuant to section 203 of the Act that reported problems with substance abuse which included driving while "seriously under the influence of alcohol".

2. The Applicant's physician has known the Applicant for 20 years and was seriously concerned for safety while driving.

3. The Canadian Council of Motor Transport Administrators ("CCMTA"), Medical Standards for Drivers, Standard 13.2, stresses the seriousness of driving and habitual alcoholic intoxication. The Standard is:

   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

4. CCMTA Standard 12.4 for Narcotics states that cocaine has limited so-called recreational use. It is euphorizing, excitatory and very dangerous. The Standard is:

   INDIVIDUALS REPEATEDLY USING NON-PRESCRIPTION NARCOTICS MAY NOT BE ELIGIBLE TO OPERATE ANY CLASS OF VEHICLE, DEPENDING ON DEGREE OF DELIBERATE ABUSE OR LOSS OF CONTROL.

5. Regulation 340/94, section 14 states:

   An applicant for or a holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

6. The Applicant's driver's record shows an administrative driver's licence suspension for driving with blood alcohol in the "warn" range, in October 2009.

7. Medical evidence shows that the Applicant has been abstinent from alcohol since mid-January 2010 and from cocaine since March 2010.

8. The Registrar requires a period of 12-months abstinence from alcohol which may be reduced upon confirmation by the Applicant's physician that he has successfully completed a substance abuse treatment program and a supportive recommendation for re-instatement.

The Applicant relies on the strong recommendation by his family physician of 20 years and the letters from his psychotherapist that confirm his on-going attendance for counselling and the positive response since commencing counselling. His physician and laboratory screens under direction of his family physician show that he has remained alcohol free since mid-January 2010 and drug free since March 2010.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension of the Applicant's driving privileges under section 47(1) of the Act upon receipt of a Medical Condition Report completed by the family physician of 20 years that reported a history of driving under the influence of alcohol and also a problem with cocaine abuse.

2. The Applicant has demonstrated genuine intention to deal with both alcohol and cocaine abuse by attending Narcotics Anonymous, and weekly consultation with a psychotherapist.

3. Letters in October 2010 from the psychotherapist, who has communicated with the Applicant's family physician, show a positive response to therapy over an eighteen month period and is supportive of re-instatement.

4. Although the period of abstinence from alcohol has been less than the twelve months required by the Registrar, the family physician has confirmed that the Applicant has remained alcohol-free since mid-January 2010, and is supportive of re-instatement.

5. The Tribunal finds that the Applicant is not dependent on alcohol or drugs to the extent that would be likely to significantly interfere with his ability to drive a motor vehicle safely.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective July 10, 2010, 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

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Kevin Flynn, M.D., Member

RELEASED: December 17, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

6342-MED-NEUR-Neurological

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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., Member

APPEARANCES: APPLICANT, self-represented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: December 14, 2010 Toronto

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* (the "Act").

PRELIMINARY MATTERS

The Applicant submitted an additional document, namely a medical report, dated November 11, 2010. The Registrar's Agent agreed to the admission of this report in evidence, and it was marked #4.

FACTS

Registrar's Evidence

Emergency Room Physician Dr. F sent a Medical Condition Report regarding the Applicant to the Ministry of Transportation (MTO) on October 28, 2010. In this he indicated that the Applicant suffered from the condition of Mental or Emotional Illness - unstable. The doctor wrote further as follows:

Patient is depressed; previous attempts at vehicular suicide and ongoing thoughts of same.

When the MTO received this report, it was decided that the Applicant's driving privilege should be suspended, and it requested an up-to-date report from her doctor.

The MTO Certified Driver Record, dated November 18, 2010, showed that the Applicant's driving Class is G2, and that there is no record of any convictions, discharges or other actions. The Demerit Points were zero. Psychiatrist Dr. R saw the Applicant in consultation on November 11, 2010 and wrote a report to the Applicant's Family Physician. In this he wrote, in part, that "this 17 year old female" had a longstanding history of mood liability and she stated that she tended to become extremely emotional and anxious in the context of specific stressors that often revolves around abandonment or perceived rejection. This came to a head at the time when she was taken into the Emergency Department of the local hospital. In spite of voicing suicidal ideas she actually had no intent to harm herself and what she was really doing was expressing her need for help. The psychiatrist found no evidence of Psychosis and no history suggesting an underlying Anxiety Disorder. He summarised his report as follows:

> My impression is that she is a 17 year old female whose history and presentation is in keeping with a diagnosis of a Dysthymic Mood Disorder. Her mood deterioration appears to be secondary to fears of abandonment and rejection, and her history over the past several years is that of engaging in relationships too quickly and creating a dependence that ultimately leads to dissolution after a few months. With respect to her ability to drive a motor vehicle, I do not believe that there is any current or ongoing psychiatric issues that are affecting this issue. In fact, I believe that the concerns raised during her Emergency visit at X Hospital were secondary to her vocalisation and attempts to attain help, and were not secondary to any genuine suicidal ideation.

Finally, Dr. S said that he had decided to refer the Applicant for psychotherapy.

Applicant's Evidence

The Applicant explained that on the day she went into the hospital Emergency Department, (October 28, 2010) she had been very upset at home and was arguing with her parents. She got so upset that she dialled 911, the police arrived and she was taken into the local hospital. She said things she did not mean because of the state she was in. She was kept in hospital for three days. When she was discharged from the hospital she was put on a medication which she took for 10 days. She is seeing a therapist once a week who is helping her. Looking back, she thinks that many of the things she said re suicide etc were impulsive statements brought on because she was really looking for help. Her psychiatrist has told her that he does not have to see her any more.

She has been driving (with G2 licence) since February 2010. She drives a lot. She has driven family members such as her mother and aunt quite long distances and she has never been in an accident or incident.

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.

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> (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 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.
>
> (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 had no option but to suspend the driving privilege of the Applicant after receiving the Medical Condition Report from Dr. F, dated August 28, 2010.

The Tribunal notes that the Applicant suffers from mood liability. She has been treated for depression in the past. In her own words, “I have days when I am fine and days when I can be very upset.” In the words of her psychiatrist, “She has a longstanding history of mood liability”.

The Tribunal finds that the crucial point upon which the decision as to whether the Applicant should or should not resume driving has to be the opinion expressed by the medical specialist. Psychiatrist Dr. S wrote a lengthy consultation report on November 11, 2010, and in the conclusion of this report he wrote, “With respect to her ability to drive a motor vehicle, I do not believe there is any current or ongoing psychiatric issues that are affecting this issue. I believe that the concerns raised during her Emergency visit to X Hospital were secondary to her vocalisation and attempts to attain help and were not secondary to any genuine suicidal ideation.”

The Tribunal has decided that the Applicant’s driving privilege should be reinstated.

DECISION

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

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Patrick Coffey, M.D., Member

RELEASED: December 17, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6344-MED-DIAB-Diabetes

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: December 14, 2010 Toronto

DECISION AND REASONS

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

FACTS:

Registrar’s Evidence:

On September 21, 2010, Dr. R sent a Medical Condition Report to the Ministry of Transportation (MTO) in which he wrote that the Applicant suffered from the condition of Diabetes or Hypoglycemia – Uncontrolled. He further wrote:

> “Seven episodes of Hypoglycemia in last three weeks; current event occurred while driving.”

When the MTO received this report, it was decided that his driver’s licence should be suspended. The MTO informed the Applicant that a detailed up-to-date report was required from his doctor.

The Diabetic Assessment was completed by the Applicant's Family Physician, Dr. K, on October 4, 2010. The following was indicated by the doctor in the Assessment:

> The diagnosis of Diabetes was first made on the Applicant in May 1949.
>
> The condition is treated by an insulin pump, Novorapid, with a sliding scale for food.
>
> The readings are electronically downloaded.
>
> The blood glucose levels are recorded three or more times a day.
>
> Less than 10% of the blood glucose readings have been below 4 mmol/L.
>
> The most recent result was 0.074.
>
> The Applicant's last Diabetic education program was in November 2009.
>
> The Applicant has suffered two major hypoglycemic events in the last two years. In both cases loss of consciousness occurred. The last one was on September 21, 2010.

The Applicant described the circumstances leading to the hypoglycemic episodes in a manner that was only partially legible

The doctor described the Applicant as being well-informed and motivated.

The MTO Certified Driver Record for the Applicant, dated November 29, 2010, showed no record of any convictions, discharges or other actions and the Demerit Points were zero.

Applicant's Evidence:

The Applicant stated that he has been a diabetic for over 60 years, (since early childhood) and has been driving for over 45 years, (with no tickets or accidents due to Diabetes). He agreed that he had had two serious hypoglycemic attacks in the last two years and in both he had become unconscious. The last one was on September 21, 2010. But, he disagreed with the report of Dr. R, dated September 21, 2010, in which the doctor stated that he had suffered this hypoglycemic episode while driving' as he maintained that he certainly had not been driving. He described this event in this way: He left the car and went for a walk and then returned to the car. He answered the phone in the car and then reached out for a candy to give himself sugar, because he was worried that the exercise of walking might have used up some calories; and then he passed out. He stated that the car was parked and that he was not driving.

The Applicant is very careful with his management of the Diabetes. He tests his blood sugar at least seven times a day. He tests before he drives a vehicle and also two to three hours after taking Insulin for meals. He likes to keep his blood sugars between 6

and 10 mmol/L. He sees a nurse and a dietician about every three months. He sees doctors regularly.

APPLICATION OF THE LAW TO FACTS

Under the heading " Hypoglycemia" of the C.C.M.T.A. Medical Standards for Drivers, the applicable standard (Standard 8.3) is written as follows:

> Individuals who become faint or unconscious from spontaneous attacks of Hypoglycemia cannot drive any type of motor vehicle safely.
> Standard: Individuals subject to spontaneous attacks may not operate any type of motor vehicle until the condition is treated and the cause eliminated.

The Tribunal notes that the Applicant has been a severe diabetic since childhood and also notes that he is meticulous about his care for the illness. He has not had a driving accident as a consequence of his Diabetes. (It should incidentally be added here that the Applicant had spoken of an episode which happened in 1996 when he lost control of his car and mounted the curb, but the Applicant stated that he was fairly sure that the cause of this was something other than his Diabetes).

However, the Tribunal notes the fact that the Applicant has suffered two major hypoglycemic episodes in the last two years, the last one being less than three months ago, (September 21, 2010), and on both these occasions the Applicant lost consciousness. The Tribunal has to be guided by the Standards set by the C.C.M.T.A. and also by the Drivers Guide of the Canadian Medical Association, (see above); and in so doing has decided that the Applicant's driving privilege should remain under suspension.

DECISION

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

LICENCE APPEAL TRIBUNAL

_____
Patrick Coffey, M.D., Member

RELEASED: *December 17, 2010*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6356-MED-PSYCH- Psychiatric

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, MEMBER

APPEARANCES: APPLICANT

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: December 22, 2010 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's evidence

The two medical reports on file concerning the Applicant that were written in 2004, showed that he was being treated for severe psychotic illness (schizophrenia). They also included the diagnosis of probable substance abuse (cocaine).

When the Ministry of Transportation (MTO) received these two reports, it was decided that the Applicant's driving privilege should be suspended.

Between the dates of July 2, 2009 and May 2, 2010, the Applicant wrote five letters to the MTO. In the first of these letters, dated July 2, 2009, the Applicant called himself

"The Eternal Spiritual Sovereign, the Queen", and the rest of the letter reads, in part, as follows:

> "The doctor who reported my inability to safely operate a motor vehicle has dun(sic) an illegal act. I am His Royal Majesty the Queen XX and it is wrong to place any kind of restrained (sic) on me. The offender is guilty of treason. I am asking for my driver's licence to be reinstated due to letter from Toronto police service and the Criminal Code section 47 (1)".

In the letter of November 16, 2009 the Applicant referred to himself as AFA, AKA Her Majesty, the Eternal Sovereign, Her majesty the Sovereign Queen, the Most Sovereign Lord XX, Monarch, The Monarch. In the rest of the letter he wrote, in part:

> "In response to your letter dated October 14, 2009, I realised that you and your department does not understand the duties of a psychiatrist, if when you ask for an assessment "concerts (sic) about royalty and treason" the reason why one's mental status is stereotyped as schizophrenia is because psychiatrists do not want to be involved with sovereign, royal, majestic matters:"

The other letters of the Applicant to the MTO tended to be written in the same vein. In all of them he referred to himself in royal terms. But, in all of them there were some passages where the meaning was clear and to the point.

The Applicant's family physician Dr. L wrote a medical report concerning the Applicant, dated July 10, 2009, as follows:

> "His mental status has been stable. He was seen by Dr. A, psychiatrist, on June 23, 2009. He was stable and compliant with medication. He has good judgement and he has no delusions or hallucinations. He is not taking any other drugs (street drugs) or alcohol. Physical examination shows normal central nervous system, normal lungs and heart and normal gastro-intestinal system. He is now mentally and physically able to drive a motor vehicle."

Dr. L wrote another report on September 1, 2009 and in conclusion, he wrote, "he is fit to drive his motor vehicle".

Psychiatrist Dr. A wrote a medical report concerning the Applicant on June 23, 2009, writing, in part, as follows:

> I continued to provide him with psychiatric care on a regular basis, and the last meeting with me was on June 15, 2009. All the times he attended in the presence of his case manager and he was being compliant with medication; and at the present time he is receiving Seroquel at bedtime as an antipsychotic, but he is also a diabetic and he is aware about the side effects. During the last meeting he seemed to be stable and compliant with the treatment and there was no evidence of active cocaine abuse.

> Laboratory testing was carried out on July 8, 2010. In this the MCV was normal at 85.1, the GGT was normal at 21 and the fasting blood glucose was normal at 5.6.
>
> Laboratory Urine Abuse Screens was carried out on February 8, 2007 and it was reported that all substances were “Not Detected”, including cocaine. Urine testing done on January 25, 2007 again showed that cocaine was “Not Detected”, but Olanzapine was “Detected”.

Dr. F wrote a medical report on August 25, 2009. writing, in part:

> He, (the Applicant), is also being followed by Dr. L and Dr. A. He appears to be compliant with his medication. He has no known admissions to hospital over the last year. Based on the notes from the above two doctors, I concur with their decision that the patient is capable of driving a motor vehicle. He has no recent drug ingestions and I have included a most recent drug screen which was reported as normal.

IN The MAC Case Summary, dated November 10, 2009 the Instructions were “Remain Suspended”. The Reasons given were:

> Driver has a history of Schizophrenia and was admitted several years ago in disorganised state having burnt a bible on his stove. Although Dr. F (Aug. 2009) and Dr. L (two recent reports) argue that the driver is stable on the basis of a psychiatric evaluation from June 09 by Dr. A, and not at risk for collisions, his letters to the MTO in July and August 2009 suggest ongoing psychosis and disorganisation e.g. he refers to himself as the queen, monarch, eternal sovereign, and accuses the MTO of high treason and the reporting physician of illegally and wrongly suspending his licence. Given the above statements, remain unclear on basis for reinstatement consideration.

The Certified Driver Record for the Applicant, dated November 11, 2010, showed no convictions, discharges, or other actions. The demerit points were zero.

Applicant’s Evidence

When the Applicant was asked what he wanted to say, he launched into a long story about what happened to him in the year 1986, a long time before his licence was suspended, (2004). What he said—and it was difficult to follow his story-- was that he bought an auto, then met a friend who had also just bought an auto. They decided to exchange autos. The Applicant drove around a city block twice and then was stopped by the police, charged with an offence and fined $350.00, which he could not pay.

The Applicant was asked If his family physician thought him to be a royal, to which he responded, “He treats me like one”.

He was asked if he thought himself to be above the law, since he was a very important royal and he answered that he would do whatever the police asked him to do. He showed respect for the law.

On questioning, he said that the last time he saw his psychiatrist, Dr. A was “last month”. He was asked if he had a psychiatric problem and he answered without any hesitation, “Yes”.

The Applicant was asked why he enclosed a photo of the licence plate of his car when he wrote one of his letters to the MTO. His reply was largely incoherent.

APPLICATION OF THE LAW TO FACTS.

The Tribunal notes that the Applicant has been hospitalised many times for his chronic schizophrenia, and also notes that his schizophrenia was considerably more severe and unstable in 2004 than in 2009. Also, in 2004 he was probably abusing cocaine, but there is no evidence of any cocaine abuse in 2009.

The Tribunal notes that the 2009 medical reports showed the Applicant’s psychotic illness (schizophrenia) was stable, he was compliant with his medication, and he was seeing his medical advisors regularly.

2009 Medical Reports:

1. Family physician Dr. L expressed the opinion in two reports, (July 10, 2009 and September 1, 2009), that the Applicant was fit to drive.

2. Dr. F (in his report of August 25, 2009) stated that, “the patient is capable of driving a motor vehicle”. But, it is seen on reading his report that Dr. F was basing his decision, partly or wholly, on the notes of Dr. L and Dr. A.

3. Psychiatrist Dr. A, in his report of June 23, 2009, did not express any opinion on the ability of the Applicant to drive.

4. Psychiatrist Dr. F in his MAC report of November 10, 2009, instructed that the driving privilege of the Applicant “Remain suspended”.

The Tribunal notes the absence of any medical reports since 2009 and is of the opinion that up-to-date reports, especially psychiatric assessments, are necessary for decision making with regard to licence reinstatement.

Therefore, the Tribunal finds that neither of the psychiatrists recommended that the Applicant's driving privilege be reinstated. (One was definitely against licence reinstatement and the other did not comment on driving.) On the basis of this, and on the basis of the Applicant's testimony and letter- writing, where he exhibited delusions, rambling, incoherence and disorganised thinking, the Tribunal has decided that the Applicant's driving privilege should remain suspended.

DECISION

Upon the application by the Applicant to appeal the decision dated November 26, 2010 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 that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Dr. Patrick Coffey, Presiding Member

RELEASED: December 30, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6358-MED-ALCL-ALCOHOL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. GARRY FISHER, MEMBER

APPEARANCES: PAUL BAUERLE, Counsel, representing the Applicant

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: December 21 2010 St. Catharines

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*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's evidence

A form 203 report was filed with the Ministry of Transport (MTO) by Dr. S, the Applicant's family doctor, on April 29 2009. He checked off "alcohol dependence" and subsequently, on May 31 2009, a letter was forwarded to the Applicant notifying her that her driver's licence was suspended.

The letter noted that she needed to obtain an assessment from her treating physician and be abstinent from alcohol for one year. The time period could be reduced with confirmation of her successfully completing alcohol rehabilitation and a favourable recommendation from her treating physician.

Problems with alcohol came to light in April 2009 when the Applicant fell down some stairs (4 stairs) and fell hard enough to suffer a compression fracture of her spine. This led to a

hospital admission – April 11 to 15 – and in the course of that admission she was treated for alcohol withdrawal. She had delirium tremens.

Alcohol abuse started in 2007. The Applicant recognised that she had a problem at that time and sought help from Dr. MS and then from a regional counselling service (NADAS). She continues to the present obtaining help from counsellors.

She is not totally abstinent – admitting to occasional glasses of wine.

The Alcohol Assessment Form of June 2009 showed score of 11, and, in the most recent, was 4. Liver enzymes (ALT, GLT) were normal. The MCV (mean rbc cell volume) is above normal and remains above normal on subsequent testing.

The MAC of the MTO recommends that her licence remain suspended. The Applicant admits to 1 to 2 glasses of wine – maybe – on a Friday or Saturday night and the MAC interprets that information to be Saturdays and Sundays only with 3 drinks per occasion. The MAC consultant recommends abstinence.

The Applicant's evidence

The Applicant is a 45 year old divorced mother of two boys with learning disabilities. The father left some years ago and returned to look after the boys in April 2009 when the Applicant had her fall and was hospitalized. The boys remain with the father.

Mr. Baurle, Solicitor for the Applicant, represents her at this Tribunal and otherwise in custody questions.

Since the licence suspension the Applicant has clearly not been totally abstinent.
She has, however, had on-going counselling, advising moderation, thrice weekly AA meetings, a three week session at a treatment facility in late May 2010 – all monitored by her family doctor (who originally filed the form 203).

She ascribes her troubles to "stress" and treating the stress with vodka through 2007 into 2009. She no longer uses vodka to deal with stress and it would appear that she has adopted the moderation route.

Dr. S writes on August 25 2010:

> "in light of.....my knowledge of this patient as her family physician.... she has taken appropriate steps to control and moderate her alcohol consumption ...(and there are) no continuing grounds for suspending her driver's licence."

The doctor has recommended abstinence to his patient, just as the MAC of the MTO rigidly follows that line, but he has accepted that some are capable of moderation and feels that his patient (the Applicant) is one of them.
The Tribunal is supportive of the counselling that the Applicant is receiving and of her apparent solid doctor/patient relationship.

ISSUES

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

LAW

O. Reg. 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,
>
> (b) a driver's licence; …
>
> 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 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

Under Section 14 of O. Reg. 340/94

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

The Applicant acknowledges that she is an alcoholic. She has with the help of her solicitor, demonstrated that she appears to have control of her problem. She has support groups to rely on. Her family doctor is clearly supportive when he states "in my opinion there are no continuing grounds for suspending her driver's licence".

The Tribunal is of the opinion that this woman is coping with her problem of alcohol abuse in a reasonable manner and would agree with her family doctor's assessment.

DECISION

Upon the application by the Applicant to appeal the decision dated May 31, 2009 of the Registrar 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

_____

Dr. Gary Fisher, Member

RELEASED: December 30, 2010

This decision, may also be available on Quicklaw.

Decisions under the Highway Traffic Act

Section 47(1)(b) - Medical

Fiscal Year 2010 - 2011, January - March

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

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- 6373-MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6373.med.pdf>
- 6374-MED-NEUR-Neurological
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6374.med.neur.pdf>
- 6377-MED-COND-Alcl
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6377.MED.pdf>
- 6392-MED-SEIZ-Seizures
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6392%20med.pdf>
- 6394-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6394%20med.pdf>
- 6406-MED-SEIZ-Seizures
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6406-MED.pdf>
- <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-47(1)(b)-January-March.aspx> 6407-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6407-MED-alcl.pdf>
- 6416-MED-ALCL-Alcohol
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/jan/6416-MED.pdf>
- 6420-MED-ALCL
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/fb/6420.MED.Suspension.pdf>
- 6421-MED-COND-Alcl
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/fb/6421-MED-COND-Alc.pdf>
- 6432-MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/fb/6432-MED-COND-Alc.pdf>
- 6442-MED-JURIS-Jurisdiction
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/fb/6442.MED.Motion.Jurisdiction.pdf>
- 6445-MED-Dementia
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/fb/6445.MED.Dementia.pdf>
- <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-47(1)(b)-January-March.aspx> 6429-MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/nar/6429.MED.pdf>
- 6436-MED-ALCL
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/nar/6436.MED.Alc.pdf>

- 6443-MED-ALCL
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/mar/6443-MED_ALC.pdf>
- *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-47(1)(b)-January-March.aspx>* 6455-MED-DEMT-Dementia
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/mar/6455.MED.pdf>
- 6477-MED-NEUR-Neurologica
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/mar/6477.med.neur.order.pdf> |
- *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-47(1)(b)-January-March.aspx>* 6493-MED-SEIZ-Cerebral
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/mar/6493.med.pdf>
- *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-47(1)(b)-January-March.aspx>* 6502-MED-COGN-Cognitive Impairment
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/mar/6502.MED.pdf>
- 6505-MED-DRUG-Drugs/Medication
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/CVOR_Medical/mar/6505.med.drug.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6373-MED

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, Presiding Member

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

DATE OF HEARING: January 4, 2011 Toronto

DECISION AND REASONS

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

PRELIMINAY MATTERS

This being an electronic hearing, an attempt was made to make contact with the Applicant by telephone, but this was unsuccessful. And so the decision was made to adjourn for half an hour. After half an hour, contact still could not be made with the Applicant, so the hearing continued in the normal manner without the Applicant.

FACTS:

Registrar’s Evidence:

The Ministry of Transportation (MTO) received a letter from the family physician of the Applicant, Dr. W, dated September 13, 2007, who wrote, in part, as follows:

> This gentleman, (the Applicant), is a 50 year old truck driver living in X. On the evening of August 15th he had some confusion according to his wife which cleared in 15 minutes and then he went on his usual route to Quebec after working on his deck without any problems. On the morning of the

> 16th he was found in a truck stop unconscious with a slight laceration to the right side of his head. He was brought to the emergency room at X Hospital where he had a seizure which required Ativan to stabilise. He was found to have hyponatremia at 119. This was corrected over several hours. He had no further convulsions. He was loaded with Dilantin. His blood pressure rose and he was started on Norvasc.
>
> CT scan done there showed left sided temporal hematoma with a small subdural element. Follow up 48 hours later showed that it was stable. Follow up CT scan done after discharge home showed resolution of the hematoma.
>
> In summary, it seems that he had a seizure on the basis of acute hyponatremia due to SIADH secondary to intracranial catastrophe which fortunately resolved. He has had no further seizures.

When the MTO received this letter, it was decided that the Applicant's driving privilege should be suspended.

Neurologist Dr. L wrote a report concerning the Applicant on June 19, 2008. In this he reviewed the recent history of the Applicant, and he agreed that the initial scan was suggestive of a contracoup contusion consistent with trauma. The doctor went on to write that there was no evidence of further bleeding nor of a mass lesion, and that he has been seizure-free.

In the MAC Case Summary of September 3, 2008, the Recommendation was to Reinstate to Class 'G' licence. The Reasons given were:

> In August 2007, the driver sustained a temporal hematoma with resulting seizure. It is not clear whether this resulted in some abnormality which may make him susceptible to further seizure. Request an EEG.

The MTO wrote to the Applicant on September 3, 2008 informing him that his Class 'AMC' licence would be changed to a Class 'GM'.

Dr. W sent a report to the MTO, dated November 25, 2008, in which he reported that the Applicant suffered another witnessed seizure on September 11, 2008.

The EEG done on the Applicant on November 18, 2008 was reported normal.

The MTO wrote to the Applicant on February 2, 2009 informing him that due to the receipt of a medical report it had been decided that his driving privilege should be suspended again.

Neurologist Dr. B wrote a letter to the MTO on May 19, 2009 as follows:

> Mr. X (the Applicant) was seen for the first time in this epilepsy clinic on April 3, 2009. He was seen because he had two seizures, one on August 16, 2007 and the other one on September 11, 2008. Since the last seizure, he has been on Dilantin 100 mg three times a day. He has not had another seizure since he was placed on an antiepileptic medication, and for that reason I would support reinstatement of his driver's license.

The MTO wrote to the Applicant on June 10, 2009 informing him that it had been decided to reinstate his driving licence.

APPLICATION OF THE LAW TO FACTS

Under the heading “Seizures” of the C.C.M.T.A. Medical Standards for Drivers it is written:

> The individual with a past history of epileptic seizures should generally not hold any licence other than Class 5 or 6 and then only if he/she satisfies the following criteria.

The applicable standard (Standard 6.3.1) is written:

> If individual has been seizure-free on or off medication for 5 years, and receives a favourable report from their usual treating physician and/or a neurologist, may operate any class of motor vehicle.

The Tribunal notes that the Applicant was found unconscious on August 16, 2007 with a small laceration on the right side of his head. It is not certain what caused this loss of consciousness. After being brought to a hospital emergency department the same day, (August 16, 2007), he suffered a seizure. He was put on anti-convulsant treatment. He suffered another witnessed seizure on September 11, 2008, but has not had one since. He has therefore had two major seizures and possibly three, (taking note of the loss of consciousness on August 16, 2007). The Applicant has had his Class ‘G’ licence reinstated, but not his commercial ‘AMC’ licence.

It is only a little over two years since the last seizure and therefore the Tribunal is of the opinion that the Applicant does not meet the applicable C.C.M.T.A. Standard 6.3.1, and that the recommendation of this standard should be followed regarding his ‘AMC’ licence.

DECISION

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

LICENCE APPEAL TRIBUNAL

_____

Patrick Coffey, M.D., Member

RELEASED: *January 11, 2011*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6374-MED-NEUR-Neurological

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: THE APPLICANT, unrepresented

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

DATE OF HEARING: January 5, 2011 Toronto

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*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's Case

In February 2007, the Registrar was informed by letter from a physician pursuant to section 203 of the Act that the Applicant had a First Psychotic Episode, in which she drove at a high rate of speed on the wrong side of the road through a red light before striking a car which was exiting at a school, causing severe personal injuries to the other driver. Following the collision, she was seen wandering about in pyjamas in -20 degree C weather. She had auditory hallucinations and was taken to a local hospital and admitted for mental assessment.

The diagnosis was schizophrenia "with First Episode Psychosis". She was stabilized on Zyprexa 10 mg daily and discharged to be followed up by her psychiatrist, Dr. N.

Her driving privileges were suspended under section 47(1) of the Act.

Following receipt of the hospital discharge summary, her case was reviewed by the Medical Advisory Committee ("MAC") of the Ministry of Transportation of Ontario ("MTO"), and in October, her licence was reinstated after six months of stability and compliance with medications.

On April 8, 2010, the Registrar received a Medical Condition Report from a psychiatrist at the community hospital, Dr. B., pursuant to section 203 of the Act. It noted:

> This patient is suffering from a psychotic illness and has driven a car erratically leading to a motor vehicle accident recently and also three years ago. I feel that therefore she should not hold a valid driver's license.

On June 1, 2010, the Registrar informed the Applicant that her driving privileges were suspended. In order to be considered for reinstatement she was required to arrange for an up-to-date psychiatrist's assessment, which includes her complete psychiatric history i.e. (duration, degree), diagnosis, treatment, and dates of hospitalizations including her most recent discharge summary. The report must provide her current treatment, compliance history, reference to any signs of impaired judgement/concentration, and any sedation or psychomotor retardation due to medication. Confirmation of her mental and emotional stability would also be required.

The Applicant was advised that she may request an Administrative Review with the MTO and advised of her right of appeal to this Tribunal.

Her previous history was contained in the assessment by Dr. N. in 2007.

A report from the community hospital Mental Health Program noted that the Applicant was having trouble coping with changes in her life. No hallucinations and no impairment in judgement were noted. There was no evidence of risk to herself or to others.

She was provided with stress coping material for schizophrenia and was advised to continue her medications. An appointment was made for follow-up in two weeks.

Between March 18 and July 6, 2010, she was admitted four times to the Mental Health Centre.

The Applicant's discharge summary by Dr. N. stated that her discharge diagnosis was:

> Chronic paranoid schizophrenia, long history of non-compliance

Dr. N. stated that the Applicant's mother called 911 after the Applicant packed her bags, and got into a car on the way "to go to a heavenly address". She had not been taking the Risperidone prescribed to her a week previously.

She was admitted and restarted her medications, including Zyprexa, and her condition improved. Once her condition stabilized she was given day passes. Her mother was designated as the substitute decision maker.

On October 14, 2010, Dr. N. wrote that:

> Her insight & acceptance of her illness have improved significantly. She is doing very well on Zyprexa 20 mg/d (also confirmed by her ACT team member who sees her weekly). I do support her application to have her driver's license re-instated.

MAC reviewed her case on November 1, 2010.

Recommendation:

> Remain suspended. Reconsider with a treating psychiatrist's report confirming one year of stability from last discharge. Report should outline level of stability, full mental status exam, symptoms, medications, doses, frequency of appointments, level of sedation, concentration, psychomotor function and ability to drive. Report should also mention any admissions since July 2010 and discharge summaries if applicable.

Reasons:

> Given previous psychiatric history as well as recent history of non-compliance a longer period of stability is required.

The Registrar informed the Applicant on November 18, 2010, that it had been decided that her driving privilege should remain under suspension. She was informed of the requirements in order to be considered for re-instatement, as outlined in the previous letter of June 1, 2010.

<u>The Applicant's Case</u>

In her Reasons for Appeal, the Applicant stated that she lived with her mother and a younger sister. She stated that her first episode in 2007 occurred after a period of stress with her sister and the recent break-up of a live-in relationship with her boyfriend. In 2009, she had a minor motor vehicle accident due to an improper lane change. This was not related to her illness contrary to what was implied in the medical reports. There was only one motor vehicle accident related to her illness, i.e. in 2007.

She stated that she could not afford the medication and stopped taking it in the Fall of 2009. This led to a relapse in the Spring of 2010 when she thought she might be pregnant. During the period in 2010 when she was admitted four times to the hospital there were stresses at home, although she was back on her medication since March with a drug card.

She is now managing her illness since her sister moved and she has support from a community mental health nurse.

ISSUES

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

LAW

O. Reg. 340/94, section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the *CCMTA Medical Standards for Drivers*.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled *CCMTA Medical Standards for Drivers*, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

(b) a driver's licence; …

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 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.

(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 relies on:

1. A medical report made pursuant to section 203 of the Act in 2007, stating that the Applicant was admitted to the hospital with a first episode of psychosis, which was associated with a serious driving offence causing serious bodily harm.

   Section 47(1) of the Act states:

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

2. O. Reg. 340/94, section 14 states:

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

3. The Applicant has been non-compliant with prescribed anti-psychotic medications leading to recurrence of psychosis and an admission to hospital in March 2010.
4. A longer period of stability is required as recommended by the MAC, with supporting medical reports confirming compliance and freedom from mental or emotional instability.

The Applicant relies on her present compliance, and the fact that since her sister left home, there has been no recurrence of the stress previously at fault. She is pursuing a college course and is attending a community support nurse regularly. Her psychiatrist Dr. N. supports the re-instatement of her driver's licence.

The Tribunal finds that:

1. The Registrar was justified in issuing a suspension of the Applicant's driving privileges under section 47(1) of the Act, upon receipt of a Medical Condition Report of recurrence of psychotic behaviour associated with non-compliance of prescribed medication.

2. The Registrar was justified in continuing the suspension under O. Reg. 340/94, section 14, upon review of medical reports that showed re-admission to the hospital four times during the Summer of 2010.

3. The Applicant requires a period of twelve months free from relapse, with evidence of compliance and stability that would likely allow her to operate a motor vehicle safely.

The Tribunal recommends that the Applicant participate in a stress management program that would enable her to cope with life stressors.

DECISION

Upon the application by the Applicant to appeal the decision of the Registrar, effective June 11, 2010, 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 confirmed.

LICENCE APPEAL TRIBUNAL

Kevin Flynn, M.D., Member

RELEASED: January 18, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6377-MED-COND-Alc

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Dr. Kevin Flynn, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

Sonia De Santis, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: January 5, 2011 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*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

A Medical Condition Report was completed by an ER Physician, Dr. H., pursuant to section 203 of the Act, on May 16, 2010:

> Alcohol Dependence
> Seizures(s)--Cerebral
>
> Seizure x 2 in past year – first attributed to alcohol withdrawal, second not likely caused by alcohol.
> Patient likely to have another seizure regardless of cause. Alcohol - 7 drinks a day on average.
>
> The patient is aware of this report.

The Registrar informed the Applicant on July 14, 2010 that it had been decided to suspend his driving privileges under Section 47(1) of the Act.

In order to have his case considered for re-instatement he must arrange for a detailed up-to-date report that must include:

- Results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.
- Completion of a Substance Abuse Assessment form from his physician.
- If his physician confirms a diagnosis of alcohol dependence, the ministry will require confirmation that he has remained abstinent from alcohol for a period of one year. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of reinstatement.
- A clinical explanation for the results of biochemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.
- Reference to his reported seizure(s), including a narrative of his recent history, cause and confirmation that he has remained seizure-free.
- Whether a diagnosis of epilepsy has been determined.

A Substance Abuse Assessment was completed by his physician, Dr. J. on July 31, 2010.

Health History:

Liver disease; Seizures.

Medical:

Patient has elevated liver enzymes in keeping with chronic alcoholism. His ultrasound does not show cirrhosis but he does have fatty infiltration. He suffered a seizure in May 2009. He left the ER AMA. His Potassium was low, it was likely an alcohol related seizure.

Physical Assessment:

Enlarged liver on ultrasound detected
MCV 98.6 (80-100)
GGT 246 (15-73) secondary to alcoholism
AST 132 (12-49) secondary to alcoholism
ALT 91 (12-49)

History of Use:

Age of first use: 15 years old. Home made wine
Age of first regular use: 18 years old
Amount consumed: at 18 years 6-10 beer/liquor
Most recent use: Monday August 2, 2010
Longest period of abstinence: 2-4 days Date of reduction or abstinence July 18, 2010
Medication: 50 mcg potassium
81 mgm ASA
Atacand

Treatment: I requested patient contact local addiction services.

Period of abstinence: He has not had a period of abstinence that I am aware of.

12 step program: is not aiming to stop drinking.

Substance Dependence:

- Persistent desire or unsuccessful efforts to cut down or control substance use.
- Continued substance use despite knowledge of having a persistent or recurrent social, psychological or physical problem that is caused or exacerbated by use of the substance.
- Withdrawal, as manifested by either (a) characteristic withdrawal syndrome for the substance or (b) the same or closely related substance is taken to relieve or avoid withdrawal syndrome.

Diagnosis: Dependence.

Recommendation: Abstinence.

I have recommended abstinence.

The local Addiction Services submitted a report to the Registrar on September 2, 2010.

The Applicant sought their help upon receipt of the Notice of Suspension.

The report referred to a seizure three years ago which was attributed to low serum potassium resulting from the use of a diuretic. He acknowledged his use of alcohol at the rate of one beer per hour from noon onwards but was reducing his consumption from about 80 per week to a goal of 56 and then he plans to set a lower target. No trigger factors were identified but at times of high stress he would drink more.

He was retired and was less busy around the house since the suspension. He did not plan to stop drinking.

The Registrar informed the Applicant on September 14, 2010 that the suspension would continue. In order to be considered for reinstatement he was required to be alcohol and seizure free for a period of one year. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of reinstatement. Biochemical markers outside normal laboratory limits must be explained.

The Applicant's Case

The Applicant in Reasons for Appeal attached copies of the ER reports of June 5, 2009 and May 16, 2010.

On June 5 he was admitted at 09:15 with a presenting history of chest pain, syncope and "?seizure". ER examination showed an ethyl alcohol level of greater than 36 mmol/L. His BP was elevated at 186/111. He was found to have a reduced level of serum potassium. He was discharged AMA (against medical advice) at 13:45.

On May 16, 2010 he was admitted at 18:05 with a history of seizure. Generalised tonic/clonic seizures were reported lasting 1-2 minutes followed by somnolence. A CT scan was normal. He was informed that the Ministry of Transportation would be notified.

He submitted that the episode on June 5, 2009 was due to the reduced potassium following a diuretic. On the second occasion he states that he had been playing golf on a hot day without sunscreen and felt weak and dizzy.

He states that he has always informed his physicians of his alcohol consumption.

He stopped drinking hard liquor in July 2010 and his goal is to reduce his consumption of beer to 45 per week.

He states that he has not provided the information requested by the Registrar in the letter of September 14, 2010 because he believed that the information requested had been provided previously. He acknowledged that he last had been drinking the evening before the Hearing, when he had six beers.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

> (1) An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical condition or disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; or
>
> (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.
>
> (2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

…

(b) a driver's licence; …

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies:

1. On section 47(1) of the Act that states:

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

2. The Medical Condition report of May 16, 2010 that stated that the Applicant's condition was alcohol dependence, and a history of seizures.

3. The Applicant continues to drink and had six beers the night before the Hearing.

4. The Applicant did not seem interested in abstinence and had no plan to enter a relapse prevention program.

5. The Registrar required more information concerning the reported seizure(s).

6. A period of one year alcohol free and seizure free was required in order to be considered for re-instatement.

7. CCMTA Guideline for alcohol dependence and alcohol withdrawal seizures state that a patient with a diagnosis of alcohol dependence including alcohol withdrawal seizures should not be allowed to drive any type of motor vehicle.

> 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 relies on his belief that the diagnosis of seizure was incorrect and on each of the ER admissions there was an alternative explanation for his symptoms, namely a reduced serum potassium level due to use of a diuretic, and exposure to too much sun.

He acknowledges his drinking and the amount consumed but does not believe that this causes a disability to the extent that he would be unsafe to drive. He is also gradually reducing the amount of alcohol consumed per day.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension of the Applicant's driving privilege upon receipt of a Medical Condition Report pursuant to section 203 of the Act stating that the condition was alcohol dependence and seizure(s).

2. The information requested by the Registrar in the letter of September 14, 2010 remains outstanding.

3. The Applicant has stated that he does not intend to stop drinking although the biochemical markers for alcoholism were elevated on the Alcohol Assessment Report. No further laboratory results have been submitted.

4. No detailed medical information has been submitted concerning reported seizures.

5. No medical evidence was submitted that supports reinstatement.

DECISION

Upon the application by the Applicant to appeal the decision dated July 15, 2010 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

Kevin Flynn, M.D.,
Presiding Member

Released: January 10, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6392-MED-SEIZ-Seizures

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: January 13, 2011 *By Telephone*

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*, R.S.O. 1990, c. H.8 (the "Act").

PRELIMINARY MATTERS

The Applicant informed the Tribunal that due to an address change he did not receive the Notice of Hearing at his current address until January 4, 2011. He telephoned the Licence Appeal Tribunal office on January 7 requesting a Hearing in person and was advised to present his argument for change in venue at the commencement. Upon being advised that an in-person Hearing could not be scheduled until February 10, 2011, he requested that the Electronic Hearing continue. The Respondent agreed.

FACTS

The Registrar's Case

A Medical Condition Report was completed on December 31, 2008 by Dr. S., a physician at a community hospital.

> Seizure(s) or loss of consciousness
>
> Patient is aware of this report.

The Registrar informed the Applicant on January 24, 2009 that his driving privilege was suspended for medical reasons under section 47(1) of the Act.

In order to be considered for reinstatement he must arrange for the Registrar to receive an up-to-date detailed report from a physician familiar with his history. This report must include a narrative of any previous syncope/seizure history, the results of any cardiologic and neurological investigations (ECG, EEG, Holter monitor). The report must indicate that the cause has been determined and successfully treated.

He was informed that he may apply for an Administrative Review and of his right of appeal.

No further correspondence took place until a Medical Condition Report was completed on January 29, 2009 by Dr. C. his family physician, reporting:

> Alcohol Dependence
>
> Seizure(s)-Alcohol related.

Attached was a consultation report from a neurologist, Dr. M. dated January 10, 2008.

Dr M.noted that the family physician informed him that the patient was a heavy drinker (4-5 drinks a day) until recently; that he had a seizure following a late night and early morning when away from home in October 2007. He was taken to the local hospital. A CT scan and EEG performed at the hospital were reported as normal. He had not been driving since the seizure.

There was no past history of seizure but a brother had died at age of two years from seizures. His son developed seizures at age eight.

The Applicant's partner described classical signs of a grand mal seizure.

The Applicant informed Dr. M. that he only has 1-2 drinks of rum after work.

He agreed not to drive until a 12 month period seizure-free had passed. He was prescribed carbamazepine and was asked to have laboratory tests in one month.

Results of laboratory tests on January 20, 2009 showed:

MCV 103.5 (range 80-97)

ALT 62 (range 4-43)

Carbamazepine level 34 (therapeutic level 17-42)

Dr. M. wrote to the Registrar on October 7, 2010. He had been following the patient for seizures and last assessed him on September 23, 2010. He reported that the patient had seizures in October 2007, November 2008, and October 2009 and was currently controlled on a higher dose of carbamazepine. He noted that the patient's alcohol consumption had been reduced considerably and he was now taking 10 units per week. The latest blood work on August 11, 2010 showed the following:

MCV 108.5

GGT 696 (normal <60)

AST normal

ALT normal

Dr. M. stated that he did not have an explanation for the biochemical abnormalities at this time.

The patient has been seizure-free for approximately one year. From an epilepsy standpoint I think he is safe to drive.

Dr. M. forwarded an Alcohol Assessment Form dated October 15, 2010.

Medical Consequences of Alcohol Use: none.

Physical Assessment normal

Laboratory results as above on August 11, 2010

Alcohol Use Audit:

Total score: 8

History of Alcohol Use

Age of first use: 15 years old

Age of first Regular Use: 30 years old.

Quantity over past month: 5

Who do you drink with? Friend. Where do you drink? Friend's house

Last Use: last week on September, 2010

First intoxication: 15 years old

Reasons for drinking: special occasion

Pattern of Use: Excessive use in past, now quit.

Reasons for stopping: Health concerns.

Consequences of Drinking:

Legal: nil

Interpersonal: nil

Vocational: nil

Medical: patient has seizures but not necessarily linked to alcohol. Strong family history of seizures (his son and brother had seizures).

Treatment:

No previous treatments

12 Step Programs: not used

Diagnosis:

None given

Recommended Goal for Alcohol Consumption

The patient was advised to continue his efforts to decrease alcohol intake down to 3 drinks per week (no more than 2 on any one sitting)

Medical Advisory Committee on November 8, 2010 recommended a report from the driver's treating physician to provide a documented clinical explanation for the driver's elevated GGT and his rising MCV.

Reasons:

Driver has had no further seizures since August 2009. However MAC notes rising increase in the driver's MCV marker in January 2009 =103.5, August 2010=108.5.
GGT marker in August 2010 =696.
MAC does recognise anti-convulsant medication can cause a rise in GGT level.

The Registrar informed the Applicant on November 24, 2010 that in light of Dr. M's assessment on October 7, 2010 it will be necessary to file an assessment from his treating physician which provides a documented clinical explanation for the elevated GGT and rising MCV test result.

The Driver's Record shows one speeding offence dated May 20 2008, 60 kmh in a 50 kmh zone.

The Applicant's Case.

The Applicant submitted that the Medical Condition Report dated December 31 did not identify him as the patient because the given name on the report was not his. The report identified the correct surname and date of birth and the given name is the same as the Applicant's middle name. The Tribunal ruled that the Report correctly applied to the Applicant.

He stated that when he went to another province in October 2007 for a sports event he had some drinks late at night and had to be up at 04:30 in order to catch a flight home. He was at a party where there were strobe lights and he had a seizure. He was taken to a city hospital and tests were performed that allowed him to return home. He saw the neurologist Dr. M. and was started on carbamazepine. He had seizures in 2008 and his last seizure was on October 2009. He is currently taking carbamazepine 600 mgm a day.

Dr. M. called him after the laboratory results in October 2010 and advised him to reduce his alcohol use to three per week and no more than two on any one day. He has had further tests since then, the last one being two weeks ago. These results have not been forwarded to the Registrar and have not been made available to the Tribunal. He states that he has stopped drinking but that the test results have not changed.

He has not shown Dr. M. the Registrar's letter dated October 7, 2010. He has asked the doctor if he can explain the elevated laboratory results but was advised that no further information was available.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

…

(b) a driver's licence; …

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1.The Medical Condition report filed pursuant to section 203 of the Act, on December 31, 2008 listing Seizure(s).

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

2. A report pursuant to section 203 of Act from the Applicant's family physician, Dr. C. on January 29, 2009 listing Alcohol Dependence and Cerebral Seizures.

3. The neurologist, Dr. M. made reference to alcohol in his letter to Dr. C. but left it to Dr. C. to initiate a report under section 203.

4. The Applicant promised to abstain from driving for 15 months on January 10, 2008 but was caught speeding on May 20, 2008.

5. The elevated GGT result over 10 times higher than normal. The Applicant was advised by his physician to cut down on alcohol but results remained high.

6. The Medical Advisory Committee recognised that the GGT may be elevated due to the anticonvulsant medication but this explanation has not been confirmed by the Applicant's physician.

7.The neurologist has recommended re-instatement on the epilepsy diagnosis but no medical recommendation has been made regarding re-instatement on the alcohol issue.

The Applicant relies on the advice given by the neurologist regarding reducing the use of alcohol, which he has followed, in spite of which the laboratory results have remained elevated. He undertook to provide the Registrar with the results of all laboratory tests in the last year and will also discuss further with Dr. M the effect of the medication on the GGT and other liver tests.

The Tribunal finds:

1. The Registrar was justified in suspending the Applicant's driving privileges upon receipt of a medical report on January 29, 2009 pursuant to section 203 of the Act, listing Alcohol Dependence and Seizures.

2. A diagnosis of alcohol dependence has not been confirmed by the Alcohol Assessment form. There remains to be explained by the Applicant's physician the marked elevation of the GTT marker and the rising MCV. The Tribunal recommends that the Applicant pursue this question with his neurologist, and he also should provide the Registrar with copies of all laboratory results done in the last twelve months.

3. A diagnosis of alcohol withdrawal seizures has not been confirmed by the neurologist, and therefore CCMTA section 13.2 does not apply.

4. The Tribunal recommends reinstatement if the Registrar receives documented evidence that the anticonvulsant carbamazepine can cause elevation of the GGT and MCV markers.

DECISION

Upon the application by the Applicant to appeal the decision dated June 11, 2010 of the Registrar 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 confirmed.

LICENCE APPEAL TRIBUNAL

Kevin Flynn, M.D.,
Presiding Member

RELEASED: January 20, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6394-MED- ALCL-Alcohol

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: January 13, 2011 *By Telephone*

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*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's Case

A Medical Condition Report Pursuant to section 203 of the Act was completed by Dr. B. on May 13, 2010, which stated:

> Alcohol or drug abuse
>
> Condition is Temporary and likely to be resolved within three months
>
> Patient is aware of this report.

The Registrar informed the Applicant by letter on July 13, 2010 that it had been decided to

suspend his driving privileges under section 47(1) of the Act regarding the reported <Alcohol Dependence.

In order to be considered for reinstatement he must arrange for the Registrar to receive a detailed up-to-date report from his physician to include the following:

- Results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.
- Completion of the enclosed Substance Abuse Assessment form by his treating physician or a physician specializing in addiction medicine.
- If as a result of the assessment his physician confirms a diagnosis of alcohol dependence, the ministry will require confirmation that he has been abstinent from alcohol for a period of twelve months. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of reinstatement of his driving privilege.
- A clinical explanation must be provided for the results of any bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

He was advised of his right to request an Administrative Review and of his right of appeal.

The Substance Abuse Form was completed on July 30, 2010 by Dr. K., his Family Physician for 20 years.

Health History:

Hospitalizations within the past twelve months

Psychiatric disorders (anxiety and depression

Chronic Anxiety or Tension

Presently on citalopram 20 mg daily. Since recent hospitalization for treatment of alcohol abuse he has <u>not</u> any alcohol and is attending AA regularly. I am also seeing him regularly as his Family Physician of many years.

Alcohol Related Syndromes

Uncomplicated alcohol withdrawal.

Physical Assessment and Laboratory Evaluation

Normal physical examination

Laboratory Evaluation: GGT 26 (<60)

AST 30 (<37)

ALT 32 (<46)

MCV 100 (80-97)

History of use:

First Use: 39

First Regular Use: 45

Amount consumed: a few drinks a day

Most recent use: June 28/2010

Date of reduction: June 29/2010

Treatment:

Residential clinic 1998

City Hospital 2010

First relapse after treatment: 4 months

Use of 12 Step Programs:

AA meetings 3 times a week

Totally abstinent now.

Substance Dependence DSM1V Criteria

Not completed

Audit –Alcohol Use

Total points 10

Diagnosis

Abuse

Recommendations

Abstain

Date advised to abstain: June 29, 2010

Dr. K., Family Physician, wrote to the Registrar on August 23, 2010 stating:

> It is my assessment that <Applicant>, a patient of mine for the last 20 years, is medically fit to operate a motor vehicle.
>
> It should be noted that his sobriety has now reached eight weeks, that he is attending AA meetings three times weekly, and that he has entered a <professional addiction counselling program> which is further testament to his determination for his continued sobriety.

Medical Advisory Committee reviewed his case on October 7, 2010

Recommendation:

> Remain suspended. Will reconsider reinstatement with a report from the driver's treating physician or a physician specializing in addiction medicine, confirming abstinence from alcohol for a sustained period of twelve months, supported by bio-chemical markers (MCV, GGT, AST ALT) at a rate to be determined by the driver's treating physician.

Reasons

> Driver has previous history of residential substance treatment in1988, a conviction for impaired driving in 2007 and most recent report of alcohol/drug abuse dated May 13, 2010. In light of the aforementioned, consideration for reinstatement cannot be considered until such time as the driver has remained alcohol free for a sustained period of 12 months supported by bio-chemical markers at a rate to be determined by his treating physician.

The Registrar informed the Applicant on October 14, 2010 that his driving privilege would remain suspended. He was advised to arrange for an up-to-date detailed report confirming abstinence for a period of twelve months supported by bio-chemical markers at a rate to be determined by his physician.

On November 23, 2010, Dr. K. wrote:

> I continue to see him regularly. He has not taken a drink and is completely abstinent, and his blood work is excellent.

Laboratory results dated November 11, 2010:

> GGT 13 (<60)
>
> AST 27 (<37)
>
> ALT 21 (<45)
>
> MCV 94 (<80-97)

On December 21, 2010, the Registrar informed the Applicant that his driving privilege would remain suspended. He was again advised that he must arrange for the Registrar to receive

a detailed, up-to-date assessment from his physician with the requirements stated in the letter of October 14, 2010.

The Driver's Record:

> Impaired driving 2007/12/04
>
> Suspended until 2008/12/04
>
> Suspended for medical reasons 2010/07/23

The Applicant's Case

The Applicant informed the Tribunal that as a result of a break-up of a 4 year relationship he was forced to sell his "dream home" at short notice early in 2010. He had to find temporary accommodation and moved into a motel with his cat.

He was prescribed an antidepressant, Ciprolex and diazepam and he started to drink. As a result of mixing medication with alcohol he became unwell and his sister arranged to have him taken to the Emergency Room by ambulance. He had been taking 4 drinks a day and had increased his consumption the day before his admission to hospital.

Having worked for over 35 years in a senior government position, the sudden suspension of his driving privilege had a traumatic effect. He has been attending Alcoholics Anonymous meetings three times a week and also enrolled in a community health centre addiction counselling program. He keeps in regular touch with his family physician of many years in order to prevent a relapse. He has been sober since June 29, 2010 and he has no demerit points on his licence to drive over 48 years. He is now unable to continue his volunteer work and sports activities as he lives outside the city.

As a result of the impaired driving conviction in 2007, he had to cope with the humiliation of the arrest, waiting for his trial and conviction which required him to use an interlock device. Following the end of the sentence period he voluntarily purchased an interlock device in order to prevent a recurrence. As a result of this he is quite familiar with the results of driving while impaired.

He submitted that his bio-chemical markers on July 30, 2010 showed only marginal elevation of MCV at 100 (range 80-97). MCH was 35 (range 27-32). GGT was normal at 26 (normal <60)..On November 12, 2010,` his MCV was 94, MCH 33 and GGT 13. He submitted that these are indicative of only a temporary minor elevation that returned to normal on stopping alcohol. He noted that Dr. B. in the Medical Condition Report did not check "Situation is a serious road safety risk" and noted that the "condition is temporary and likely to be resolved within 3 months".

Also the Applicant submitted that the Registrar interpreted "Alcohol Abuse" as indicated in the Report on March 13, 2010 as "Alcohol Dependence" in the Notice of Suspension letter

on July 13, 2010. His Family Physician diagnosed Alcohol Abuse, not Dependence,in the Alcohol Abuse Assessment.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

(b) a driver's licence; …

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 of 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 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.

(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 relies on:

1. The Medical Condition Report completed by a physician pursuant to section 203 reported alcohol abuse. Section 47(1) states:

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

   on the grounds of any other sufficient reason not referred to in clause (d), (e) or (f).

2. The driver's record of conviction of impaired driving in 2007.

3. The history of relapse following residential treatment in 1988 and the more recent relapse in May 2010.

4. The bio-chemical marker MCV was outside the normal range, without an explanation.

5. The review by the Medical Advisory Committee on October 7, 2010 recommending that the Applicant's driving privilege should remain suspended pending a sustained period of abstinence of 12 months supported by bio-chemical markers.

The Applicant relies on:

1. The Medical Condition Report on May 13, 2010 did list Alcohol Abuse as the condition. The Registrar was in error stating that he suffered from Alcohol Dependence.

2. The bio-chemical markers on which the Registrar relied were only marginally elevated and were normal following a period of sobriety.

3. He has taken steps to prevent relapse by attending AA three times weekly and by enrolling in a community based addiction counselling program.

4. He sees his family physician regularly for management of his problem.

5. He has a previous record of sobriety of 35 months following the conviction in 2007.

6. He has now been sober for over six months.

The Tribunal rules:

1. The Registrar was justified in issuing a suspension of driving privileges under section 47(1) of the Act upon receipt of a Medical Condition Report completed by a physician pursuant to section 203 on May 13, 2010, listing "Alcohol Abuse, likely to significantly interfere with driving".

2. The Registrar was not correct in listing the condition as <Alcohol Dependence> in the Notice of Suspension on July 13, 2010.

3. The elevation of the bio-chemical marker MCV on July 30, 2010 on which the Registrar relies was only marginally elevated and was not accompanied by an elevated GGT. Both tests were in the normal range on November 11, 2010.

4. The Applicant has taken several steps to prevent relapse, by attendance at AA three times a week, enrolment in a community based addiction program, and regularly attends his family physician of 20 years.

5. His family physician is supportive of reinstatement.

6. The period of abstinence of over six months is reasonable under the circumstances listed above.

7. The Applicant is not addicted to the use of alcohol to an extent likely to significantly interfere with his ability to drive a motor vehicle safely.

DECISION

Upon the application by the Applicant to appeal the decision dated June 11, 2010 of the Registrar 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

KEVIN FLYNN
Presiding Member

RELEASED: January 20, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

6406-MED-SEIZ-Seizures

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN Presiding Member

APPEARANCES: RUSSELL McKNIGHT
Representative for the Registrar of Motor Vehicles

APPLICANT

DATE OF HEARING: January 21, 2011 Toronto

DECISION AND REASONS

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

EXHIBITS

1. Notice of Appeal received at the Tribunal December 23, 2010**,** filed by the Applicant.

2. Notice of Suspension issued by the Registrar of Motor Vehicles effective November 7, 2010, contained in tabbed file #1-9. Filed by the Tribunal.

FACTS

The Respondent's Case

A Medical Condition Report was completed pursuant to section 203 of the Act, by Dr. H., a psychiatrist at a teaching hospital, on October 10, 2010.

The medical condition(s) listed were:

> Seizure(s) – Alcohol related.
>
> Post-operative seizure, possibly related to alcohol withdrawal
>
> The patient is aware of this report.

On October 20, 2010, the Registrar notified the Applicant by letter that as a result of the report submitted in compliance with the Act, his licence to drive was suspended under Section 47(1) of the Act.

He was advised that in order for his case to be reconsidered, he must arrange for a detailed up-to-date report from his doctor. The report must include:

- The results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle;
- A reference to the reported seizure(s). As the seizure appeared to be related to alcohol misuse, he must arrange for completion of a Substance Abuse Assessment form by his physician;
- If as a result of the assessment, his physician confirms a diagnosis of alcohol dependence and/or that the Applicant has experienced an alcohol withdrawal or alcohol related seizure, this assessment must confirm that he has remained both seizure free and abstinent from alcohol for a period of one year. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of the reinstatement of his driving privilege;
- A clinical explanation must be provided for the results of any bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range;
- Details of the circumstances surrounding the reported seizure as well as details of any previous seizure whether alcohol related or not.

He was advised of his right to Administrative Review and of his right of Appeal.

On November 2, 2010, a copy of a consultation report from a cardiologist, Dr. D. to the Applicant's family physician, Dr. G was forwarded to the Registrar together with a completed Alcohol Assessment Form.

The specialist noted that the 53 year old patient underwent cardiac surgery at a teaching hospital on October 4, 2010. His post-operative course was complicated by delirium, agitation and a single seizure. CT scan showed generalised atrophy. It was felt that the seizure was probably due to alcohol withdrawal.

No further cardiac problems occurred and he was discharged home on Aspirin, metoprolol 12.5 mg twice daily and Ramipril 2.5 mgm daily. Physical examination was normal. He was advised to avoid alcohol in the future and was abstaining currently.

The Substance Abuse Assessment form was completed by the family physician, Dr. G. on November 30, 2010.

Health History

Not completed.

Medical Consequences Related to Alcohol Use

Nil

Alcohol Related Syndromes

Uncomplicated alcohol withdrawal begins 12-18 hours after cessation of drinking:

Related to post-op cardiac surgery

Physical Assessment and Laboratory Evaluation

Blood Pressure	120/70 (normal)
Liver	Normal
Neurological	Normal
GGT	45 (normal)
MCV	80.6 (normal)
ALT	19 (normal)
ASR	17 (normal)

DSM-IV Criteria for Alcohol Dependence

Nothing indicated

History of Alcohol Use

Age of First Use	16
Age of First Regular Use	18
Last Use	October 3, 2010
Pattern of Use	4-5 times per week
Amount consumed at each session	4-5 beers

Substance Dependence (DSM 1V criteria)

Substance is often taken in larger amounts or over larger period than intended

Treatment

1. nil

2. Use of 12 Step Programs

   Attending ADAPT

Audit score:

6

Diagnosis

Misuse

Recommended goal for alcohol consumption

Abstain

Date advised to abstain

October 4, 2010

Date became abstinent

October 15, 2010

On December 14, 2010, the Registrar informed the Applicant that it had been decided that the suspension should continue because a longer period of recovery was advised by the medical advisors.

He was requested to submit an up to date detailed report from his physician or a physician specialising in addictions medicine regarding his reported seizure. This assessment should confirm that he has remained both seizure-free and abstinent from alcohol for a period of one year. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of the reinstatement of his driving privilege. A clinical explanation must be provided for the results of any bio-chemical markers that are outside the normal laboratory range. His physician must also include details of the circumstances surrounding the reported seizure as well as details of any previous seizure whether alcohol related or not.

He was advised of his right of appeal.

Dr. G., the Applicant's family physician wrote to the Registrar on December 15, 2010.

> This is to certify that <Applicant> does not have a seizure disorder. He had one seizure which probably was due to alcohol withdrawal related to hospitalization for cardiac surgery, which required that he stop all alcohol consumption. There was never a definitive diagnosis. However it was not epilepsy. Additionally there has been no need for anti-convulsant meds. Neither have there been any further seizures.
>
> I also can verify that <Applicant> does not have any alcohol dependence and that he does not require alcohol rehabilitation treatment.

The Registrar informed the Applicant on December 23, 2010 that the letter from Dr. G. had been reviewed and it had been decided that his driving privilege should remain suspended.

The reason given was that insufficient time had elapsed since the date of his last seizure to ensure that his condition had been adequately controlled. In order to be considered for reinstatement he must submit a detailed report from his treating physician or a specialist in addiction medicine confirming that he has remained seizure free and abstinent from alcohol for a period of one year.

This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of the reinstatement of his driving privilege. A clinical explanation must be provided for the results of any bio-chemical markers that are outside the normal laboratory range. His physician must also include details of the circumstances surrounding the reported seizure as well as details of any previous seizure whether alcohol related or not.

The Applicant's driver record showed no infractions or demerit points.

The Applicant's Case

The Applicant stated that he had cardiac valve surgery at the teaching hospital on October 4, 2010. During the surgery he suffered a seizure. During the recovery period he was seen by the psychiatrist, Dr. H. on October 12, 2010. He stated that Dr. H. interviewed him for approximately half an hour and informed him that a report would be sent to the Ministry of Transportation. Following receipt of the Registrar's letter of suspension he saw his family physician for completion of the Substance Abuse form and had laboratory tests as requested by the ministry. All the tests were in the normal range. The cardiac surgeon told him at his follow-up appointment that he had made a good recovery and also indicated to him that he did not understand why his licence was suspended. His cardiologist also told him that he did not have any concerns. His family physician was supportive of reinstatement.

He has suffered substantial financial losses since losing his driving privilege. He states that he has complied with all the requests by the Registrar and has not consumed alcohol since October 16, 2010. He has never had a seizure in the past and there is no family history of seizures. He does not agree with the diagnosis of alcohol withdrawal seizure but acknowledges that he did have a seizure during surgery. He points out that the Medical Condition report stated "*possibly related to alcohol withdrawal".* He has remained abstinent for three months and he intends not to drink in the future. He contacted ADAPT in order to satisfy the ministry requirements. His family physician has stated in the Substance Assessment report that his diagnosis is *misuse* and not *dependence.* His use of alcohol was 12 to 18 beers a week and sometimes he would not drink at all.

ISSUES

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

LAW

Regulation 340/94, Section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
>
> (b) a driver's licence; or
>
> (c) a CVOR certificate,
>
> on the grounds of,
>
> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
>
> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
>
> (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
>
> (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. Section 47(1)(b)(g) of the Act that states:

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

The Medical Condition Report submitted pursuant to Section 203 of the Act required the Registrar to suspend the Applicant's licence to drive.

2. Regulation 340/94 (14) (a) states that:

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;

3. The Applicant was reported for "possibly alcohol withdrawal seizure" and was advised by his cardiologist to avoid alcohol in the future.

4. The family physician checked that "uncomplicated complication of alcohol withdrawal beginning 12-18 hours after cessation of drinking was related to post-operative cardiac surgery".

5. No other cause was found for the seizure

6. CCMTA Section 13.2 states that patients with a diagnosis of alcohol dependence including those with alcohol withdrawal induced seizures, should not be allowed to drive any type of motor vehicle.

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 relies on the advice given by his cardiac surgeon, his cardiologist and the written advice by his family physician that he does not have a problem with alcohol or seizures. He has been sober for three months and has taken seriously the medical advice to abstain. The seizure has been attributed possibly to alcohol withdrawal. He has made every effort to meet the Registrar's requirements except for the twelve month period seizure free and alcohol free.

The Tribunal finds as fact:

1. The Registrar was justified in issuing a suspension of the Applicant's licence to drive under Section 47(1) upon receipt of a Medical Condition Report filed pursuant to Section 203 of the Act that stated the Applicant suffered from

   Seizure –Alcohol Related .

2. The Substance Abuse Assessment form completed by the family physician for 20 years did not make a diagnosis of alcohol abuse or dependence, but alcohol misuse. The bio-chemical markers were in the normal range.

3 The recommendation by the family physician was abstinence. The Applicant has been abstinent for three months.

4 CCMTA section 13.2 is directed to patients who have a diagnosis of alcohol dependence, including those with alcohol withdrawal seizures. The Tribunal finds that there the Applicant does not have a diagnosis of alcohol dependence. There is strong indication that the Applicant did suffer an alcohol withdrawal seizure which was solitary and was treated and is not likely to recur as long as the Applicant remains alcohol-free. The Applicant is strongly motivated to avoid relapse.

5 The Tribunal finds that the Applicant does not suffer 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.

DECISION

Upon the application by the Applicant to appeal the decision dated November 7, 2010 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 set aside.

LICENCE APPEAL TRIBUNAL

_____

Kevin Flynn, M.D., Presiding Member

RELEASED: January 25, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6407-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN Presiding Member

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

APPLICANT

DATE OF HEARING: January 21, 2011 *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").

EXHIBITS

1. Notice of Appeal received at the Tribunal December 23, 2010**,** filed by the Applicant.

2. Notice of Suspension issued by the Registrar of Motor Vehicles on November 7, 2010, contained in tabbed file #1-9. Filed by the Tribunal.

PRELIMINARY MATTERS

The Respondent acknowledged that the Medical Review Section erred in not issuing a suspension of the Applicant's driving privilege immediately upon receipt of the Medical Condition Report in May 2010. Notice of Suspension was issued on November 7, 2010. It appears that the Applicant did not drive after he was discharged from hospital in May because he was aware that the ministry had received a report

FACTS

The Respondent's Case

On May 7, 2010 a Medical Condition Report was completed by an Emergency Room physician, Dr. S. pursuant to section 203 of the Act.

The medical condition(s) listed were:

> Alcohol Dependence
>
> Mental or Emotional illness-Unstable
>
> Delusions
>
> The patient is aware of this report.

On June 28, 2010 a letter dated June 2, 2010 was received from the Applicant's family physician, Dr. S.

> <Applicant> has been a patient of mine since 1991.
>
> He has asked me to write to you on his behalf. He told me that his driver's licence has been suspended because of a medical condition.
>
> He was admitted to a city hospital on May 2, 2010. He was admitted because of hallucinations and delusions as a result of alcohol withdrawal. The patient was discharged on May 11, 2010. He has been able to abstain from alcohol since his discharge from hospital. His medical condition has improved. He no longer suffers from alcohol withdrawal.
>
> Since his medical condition has improved, it is not a risk to road safety to operate a motor vehicle.

On July 12, 2010 the Registrar notified the Applicant by letter that he was required to file an up-to-date, detailed assessment from his physician.

The report must contain the following:

- Results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other

disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.

- Completion of a Substance Assessment form by his physician or a physician specializing in addiction medicine
- If a diagnosis of alcohol dependence is confirmed a period of abstinence for one year is required with confirmation. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of reinstatement.
- A clinical explanation must be provided for the results of any bio-chemical markers (MCV, GT, AST, ALT) that are outside the normal laboratory range.

He was requested to file the assessment by September 10, 2010 or his licence would be suspended.

He was advised of his right to Administrative Review and of his right of Appeal.

On July 29, 2010 Dr S. forwarded the completed Substance Abuse Assessment form and in a cover letter he noted:

> <Applicant's> medical condition is under control. If he is able to maintain his sobriety, he should be able to safely operate a motor vehicle.

Personal Health History

Insomnia

Patent has been admitted to <city hospital> on May 4, 2010 with alcohol withdrawal. He has abstained from alcohol since then.

Alcohol Related Syndromes

Alcohol induced psychotic disorder with hallucinations

Physical Assessment and Laboratory Evaluation

Blood Pressure	120/70 (normal)
Liver	Normal
Neurological	Normal
GGT	**blank**
AST	**blank**
MCV	87.7 (normal)
ALT	19 (normal)

Alcohol Audit Test Score

Responses applied only since May, 2010

DSM-IV Criteria for Alcohol Dependence

***Nothing indicated**

History of Alcohol Use

The patient had a 10 year history of abstinence. He recently returned to alcohol abuse but for 2 months has been sober.

Treatment

In early 1990s patient in treatment and for 10 years maintained sobriety. Now sober since May 4, 2010.

Diagnosis

Abuse

Recommended goal for alcohol consumption

Patient has been advised to reduce

On October 13, 2010, the Medical Advisory Committee (M.A.C.) case study recommended suspension.

Will reconsider reinstatement with an assessment from a physician specializing in addictions medicine. The report must provide a complete assessment and a full alcohol use history. Additionally, the report must indicate if the disease of alcoholism is present and if so what is the recommended form of treatment. The report must also include an interpretation of bio-chemical markers (MCV, GGT, ALT & AST) with a clinical explanation for any level outside the normal laboratory range. Furthermore, the report must also address the hospitalization of May 7, 2010, a copy of the discharge summary with notes. The driver reported a10 year period of abstinence sometime post early 1990s, and an opinion whether reduced drinking at a minimum risk level is appropriate in this case.

Reasons:

As this driver had a significant relapse requiring hospitalization, post treatment with confirmed abstinence of less than 3 months, suspension is recommended. Driver was reported to ministry on May 7, 2010 on account of alcohol dependence and delusions. Substance Abuse Assessment form completed on July 29, 2010 indicates diagnosis of alcohol abuse. Individual history includes a ten year period of abstinence following treatment in early 1990, which would indicate probable relapse for many years. Individual was in alcohol withdrawal with delusions and mental or emotional illness when admitted to hospital on May 4, 2010. Assessment from an Addictionist is required.

On October 28, 2010 the Applicant was accordingly advised that it had been decided that his driving privilege was suspended for medical reasons under section 47(1) of the Act.

He was requested to submit an up-to-date assessment from a physician specializing in Addictions Medicine. The report must include a complete assessment and a full alcohol use history. Additionally, the report must indicate if the disease of alcoholism is present and if so what is the recommended form of treatment. The report must also include an interpretation of bio-chemical markers (MCV, GGT, ALT & AST) with a clinical explanation for any level outside the normal laboratory range. Furthermore, the report must also

address the hospitalization of May 7, 2010, a copy of the discharge summary with notes, the reported 10 year period of abstinence sometime post early 1990s, and an opinion whether reduced drinking at a minimum risk level is appropriate in this case.

The Respondent cited:

1 The Applicant's driving record that shows disobeying a red light in 2008
2. H.T.A. Section 47(1)
3. Ontario Regulation 340/94.(14)
4. CCMTA Section 13,2

The Applicant's Case

The Applicant informed the Tribunal that he lost his job as an executive in November 2009 and he encountered financial problems with sleeping difficulties. He turned to drink to help him sleep and soon found that he was drinking too much. In May 2010 he began hallucinating and he would ask his wife for reality checks. She advised him to see his family physician who told him to go to the hospital Emergency Room. He was seen by a psychiatrist and a psychologist and by the third day of hospitalization he was normal. He was discharged on May 11, 2010.

Under cross examination he stated that he suffered from alcohol dependence about ten years ago and he entered into a detoxification center for one week and a treatment program at the local hospital. He remained sober from 1994 to 2004. He attended AA and received the medallion in 2004 for ten years of sobriety. He stated that the reason for his dependence was the loss of a large sum of money due to litigation with an ex partner in 1993.

He was working in western Canada in 2009 when he lost his job during winter and began to drink again. He explained that the offence of disobeying a red light occurred when he was stopped just inside an intersection when the lights changed. Unfortunately a police car was waiting to make a left turn at the same time.

Following his treatment in May 2010, he relapsed again in June 2010 due to financial difficulties and because he was having sleep difficulties.

Under cross examination he acknowledged that his family physician was not aware of the amount of alcohol consumed in 2009 when he was in Western Canada.

He acknowledged the responsibility of physicians in Ontario to report to the ministry when a patient suffers from a medical condition that may interfere with ability to operate a motor vehicle safely. He questioned the need for a specialist in addictions medicine and was informed by the Registrar's representative that addictionists are trained in evaluating addiction problems on referral by a family physician who would provide the patient's

medical history. The function of the addictionist would be to determine if the problem is abuse or dependence and to establish the likelihood of relapse. He denies that alcoholism is a disease and that total abstinence is required.

ISSUES

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

LAW

Regulation 340/94, Section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
>
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
>
> (b) a driver's licence; or
>
> (c) a CVOR certificate,
>
> on the grounds of,
>
> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
>
> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
>
> (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
>
> (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

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

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. Section 47(1)(b)(g) that states:

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

The Medical Condition Report submitted pursuant to Section 203 of the Act required the Registrar to suspend the Applicant's licence to drive. The Registrar responded to the Report by requesting further information but due to an internal error the Notice of Suspension was not issued until November 2010.

2. The Applicant has had three relapses since 1993 for alcohol dependence.. He has attended AA but has not successfully completed a treatment program. He has not submitted an up-to date assessment by an Addictions Medicine specialist or sought such an assessment. The number of relapses indicates impaired judgement.

3. Regulation 340/94, Section 14(b): An applicant for or a holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

4. On discharge from hospital in May 2010 the Applicant was provided with information on a rehabilitation program but did not follow up.

5. The Registrar requested more medical information which has not been received. There is insufficient medical information to justify reinstatement.

6. CCMTA Section 13.2:

Patients with a history of alcohol dependence should not be allowed to drive any type of motor vehicle. Patients 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 for a period of time before recommencing driving.

STANDARD: MAY NOT DRIVE ANY MOTOR VEHICLE FOR TWELVE MONTHS DURING WHICH TIME THE INDIVIDUAL MUST REMAIN …ALCOHOL-FREE.

EARLIER RELICENSURE MAY BE CONSIDERED UPON FAVOURABLE RECOMMENDATION FROM AN ADDICTION MEDICINE SPECIALIST RECOGNISED BY THE LICENSING AUTHORITY AND THE SUCCESSFUL COMPLETION OF AN ALCCOHOL REHABILITATION PROGRAM.

The Applicant relies on:

1. He has been driving since 1960 and has never been stopped for drinking and driving.

2. He does not see that he has a drinking problem and is opposed to seeing an addiction medicine specialist. The cost alone ($1200) would be prohibitive.

3. He has held a responsible position with perfect attendance as an executive.

4. He has not had the urge to drink since June 2010. He submits that alcoholism is not a disease and that controlled drinking is acceptable.

The Tribunal finds as fact:

1. The Registrar was justified in issuing a suspension of the Applicant's licence to drive under Section 47(1) upon receipt of a Medical Condition Report filed pursuant to Section 203 of the Act that stated the Applicant suffered from Alcohol Dependence, Mental or Emotional Illness, and Delusions.

2. The Registrar was justified in continuing the suspension under Ontario Regulation 340/94(14)(b) upon receipt of the Alcohol Assessment Form and following the Medical Advisory Committee recommendations.

3. The Applicant has not successfully completed an alcohol rehabilitation program and has not submitted medical evidence that he has remained alcohol free for a period of twelve months.

4. Reduced drinking is not an achievable goal for this Applicant

DECISION:

Upon the application by the Applicant to appeal the decision dated April 10, 2006 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

KEVIN FLYNN
Presiding Member

RELEASED: *January 27, 2011*

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6416-MED-Alcl-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

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

DATE OF HEARING: January 27, 2011 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's Case

On July 21, 2010, a family physician, Dr. M. completed a Medical Condition Report on the Applicant. The condition report based on an examination on May 20, 2010:

> Alcohol Dependence/Abuse
>
> Patient admitted to driving while intoxicated and had son in the car at the time.
>
> Patient is aware of this report

The Registrar wrote to the Applicant on July 26, 2010 informing him that considering all the relevant facts available, it had been decided to suspend his driving privilege under section 47(1) of the Act.

In order to be considered for reinstatement he must arrange for a detailed, up-to-date report from his physician to include:

- Results of all investigations, diagnosis, prognosis, current status, confirmation that the condition is controlled, and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.

- Completion of a Substance Abuse Assessment form by his treating physician or a physician specializing in addiction medicine.

- If as a result of the assessment, his physician confirms a diagnosis of alcohol dependence, the ministry will require confirmation that he has remained abstinent from alcohol for a period of one year. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of the reinstatement of his driving privilege.

- A clinical explanation must be provided for any bio-chemical markers (MCV, GGT, AST and ALT) that are outside the normal laboratory range.

He was advised that he may request an Administrative Review and of his right of appeal.

A blank Substance Abuse Assessment form was enclosed.

The Registrar received none of the information requested.

The Driver's Record showed:

- a fine for speeding 50 km/h in 40 km/h zone on May 12, 2008
- suspension for unpaid fine August 21, 2008
- reinstatement October 20, 2008
- disobey traffic sign April 27, 2009
- disobey legal sign February 4, 2009
- speeding 71 km/h in 50 km/h zone
- fail to have insurance card January 4, 2010
- speeding 74 km/h in 60 km/h zone February 15, 2010
- speeding 56 km/h in 40 km/h zone May 21, 2010
- fail to have insurance card May 21, 2010
- suspension for medical reasons August 5, 2010

Total demerit points: 10

The Applicant's Case

In Reasons for Appeal, the Applicant submitted that information he gave to the family doctor was taken out of context in regard to a visit he had prior to the suspension.

In sworn testimony he stated that during his visit to Dr. M. on July 20, 2010, the doctor asked if he had been drinking prior to picking his 5 year old son from school on day prior to the appointment. He told the doctor that he had a couple of drinks of beer. His wife was concerned and contacted the doctor. The Applicant initiated the appointment. He informed the doctor that he worked at two fulltime jobs, both of which placed him in contact with alcohol on a regular basis. His told the doctor that his life was "rough and tumble" because of his work hours and he would regularly consume between one and eight to ten drinks a day. Often he would not finish work until 2 a.m. Dr. M. told him that he thought that he drank excessively and he phoned the Applicant three days later to inform him that he was sending the report to the ministry.

He informed the Tribunal that he saw a counsellor about a year previously on referral by CAMH following a MARS assessment. Following the counselling he abstained from alcohol for ninety days.

His work places him in contact with many peers who told him that they do not consider that he has a drinking problem. His wife comes from a different culture and she does not approve of him drinking; therefore he does not drink at home.

Following receipt of the July 26, 2010 letter from the Registrar he made a second appointment with Dr. M. and asked him to complete the Substance Abuse form. The doctor refused, saying that he did not have time. He tried several other physicians and an addiction medicine specialist but found that either they did not wish to complete the form or the cost was one or two thousand dollars. Therefore he decided to appeal. He acknowledged that he did not request an Administrative Review.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

> (1) An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical condition or disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; or
>
> (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.
>
> (2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

…

(b) a driver's licence; …

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. Upon receipt of an unsolicited Medical Condition Report by a physician pursuant to section 203 of the Act, listing alcohol *dependence/abuse*, the Registrar was obligated to issue a suspension, pending the receipt of more medical information.

2. While there is no medical diagnosis of alcohol dependence there is a history of an ongoing problem with alcohol as evidenced by past history of counselling for alcohol a year ago followed by a period of abstinence.

3. The Applicant works in an environment where alcohol is prevalent.

4. Without receipt of a completed Substance Abuse Assessment form the Registrar has no medical support for reinstatement.

5. Since the Medical Condition Report listed alcohol dependence/abuse, the CCMTA guideline 13.2 standard is:

> MAY NOT DRIVE ANY MOTOR VEHICLE FOR 12 MONTHS DURING WHICH TIME THE INDIVIDUAL MUST REMAIN ALCOHOL-FREE.
>
> EARLIER RELICENSURE MAY BE CONSIDERED UPON FAVOURABLE RECOMMENDATION FROM AN ADDICTION SPECIALIST RECOGNISED BY THE LICENSING AUTHORITY AND THE SUCCESSFUL COMPLETION OF AN ALCOHOL REHABILITATION PROGRAM.

The Applicant relies on:

1. There is no history of alcohol abuse.

2. The response to his visit to the physician was “overkill”.

3. He himself took steps to see the doctor in response to his wife’s concerns.

4. He has failed to get a family physician willing to complete the Substance Abuse Assessment form after between twenty and forty attempts.

5. He is unable to operate his business without the use of a car.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension under section 47(1) of the Act, of the Applicant's driving privilege upon receipt of a Medical Condition Report made pursuant to section 203 of the Act that listed Alcohol Dependence/Abuse.

2. The Medical Condition Report was made in the context of concern expressed by the wife of the Applicant, the past history of alcohol abuse counselling and the work environment that places the Applicant in regular contact with alcohol.

3. The Applicant has a history consistent with alcohol abuse but there is no evidence of alcohol dependence or addiction.

4. A completed Substance Abuse Assessment form is necessary before the Registrar can consider re-instatement of the Applicant's driving privilege.

DECISION

Upon the application by the Applicant to appeal the decision dated August 5, 2010 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

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Kevin Flynn M.D., Presiding Member

RELEASED: January 31, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6420-MED-ALC

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: February 10, 2011 *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*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar received a Medical Report on December 11, 2009 for a Class 'A' licence.

The family physician for 20 years, Dr. M. reported:

> Diabetes
> Psychiatric Disorder
> Addiction: Alcohol
>
> Alcoholism – does not drink & drive (admission to rehab – needs to stop)
> Diabetes controlled; HbA1C Nov 27/09 = 0.057
> Myocardial infarction 2005 – no angina
> Generalised anxiety disorder – controlled well – no tranquilizers used with Paxil

The Registrar informed the Applicant on March 16, 2009 that he no longer met the medical standards for Class 'A'. Under Regulation 340/94 of the Act he may apply for a waiver of the medical standards and he was provided with a Waiver Package to be completed by his physician.

Also he was provided with a Diabetic Assessment form. The form was necessary for confirmation that he has not experienced any severe hypoglycaemic reactions, for assessment of his diabetic diary with blood tests at least twice daily for the last 30 days including the number of levels below 4, and to provide a recent HbA1C.

In addition the assessment must reference his cardiac condition and confirm that he meets the New York Heart Association functional class for Class 'A' licence.

He was also required to have an Alcohol Assessment form completed. If this assessment indicates a diagnosis of dependence, it must confirm that he has remained abstinent from alcohol for a period of one year. This period may be reduced if he provides confirmation that he has successfully completed an alcohol treatment program and upon a favourable recommendation from his physician, and if he provides the results of bio-chemical markers (MCV, GGT) with a clinical explanation if any results are outside the normal laboratory range.

The Alcohol Assessment form was completed by Dr. M. on October 22, 2009.

Health History:

Cardiovascular Disease
Metabolic Disease
Psychiatric Disorder
Addiction

Medical Consequences Related to Alcohol Use

Liver Disease

Physical Assessment & Laboratory Evaluation

BP 110/70
Liver: abnormal
GGT: abnormal
MCV: abnormal 105.4

Audit

Total score 15. Completed prior to intervention.

DSM Criteria for Alcohol Dependence

Not completed.

History of Alcohol Use

Age of first regular use: 21

Who do you drink with: friends

Where do you drink: home

Reasons for stopping: health

Consequences of Drinking

Legal: impaired Nov/07 Zero tolerance on Highway 400

Has drinking ever affected work performance? No

Treatment

Use of 12 Step Programs: AA

Diagnosis

None given

Recommended Goal for Alcohol Consumption

Abstinence recommended. Attending AA.

A letter from a Residential Program dated February 7, 2008 confirmed that the Applicant completed the program from January 17, 2008 to February 7, 2008 and was then transferred to the follow-up program. He was advised to attend regular AA meetings.

The Diabetic Assessment Form completed by Dr. M. on February 19, 2009 showed

> "excellent diabetes control".

Results of cardiac assessment including Exercise Stress Test, Echo Doppler Report, were normal.

A Discharge Summary from the local hospital on June 14, 2007 showed that he was then on Insulin.

A letter to the Registrar from Dr. M. on February 22, 2010 stated:

> Recent blood results indicate normal MCV, increased GGT due to fatty infiltration of liver and excellent HbA1C. With avoidance of alcohol and change in dietary habits he should no longer require insulin injections. His hand printed records of glucose readings are consistent with recent HbA1C. He is attending regular physician appointments and is compliant with all recommendations.

On May 19, 2010 Dr. M. wrote:

> This physician has no concerns regarding his fitness to drive given current results. I feel that <Applicant> has a very low future risk of driving a motor vehicle while under the influence of alcohol.

Medical Advisory Committee (M.A.C.) summaries on July 7, 2010:

- From Endocrinology perspective reinstate and waive to Class 'DM'.

- From a Cardio perspective waive to Class 'A' with an assessment from the drivers treating physician or cardiologist and signed waiver certificate as per cyclical requirements. Next renewal must include NYHA Functional Class and LVEF.

.

- From a Substance Abuse perspective request a report from Dr. M. to confirm the driver has remained abstinent from alcohol post addictions treatment and relapse prevention program. Furthermore to provide the driver's current bio-chemical markers (MCV, GGT, ALT & AST). A clinical explanation will be required for any level outside normal laboratory values.

On August 3, the Registrar wrote to the Applicant and referred to the correspondence of February 7, 2008, February 23, 2010 and May 19, 2010 and requested a further report from Dr. M.

The report must confirm that the Applicant has remained abstinent from alcohol post addiction treatment and relapse prevention program. The report must provide current bio-chemical markers (MCV, GGT, AST and ALT) with a clinical explanation for any results that are outside the normal range.

Upon receipt of the assessment, his case would be considered for reinstatement.

<u>The Applicant's Case</u>

The Applicant informed the Tribunal that he has been driving since age 17. Since then he has accumulated two speeding tickets and one careless driving charge in 2008. He currently has no demerit points.

As a result of a personality clash at his employment in 2005 his blood pressure was elevated and while being assessed in the local hospital he was discovered to have diabetes. He was also advised at that time to reduce his alcohol intake which had increased due to the stress at work. His marriage was under stress due to his drinking in the 1990s. Following his hospitalisation he arranged a referral to the treatment centre. Since then, he has attended AA regularly and he has become reconciled with his wife.

He has followed the advice given by the hospital doctor, the diabetes centre, and his family doctor, and he believes that both he and his family doctor have met all of the requirements by the Ministry for reinstatement. His family doctor has stated in a letter that since she is in a rural practice and is very busy her reports have sometimes fallen behind.

His last drink was in July or August 2010.

ISSUES

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

Is the Applicant no longer 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?

LAW

O. Reg. 340/94, Section 14 states:

> (1) An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical condition or disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; or
> (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.
>
> (2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,
>
> (a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and
> (b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,
> (i) any reports of examinations under section 15, and
> (ii) any additional medical information.
>
> (3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.
>
> (4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
> (b) a driver's licence; …
>
> 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 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.
(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. The Medical Report filed by Dr. M. for renewal of his Class 'A' licence listed a number of medical issues, including alcohol addiction that justified the request for more detailed information by the Registrar on March 16, 2009.

2. A number of requests by the Registrar with reference to the reported alcohol addiction did not provide the information requested, specifically confirmation that the Applicant has remained abstinent from alcohol since completion of the residential treatment program, for a period of one year. Therefore the Registrar issued a suspension of driving privileges under section 47(1) on January 7, 2011.

3. The family physician recommended abstinence on the Alcohol Assessment form in October 2009.

4. Since the most recent report from the Applicant's family physician on May 19, 2010 the Applicant last had a drink in July or August 2010.
5. The Applicant has a history of alcohol abuse since the 1990s and has reacted to stress by resorting to alcohol.

6. The Registrar requires confirmation by the family physician that the Applicant is compliant with the recommendation of abstinence for a period of one year or a recommendation for earlier reinstatement supported by the bio-chemical markers requested, (MCV, GGT, AST, ALT) with an

explanation for results that are outside the normal range for the laboratory.

The Applicant relies on the reports already filed with the Registrar by his family physician. He undertakes to request an up-to-date report by the doctor.

The Tribunal finds:

- The Registrar was justified in issuing a suspension of the Applicant's driving privilege under section 47(1) of the Act upon failure by the Applicant to submit confirmation of abstinence for a period of one year since completing the residential treatment program.

- The Applicant's family physician has provided a clinical explanation for elevation of GGT, (liver changes) and is supportive of reinstatement.

- Since the last report submitted to the Registrar by the family physician in May 2010, the Applicant has informed the Tribunal that he last had alcohol in July or August, 2010.

- The Applicant has not abstained from the one year period and the Tribunal concludes that reinstatement would be premature.

DECISION

Upon the application by the Applicant to appeal the decision dated January 7, 2011 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

Kevin Flynn, M.D., Presiding Member

RELEASED: February 15, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6421-MED-COND-Alc

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: Sarah O'Connor, Counsel, representing the Applicant

Caroline Mardon, Psychotherapist

Kyle Biel , Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: February 1, 2011 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

PRELIMINARY MATTERS

The Applicant submitted an additional document, namely a Laboratory Report, dated January 28, 2011. The Registrar's Agent agreed to the admission of this report in evidence, and it was marked Exhibit #4.

FACTS

Registrar's Evidence

Dr. L sent in a Medical Condition Report, dated January 15, 2008 in which he wrote "Alcohol Dependence" as the applicable medical condition of the Applicant.

On July 30, 2009 addiction specialist Dr. S sent a medical report to the Ministry of Transportation (MTO) concerning the Applicant. In this the doctor wrote that the Applicant stated that in early January 2008 he was drinking about eight standard drinks every other day, which was a pattern since 2001. Prior to this he was a social drinker.

He got into some legal problems with his neighbours because of noise complaints when he was intoxicated, and, because of this, was encouraged by the courts to seek help from an addiction medicine physician. The Applicant has never had a history of withdrawal seizures or delirium tremens.

Following this, the Applicant saw addiction specialist Dr. L on five occasions and then Dr. S on five occasions, (from March 2, 2009 to July 23, 2009)

Dr. S went on to say in his medical report that the Applicant did have a few months of abstinence for a time in 2008 and from December 2008 to April 2009, but then when his brother passed away, he relapsed. A few weeks after that , the Applicant returned to get help. Dr. S sent in a laboratory report accompanying his report which showed the MCV, the GGT and the liver function tests to be normal.

In the MAC Case Summary, dated October 2, 2009 the Instructions were to "Remain Suspended". And the reasons for this were:

> Driver has a history of relapse. Driver relapsed in 2008 after being abstinent for only a few months and again relapsed in February 2009 for two weeks. Require full 12 months period of abstinence before consideration can be given for reinstatement.

In a medical report from Dr. G, the Applicant's family doctor, dated December 15, 2010, the doctor enclosed a laboratory report showing normal GGT, MCV and ALT levels. The only medical condition indicated in a positive manner was "Psychiatric Disorders", and the doctor's explanation for this was:

> Depression. Has taken medication. Stable. Not symptomatic now. Takes Cipralex 10 mg daily.

The MTO Alcohol Assessment Form for the Applicant was completed by Dr. G on December 21, 2010.

Under Personal Health History the only condition noted was "Depression – not symptomatic now." The physical assessment and laboratory evaluation was normal. The AUDIT score was 5. Under legal consequences of driving it was written, "No driving related charges". In conclusion, the doctor recommended, "Follow safe drinking guidelines, max. two drinks a day on six days a week."

Addiction specialist Dr. L wrote a consultation report on January 15, 2008 addressed to Dr. G. In part, he said in the report that the Applicant came into contact with the law on two occasions, the most recent being in November 2007 and was then mandated to remain abstinent and seek therapy for alcohol abuse as part of his bail condition.
The doctor wrote that since 2001 the Applicant was consuming about eight standard drinks every other day. Prior to that he had been binge drinking during social occasions at which time he experienced some shakiness when he abstained. Since November 2007, the Applicant cut back his consumption to two to three standard drinks every nine days or so.

Dr. L wrote that the Applicant had a history of DUI charges and he also said that he understood that Dr. G diagnosed him with bipolar disorder.

The doctor found his physical examination normal and his GGT, MCV, AST, ALT and ALT were normal on January 3, 2008.

Dr. L's impression was that the Applicant was dependent on alcohol since 2001, that he has continued to drink, though less than before and that he did agree to try a 90 day period of abstinence. The doctor felt that the Applicant should not be driving.

In the Certified Driver Record, dated January 5, 2011 there is one conviction for "speeding" and one for "failing to come to a stop at an intersection", but none indicating "driving under influence". The demerit points are 0.

Laboratory Report, dated January 27, 2011, (Exhibit # 4); test results were normal.

A Summons to a Witness before the Licence Appeal Tribunal, dated January 19, 2011, (Exhibit # 5), was sent to Dr. L.

Psychotherapist Ms. M wrote a detailed, lengthy report concerning the Applicant, (January 27, 2011). She explained that he had been her client from 1996 to 1998 and he recently resumed individual psychotherapy sessions with her. She wrote that she did not see any evidence to support "bipolar disorder. She expressed the opinion that the Applicant does not demonstrate the markers of chronic substance abuse, in that he has never failed to fulfill his obligations at work or at home, and "in fact demonstrates highly capable, responsible behavior at his teaching position and property management". She went on to write that there is no record of hazardous behavior such as drinking and driving and she believes he is capable of ceasing his social drinking on request.

In conclusion, Ms. M, in her report, said that the Applicant was applying himself sincerely to the ongoing psychotherapeutic work, and that she felt confident that their sessions were addressing the root causes of the behaviour which led to the legal review.

Applicant's Evidence

The Applicant stated that he obtained a University B.A. degree and that he is at present a Professor at X College. He was asked how it came to pass that he lost his driving licence. He said that there was an incident at his home in 2007. He was playing music at 11 p.m. which his neighbor complained about and there was a conflict. The Applicant admitted that he was intoxicated at the time. The neighbour called the police. Subsequently, the law expected him to seek counseling, so that was when he saw addiction specialist Dr. L. She was replacing addiction specialist Dr. S, who was on maternity leave at the time. The interview with Dr. L was for only half an hour, and he understood that Dr. L had only recently become a specialist in addiction medicine. The Applicant said that he has not had a real drinking problem since then – in 2007.

The Applicant vigorously denied the statement in Dr. L's report that he had been charged with DUI (driving under the influence) in the past, for he said that he has never been so charged. He also stated that his doctor, Dr. G, has never made a diagnosis of "Bipolar" about him. He said that he has suffered from depression in the past, but not now. He also explained that when the word "hypomanic" was referred to him, that was because he was suffering from a side-effect of the medication "Paxel", and he felt better as soon as he stopped this medication.

Psychotherapist's Evidence.

Ms. M went briefly through her curriculum vitae. She stated that she has in the past treated clients with substance abuse problems. She has four important "Markers" to give a diagnosis of substance abuse and considers that the Applicant does not fit into any of them. In answer to questions from Counsel , the Psychotherapist stated that the Applicant does not suffer from a condition likely to interfere with his ability to drive a motor vehicle safely. In fact, she said that quite likely a small or moderate amount of alcohol could help his overall mental state.
The Psychotherapist was asked by the Respondent if she disagreed with the opinion of Dr. L regarding his diagnosis of alcohol dependency. She replied that she did disagree with it. She stated the Applicant is not an alcoholic.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

(b) a driver's licence;

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Tribunal notes that the Applicant consumed more alcohol in the past than at present. A marked improvement is seen. Dr. L reported, (January 15, 2008), that before the time the Applicant was reported to the Police by his neighbour (2007), he was consuming eight standard drinks every other day. And prior to that he sometimes went on binges when socializing, to the extent that he occasionally suffered from shakiness after withdrawal. The Applicant admitted that he has not had a real drinking problem since that time in 2007 when his neighbor complained. Then, in 2008 and 2009 he drank less. According to Dr. L's report he consumed two to three standard drinks every nine days. In 2008 he agreed to a ninety day period of abstinence. There was a relapse when he heard of the sudden death of his brother, (Dr. S's report of July 30, 2009). The Applicant asserted at the hearing that this relapse only lasted for about a day. There is some doubt about the last time he consumed alcohol, whether it was September or November 2010. According to the words of the Applicant there was the occasional, small departure from perfection in terms of alcohol consumption since that date.

The Tribunal notes that Dr. L diagnosed the Applicant as being "Alcohol Dependent"; this was in January 2008. More recently, in Dr. S's report of July 30, 2009, there was no mention of this term. And, in Ms. M's report, (January 27, 2011) and at the hearing, she asserted that she did not believe that the Applicant was alcohol dependent.

On the matter of alcohol dependency, the Tribunal notes that in the Ministry of Transportation Alcohol Form, under Diagnosis, it is written that one of the criteria for being alcohol dependent is "50 or more standard drinks per week". The Applicant falls far short of this and probably did so in the past.

The Tribunal ponders the terms used to describe a person's consumption of alcohol – "alcohol dependent", "alcohol abuse" etc. No term can define exactly the ability or the lack of ability of an individual to be able to drive a vehicle safely. The Tribunal is aware that, as well as the quantity of alcohol consumed, other factors come into play, such as the tolerance to alcohol which some individuals build up, and the variation amongst individuals regarding how consistently the dictum of "no drinking and driving" is kept.

The Tribunal is impressed with the following facts which are in favour of the reinstatement of the Applicant's driving privilege:

1. Good driving record.

2. All the Laboratory blood indices for alcohol (four reports from January 3, 2008 to January 27, 2011) have been normal.

3. The Applicant is now consuming much less alcohol than he did in the past.

4. He is capable of holding responsible work positions. There is no history of an unreasonable number of sick days taken, (a sign of serious alcohol abuse). In fact, the evidence leads one to the opposite conclusion, that there have been very few sick days.

5. The Applicant is still seeing and receiving treatment from his Psychotherapist.

DECISION

After consideration of all the evidence the Tribunal does not find sufficient evidence to warrant the continued suspension of the Applicant's driving licence under section 47(1) of the Highway Traffic Act, in that the Applicant does not suffer from a medical disability likely to significantly interfere with his ability to drive a motor vehicle safely.

IT IS THE DECISION OF THE TRIBUNAL, pursuant to 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

_____

Dr. Patrick Coffey, Presiding Member

RELEASED: February 7, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6432-MED

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: KYLE BIEL, Agent, representing the Registrar of Motor Vehicles
SERHIY SENATORON, Counsel, representing the Applicant

DATE OF HEARING: February 14, 2011 Barrie

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* (the "Act").

PRELIMINARY MATTERS

On a motion by the Registrar’s representative to exclude witnesses called by counsel for the Applicant, the Tribunal ruled that they be excluded from the hearing with consent of the Parties until called to give evidence.

FACTS

The Respondent's Case:

On March 3, 2010 a family physician, Dr. N. completed a Medical Condition Report pursuant to section 203 of the Act, that stated the condition was:

> Alcohol Dependence
>
> The patient is aware of this report.

On March 8, 2010 the Registrar informed the Applicant that after considering all the relevant facts available it had been decided to suspend his driving privilege under section 47(1) of the Act.

In order to be considered for reinstatement he must arrange for a detailed up-to-date report from his physician. The report must include:

- The results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.
- Completion of a Substance Abuse Assessment form by his physician or a physician specializing in addiction medicine.
- If, as a result of the assessment, his physician confirms a diagnosis of alcohol dependence, the ministry will require confirmation that he has remained abstinent from alcohol for a period of one year. This period may be reduced if his physician confirms that he has successfully completed an alcohol treatment program and is supportive of the reinstatement of his driving privilege.
- A clinical explanation must be provided for the results of any bio-chemical markers (MCV, GGT, AST and Alt) that are outside the normal laboratory range.

He was advised that he may request an Administrative Review and of his right of appeal. A Hearing date was set for April 27, 2010. The Applicant withdrew his appeal on April 21, 2010.

A new Notice of Appeal was forwarded to the Registrar on January 12, 2011.

A letter written by Dr. N. dated October 22, 2010 was received by the Registrar on November 2, 2010.

Dr. N. wrote:

> I have completed the Substance Form. I enclose copies of reports I have received from<Applicant's> addiction specialist. Despite his low score on the AUDIT questionnaire, I continue to have concerns about <Applicant's> behaviour surrounding his dependence.
>
> This is my second contact with <Applicant> regarding his alcohol use. In March 2008, he presented with what appeared to be withdrawal symptoms from alcohol use. He was using a substantial amount of alcohol. I advised him at that time that he should abstain from drinking. I believe at that time he did reduce his alcohol consumption.

He presented in February 2010 with evidence of alcoholic hepatitis. He was again drinking large quantities of alcohol. His CAGE screen was positive on three questions. <Applicant> had a professional licence at that time and this is what prompted me to suspend his licence.

Since that time <Applicant> has been trying to obtain his licence back from suspension. He has actually referred himself to an addiction specialist, Dr. B. It would appear that <Applicant> withheld information from Dr. B. regarding his alcohol condition. It was only after a conversation that I had with Dr. B. over the phone, that he became aware of the medical complications <Applicant> was experiencing from his alcohol use.

In September 2010 I received a request for a transfer of medical records to Dr. K. Out of courtesy I contacted Dr. K. regarding <Applicant's> history. It would appear that <Applicant> again withheld information regarding his condition as Dr. K. was unaware of the full story.

Dr. B. has referred <Applicant> to a treatment program. Unfortunately <Applicant> did not feel he had a problem and discharged himself from the program. I believe it was a rehab centre in a <Northern Ontario town>. I received a telephone call from Dr. B. indicating that he would not allow <Applicant> to return to driving because of his behaviour.

I would suggest that <Applicant> have the full one year suspension of his licence. I would strongly recommend that the Ministry of Transportation require <Applicant> to go through a substance abuse rehabilitation program before returning his licence. I have informed <Applicant that I would be filing this report and details of this report.

Also forwarded was a completed Substance Abuse Assessment signed by the Applicant on October 15, 2010, unsigned by the doctor and received at the Ministry on November 3, 2010.

Health History

Liver Disease.

Medical

Positive responses reported above

Paresis Paresthesis left leg & arm
Acute Hepatitis on lab tests.

Substance Dependence (DSM1V) Criteria

Continued substance use despite knowledge of having a persistent or recurrent social, psychological or physical problem that is caused or exacerbated by use of the substance.

AUDIT –Alcohol Use Disorders Identification Test

Total score 4.

Diagnosis

Dependence

Recommended Treatment Goals

Abstain

If patient has been advised to reduce consumption or to abstain, please provide when given:
2008/03/07

If patient has already reduced consumption or become abstinent please provide date:
2010/03/03

Other treatment recommended Yes

If yes, please provide details: Substance Abuse Program

Physical Assessment and Laboratory Evaluation:

Blood Pressure 135/100 Comments 125/90 June/09 140/90 Feb/10

Liver exam Normal

Neurological Exam Normal

MCV 89.4 Lab Range 80-100
GGT 19 Lab Range 15-73

History of Use

Age of first use 16 years
Age of Regular use 20 years

First intoxication/High 20 years

Amount consumed use on each occasion 2 per day

Longest period of abstinence in last 3 years: 8 months – 9 months

Age of first regular use: 20 years old

Frequency of Use:: daily

Most recent use: January 2010

Date of reduction or abstinence: January 2010

Treatment Program: Did not complete program

Period of abstinence following treatment: Did not complete but is still abstinent

Use of 12 Step Program: None

Current Participation in Relapse Prevention: None

On November 15, 2010 the Registrar informed the Applicant that following review of the reports filed, it had been decided that his driving privilege should remain under suspension.

The medical evidence filed does not support the reinstatement of your driving privilege.

> We will be pleased to reconsider your case upon receipt of satisfactory medical information. Please arrange to have this office receive a detailed report from a physician specializing in addictions medicine or your treating physician.
> The report must confirm that you have remained abstinent from alcohol for one year. This period may be reduced if you provide confirmation that you have successfully completed an alcohol treatment program and upon favourable recommendation from your physician. It must also include the results of bio-chemical (MCV, GGT, AST, ALT) with a clinical explanation if any results are outside normal laboratory range.

The Driver Record shows no convictions.

The Applicant's Case

The Applicant informed the Tribunal that he went to his family physician Dr. N. who has known him for eight or nine years, in February 2010 with complaints of swelling and weakness in his left arm and leg, concerned about a possible stroke. Dr. N. informed him that he would have to suspend his licence to drive for stroke. He ordered some tests. A CT scan was normal and he told the Applicant that there was no stroke but he believed that he had an alcohol problem. The Applicant told the doctor that he did not have an alcohol problem; he drank on special occasions and has a glass of red wine with dinner. The doctor told him he was allowed to suspend his licence and he recommended that he enter a program for alcohol abuse. He asked Dr. N. if he would reinstate him if he gave up his AZ licence. He stopped drinking. He asked if it would be enough if he took the "Program". The doctor approved of the Program.

Upon receiving the letter of suspension from the Ministry he contacted a lawyer who referred him to an addictionist, Dr. B. He had also sought an opinion from a walk-in doctor who refused to be involved.

Dr. B. obtained his blood test results and told him that he did not understand the reasons for suspension. He gave Dr. B. permission to speak to Dr. N. in his presence and after Dr. B. spoke with Dr. N. he told the Applicant that he agreed that he was an alcoholic. Dr. B. advised him not to appeal the suspension because he, Dr. B. was known at the Ministry and that he would have the suspension removed in three months. Dr. B. referred him to the rehabilitation centre and he agreed in order to satisfy the Ministry. He entered the rehabilitation centre in northern Ontario on July 26, 2010. He informed the intake worker there that he did not have an alcohol addiction but that he was there in order to get his licence back. He stated that the worker seemed to agree and advised him that he should ask his family doctor to seek a second opinion. He was discharged on August 9, 2010.

The discharge summary from the rehab centre states:

> <Applicant> openly addressed his being mandated to treatment issue in regards to his licence being suspended by family doctor. Client indicates he does not have a problem with alcohol/chemical dependency at this time. Client discharged as mutual decision and encouraged to follow his aftercare as outlined below.
>
> NEGOTIATED AFTERCARE PLAN AND PROGNOSIS: GUARDED

- Meet with family doctor to address conflict of opinions
- Address legal issues ASAP
- Physical and Psychological reassessment after 3-6 months clean and sober

ADDITIONAL NOTES AND COMMENTS: Client was discharged without medication

DISCHARGE STATUS: With staff approval home

On returning home he saw Dr. N. who was not satisfied with the report from the rehabilitation centre.

He arranged to see a new family physician, Dr. K. He did not tell Dr. K. about his licence problem. Dr. K. arranged some blood tests. A thyroid test suggested an underactive thyroid. He was concerned that Dr. N. did not inform him that this could explain some of his symptoms.

On his next visit with Dr. K. he asked her to complete the Substance Abuse Assessment form. He explained to her what had transpired with Dr. N. and she informed him that she would have to make a decision. A few days later he received a letter from her informing him that she would not provide medical care for him.

In mid September Dr. B.'s office informed him that the doctor was not seeing patients for a while due to his personal health.

He met with Dr. N in order to have the Assessment form completed. The doctor informed him that he was not happy with anything he (Applicant) had done. He asked the doctor what would satisfy him and he told him that he had to complete the program. He then completed the Assessment form.

Under cross examination the Applicant stated that Dr. N. did not tell him that he had alcoholic hepatitis.

The Applicant introduced a number of documents from his medical files.

Date	MD	MCV	Range	GGT	Range	AST	Range	ALT	Range	TSH	Range	notes	Lab
March 16/10	Dr.N	99	80-97	35	<60								GD
Aug 13/10	Dr B	89.6	80-100	19	15--73	20	7--37	22	12--49	9.36	0.35-5.0	ccDr.K	LifeLab
Sept 16/10	Dr.K	96	80-97	21	5--50	28	6--42	23	4--43	3.77	0.3-4.7	CML	CML

A letter from Dr. K. to the Applicant dated September 20, 2010 stated:

> I regret to inform you that I can no longer provide ongoing medical care to you.
>
> I am informing you that I will not be in a position to provide you with further medical services. I will be available to render emergency services for you for 30 days until October 19, 2010 but I will not be able to provide non-emergency care.

The Applicant presented two character witnesses

Witness #1. C.P. his sister stated that she sees the Applicant at least weekly and at family gatherings. She stated that she has never seen him intoxicated nor did she ever have a concern about his use of alcohol. She stated that to her knowledge he does not drink every day. After family gatherings his wife would usually drive.

Witness #2 M.D. is a lessor of heavy equipment to the Applicant. He has observed him at a job site on three or four occasions and has never had a concern about his use of alcohol. Furthermore, he would not lease equipment to him if he had any concerns in this regard.

ISSUE

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

LAW

Regulation 340/94, section 14 states:

> An applicant for or a holder of a driver's licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
> (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> (b) a driver's licence; or
>
> …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 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.

(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 relies on:

1. The Registrar was obliged to issue a suspension of driving privileges under section 47(1) of the Act upon receipt of a Medical Condition Report completed on March 32, 2010 by the family physician, Dr. N. pursuant to section 203 of the Act that stated *Alcohol dependent.*

2. An Alcohol Assessment form completed by Dr. N. on October 15, 2010 reported a diagnosis of *Alcoholic hepatitis.*

3. A laboratory report from Dr. N. dated March 16, 2010 showed a GGT level of 35 (normal <60) and MCV level of 99 (normal 80-97).

4. The family physician for 8 or 9 years believed that the Applicant had an alcohol problem.
   Regulation 340/94 (14)(b) states An applicant for or a holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

5. CCMTA section 13 states that:

   a driver with a diagnosis of alcohol dependence may not drive any motor vehicle for 12 months during which time the individual must remain alcohol-free.

6. An addictionist, Dr. B. referred to the Applicant as being an alcoholic following a conversation with the family doctor, Dr. N.

7. A new family physician, Dr. K. refused to continue seeing the Applicant because he withheld information concerning the diagnosis by Dr. N.

8. The rehabilitation centre described the Applicant's prognosis as *Guarded.*

The Applicant relies on:

1. The visit to Dr. N. in February 2010 was to seek a reason for swelling of his arm and leg. The doctor ordered some tests and one test showed a borderline elevation of the MCV at 99 with a normal range of 80-97. The GGT was normal at 35 (normal <60).

2. The family doctor made a diagnosis of alcohol dependence and did not describe clinical findings that support his diagnosis. Also he did not report laboratory confirmation of hepatitis

3. The family doctor communicated his diagnosis to two other physicians, one an addictionist who accepted his opinion resulting in referral to a rehabilitation centre and also to being discharged by a new family doctor.

4. Repeated laboratory tests in August and September 2010 showed normal bio-chemical markers.

5. The Applicant has been abstinent from alcohol use since February 2010.

6. Regulation 340/94 stipulates that

   An applicant for or a holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

   There is no medical evidence of addiction other than the opinion of the family doctor and his use of alcohol in the past has not significantly interfered with his ability to drive a motor vehicle safely.

7. The Applicant has a clean driver record, has a good family background and is well regarded in his work as a heavy equipment operator.

<u>The Tribunal finds</u>

1. The Registrar was justified in issuing a suspension of the Applicant's driving privilege upon receipt of a Medical Condition Report from a physician pursuant to Section 203 of the Act, that reported a diagnosis of Alcohol Dependence.

2. The family physician at time of reporting did not have laboratory bio-chemical markers that supported the diagnosis of alcohol dependence and did not provide clinical evidence that supported his diagnosis of alcoholic hepatitis on the Alcohol Assessment form completed on October 15, 2010.

3. The Alcohol Assessment form fails to support a diagnosis of alcohol dependence and the Tribunal notes that under the Diagnosis section the word *Abuse* was checked and then cancelled and *Dependence* was checked.

4. The Applicant attempted to meet the requirements for reinstatement by seeking the help of an addictionist, Dr. B. This doctor ordered laboratory tests that showed normal bio-chemical markers on August 13, 2010 and appears to base his finding of alcoholism on a telephone conversation with Dr. N.

5. The Applicant entered a rehabilitation centre on the advice of Dr. B. in order to support his case for reinstatement. The centre agreed that he would not benefit from remaining at the centre and he was discharged by mutual agreement.

6. The prognosis of *Guarded* is unqualified and may have been used to absolve the centre from responsibility.

7. The Applicant attempted to find a new physician who would reassess his situation and at first he did not disclose his licence difficulties. When this physician, Dr. K. contacted Dr N.'s office for the patient's file she received a telephone call from Dr. N. informing her of his opinion. She also reviewed laboratory tests ordered by her. These showed normal bio-chemical markers for alcoholism but also showed a previously undiagnosed under-active thyroid function test. Upon repeating this test one month later the result was normal. She then dismissed the Applicant from her practice because of his withholding the Dr. N.'s diagnosis of alcohol dependence.

8. The Applicant has been abstinent since February 2010, has been forthright with the Tribunal, and the diagnoses of alcohol dependence and alcoholic hepatitis have not been supported either by clinical findings or bio-chemical markers.

9. The Applicant is not addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his ability to drive a motor vehicle safely.

10. The Applicant has now been abstinent for a period of approximately twelve months.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective February 5, 2009, 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;
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

_____
Kevin Flynn, M.D., Member

RELEASED: February 18, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6442-MED-JURIS-Jurisdiction

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE MINISTER OF TRANSPORTATION PURSUANT TO SECTION 32 (5) (b) (ii) OF THAT ACT

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: D. GREGORY FLUDE, VICE-CHAIR, Presiding Member
DR. F. WAYNE FURLONG, Member

APPEARANCES: APPLICANT, Unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: February 16, 2011 *Teleconference*

MOTION

This is a motion brought by the Minister of Transportation (the "Minister") to determine the jurisdiction of the Tribunal to hear an appeal from a decision of the Registrar to suspend the Applicant's licence pursuant to section 32(5)(b)(ii) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

On or about January 6, 2011 the Minister sent notice to the Applicant that his licence to drive a motor vehicle was suspended effective January 15, 2011. The sole grounds set out in the notice were that the Applicant did not meet the prescribed visual standards to hold a driver's licence. The notice was computer generated and cited s. 32(12)(b)(ii) of the Act as the statutory authority for the Minister's actions. In fact, s. 32(12)(b)(ii) has been repealed and replaced by s. 32(5)(b)(ii) of the Act. The Applicant appeals that decision to this Tribunal. It is the position of the Registrar that this tribunal does not have jurisdiction to hear an appeal from a licence suspension under s. 32(5)(b)(ii) of the Act. The Applicant took no position with respect to the Registrar's motion.

ISSUES

Does the Tribunal have jurisdiction to entertain an appeal from a licence suspension under s. 32(5)(b)(ii)?

DISCUSSION

The jurisdiction of the Tribunal to hear appeals is set out in section 50 of the Act, which states:

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

It is clear from a reading of s. 50 that the Tribunal may entertain appeals from decisions under s. 32(5) only where a right of appeal is set out in regulations made pursuant to s. 32(14)(n). The applicable regulation is s. 25.1 of O. Reg 340/94 which states:

> 25.1 A decision made by the Minister under subclause 32 (5) (b) (i) of the Act is prescribed as a kind of decision a person may appeal under section 50 of the Act. O. Reg. 205/10, s. 9.

In the absence of express regulatory authority permitting appeals under s. 32(5)(b)(ii), the legislation makes it clear that the Tribunal has no jurisdiction to hear this appeal.

DECISION

Upon motion by the Minister, the Tribunal finds it has no jurisdiction to hear the Applicant's appeal. The appeal is, therefore, a nullity and the Tribunal shall close its file.

LICENCE APPEAL TRIBUNAL

_____

D. Gregory Flude, Vice-Chair

_____

Dr. F. Wayne Furlong, Member

RELEASED: February 22, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6445/MED-Dementia

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. KEVIN FLYNN, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: February 16, 2011 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's Case

The Registrar received a medical condition report on December 6, 2005 from a neurologist, Dr. S. pursuant to section 203 of the Act.

> I saw <Applicant> in the hospital after he developed an episode of visual difficulty.
>
> On examination, I queried a subtle, right upper quadrantic defect. I am not positive this is a bona fide finding but I am investigating him with an MRI scan. Until his investigations are complete, I have asked him not to drive.

> If his investigations are negative for stroke, I expect he will return to driving

The Registrar informed the Applicant that he must submit further medical information.

On January 19, 2006, Dr. A., the Applicant's family physician wrote:

> I am <Applicant's> Family Doctor and I am well acquainted with his health.
>
> In my opinion he has no medical conditions for which his driver's licence should be revoked.

Dr. A. sent a copy of the MRI scan dated November 28, 2005 that was compared with an MRI on November 8, 2005. The report showed no abnormality.

A Holter report dated November 12, 2005 was normal.

A visual field dated January 21, 2006 was submitted.

On April 26, 2006 the Registrar requested a report from an eye specialist. This was approved by the Registrar.

On February 18, 2010 a Medical Condition Report was completed by Dr. B., a physician at a seniors' health centre. <Applicant> has been his patient for two months.

> Dementia or Alzheimer's.
>
> Has been assessed by DriveABLE on March 8, 2010.
>
> Patient is aware of this report.

Dr. A. also sent a Medical Condition Report dated March 11, 2010.

> Dementia or Alzheimer's

Attached was a copy of a Driver Assessment. Referral was by Dr. B. to determine fitness to drive.

> **Summary:**
>
> - Physical assessment findings indicate reasonable strength, range of motion and coordination sufficient for driving.
> - Performance on the Cognitive Assessment indicates that cognitive function has declined to a level that will likely impact driving.
> - Driving performance was observed to be outside the range of healthy drivers and driving cessation is recommended. The on-road test was aborted as it was considered too dangerous to proceed.
>
> **Recommendations**

- **Driving cessation** is recommended as driving performance was observed to be outside the range of healthy, normal drivers.

- The client and his wife were advised of the results. The client and his wife were advised that he must stop driving immediately.

Medical Concerns: Mild cognitive impairment.

Onset: Unknown

Medications: sotalol, ramipril, norvasc, caltrate, Lipitor, aspirin, rhinocort, Tylenol

Side Effects: None reported

Past Medical History

- Quadruple bypass 1994; TIA summer 2005; shoulder pain related to 2 falls in 2009.

Documents Reviewed

- Medical Update Form, completed by Dr. C. March 2, 2010

- Vision Note including field testing, completed by Dr. B. March 4, 2010

Vision

Visual History: Good eye health reported.

Corrective Lenses: Condition of his licence.

Ophthalmologist report received

Meets Ministry of Transportation requirements: Yes.

Driving history

Driving Behaviours Almost daily

Absence from driving None

Driving limitations None

History of Disorientation or "Getting Lost" No

Current vehicle: Toyota Highlander

History of Collisions, Suspensions or Moving Violations (past 5 years)

- Client reports no moving violations or suspensions

- Client reported being struck from the side by an out of control vehicle on the 404 within last couple of years. He stated that he was not injured and his vehicle was repaired.

Perceptual/Cognitive/Behavioural Assessment Results:

- Cognitive/Perceptual functions for driving is measured using the DriveABLE Competence Screen.

Physical Assessment Results

Neck range, Trunk control, Upper extremity, Lower extremity: within Functional Limits for driving.

Mobility

Normal

On-Road Assessment

- The On-Road Evaluation is conducted by a Certified Driving Instructor and Occupational Therapist using the standardized DriveABLE Road Test.

- This test was stopped after <Applicant> turned into oncoming traffic by turning left to the wrong side of a median

Cognitive Assessment:

- Motor Speed/Control: Average
- Span of Attentional Field: Below average
- Spatial Judgement and Decision Making: Average
- Speed of Attention Shifting: Below average
- Executive Function: Well below average
- Identification of Driving Situations: Well below average

Summary: 95% predicted probability of road failure.

<Applicant's> overall performance outcome was outside the range of normal healthy drivers as defined through the research and commensurate with driving ability having declined to an unsafe level. Continued driving can place <Applicant's> safety and the safety of others at risk.

Driving cessation is strongly recommended.

On-Road Evaluation:

<Applicant> was not given an on-road evaluation. The research showed that 9/10 individuals performing in this range on the Cognitive Assessment made significant and often dangerous driving errors. A test

> on public roadways may present unnecessary risk to the driver and other road users.
>
> **Significant driving errors**
>
> 1. Committed to a left turn with pedestrians occupying intended path.
>
> 2. Dangerously entered and drove in oncoming traffic lane before or after turn.
>
> The road evaluation was discontinued as it was unsafe to continue.

The Registrar wrote to the Applicant on March 18, 2010 informing him that it had been decided to suspend his driving privilege under section 47(1) of the Act.

In order to be considered for re-instatement he must arrange for a detailed up-to-date report from his doctor. The report must contain:

- The results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle.

- A clinical evaluation of his cognitive functions. Once this report has been reviewed and approved he may be required to undergo a driving evaluation at a rehabilitation centre.

The Driver Record shows no convictions and no demerit points.

<u>The Applicant's Case</u>

The Applicant in Reasons for Appeal stated that he has been driving since 1951 and has never been involved in an at-fault accident. He drove a rental car with his wife in Europe without any problems.

He could not remember who referred him to the seniors' health centre. He started there in January 2010 and was there until March. He does not remember seeing Dr. B. who referred him for Driving Assessment. He remembers doing a memory test at the centre and made a mistake at the first attempt of the clock test but completed the test successfully.

His sister died of Alzheimer's Disease.

After the report was sent to the Registrar and after receiving the Notice of Suspension he changed doctors and attended Dr. L. At her clinic he received a number of comprehensive assessments which do not appear to include a memory test. His list of medications include Aricept 5 mg. He stated that this was prescribed by his previous family doctor, Dr. A. in late

2009 to improve his memory. He did not show the March 18, 2010 letter from the Registrar to Dr. L.

He stated that he was not advised to restrict his driving by either his doctor or his family, prior to the suspension.

Regarding the DriveABLE test he stated that he was not familiar with the make of car used. He has no recollection of placing a pedestrian in danger and when doing a left turn at an intersection he realized that traffic was coming against him and the driving instructor intervened.

He does not recall any cognitive tests or questions at the testing centre.

He is receptive to suggestions by the Registrar's representative:

a. He should show the Registrar's letter of March 18, 2010 to his current family physician in order to obtain the up-to-date detailed report requested.

b. He should undergo a standard recognised cognitive test.

c. He should request a driving evaluation at a different centre with a temporary driving permit.

d. He should take driving lessons from a certified driving instructor prior to taking the road test evaluation with a temporary driving permit.

ISSUES

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

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

LAW

O. Reg. 340/94, Section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

…
(b) a driver's licence; …

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 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.

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

APPLICATION OF THE LAW TO FACTS

The Respondent relies on:

1. Section 47(1)(g) authorized the Registrar to suspend driving privileges upon receipt of a Medical Condition Report stating that the Applicant suffered from dementia.

2. The DriveABLE assessment conducted in March 2010 recommended cessation of driving.

3. The Registrar requested a detailed medical report on March 18, 2010 to include results of all investigations, diagnosis, prognosis, treatment, current status, confirmation that the condition is controlled and that there are no other medical concerns that may impact his ability to safely operate a motor vehicle.

4. The Registrar requested a clinical evaluation of his cognitive functions.

The Applicant made no submission.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension under section 47(1)(g) of the Act of the driving privilege upon receipt of a Medical Condition Report completed by a physician pursuant to section 203 of the Act, stating that the Applicant suffered from Dementia.

2. The results of a Driving Assessment found that the Applicant's driving errors were outside the range of normal healthy drivers and beyond reasonable road safety.

3. Regulation 340/90 (14)(b) states a driver:

   must not suffer from any mental, emotional, nervous or physical condition or disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely.

4. CCMTA section 6.8 states

> that the driver with evidence of memory impairment (dementia may not yet been definitely diagnosed) or with mild dementia (defined as having difficulty with complex tasks such as managing finances, shopping, taking medications, cooking) **may** be able to drive a private vehicle. This is best determined by performing a professional assessment of driving ability. Such drivers should be reassessed annually because of the progressive nature of most dementing illnesses.

5. While the reported condition is dementia, medical information available to the Registrar does not include a cognitive assessment according to accepted cognitive standards. The Tribunal agrees with the Registrar's request for the detailed up-to-date report requested on March 18, 2010 plus a clinical evaluation of cognitive functions.

6. The Tribunal recommends that once the requested information has been received and evaluated, if the decision of the Registrar is to request a driving assessment, the Applicant be allowed to take driving lessons prior to the driving assessment

DECISION

Upon the application by the Applicant to appeal the decision dated March 28, 2010 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

Kevin Flynn, M.D. Presiding Member

RELEASED: February 22, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6429-MED

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. D. IAN TURNBULL, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: February 15, 2011 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

INTRODUCTION

The Applicant is a 42-year-old executive. In a February 17, 2010 decision (Exhibit 3, Tab 6d), the Tribunal confirmed the decision of the Registrar to suspend the driving privileges of the Applicant because of a lack of medical/psychiatric reports.

EXHIBITS

1. December 6, 2010: Registrar (Exhibit 3, Tab 12a) – driving privileges remain under suspension
2. January 13, 2011: Applicant – Notice of Appeal
3. January 28, 2011: Tabbed submission – Registrar
4. February 11, 2011: PP1-11 – Applicant

5. November 16, 2009: Page 2 of Exhibit 3 (5c) – Applicant

FACTS

1. July 23, 2009, an Emergency Room physician examined the Applicant, and faxed an unsolicited report to the Registrar – July 27, 2009, pursuant to Section 203 of the Act, regarding psychosis, not otherwise specified (NOS).

2. On July 23, 2009, the Applicant was a passenger in a car driven by a "friend". The Applicant became suspicious his "friend" was a Central Intelligence Agency ("CIA") agent who intended to kidnap him and take him to the United States. The Applicant spotted a police cruiser on the other side of the road and asked his "friend" to pull over. The Applicant went to the police cruiser and relayed his concerns. The officers brought him to a hospital Emergency Room ("ER") for an assessment.

   Today, the Applicant believes he was mistaken his "friend" was a CIA agent and believes he is more likely associated with Mossad.

3. The Applicant appealed the Registrar's decision January 13, 2010. A Tribunal hearing was held February 10, 2010. The Tribunal confirmed the Registrar's decision (Exhibit 3, Tab 6d).

4. At the same time the Applicant lodged a complaint to the College of Physicians and Surgeons of Ontario ("CPSO") regarding the ER physician who reported him to the Registrar.

   The CPSO report (Exhibit 3, Tab 13b) states the ER physician did examine the Applicant on July 23, 2009, and did fax his report to the Registrar on July 27, 2009, pursuant to Section 203 of the Highway Traffic Act (HTA). Furthermore:

   > The Committee must emphasize that had he not filed a report, he would not have been fulfilling his professional and legal obligations and could have been subject to sanctions.

5. The December 3, 2010 report of the Medical Advisory Committee (MAC) of the MTO (Exhibit 3, Tab 12) is central to possible consideration of the Applicant's driving privileges. It states:

   > File cannot be reviewed properly due to minimal and missing data, e.g. no details of circumstances/ reason for admission to CAMH (NOV/09 to JAN/10). Seemingly, driver suffers from delusional disorder and the psychiatrist assumes impression that driver is able to drive sufficiently safely despite the influence of delusions; in some cases individuals with fixed delusions can drive as they tend to be more functional than those with schizophrenia who also have cognitive

> symptoms and distracting hallucinations. Nonetheless, particularly in light of driver's somewhat disorganized and paranoid-tinged letters to MTO, it is especially prudent and proper to ask the physician to provide all the additional information noted above. His statement that the driver does not have a condition which impairs driving is insufficient to objectively determine what road risk may be.

6. Driving Record (Exhibit 3, Tab 15) – no demerit points.

7. The Applicant's current appeal (Exhibit 2) is essentially appealing both the initial suspension of August 24, 2009 (Exhibit 3, Tab 6d) and the LAT hearing decision of February 10, 2010.

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,
>
> …
>
> (b) a driver's licence; …
>
> 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 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.

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

APPLICATION OF THE LAW TO FACTS

The Registrar has made the case that the Applicant's driving privileges should remain suspended.

The Registrar acted correctly when it suspended his driving privileges, effective August 30, 2009 (Exhibit 3, Tab 6d) upon receiving a letter from an Emergency Room physician (faxed July 27, 2009), concerning psychosis NOS (not otherwise specified).

An appeal to the License Appeal Tribunal February 10, 2010, confirmed the Registrar's decision to continue the license suspension pending receipt of suitable medical and psychiatric reports (Exhibit 3, Item 6D).

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.

The request for both medical and psychiatric reports has been made repeatedly, most recently and succinctly in Exhibit 3, Tab 12.

The Applicant's Centre for Addiction and Mental Health ("CAMH") psychiatrist states October 7, 2010 (Exhibit 3, Tab 11a) "based on my report of January 2010 and April 28, 2010, and today, I do not believe that he has a medical condition that makes him unsafe to drive a motor vehicle." His letter does not address the questions raised by the Registrar (Exhibit 3, Tab 10, dated May 31, 2010) regarding ongoing mental and emotional stability and evidence concerning psychiatric symptoms for at least six months.

Furthermore, under Section 47(1), the law states:

> Subject to section 47.1, the Registrar may suspend or cancel (driving privileges) for any other sufficient reason, not referred to in clause (d), (e) or (f).

This section overrides the psychiatrist's support of reinstatement of an Applicant's driving privileges if the Registrar has any concern about the ability of a person to drive a motor vehicle safely.

The Applicant has at least two additional concerns:

Firstly, regarding the ER doctor's actions July 23, 2009 – the Applicant's complaint to the CPSO (Section 3, Tab 3) supports the ER doctor, but the Applicant remains convinced this is not the case; forgery is involved … "clearly lied".

Secondly, he claims he was never served a Form 1 since he was only in the hospital overnight, and that Form 1 is for a 72-hour involuntary assessment. To prove his point, he says the Form 1 had to be handed to him, and it was not. In fact, Form 1 is for a maximum 72-hour assessment, and may be cancelled at any time.

Form 1 is referred to in the Applicant's file by two independent medical doctors:

- Exhibit 3, Tab 5a – ER note, January 14, 2010
- Exhibit 3, Tab 13c

For these reasons, which the Applicant discredits, the Applicant does not provide the requested medical/psychiatric information to the Registrar to assess his paranoid/delusional state. This is particularly important since the Applicant's initial reported psychiatric episode occurred while he was in an automobile.

The Tribunal needs a medical/psychiatric assessment of the risk that the Applicant's paranoid/delusional state may affect his ability to drive a motor vehicle safely. Further the specific requests of the Registrar for information must be answered.

The Tribunal findings are virtually identical to the February 10, 2010 decision by the Presiding Member at the Tribunal hearing.

1. The Registrar was correct in suspending the Applicant's driving privileges in August 2009, following a physician report (Section 203 of the Act) indicating a psychotic state.

2. In the absence of substantive medical and psychiatric reports, as requested by the MAC of the Registrar (December 3, 2010), the Tribunal cannot grant an appeal.

DECISION

Upon the application by the Applicant to appeal the decision dated August 30, 2009 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

D. Ian Turnbull, M.D., Presiding Member

RELEASED: March 3, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6436/Med/Alcl

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: KEVIN FLYNN, M.D. Presiding Member

APPEARANCES: APPLICANT, Unrepresented

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

DATE OF HEARING: February 28, 2011 *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*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's Case

The Registrar received a Medical Condition Report that was completed by an Emergency Room physician on April 9, 2009 pursuant to section 203 of the Act, based on an examination on April 7, 2009.

> Alcohol Dependence
>
> Fall with head injury

On May 30, 2009 the Registrar informed the Applicant that his driving privileges had been suspended under section 47(1) of the Act. In order to be considered for reinstatement he must arrange for the completion of a Substance Abuse Assessment form. If a diagnosis of alcohol dependence is made he must be abstinent from alcohol for one year. This period may be reduced upon a favourable recommendation by his physician who must confirm

that he has successfully completed an alcohol treatment program. Also results of MCV and GGT must be included with a clinical explanation if any results are outside the normal laboratory range and reference must be made regarding the reported head injury.

He was advised of his right to appeal.

On January 20, 2011 the Applicant forwarded a copy of a letter from a neurologist, Dr. M. to a family physician, Dr. H. dated October 21, 2009. The Applicant had been referred regarding two seizures. The first incident had occurred when he developed dizziness while painting a ceiling. He fell backwards bumping his head, witnessed by a friend. He was taken to the E.R. by ambulance. A CT scan was normal and he was diagnosed as a "faint" and discharged.

Within two hours of returning home he had an episode of unconsciousness that was associated with stiffness witnessed by his mother. He was taken again to the E.R. His mother told the ambulance attendants that he had a seizure. He informed the neurologist that he was a "self-labelled alcoholic". His opinion was that the Applicant had a vasovagal episode, followed by a possible post-head-injury seizure. An EEG was normal. He did not believe that the incidents were due to alcohol withdrawal seizures. Dr. M. stated:

> No further investigations are necessary and you could write to the Ministry of Transportation recommending reinstatement of his driver's licence.

The Applicant also submitted laboratory results dated September 3, 2009.

> MCV=92.9 (normal 80-94)
>
> GGT = 26 (normal 0-50)
>
> Abdominal ultrasound dated August 19, 2010 was normal.

On February 7, 2011 the Registrar informed the Applicant that the reports submitted were outdated and were unacceptable for review. He was informed that he must arrange to submit the information requested on May 30, 2009. An up-to-date Substance Abuse Assessment was required with laboratory bio-chemical markers and a clinical explanation for results that are outside the normal range and confirmation that he has remained alcohol free and seizure free for a period of one year. Also he was required to show confirmation of successful completion of an alcohol treatment program.

The Driver Record shows conviction for impaired driving on October 11, 1985.

<u>The Applicant's Case</u>

While painting a low ceiling in the basement of his parent's house in April 2009 he had his head extended and when he finished he felt faint and collapsed backwards striking the back of his head on the floor. He was taken by ambulance to the E.R. where a CT scan was found to be normal and he was allowed home. Shortly after arriving home he had a headache and fainted again. His mother observed him stiffening and she informed the

ambulance personnel that he had a seizure. He was again taken to the E.R. and allowed to go home after he was assessed.

He stated that he had been convicted of impaired driving twenty six years ago. He had been abstinent for two and a half years but had been drinking heavily for two weeks prior to the April 2009 episode but had stopped three days before. His usual consumption was three or four glasses of wine in the evening.

He had stopped attending Alcoholics Anonymous ("AA") about six months prior to the April 2009 incidents, due to family issues. He is now attending AA meetings again. His last drink was in June 2009.

The Applicant stated that he believed that Dr. H. had completed the Substance Abuse Assessment form in 2009. He had obtained all of his medical records from Dr. H. in January 2011 but they did not include this form. He was not aware until January 2011 that the neurologist had recommended reinstatement in October 2009.

The Applicant submitted a letter from a treatment centre dated April 30, 2010.

> <Applicant> entered the rehabilitation program for the treatment of Substance Dependence at the <centre> on April 12, 2010. He completed the residential portion of this two-party treatment program on April 30, 2010.
>
> In order to fully complete his treatment at the <centre>, he will need to attend our Aftercare Program for a period of six months.
>
> Confirmation that treatment is complete will be provided after this six-month period through a completion letter.
>
> In our opinion <Applicant> will continue to remain abstinent as long as he applies himself to the community-based self-help program which was introduced to him during his stay at the <centre> and regularly attends the Aftercare program available to him.

The Applicant informed the Tribunal that he attended the Aftercare Program four times.

He did not submit to the Tribunal the letter of referral from Dr. H. to the <centre>.

ISSUES

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

Is the Applicant no longer 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?

LAW

O. Reg. 340/94, Section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

…

(b) a driver's licence; …

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 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.

(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 relies on:

1. The Medical Condition report of alcohol dependence and head injury was filed by a physician pursuant to section 203 of the Act in April 2009.

2. The Applicant has failed to provide medical evidence that would support reinstatement.

3. A completed Substance Abuse Assessment form has not been submitted.

4. The medical information submitted by the Applicant in January 2011 is outdated.

5. The Applicant has acknowledged that he is an alcoholic and he attends AA meetings.

6. The Applicant was convicted of impaired driving in 1985.

7. The Applicant attended a relapse prevention centre in 2010 but did not complete the Aftercare program.

8. A copy of the referral letter from his physician to the treatment centre has not been provided.

9. CCMTA section 13.2 states:

> Patients 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 for a period of one year before recommencing driving.

The Applicant relies on:

1. He has been abstinent since June 2009.

2. He has not had an incident since April 2009.

3. His neurologist stated in his letter to his family physician in October 2009 that he did not require further investigation and that he was fit to have his licence reinstated.

4. As far as he knew the Substance Abuse Assessment form was completed by his family physician in 2009.

5. He attended the <treatment centre> in 2010 although he did not fully complete the Aftercare Program.

6. The loss of his licence has placed heavy stress on his wife.

The Tribunal finds:

1. The Registrar was justified in issuing a suspension of the Applicant's driving privilege under section 47(1)(b)(g) of the Act upon receipt of a Medical Condition Report of alcohol dependence from a physician pursuant to section 203 of the Act.

2. The Applicant's self-admission of chronic alcoholism requires him to arrange for the Registrar to receive an up-to-date completed Substance Abuse Assessment form that includes bio-chemical markers with a clinical explanation for results that are outside the normal laboratory range.

3. The Registrar was justified in continuing the suspension under Regulation 340/94 (1)(b) in the absence of up-to-date medical information that supports reinstatement and confirmation that he has remained abstinent from alcohol for one year.

4. The Registrar is justified in requesting confirmation that the Applicant has successfully completed a relapse prevention program and has been abstinent from alcohol for a period of one year.

5. The Registrar may consider earlier reinstatement upon favourable recommendation by the Applicant's physician following receipt of up-to-date information requested on February 7, 2011 as recommended by CCMTA section 13.2.

DECISION

Upon the application by the Applicant to appeal the decision dated June 9, 2009 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

_____

Kevin Flynn, M.D. Presiding Member

RELEASED: March 3, 2011

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6443-MED-Alc

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Dr. Ian Turnbull, Presiding Member
Dr. Vadim Dreyzin, Member

APPEARANCES: APPLICANT, Unrepresented

Russell McKnight, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: February 15, 2011 *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*, R.S.O. 1990, c. H.8 (the "Act").

INTRODUCTION

The Applicant is a 58-year-old family physician whose driving privileges were suspended April 20, 2008 (Exhibit 3, Tab 2a).

A physician had submitted a report (Exhibit 3, Tab 1), pursuant to Section 203 of the Highway Traffic Act (HTA), stating the Applicant had experienced a first generalized seizure.

Following extensive correspondence with the MTO (Exhibit 3, pages 4 and 5), and still being unable to regain his driving privileges, he appealed to the LAT (Exhibit 2) January 14, 2011.

EXHIBITS

1. Notice of Suspension from MTO – April 20, 2008
2. Notice of Appeal – Applicant – January 14, 2011
3. Registrar – Tabbed Submission – February 4, 2011

FACTS

1. The Applicant had a generalized seizure March 26, 2008. He had no prior seizures; there was a remote (1981) closed head injury.

2. The Applicant has several medical problems:

   - Hypothryoidism
   - Sleep apnea
   - Hypertension
   - Obesity (around 300 pounds); and a Body Mass Index (BMI) of 39 (Exhibit 3, Tab 7a)
   - Gastroesophageal reflux
   - Atrial fibrillation
   - Asthma

   and takes numerous prescription medications.

3. Neurologic examination in March 2008 was normal. The cause of his 2008 seizure is not known; it may be "multifactorial" (Exhibit 3, Tab 1).

4. The MTO (Exhibit 3, Tab 4) is interested in the role of alcohol dependence/ withdrawal as the possible cause of his solitary seizure. Accordingly, the Applicant tried to comply with the Registrar's request (August 13, 2008, Exhibit 3, Tab 4) to:

   - See a physician specializing in Addictions Medicine
   - Completing the Alcohol Assessment Form with his physician
   - Submitting hematologic mean corpuscular volume (MCV) and biochemical gamma glutoryl transferase (GGT) markers
   - Remain abstinent from alcohol for 12 months

5. Exhibit 3, Tab 5a (MTO – Alcohol Assessment Form) shows the Applicant is a social drinker. His physician has circled (Page 4 - #2) "withdrawal" as a possible cause of a seizure.

   The Applicant's test score is 12. On Page 6, his physician indicates the Applicant does not meet the criteria for alcohol dependency. The Applicant says he has been abstinent from alcohol for the past six months (October 2010).

   The Applicant has been seizure-free for 35 months, the last six months while abstinent of alcohol.

6. Exhibit 3, Tab 8 – a report from the Medical Advisory Committee (MAC) of the MTO (April 14, 2008) states the March 2008 seizure was due to alcohol withdrawal.

7. This assessment prompts (Exhibit 3, Tab 8a) a May 7, 2009 letter from the MTO to start over again, i.e. Exhibit 3, Tab 4 – August 13, 2008. The Applicant refused to participate in another Alcohol Assessment Form.

8. The Applicant's driving record (Exhibit 3, Tab 16) shows no demerit points. It shows two incidents of being apprehended for driving while his license was under (medical) suspension. There are no alcohol-related driving infractions.

9. In the Applicant's summary, he mentions having successfully completed a "Fitness to Practice" investigation by the College of Physicians and Surgeons of Ontario (CPSO). The Applicant has not included this supportive evidence with his appeal.

10. The Applicant has been in practice for 38 years. He is divorced and lives alone. His day starts at 6 am, and he "has the bit" at 7 am. In addition to an office practice, he does minor surgical procedures on his patients. In 38 years of practice, he had four complaints to the CPSO, all resolved without penalty. Exhibit 3 has positive letters of reference:

    - 5G – *dedicated, caring professional*
    - 5I – *high degree of integrity, responsibility and professionalism*

    The letter also states that "*there was never any indication of inappropriate or unprofessional behaviour or activity, such as inappropriate use of alcohol."*

11. The Tribunal is not aware of any single laboratory test (specifically liver function test) or combination of tests which are independent indicators of alcohol abuse. In this case, with so many ascribed physical ailments and prescribed medications, a plausible interpretation is virtually impossible.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

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

…

(b) a driver's licence; …

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 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.

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

APPLICATION OF THE LAW TO FACTS

The MTO has made the case for the continuation of the Applicant's suspension of his driving privileges.

The Registrar was correct in April 28, 2008 (Exhibit 3, Tab 2a) in suspending the Applicant's driving privileges after a generalized seizure, following a physician's report, pursuant to Section 203 of the HTA.

The MTO was correct in asking for up-to-date medical information regarding his seizure activity, with which the Applicant complied.

The Tribunal does not know the cause of his solitary seizure, but he has had no seizures in almost three years.

The Applicant has been examined by two neurologists; neither believes he will experience another seizure (Exhibit 3, Tab 3). The best-educated guess as to the cause of the seizure is "multifactorial" (Exhibit 3, Tab 11).

The MTO maintains that the seizure activity in March 2008 was related to alcohol withdrawal. The Applicant disputes the neurologist's report of March 27, 2008 (Exhibit 3, Tab 5e), but does admit to a single episode of consuming 26 ounces of liquor with some buddies between noon and 3 am, while sitting in a chair at home.

The medical standard Regulation 340/94. Section 14(b) provides the license holder must not *"be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."*

The Applicant may apply for consideration of reinstatement of his driving privileges if he provides a medical report stating he has been abstinent from alcohol for one year.

This period may be reduced if he provides evidence of counselling (successfully completing a treatment program for substance abuse and a supportive letter from his family physician (or addiction medicine specialist) recommending reinstatement of his driving privileges.

In the Applicant's favour is the MOT Alcohol Assessment Form (Exhibit 3, Tab 5a) suggesting he is not alcohol dependent. Conversely, the same form states he is a "hazardous or problem drinker". Also in the Applicant's favour is a Driving Record which has no alcohol-related driving convictions.

The Applicant states that following his seizure in 2008, a CPSO panel examined him regarding his Fitness to Practice. According to the Applicant, he was successful, but cannot provide any CPSO documentation since "the CPSO does not release that information". The Applicant was not clear as to the reason(s) for the CPSO inquiry.

The Applicant's driver's license was suspended almost three years ago, but a concerted effort to be abstinent only began in October 2010. The Tribunal believes this shows a lack of insight into his possible alcohol dependency. The ability to be abstinent from alcohol for the past five months is promising for a successful counselling program.

Returning to Regulation 390/94, Section 14(b), the statute realizes not all substance-dependent persons pose a significant risk to driving safety. The Tribunal carefully considered that road safety of both the Applicant and general public if his driving privileges are restored prior to 12 months abstinence.

The Tribunal recommends the Applicant provide a letter from a physician/ health professional confirming full participation and completion of a recognized alcohol/ drug counselling program. The Tribunal further recommends the Registrar give consideration to early restoration of the Applicant's driving privileges if he continues to demonstrate sustained abstinence from alcohol, and a supportive letter and favourable recommendations are received from his family physician.

DECISION

Upon the application by the Applicant to appeal the decision dated April 30, 2008, 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

D. Ian Turnbull, Presiding Member

Dr. Vadim Dreyzin, Member

RELEASED: March 1, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6455-MED-DEMT-Dementia

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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
DAVID BORENSTEIN, M.D., Member

APPEARANCES: APPLICANT, Unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 02, 2011 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

On May 20, 2010 Emergency Physician Dr. Y. sent in a Medical Condition Report to the Ministry of Transportation (MTO) in which he stated that the Applicant suffered from the condition of Dementia or Alzheimers.

When the MTO received this report, it was decided that the Applicant's driving privilege should be suspended.

Geriatrician Dr. P. wrote an Ambulatory Care Clinic Report on July 19, 2010 regarding the Applicant as follows:

> I saw (the Applicant) in my office today with his wife. His wife had brought in a typed note which stated that he is now getting lost while driving and she, at one point, took his car keys and did not let him drive, but then he was very upset and he is quite depressed with the idea of not driving. He continues to drive. He has got lost when his friends had called in from a buffet and he could not find his way to the friend.
>
> On further questioning, he is reporting that he is driving in a new area and he got lost, but then made his way. He was very argumentative with his wife about the issue of driving. I did a MoCA testing and he scored 17/30. I have advised him to go for a driver's test. He has agreed to undergo this testing and I have increased his Reminyl to 60 mg a day.

The Applicant was tested at a Driver Assessment Centre on October 13, 2010. In the Summary it was written:

> Physical assessment findings indicated functional strength, range of motion, coordination and sensation sufficient for driving. Minimal impairments noted in neck rotation, grip strength and upper extremity coordination.
>
> Performance on the Cognitive Assessment indicates that cognitive function has declined to a level that may impact driving.
>
> Driving performance was observed to be outside the range of healthy, normal drivers and cessation was recommended.

In the Recommendation, Driving Cessation was strongly recommended.

In the Certified Driver Record, dated January 26, 2011, the following was shown:

> June 3, 2010. Failure/improper use seat belt.
> Current demerit points – 2.

Applicant's Evidence

The Applicant stated that he used to be a Bank Guard before he retired. Since retirement, he has done voluntary work such as church work, Meals on Wheels etc. and he has been a regular blood donor since the age of 17.

He said that he was feeling very nervous when he took the Driver Test, which was the reason why he did not do well.

He feels he can drive well, does not want to leave all the driving to his wife and would very much like to get his licence back.

Applicant's Wife's Evidence

The Applicant's wife said that her husband is very anxious to get back to driving. She said that if this was possible it would be a relief because there have been times when he has wanted to go out, but she has been unable to drive at the time.

They were both asked what was the reason that he, (the Applicant), had to go to the hospital Emergency Department on May 20, 2010, (the day he saw Dr. H., who sent in the Medical Condition Report). As far as they could remember, it was either the time he had a fall in their backyard and hurt his back, or the time he injured his thumb.

ISSUES

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

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

LAW

O. Reg. 340/94, Section 14 states:

> (1) An applicant for or a holder of a driver's licence must not,
>
> > (a) suffer from any mental, emotional, nervous or physical condition or disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; or
> >
> > (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.
>
> (2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,
>
> > (a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and
> >
> > (b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,
> >
> > (i) any reports of examinations under section 15, and
> >
> > (ii) any additional medical information.
>
> (3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.
>
> (4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian

> Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> …
>
> (b) a driver's licence; …
>
> 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 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

Under the heading "Dementia", (6.8) of the C.C.M.T.A. Medical Standards for Drivers, it is written:

> STANDARD:
> Memory impairment or mild dementia – eligible for Class 5 Licence, subject to satisfactory driving assessment.
>
> Moderate or severe dementia – ineligible for any class of licence.

The Tribunal sympathises with the Applicant's wish to resume driving; and the Tribunal recognises that the Applicant has a very good driving record.

However, the Tribunal notes that the driving assessment which the Applicant went through resulted in the strong recommendation for “driving cessation”. Therefore, it is the decision of the Tribunal that the Applicant’s driving privilege should remain suspended.

DECISION

Upon the application by the Applicant to appeal the decision dated August 4, 2010 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

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Patrick Coffey, M.D., Presiding Member

_____
David Borenstein, M.D., Member

RELEASED: March 4, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6477-MED-NEUR-Neurological

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DAVID IAN TURNBULL, M.D., Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 8, 2011 Toronto

ORDER

On November 3, 2010, the Registrar of Motor Vehicles (the “Registrar”) was notified by a physician reporting pursuant to section 203 of the *Highway Traffic Act* (the "Act").

The Registrar suspended the Applicant’s driving privileges under section 47(1) of the Act, effective November 18, 2010.

The Applicant filed an appeal to the Licence Appeal Tribunal (the “Tribunal”) on February 9, 2011, and the hearing was subsequently scheduled for March 8, 2011.

The hearing began at 1:35 p.m. on Tuesday, March 8, 2011, at the Tribunal’s Chambers in Toronto, Ontario.

During the course of the hearing, the Agent for the Registrar stated that up-to-date medical information from the Applicant’s physician had recently been received by the Medical Advisory Committee of the Ministry of Transportation of Ontario. She noted that a decision on reinstatement of the Applicant’s driving privileges had not yet been made, but would be forthcoming shortly.
Accordingly, the hearing was adjourned at 2:35 p.m. to allow the Registrar’s process to

move forward.

On March 11, 2011, the Tribunal was advised that the Applicant's driver's licence had been reinstated, and the appeal is, therefore, moot.

The proceedings before the Tribunal are concluded, and the file is now closed.

LICENCE APPEAL TRIBUNAL

_____

David Ian Turnbull, M.D., Member

RELEASED: March 18, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6493-MED- SEIZURE(S)- CEREBRAL

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. GARRY FISHER presiding

APPEARANCES: APPLICANT, Self-Represented

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: Mar 17 2011 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

The Registrar's evidence

The Ministry of Transportation (MTO) received a form 203 dated Oct 4 2010, from Dr. JS with the checked box "Seizure(s)-Cerebral". A standard letter was sent to the Applicant from MTO, dated Oct 7 2010, suspending his driver's licence.

MTO requested an up-to-date report from his doctor(s) as well as results of investigations, diagnosis, prognosis, treatment,current status, and reassurance that the condition was controlled.

No mention is made of a time frame in this initial letter.

On November 25, 2010, Dr. JS, who is a highly regarded neurosurgeon, and who filed the original Form 203 (as pointed out by the Respondent – the doctor's legal obligation) wrote to the MTO outlining the sequence of events.

The Applicant had been found to have a brain tumour – an incidental finding when a MRI was done on his head after a fall from his bicycle. The tumour looked like a small meningioma and he was referred to Dr. JS. It was optional whether he had it removed or simply monitored. He elected the surgical removal.

Thus on October 1 2010, a small benign tumour was removed from the right parietal region. About two or three hours post-operation, the Applicant briefly had twitching in his left forearm. He was prescribed Dilantin for seven days and Decadron for three days, both fairly standard post-op orders.

On November 25, 2010, Dr. JS wrote that post-op MRI and EEG studies had not demonstrated any residual tumour or abnormalities that would raise concern about further seizures.

The MTO sent the second letter on January 6, 2011 announcing that he needed to wait a year before having his licence restored or he had an option of appealing the suspension.

A further letter came from his family doctor (Dr.. DM), dated February 16, 2011. He pointed out the history of the brain tumour surgery – using terms like lucky, incidental, and full recovery. He had cleared the Applicant to resume high intensity triathalon training. In conclusion, he noted that "there is absolutely no evidence that (the Applicant), is not safe to operate a motor vehicle at this time".

There are two sets of guidelines: CCMTA Medical standards and the CMA driver's guide.

In this instance the MTO is using the more stringent of the two i.e. CMA 10.8.1 which states "if a seizure occurs either before or after the removal of a tumour the patient should be seizure-free for at least twelve months... before resuming driving.

The Applicant's evidence:

The Applicant presented a very long detailed description of the discovery of his brain tumour (his small benign meningioma), the treatment, the post-op seizure, and his ensuing recovery from the surgery.

The Tribunal is aware that Dilantin and Decadron are used prophylactically post neurosurgical procedures and the Applicant suggests that because his IV wasn't

behaving post operatively, he was not getting the dose that he needed to ward off brain irritability. (he is clear about his arm stinging, the machine “beeping” and nurses putting cold compresses on his arm).

The Applicant is fit and fit-looking as one might expect a triathlete to be. He drives very little other than to transport a young family to outings. He bicycles to work.

He questions the meaning of phrases in letters from the MTO such as “since your last seizure” – he had one isolated minor post op seizure. And he questions “your condition”. “What condition?” he asks.

Contradictions are apparent in the CMA guidelines. In CMA 10.4 it states, in discussing single episodes of seizure, that “the time period should be considered a guideline”. Yet, the Applicant pointed out the difference between a “guideline” and the arbitrary nature of the CMA10.8.1.

When he had an EEG in November 2010 sound and sight stimuli were associated with the test. Neither affected his EEG. He notes that every day, he swims many laps with flip turns at each end of the pool and breathes from side to side – all of which would be highly stimulating if he were prone to seizure activity.

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,
>
> …

(b) a driver's licence; …

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 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.

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

APPLICATION OF THE LAW TO FACTS

There are two relevant medical standards for applicants; the CCMTA Medical standards and the CMA Guidelines of the CCMTA Medical Standards.. In section 6.10 – the Individual who has made a good recovery following surgery, may be allowed to operate a class 5 or 6 motor vehicle after an appropriate recovery period and with a detailed assessment from a neurologist or neurosurgeon including reference to the nature and extent of the tumour, the likelihood of recurrence and any indication of residual deficits, may operate a motor vehicle. However, the MTO in this decision seems to be using as a basis for decision, the CMA guideline 10.8.1, referenced above, an inflexible rule, rather than the CCMTA Medical Standards

The Tribunal agrees with the Applicant who found the notification from the MTO to be confusing and arbitrary.

He had a small superficial brain tumour removed by an esteemed neurosurgeon who judged the Applicant fit and unlikely to have *sequellae*. Who better to assess the Applicant?

DECISION

Upon the application by the Applicant to appeal the decision dated Oct 7 2010 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 set aside.

LICENCE APPEAL TRIBUNAL

_____

Dr. Garry Fisher Presiding Member

RELEASED: March 22, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6502-MED- COGNITIVE IMPAIRMENT

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: D. W. HURST, M.D. Presiding Member

APPEARANCES: APPLICANT, Self-Represented

RUSSEL MCKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: MARCH 24. 2011 TORONTO

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Registrar") pursuant to section 47(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

Mr. McKnight, the Agent for the Ministry began by explaining that the first nine Tabs were to do with a medical condition report which was filed by Dr. M.L. a neurologist on November 22, 2010. He drew attention to Tab #5, which is a Medical Condition Report pertaining to the Applicant with the possibility of mental or emotional illness and / or dementia or Alzheimer's disease. The Agent drew attention to Section 203 of the HTA, wherein medical conditions related to mental and emotional, dementia and / or Alzheimer are deemed to render a driver incapable of performing safely on the highway. In this Report, the note included the possibility of short-term memory loss and

two episodes of amnesia and that the Applicant had been involved in two minor MVA's.

On January 19, 2011, the MTO wrote to the Applicant indicating that he may have a condition which impairs his ability to safely operate a motor vehicle. He was informed of the Registrar of Motor Vehicles had decided to suspend his driver's privilege under Section 47(1) of The Highway Traffic.

It was noted in this letter that the Ministry would reconsider his case for reinstatement upon receipt of information satisfactory to the Registrar and that he must arrange for the Ministry to receive an up-to-date report from his doctor including copies of all investigations, diagnosis, prognosis, treatment, current status with confirmation that the condition is controlled and that there are no other disqualifying medical concerns that may impact his ability to safely operate a motor vehicle. They also asked for a clinical evaluation of his cognitive functions. They suggested that he may also be required to undergo a driving evaluation at a Rehabilitation Centre.

Dr. M. L. wrote to the Applicant's family doctor, Dr. H.R., describing the Applicant's extreme distress over the suspension which has severely affected his livelihood, but the good news was that his EEG and brain MRI were completely normal. It was also noted that his minor car accidents had taken place over a period of forty-two years. Dr. M.L. stated that he was "suspicious that his complaints of amnesia may well be at least partially stress-related. He is scheduled to see a psychiatrist, Dr. W.R. at a memory clinic shortly". This neurologist also noted that the Applicant's MMSE was 30/30. He was also noted to have difficulty generating a list of different animals. He also had minimal difficulty mimicking a three step motor command. The neurologist's impression was that he should be allowed to undergo a detailed driver's safety test – Drive Able. He stated that the Applicant would likely pass the test and felt that he should be granted his driving privilege. He also noted that the Applicant would require serial observations of cognitive function over time as well.

The Applicant's physician, Dr. H.R.wrote a letter indicating as follows: "I have been the Applicant's family physician for the past fifteen years. In the summer of 2010, the Applicant asked me to refer him to a neurologist for an examination because he had experienced two incidents of short term memory lapses. For this reason, I referred him to a neurologist, Dr. M.L.

Dr. M.L., met with the applicant for a brief period on November 22, 2010, and conducted a clinical evaluation of his cognitive function. Following this examination, Dr. M.L. arranged for the Applicant to undergo an MRI of the brain as well as an EEG.

Following his initial office clinical assessment, but prior to the Applicant having the above investigations completed, Dr. M.L. notified MTO in writing of his impression of this Applicant's condition. In reviewing Dr. M. L's. consultation report, he stated that the Applicant may possibly have mild cognitive impairment, an emotional illness or early Alzheimer's dementia. The Applicant then did attend at a regional hospital where an

MRI of the brain and EEG were completed. Both tests came back negative for any pathology.

Dr. H.R. reported that he had

> "never known him to exhibit signs of any of the conditions suggested by Dr. M.L's report. In my opinion, the Applicant may have had stress related issues that contributed to his two incidents of memory lapse. I have informed the doctor that these issues have resolved and in my view any recurrence is highly unlikely – certainly no treatment is required".

The doctor went on to state that he is strongly of the opinion that "the Applicant has no medical condition which would impact or impair his ability to drive a motor vehicle at this time and I respectfully request that his driver's licence be reinstated".

On February 25, 2011 the MTO wrote to the Applicant stating that his case had been reviewed in light of Dr. M.L.'s report dated February 7, 2011 and Dr. H.R.'s report dated February 10, 2011. This letter went on to state that it will be necessary to file the results of the scheduled assessment with Dr. W.R. (psychiatrist), regarding the memory difficulties. The report must also include a diagnosis, treatment (medication/dosage), reference to his current level of function and include confirmation of mental and emotional stability. Once this report was received by the Ministry and approved, the Applicant would be required to undergo a driving evaluation at a Rehabilitation Centre.

The Agent stated that this request from the Ministry was not unreasonable and that they have received no further information to date. The Agent then filed a certified copy of the Applicant's driving record which noted minor speeding violations and a medical suspension on January 9, 2011. He noted that there were no demerit points.

Also relied on by the Agent was the CCMTA Medical Standards for Drivers, with emphasis on Section 6 pertaining to the nervous system and driving. He stressed that this case is still being investigated and that the Ministry needs more information to be able to apply the guidelines fairly and adequately. He also wanted the results of the Drive Able test.

THE APPLICANT'S CASE

Mr. M.R. appeared to represent his brother, the Applicant. He began with a series of questions and statements.

1. He questioned the fairness of the Ministry in proceeding with a suspension as a result of one letter by Dr. M.L. being done before any driving test had been carried out. He said that no diagnosis had been made and only some possibilities mentioned.

2. He pointed out that the letter to his brother, the Applicant, said the suspension was a result of possible cognitive impairment. He noted that in the Medical Condition Report

that this is not mentioned. Mr. McKnight said that there was mention of short term memory loss and when this is reported the Registrar must act.

3. He questioned the issue of mental impairment in Section 47(1) of the HTA regarding a commercial licence. Mr. McKnight stated that this is the law.

4. The Agent pointed out the excellence of his brother's driving record which of course only dates back three years and Mr. McKnight was in agreement.

5. The Agent for the Applicant mentioned the MMSE (Mini Mental State Examination), and he pointed out that this is used to test for cognitive impairment and dementia and that the Applicant's score was 30/30 and above 25 is normal. He said this good score would show proof of normalcy but the Mr. McKnight for the Ministry said that they need other tests.

The Agent for the Applicant went on to question the significance of Dr. M.L.'s report, the result of a brief interview, compared to the letter from Dr. H.R., the family physician, who has known the Applicant for fifteen years and is, therefore, in a much better position to assess the Applicant's mental state. Mr. McKnight disagreed and pointed out that the family doctor himself had referred the Applicant to a neurologist.

The Applicant works in real estate, has two children, aged 22 and 17 and is divorced. He reviewed the Applicant's visit to Dr. M.L., noting the plans for an EEG and an MRI, and that he took a detailed history.

He then explained that the Applicant had been driving for 42 years, had two minor "fender benders" and no points attached to his driving record.

The most recent collision, a rear-ender occurred when the Applicant was reaching for an inhaler and accidently struck the car ahead. It was noted that the Applicant had voluntarily asked his family doctor for a report concerning the recent minor memory lapses. The Applicant in fact denied short term memory problems and that at the time of this accident he was quite stressed and that might have been a factor.

The Applicant testified in cross-examination and stated that he had asked his family doctor to do a report about two recent episodes of short term memory loss. The Applicant said he did not feel he needed to see a neurologist. The neurologist's report disclosed that he had no further plans to see him. It was also noted that the Applicant has a tentative appointment to see a psychiatrist in May. Mr. McKnight drew attention to the fact that the neurologist wishes that the Applicant undergo a Drive Able test. This Tribunal was also informed that the Applicant's family doctor is aware of the plans for the Applicant to see a psychiatrist and thinks that this is unnecessary.

MR. MCKNIGHT IN SUMMARY:

The Agent considered it significant that the Applicant's family doctor was sufficiently concerned to send his patient to see a neurologist and the neurologist wanted the MTO to be aware of these events. There were lots of problems in this report with no definite diagnosis. Questions were raised to cause concerns for the Registrar. He pointed out that two significant tests, (MRI and EEG) were done indicating the neurologist's concerns. He noted that no memory evaluation had been done yet and the MTO felt that suspension was warranted. The Registrar obviously had concerns about the two episodes of memory loss and the occurrences of two car accidents. He felt that the neurologist wanted to report these events to the MTO out of his concern about safety. He went on to underline the fact that the neurologist reported these events even though the Applicant tends to belittle what has happened. Again, Mr. McKnight stressed that the neurologist wants a psychiatric report and a driving test. He conceded that the family doctor has taken the opposite stance from the neurologist and strongly felt that there were no significant medical problems. Despite that, the neurologist wants a Drive Able test. Mr. McKnight submitted that the MTO had acted wisely and asked that the Tribunal confirm their decision.

AGENT FOR THE APPLICANT IN SUMMARY:

He noted that the decision to suspend was not based on two reports three days apart to the MTO but only the November 22nd report by Dr. M.L. The MTO decision is based only on the findings of the neurologist and not of the family doctor. He indicated that the family doctor probably sent the Applicant to a neurologist as a back up check on his own opinion. He also stated that this neurologist is not qualified to say if the Applicant can drive safely.

The Agent stated that the current difficulties are all related to the Applicant's memory problems and not driving skill. He felt that this memory loss was not pertinent and noted the normal MRI and EEG. He said nothing showed cognitive problems. He also said the 30/30 score on the MMSE test indicated that the MTO's conclusions are unfounded, unsupported and premature. He complained that the Ministry is now seeking more tests including a very expensive Drive Able test, and he feels these are redundant. He went on to conclude that the MTO could suspend thousands of drivers on the slim evidence presented here. He stated that the Applicant's two minor car accidents were years apart and do no represent an ongoing problem. In asking that this decision of the Ministry be set aside he also pointed out that the Applicant shows no sign of cognitive impairment and that therefore there is no basis for a suspension. He supported this position by again referring to the family doctor's statements. Also he described the three to four visits per year by the Applicant with his family doctor compared to one twenty minute session with the neurologist. He said that the Applicant rues the day he ever went to talk to his family doctor regarding his minor memory lapses.

Questioning by the Tribunal disclosed that the Applicant underwent bariatric surgery on his stomach on December 31, 2003 with a weight decline from 325 pounds to a current 165 pounds. The Applicant, despite having suffered morbid obesity, has no blood pressure problems and is not diabetic, and the several visits with his doctor each year have to do with follow up of the weight loss surgery.

ISSUES

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

LAW

O. Reg. 340/94, Section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
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> …
>
> (b) a driver's licence; …
>
> 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 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

The Ministry's decision was based on the medical condition report filed by a neurologist, which the Tribunal finds is not persuasive. The Applicant had suffered two minor memory lapses which this Tribunal would consider of no great importance but he voluntarily went to his family doctor to have this situation reviewed. The neurologist very quickly filed a Medical Condition Report with the Ministry. The neurologist in a letter to the family doctor on February 7th, 2011, said that the Applicant's complaint of amnesia might be at least partially stress related as the findings on behalf of the Applicant show an excellent score on the MMSE test and normal EEG and MRI of the brain.

The family doctor who states that he has known the Applicant as his patient "for fifteen years never saw the applicant "exhibit signs of any of the conditions suggested in Dr. M.L's (neurologist) report".

This family doctor also concurred with the neurologist that stress related issues might have contributed to the two incidents of memory lapse. He went on to state that he considered the recurrence of these problems as highly unlikely and that no treatment is required. This family doctor then concluded with the strong opinion that the Applicant has no medical condition which would impact or impair his ability to drive a motor vehicle.

The Applicant spoke well as a witness at this Tribunal hearing. At the present time, the evidence against him regarding his driving privilege is minor memory lapses which might be experienced by anyone holding a driver's licence in Ontario.

The evidence today supports that both the findings of the neurologist and the Registrar demonstrated unreasonable and impractical precautions while the general practitioner who knows the Applicant best demonstrated common sense and good balanced judgment. The Applicant should be allowed to drive.

DECISION

Upon the application by the Applicant to appeal the decision dated January 19, 2011 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 set aside.

LICENCE APPEAL TRIBUNAL

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D. W. Hurt, M.D., Presiding Member

RELEASED: March 31, 2011

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6505-MED-DRUG-Drugs/Medication

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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., Member

APPEARANCES: THE APPLICANT, unrepresented

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

DATE OF HEARING: March 25, 2011 Toronto

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*, R.S.O. 1990, c. H.8 (the "Act").

PRELIMINARY MATTERS

The Applicant submitted an additional document, namely a laboratory report, dated December 21, 2010. The Registrar's Agent agreed to the admission of this report into evidence, and it was marked as Exhibit #3.

FACTS

Dr. X (name illegible) sent in a Medical Condition Report on March 12, 2007, indicating that the Applicant had the condition of "Alcohol or drug abuse (with seizure on March 12, 2007)", and also indicating that, with regard to "The threat to road safety", "may be at risk". The doctor also commented that the condition was "most likely drug abuse use related".

When the Ministry of Transportation of Ontario ("MTO") received this report, it was decided that the Applicant's driving privilege should be suspended.

The following tests done in May or June of 2007 were reported either normal or negative: EEG, ECG, CT of brain, Drug Abuse Screen and Urinalysis.

Neurologist Dr. M. sent in a report to the MTO regarding the Applicant on August 27, 2007, writing as follows:

> This young lady with renal problems and dialysis took some cocaine, which led to a seizure. She has had no epilepsy previously.
>
> Her EEG is normal as is her CT scan.
>
> It appears that she has learned her lesson very well. I expect that she will not venture in such things again.
>
> She does not have epilepsy and will not need medication.
>
> If the drug aspect is controlled, I see no reason for her not being able to drive.

An Addiction Specialist Dr. W. sent a report to the MTO, dated January 29, 2008. In this report, the doctor indicated that the Applicant had been under his care for cocaine abuse since October 9, 2007, and had been attending counselling sessions. His impression was that the Applicant was not at risk to drive at present.

Four urine tests for abusive drugs were performed on the Applicant in November and December of 2007 and in January of 2008, and all reported as "Not Detected".

The MTO wrote to the Applicant on March 5, 2008, informing her that her driving privilege was reinstated.

An Emergency Room physician, Dr. F., sent in a Medical Condition Report on November 17, 2010, in which he indicated that the Applicant had the medical conditions of first, "Drug Dependence" and secondly of "Mental or Emotional Illness-Unstable".

When the MTO received this report, it was decided that the Applicant's driving privilege should be suspended, and a number of reports and results of investigations were requested.

After the Applicant was seen in a hospital emergency department on November 17, 2010, she was admitted to the hospital. While she was in the hospital, a psychiatric consultation was requested and the Applicant was seen on three occasions by psychiatrist Dr. M. In the first report from the psychiatrist, he stated that the Applicant denied having any mood or anxiety symptoms or negative thoughts. She told the doctor that she was taking Effexor (a medication for depression) for fibromyalgia. In the second report, the Applicant again denied having any suicidal, homicidal or negative

thoughts. In the third report, the doctor wrote that the Applicant denies using or abusing any narcotic medication. She admitted to having used cocaine in the past and said that she was planning on attending counselling therapy for her addiction problem when she left the hospital. The doctor stated that he was switching the Applicant's Effexor medication to Cymbalta.

When the Applicant was discharged from the hospital Dr. I. wrote the Final Summary report on November 26, 2010. The discharge diagnosis was:

1. Acute-on-chronic renal failure secondary to non-compliance with peritoneal dialysis.
2. Respiratory failure, needed intubation.
3. Decreased level of consciousness, most likely overdose of narcotic pain medication.

Dr. I. wrote, in part, that the Applicant had been admitted to hospital due to an altered level of consciousness and that she had been taking Percocet – oxycodone, chronically for a year. Her peritoneal dialysis was restarted. She was noted to have a low iron level. She was seen by psychiatrist Dr. M. who recommended starting the medication Cymbalta after weaning off Effexor.

The Extended Driver Record Search for the Applicant, dated February 25, 2011, showed zero demerit points.

The Applicant underwent drug testing from her hair on December 21, 2010, and this was reported as negative for all five drugs.

The Applicant's Testimony

The Applicant asserted that she was admitted to hospital in November, mainly for peritoneal dialysis and also because of respiratory problems and anemia, but not for psychiatric problems. When she was asked why her level of consciousness was low at the time of her admission, she explained that this was because of her overall ill-health at the time, and it was not because of having taken overmuch medication for pain. In fact, she said that about all the medication, which she had been taking had been anti-inflammatory medication, Arthrotec. She felt much better at the time she was discharged from hospital.

She said that she needs to drive in order to take her son to school, to keep medical appointments and to do shopping for the home. She has been having peritoneal dialysis for five years.

ISSUES

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

Is the Applicant no longer 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?

LAW

O. Reg. 340/94, section 14 states:

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

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

(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.

(2) In determining whether an applicant for or a holder of a driver's licence of any class meets the qualifications described in subsection (1), the Minister,

(a) may take into consideration the relevant medical standards for applicants or holders of that class of driver's licence set out in the *CCMTA Medical Standards for Drivers*; and

(b) may require the applicant or holder to provide evidence satisfactory to the Minister that he or she is able to drive a motor vehicle of the applicable class safely, including,

(i) any reports of examinations under section 15, and

(ii) any additional medical information.

(3) Despite clause (2) (a) and unless otherwise provided in this Regulation, if there is a difference between a medical standard set out in the *CCMTA Medical Standards for Drivers* and a medical standard set out in this Regulation, the Minister shall take into consideration the standard set out in this Regulation instead of the standard set out in the CCMTA Medical Standards for Drivers.

(4) In this section, the *CCMTA Medical Standards for Drivers* means the document entitled CCMTA Medical Standards for Drivers, published by the Canadian Council of Motor Transport Administrators and dated March 2009, as it may be amended from time to time, that is available on the Internet through the website of the Canadian Council of Motor Transport Administrators.

Section 47(1) states:

> Subject to section 47.1, the Registrar may suspend or cancel,
> …
>
> (b) a driver's licence; …
>
> 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;
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> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
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> (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 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.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

The Tribunal sympathizes with the Applicant who strongly wishes to return to driving, especially so that she can drive her son to school, and to receive medical attention when needed.

The Tribunal recognizes that the Applicant felt a great improvement in her health after her stay in the hospital in November 2010, that the laboratory test for five drugs (December 21, 2010), was reported as being entirely negative (signifying that she has not ingested any of those drugs since she left the hospital). Also, she has an excellent driving record.

However, the Tribunal notes that when the Applicant was admitted to hospital on November 17, 2010, she was found to have a decreased level of consciousness, and this was considered to be secondary to "narcotic pain medication overdose" (see Final Hospital Summary Report - November 26, 2010).

And the Tribunal also notes that when the Applicant was examined in the hospital Emergency Department on November 17, 2010, prior to being admitted, Dr. F. wrote as the pertinent medical conditions “Drug Dependence and Mental or Emotional Illness-Unstable”.

The Tribunal is of the opinion that reinstatement of the Applicant’s driving privileges cannot be considered until there is sufficient long-term evidence of abstinence from drug use. In an effort to achieve this, the Tribunal recommends that the Applicant come under the care of a family physician or an addiction specialist.

DECISION

Upon the application by the Applicant to appeal the Registrar’s decision, effective December 2, 2010, 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 confirmed.

LICENCE APPEAL TRIBUNAL

Patrick Coffey, M.D., Member

RELEASED: March 31, 2011

This decision may also be available on Quicklaw.

Decisions under the Highway Traffic Act

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

Fiscal Year 2010 - 2011

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

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- Maxi Transport Inc.-Settlement
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/apr/5872.cvor.%20Maxi%20Transport.pdf>
- St. Denis Briques & Pierres Inc.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/may/5721.cvor.StDenisBriques.pdf>
- Over The Road Transportation Inc.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/aug/5876.cvor.Over%20the%20Road.pdf>
- Anpro Excavating And Grading Ltd.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/sep/Anpro%20Excavating%20and%20Grading%20Ltd.pdf>
- Shiney Express Ltd. And C D Transport Corp.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/jan/6191.cvor.C%20D%20Transport%20Corp.pdf>
- 1811519 Ontario Inc. O/A Bestway Waste Management - Interim Order
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/jan/6216-CVOR-Bestway-Interim%20Order.pdf>
- 2105360 Ontario Inc. Lee Trans Corporation, And 1565262 Ontario Inc.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/jan/6273.cvor.LeesTrans.pdf>
- 1811519 Ontario Inc. O/A Bestway Waste Management
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/mar/6216.COR.Bestway.pdf>
- 1772065 Ontario Inc.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/mar/6316.COR.1772065%20Ont.decision.pdf>
- A & W X-Press Inc.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvor/mar/6387.AW_x_press.CVOR.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ST. DENIS BRIQUES & PIERRES INC.

APPEAL FROM A CANCELLATION AND SEIZURE ORDER DATED OCTOBER 7, 2009 ISSUED BY THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 47(1) OF THE *HIGHWAY TRAFFIC ACT.*

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

PARTIES: SYLVIE NICKERSON, Agent for the Applicant (in February)

CHARLENE CHAUMONT, Agent for the Applicant (in April)

PATRICK MOORE and JEAN-CLAUDE GÉLINAS, Counsel for the Respondent, the Registrar of Motor Vehicles

DATES OF HEARING: February 8 and 9, April 8 and 9, 2010 *Ottawa*

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises from a written Cancellation and Seizure Order dated October 7, 2009, issued by the Registrar under the *Highway Traffic Act* (the "Registrar" and the "Act" respectively) in respect of CVOR certificate 096-926-615 and the plate portion of permits for all commercial vehicles and trailers issued to St. Denis Briques & Pierres Inc.

Prior to the above, by notice of cancellation dated August 7, 2009, the Registrar notified the Applicant that he proposed to cancel the CVOR certificate and permits of the Applicant. An opportunity was then afforded to the Applicant at a hearing convened on September 17, 2009, to show cause as to why the cancellation should not take place. Following this, on October 7, 2009, the Registrar's cancellation order was issued.

St. Denis Briques & Pierre Inc. filed a Notice of Appeal dated October 22, 2009.

The hearing of this matter before the Tribunal took place over a period of four days in February and April 2010.

PRELIMINARY ISSUE

This hearing was conducted in French and in English. At the outset, the Applicant requested a French hearing and an interpreter was to be present throughout the hearing in order to facilitate the understanding of Mr. Daniel St. Denis. As it turned out, Respondent's counsel and first two witnesses being francophone, the first two days of the hearing were conducted in French and an interpreter was unnecessary. Where the Applicant or the Applicant's agent wished to communicate or use terms in English, this was done; otherwise the matter proceeded in French. The third day of hearing was conducted with the assistance of an interpreted, as the Respondent's witness was anglophone and her evidence was interpreter for Mr. St. Denis. In addition, at the beginning of the third day of hearing, a different agent was present for the Applicant and the agent expressed a preference for communications in English. Mr. St. Denis asked that the proceedings continue in a manner so that his agent could understand and stated that he was well able to continue the hearing in English. As stated, an interpreter was used for the evidence of the respondent's second witness. Thereafter, no interpretation was needed. The hearing proceeded in French and in English, at the comfort of the Applicant. Submissions by the representatives were made in French (by the Registrar) and in English (by the Applicant).

EVIDENCE

Testimony on behalf of the Registrar was given by Michelle Chaussé, an inspector with the Ministry of Transportation, Johanne Tardif, an analyst with the Ministry of Transportation, and Adele Di Paolo, a project analyst with the Ministry of Transportation. Mr. Daniel St. Denis gave evidence on behalf of the Applicant.

As a general comment, this Tribunal notes that much latitude was given to the Applicant in the process of cross-examination. In some instances, the Tribunal allowed both the Agent of the Applicant and Daniel St. Denis to address questions, in turn, to the same witness or to ask the same question more than once where there was possibly a doubt as to the question or answer being understood. As to the language in which questions were asked by the Applicant, either English or French, sometimes both were used to accommodate all in attendance.

Testimony of Michelle Chaussé

Michelle Chaussé has worked for the Ministry of Transportation for 15 years. She has been an inspector since 2000 and was previously a controller at the Lancaster station.

After a general description of the Commercial Vehicle Operator's Registration (CVOR) system, Agent Chaussé described a facility audit that she conducted in May 2004 at the operations of the Applicant. She was sent by the Ministry who had initiated the audit. The Facility Audit Findings are at tab 9 of Exhibit 3. During this audit, she interviewed Mr. Daniel St. Denis to obtain information and to explain the audit process; she communicated with Mr. St. Denis in French. Agent Chaussé described for the Tribunal various the aspects of the operator's performance and operations that factor into the compliance rates; the compliance rate for drivers being 22.2% and for vehicles being 18.4%, and the overall audit compliance achieved was 20.3%. To pass the audit, a score of 55% must be achieved in each of the two sections (drivers and vehicles). At the end of the onsite visit, Agent Chaussé went through the details of her findings with Mr. St. Denis, the sample was explained, the deficiencies were explained, a copy of the manual that explains the program was given to him, examples of the forms were noted and how to complete them properly was discussed, a copy of the relevant rules and regulations was provided and a copy of the lengthy Facility Audit – Notes was left with him.

Agent Chaussé conducted another facility audit of the Applicant's operations for the Ministry in November 2008. The infraction rate on the Applicant's CVOR was very high at that time. Agent Chaussé was aware that Mr. St. Denis had attended an interview with the Enforcement Branch of the Ministry in July 2007. She was requested to conduct a facility audit in March 2008 and a date had been set. Mr. St. Denis had requested an extension in order to get his documents in order; this request was granted by the Ministry and the audit was conducted in November rather than in March 2008. An entrance interview was conducted with Mr. St. Denis. The number of drivers and vehicles was smaller than the records showed. The preventative maintenance program in effect was manned by unlicensed mechanics; the drivers' records were not kept updated in the office; though driver training was said to have occurred, the operator could not state the date of the training nor provide a list of drivers who had attended the training; the driver's documentation was not checked by the operator after it was submitted; documents required of the drivers are often missing; no accident prevention program had been put in place. The compliance rates were 22.2% for the drivers and 22.9% for the vehicles, with an audit compliance of 22.5%.

Many questions were asked by the Applicant's agent pertaining to specific details in each of the two facility audits. Agent Chaussé was questioned about the qualifications of certain inspectors whose name was on inspection reports (which formed part of the compliance rates), the number of points accorded to different drivers for various incidents of non-compliance and the fairness of same, why certain drivers or vehicles were chosen for the sample used in the facility audit and how the operator could control the conduct of drivers whether in relation to document compliance, hours driven, safety checks when out on the road or other matters. She was also challenged on the seriousness of document compliance versus vehicle mechanical compliance.

Testimony of Johanne Tardif

Johanne Tardif has worked for the Ministry for 21 years. She has been an analyst in the Safety and Enforcement Branch since 2004 and was previously a controller at a Toronto station. As an analyst, her job involves reviewing carrier files and changes therein, incidents, accidents, inspections, violations and Ministry interventions. The Ontario CVOR and Carrier Safety Rating Public Guideline are at Tabs 20 (English) and 21 (French) of Exhibit 4. Ms. Tardif explained that the program underwent changes in 1998 to include a code of safety for carriers and another set of changes in 2007 which changed the rating system to be more reality based on kilometres travelled by the carrier (rather than number of vehicles). She explained that the CVOR system monitors a carrier's CVOR record over a two-year period and that the Carrier Safety Rating is assigned to operators based on its safety record. The rating is based 40% on collisions (accidents), 40% on convictions (infractions or incidents) and 20% on inspections. Points are accorded to these events and the higher the points the more serious the safety concern. Analysts review the ratings for certain thresholds in order to intervene: at 35% a warning letter, over 50% a facility audit, over 80% an interview (or meeting with the branch), at 100% sanction. The Registrar has the discretion to intervene at any time and a carrier need not attain any particular threshold for there to be an intervention. The goal of an intervention is to open communications between the Registrar (usually an analyst) and the carrier, to assist the carrier in its efforts to improve its rating, and to sanction the carrier, if necessary.

In 2006, when the Applicant's safety rating had exceeded 85%, an interview was requested and was conducted by Ms. Tardif in July 2006. Mr. Daniel St. Denis was the company representative at that meeting. Ms. Tardif spoke in French with Mr. St. Denis. Ms. Tardif's notes from that interview-meeting are at Tab 14 of Exhibit 3; the interview and notes were described in detail by Ms. Tardif. It was noted that many remedial actions were to have been taken by the carrier 'by October 2006'.

The CVOR of the Applicant from June 2007 to June 2009 is at Tab 3 of Exhibit 3; background documents to the CVOR were also mentioned: Accident Reports are in Tab 4, Inspection Reports at Tab 5, and Fines at Tab 6.

Questions were asked of Ms. Tardif relating to accidents, convictions and inspections of the Applicant during the years 2006, 2007, 2008 and 2009. Ms. Tardif agreed with the Applicant's agent that fewer inspection points were accorded in 2009 than in 2008, in 2008 than in 2007, and in 2007 than in 2006. The same was said of convictions and collisions. When asked whether this was not 'an improvement' (une amelioration), Ms. Tardif responded that she could not say ("je ne peux pas répondre"), as the safety rating in each case was nevertheless very high.

The CVOR of the Applicant in the June 2007 to June 2009 did not note any Ministry interventions during that time period. When asked why not when the Applicant's safety rating was at 121.8%, Ms. Tardif explained that there had been interventions but not of the sort listed on p. 6 of Tab 3 of Ex. 3 or within that time period. Warning letters had

been sent to the Applicant in September 1996 and December 2003, a facility audit was conducted in May 2004, a suspension order had been issued in February 2005, and another facility audit occurred in November 2008.

Ms. Tardif was questioned about the changes to the safety rating system in 2007 and whether the global rate of sanctions had increased as a result. Ms. Tardif said she had not done an analysis on this point and that the statistics on sanctions could be addressed with one of the next witnesses.

Evidence of Adele Di Paolo

Adele Di Paolo is an employee of the Ministry. Her current position since February 2010 is as a project analyst; prior to that, she was a carrier safety rating administrator. One of her many duties is the preparation of Safety Record Review; examples can be found at Tabs 2 and 11 of Exhibit 3. When an intervention is recommended, she prepares a Safety Record Review. This analysis is done for the Deputy Registrar and it is in the record for show cause meetings.

Ms. Di Paolo confirmed that she reviewed the Safety Record Reviews of the Applicant, that she has access to the vehicle registration system, the CVOR record, plate history and all information in the Ministry's system. The history of the Applicant is contained in the Safety Record Review: past history and recent history.

When asked to interpret the facility audit results of May 10, 2004, Ms. Di Paolo stated that this is a poor and failed audit, the operator failed both the driver audit and the vehicle audit. This audit triggered further intervention as the operator's record worsened after the audit. A suspension and seizure was affected and took place for 21 days in 2005. A notice was issued in January 2005. A show cause hearing took place in February 2005 at which Ms. Di Paolo was present and took notes. The notice was for a 30 day suspension and the time period was reduced to 21 days during March 2005.

There was no improvement upon more recent review of the Applicant's record. In July 2006, an interview was conducted (Tab 14 Ex. 3). Another facility audit was done in 2008 after the operator went over 100% again (Tab 15, Ex. 3). The results (Facility Audit Findings) were very poor. After numerous Ministry interventions, the scores were very low at 22.2% and 22.9%, no real improvement in the Ministry's eyes. As a result, Ms. Di Paolo and her program manager recommended a suspension and seizure order.

The Notice of suspension and seizure provided another opportunity for the operator to show cause why such an order should not become final. A show cause meeting was held in September 2009 with the Deputy Registrar and Daniel St. Denis; Ms. Di Paolo was present and took minutes. Mr. St. Denis' representations at the 2009 were similar to those made by him in 2005. The verbal submissions made by Mr. St. Denis and written ones made afterwards did not satisfy the Deputy Registrar, and a cancellation and Seizure Order was issued in October 2009.

In cross-examination, the Applicant and its agent suggested to the witness that infractions were counted twice in the facility audits, once when they occurred and were reported by the inspector or officer and then again when reviewed during the facility audit. However, the Applicant could not provide examples in the documents where this had, in fact, occurred. Ms. Di Paolo was asked why a wheel separation in 2004 continued to be mentioned, and she replied that it was a serious incident; incidents of this kind had caused deaths on Ontario roads in the past. Had this operator improved its record and only had low rates of violation afterwards, then the wheel separation would probably be looked at in a different light. When there is a record like the Applicant's, with a lot of interventions and a high violation rate resulting in repeated interventions by the Ministry, the Ministry looks at serious incidents dating back further than a two year period. Ms. Di Paolo was asked whether the Applicant's business location, near the border of Ontario and Quebec in an area where there is no choice as to the route that vehicles can take, subjected the Applicant's drivers and vehicles to an unfairly high number of inspections, and she answered that it looks good on the operator's record to have a lot of passed inspections and inspections should not be feared, but rather invited if an operator is in compliance.

Evidence of Daniel St. Denis

Mr. St. Denis gave evidence by way of statement rather than question and answer. This was acceptable to the Tribunal in the circumstances of a non-lawyer Agent representing the Applicant and the comfort of Mr. St. Denis in testifying in this manner.

This evidence was given in French and questions in cross-examination or by the Tribunal were asked in French. On occasion, the Applicant's Agent asked a question or made an observation mostly in English.

Mr. St. Denis testified that since 2008 the company has a system in place to check drivers' documentation,`that this is done every weekend prior to a pay check being issued, and that if any problems are noticed they are addressed with the driver. He states that a current CVOR would show a much improved record. The drivers who caused the most problems are no longer with the company. Training courses have been given to the drivers, in 2005, 2006 and 2009. There is a safety action plan in place, daily inspections must be performed before a vehicle takes to the road, there is a preventative maintenance system, and driver abstracts are obtained every 3 months.

The company intends to take its business on a new course and has already reduced its fleet to 3 vehicles; it plans to limit itself to 2 vehicles shortly. Instead of transport, the company will focus on landscaping and its commercial vehicles will only be used to service its landscaping clients by delivering materials or equipment needed for that job. Mr. St. Denis pointed to a limitation of the company's insurance policy and its credit line with the bank as consistent with its intention of having only 2 vehicles and a specific client and business base going forward. Mr. St. Denis gave evidence on the salaries

paid to employees by the Applicant company and stated that jobs would be lost if the Applicant could no longer have any commercially plated vehicles.

Mr. St. Denis pointed to improvements in the infraction rate of the Applicant's drivers between November 2009 and now. According to him, the infractions that have taken place have not been dangerous to public safety; two are in error and should not have been sent to the CVOR record.

On cross-examination, Mr. St. Denis testified that most of the systems he has in place were described to the Ministry at the September show cause meeting, though some had not yet been implemented to the current extent. The drivers are not required to present their logbooks at the end of each trip, only once a week with submission of their pay request; if the information in the logbooks is false, the driver will not be kept on and there are examples of when this has been done; however, Mr. St. Denis admitted that there were also instances where this has not been done.

Mr. St. Denis agreed that there had been numerous interventions since 2005 and that at each one the Applicant was asked to make changes and told it had to improve its performance. He also agreed that it was only after the cancellation and seizure order in October 2009 that many of the changes were implemented.

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).
>
> (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.

...

(4) Where a restriction is imposed under subsection (2), the Registrar shall issue to the holder of the CVOR certificate fleet limitation certificates in a number equal to the number of vehicles permitted to be operated.

Subsection 16 of the Act includes certain definitions, including the following:

"CVOR cerficiate" means a Commercial Vehicle Operator's Registration Certifiecate issued under this Act; and

"operator" means the person directly or indirectly responsible for the operation of a commercial motor vehicle, including the conduct of the driver or, and the carriage of goods or passengers, if any, in the vehicle or combination of vehicles,

"safety record" means the safety record of an operator determine in accordance with the regulations.

Regulation 424/97, s.5(1) sets out 16 paragraphs describing the information contained in the safety record and at number 17 States "any compilation of analyses of any of the information in paragraphs 1 to 16".

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

1. Any suspension or cancellation of the plate portion of the permit under clause 47 (1) (a) of the Act.

2. Any suspension or cancellation of the operator's CVOR certificate under clause 47 (1) (c) of the Act.

3. Any restriction imposed under subsection 47 (2) of the Act on the number of commercial motor vehicles that may be operated by the operator.

4. Any order under subsections 47 (8.1) or (10) of the Act for the seizure of the plate portion of permits, permits or number plates.

5. Any notice sent to the operator under section 47.1 of the Act.

6. Any warning letters sent by, or interviews held with, Ministry officials relating to the operator's safety performance and practices.

7. Any conviction related to the operation of a commercial motor vehicle or a vehicle drawn by it, for an offence committed by an operator, its agents or employees,

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

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

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

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

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

i. under the Act, the Compulsory Automobile Insurance Act, the Dangerous Goods Transportation Act, the Public Vehicles Act, the Truck Transportation Act, the Fuel Tax Act, the Apprenticeship and Certification Act, 1998, the Motor Vehicle Transport Act (Canada), or

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

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

12. The results of any audits of the operator.

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

14. The operator's fleet size.

15. The total kilometres travelled by the fleet operated by the operator in each of,

i. Ontario,

ii. Canada outside Ontario, and

iii. outside Canada.

16. The total kilometres of projected travel by the fleet operated by the operator, as reported by the operator at any time, in each of,

i. Ontario,

ii. Canada outside Ontario, and

iii. outside Canada.

17. Any compilations or analyses of any of the information in paragraphs 1 to 16.

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

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

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

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

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.

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

As to jurisprudence, the Tribunal has had reference to the following:

Registrar of Alcohol and Gamin v. Hosseini-Rad [2004] O.J. No. 1273

Re Rainbow Cars (Tecumseh) Inc. [2008] O.L.A.T.D. No. 274

Muscillo Transport Ltd. V. Ontario (L.S.A.B.) [1997] O.J. No. 3111

Re R & S Transportation Inc. [2002] O.L.A.T.D. No. 278

Quick Service Transportation Ltd. v. Registrar of Motor Vehicles, LAT decision, (Oct. 2003)

Re 1295503 Ontario Inc. [2009] O.L.A.T.D. No. 226

DECISION

There are certain questions before the Tribunal.

1 – to paraphrase subsection 47(1) of the Act, does the Tribunal have reason to believe, having regard to the safety record of St. Denis Briques & Pierre Inc. (the Applicant), and the other evidence that the Tribunal considers relevant, that the Applicant will not operate a commercial motor vehicle safely or in accordance with the law;

2 – if the answer is yes, then what should be done?

The evidence is that there were warning letters and interviews, a plate suspension in 2004, a certificate suspension in 2005, numerous convictions against the operator and drivers, accidents involving the operator's vehicles, many failed inspections, two failed facility audits and a very poor safety rating over the period of many years. All of this is of concern to the Tribunal. So is the attitude of Mr. St. Denis in being unwilling to accept responsibility for the safety records of his operations, preferring to lament his inability to control the company's drivers, the injustice of being often the subject of inspection, and the alleged inaccuracies in calculating the compliance rates of the company's drivers and vehicles.

The Applicant is proposing to reduce the size of its fleet and points to improvements within his company's systems since October 2009. The Applicant is also proposing to limit the business of the Applicant company. However, ss. 47(2) and (4) of the Act mention a restriction of the number of vehicles for a specified time, not a restriction of the manner of use of commercial vehicles nor a reduced fleet for an unlimited time. Had the fleet reduction been combined with a new and improved safety monitoring and training program, fully implemented and sustained over some time, the Applicant might have restructured its operation to meet the required safety levels. However, the

Applicant failed to take corrective action in time and the Tribunal notes that the time discussed here are the years since it was warned by letter in 2003 of the Ministry's concerns.

In light of the foregoing, the Tribunal has little confidence that Mr. St. Denis' proposed reduction in fleet size and implementation of the latest action plans will result in a trucking fleet that achieves the required levels of safe operation. As a result, the Tribunal believes that the CVOR certificate of the Applicant must be cancelled.

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 Cancellation and Seizure Order of October 7, 2009 against the Applicant St. Denis Briques & Pierre Inc.

LICENCE APPEAL TRIBUNAL

_____
Shu-Tai Cheng, Vice-Chair

RELEASED: May 14, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MAXI TRANSPORT INC.-Settlement

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

TO SUSPEND COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE #134-422-552 AND SEIZE THE PLATE PORTION OF PERMITS

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: LARRY YOUNG, Agent, representing the Applicant,

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

DATE OF PRE-HEARING: April 28, 2010 Toronto

ORDER

By notice dated January 25, 2010, Maxi Transport Inc. (the "Applicant") appealed the Registrar's Suspension and Seizure Order dated January 14, 2010.

At the commencement of the hearing, Counsel for the Deputy Registrar advised that Minutes of Settlement had been executed by the parties whereby the Applicant had agreed to withdraw its appeal and the Registrar had agreed to delay imposition of its Order to May 10, 2010.

Upon reviewing the settlement agreement and having submissions of both parties, the Tribunal Orders:

1. Pursuant to s. 50(2) of the *Highway Traffic Act*, the hearing is dismissed and proceedings before the Tribunal hereby concluded.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

Released: April 30, 2010

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

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

Ontario

OVER THE ROAD TRANSPORTATION INC.

Appeal under section 50.(1) of the *Highway Traffic Act* R.S.O. 1990, c. H.8 from the Cancellation and Seizure Order of the Deputy Registrar pursuant to section 47(1) of the Act.

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: HARVEY CAPP Q.C., Counsel for the Applicant

PATRICK MOORE, Counsel for the Respondent

DATES OF HEARING: May 12, 13 & 14, 2010 Toronto

REASONS FOR DECISION

This is a hearing of the appeal of the Applicant pursuant to section 50(1) of the *Highway Traffic Act*, R.S.O., 1990, c, H.8 ("HTA" or the "Act") of the cancellation and seizure order dated January 15, 2010, issued by the Deputy Registrar of Motor Vehicles, Carrier Safety and Enforcement Branch of the Ministry of Transportation (the "Respondent") under sections 47 and 47.1 of the Act

BACKGROUND

The cancellation and seizure order was issued to both Over the Road Transportation Inc. and On the Double World-Wide Courier Ltd. and it was confirmed by counsel for the Applicant that this appeal was only in respect of the cancellation and seizure order issued against Over the Road Transportation Inc. (the "Applicant").

On April 21, 2008, the Respondent issued a Notice of Suspension and Seizure proposing a 30 day suspension of the CVOR certificates issued to the Applicant. and On the Double World-Wide Courier Ltd. ("On the Double") and suspension of the plate portion of permits for all commercial motor vehicles registered in the name of the Applicant and On the Double.

After reviewing the submissions of the Applicant and On the Double made at a show cause meeting with the Respondent and the safety record of the parties, the Respondent issued a suspension and seizure order against the Applicant and On the Double dated June 6, 2008, which order was appealed to the Tribunal. The hearing of that took place on February 23, 2009 and it was the Tribunal's decision, after hearing the appeal, to direct the Respondent to carry out the suspension and seizure order ([2009], O.L.A.D. No. 73).

Pursuant to the decision of the Tribunal, the Respondent issued a suspension and seizure order, dated April 14, 2009, against the Applicant and On the Double. that the CVOR certificates and the plate portion of permits for all commercial motor vehicles and trailers issued to the Applicant and On the Double World-Wide Courier Ltd. be suspended for 30 days and thereafter until all outstanding fines are paid. The order took effect on April 20, 2009.

On December 7, 2009, the Respondent issued a Notice of Cancellation and Seizure to the Applicant and On the Double. that the plate portion of permits for all commercial motor vehicles and trailers issued to the Applicant and On the Double. will be cancelled.

Once again submissions were made at a show cause meeting held on December 22, 2009 after which the Respondent issued the cancellation and seizure order dated January 15, 2010, which is the subject of this appeal.

The Applicant acknowledges that the Tribunal has no jurisdiction with respect to the suspension and seizure order dated April 14, 2009 and that that order remains in effect and does not form part of this appeal.

POSITIONS OF THE PARTIES

It is the Respondent's position that the Applicant's CVOR certificate should be cancelled because of:

1. its poor safety record;
2. the number of convictions;
3. unpaid fines; and
4. the Applicant operating commercial motor vehicles while its CVOR certificates are under suspension.

The Applicant's position is that:

1. it is not operating commercial motor vehicles but is acting as a load broker;
2. it has taken steps to improve its management of drivers; and
3. it has been unable to pay the outstanding fines primarily because of one significant fine of approximately $25,000.00.

ISSUES

The issue before the Tribunal is should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a cancellation and seizure order to the Applicant?

EVIDENCE

At the commencement of the hearing, the Applicant's Appeal Books of Documents were entered as exhibits with Volume 1 being Exhibit 3 and Volume 2 being Exhibit 4. The Respondent's Books of Documents were also entered as exhibits with Volume I being Exhibit 5, Volume II being Exhibit 6 and the Respondent's Supplementary Exhibit Book being Exhibit 7.

During the course of the hearing, the terms "load broker", "freight broker" "transportation broker", "load intermediary" or "freight intermediary" were used by the witnesses. For the purpose of this decision the term "load broker" will be used to refer to such parties.

Michael Skelton

The first witness called by the Respondent was Michael Skelton, who is the vice-president of Skelton Truck Lines Ltd. ("Skelton") located in Sharon, Ontario which is a family owned business established in 1962. Mr. Skelton has been working for the company for 30 years. The witness stated that the company owns 45 trucks.

Mr. Skelton testified that the company did not act as a load broker, but there were occasions when the movement of goods would be assigned to other carriers which serviced areas where the goods were being shipped.

The witness referred to the "Load Link" website which provides a site for those seeking to have a load moved or for carriers looking for loads to carry to connect.

Mr. Skelton referred to the "load confirmation sheet" (Exhibit 6, Tab 28, page 306) pursuant to which the Applicant was to carry a load to Walpole, Massachusetts, on July 8, 2009. The witness testified that Skelton did not deal with load brokers but would arrange directly with another carrier to take a load, if necessary.

The witness testified that he did not know that the Applicant's CVOR certificate had been suspended and stated that, had he known, Skelton would not have used the Applicant to carry the load pursuant to the load confirmation sheet of July 7, 2009, nor to carry any other loads. Mr. Skelton stated that he learned of the Applicant's suspension in December 2009, as a result of a conversation with Marc Lavalle, an inspector with the Ministry of Transportation.

Mr. Skelton referred to the document at Tab 1 of Exhibit 7 which was described as being the print of a screen that appears as part of the Load Link website specific to the Applicant which was printed by an employee of Skelton on April 21, 2010. The witness testified that the document appearing at page 2, Exhibit 7, Tab 1 identifies the Applicant as having an Ontario CVOR number with authorities for Ontario. The document at page 3 indicates that the Applicant carries insurance and page 4 indicates the insurance particulars of the Applicant's insurance as recorded on the Load Link website. The witness stated that on the first screen the Applicant is identified under business type as "carrier", whereas if the Applicant was a load broker the designation would be "broker".

Mr. Skelton identified the document appearing at Exhibit 7, Tab 3, as being a bill of lading for the shipment previously referred to whereby Skelton was contacted by a manufacturer to deliver freight to Walpole, Massachusetts. The witness testified that within Tab 3 there is documentation that shows that the Applicant carried freight on July 21, 2009 and September 30, 2009 and again on December 4, 2009 for Skelton. The witness testified that the invoices appearing at Exhibit 7, Tab 4, represented invoices from the Applicant to Skelton for the transportation of goods previously identified.

On cross examination, Mr. Skelton confirmed that Skelton was a contract carrier as opposed to a common carrier and as such they provided services to named customers. He agreed that the document appearing at Exhibit 7, Tab 3, page 10, is a contract for the carriage of goods.

Mr. Skelton acknowledged that US carriers could file on Load Link and if they held a US authority could identify themselves as a "carrier". The witness agreed that the document appearing at Exhibit 7, Tab 2, page 10, being a bill of lading, was prepared by the shipper, in this case a manufacturer in Woodbridge, and therefore it would be the shipper who would identify Skelton as the carrier and that the load confirmation was then faxed to the "carrier". The witness acknowledged that the statement on the document appearing on Exhibit 7, Tab 3, page 11, which reads "you must ID as Skelton Truck Lines" was there to ensure that the party picking up the load identified itself as doing so on behalf of Skelton.

Mr. Skelton did not agree that such activity constituted "brokering" or that Skelton was acting as a load broker, but, in the opinion of the witness, Skelton was merely providing a service to its customer.

The witness acknowledged that after the meeting with Inspector Lavalle, Skelton ceased doing business with the Applicant.

When asked in reply to interpret the information contained on the Load Link website with respect to the Applicant, the witness observed that according to the site, the Applicant was still insured with a active CVOR certificate and that page 2 of the Load Link website indicated that the Applicant did not hold any US authorities.

Walter Stulp

Mr. Stulp, is a part owner of Here 2 There Freight Management Inc. ("Here 2 There") who has worked for the company since July 2007. Mr. Strulp stated that Here 2 There is a freight broker and as such does not own any trucks and is not a carrier. The witness stated that Here 2 There has a list of approximately 300 shippers and 400 to 500 carriers with which they regularly do business.

Mr. Stulp testified that he has been involved in the trucking industry for 25 years: 13 years driving and 12 years in administration.

The witness acknowledged that Here 2 There had brokered loads with the Applicant with the first such load being given to the Applicant in September of 2007. Mr. Stulp stated that Here 2 There ceased doing business with the Applicant when they were advised by the Ministry of Transportation that the Applicant did not have a CVOR certificate.

The witness identified the document appearing at Exhibit 6, Tab 29, page 312, as being a Here 2 There carrier confirmation form which shows the Applicant as the carrier and that Richard Meyers is the contact person.

Mr. Stulp stated that he did not "double broker" as Here 2 There did not want different names to appear as carriers and they did not want to get into a dispute as to who is to be paid.

The witness testified that the Applicant did not advise Here 2 There that it was acting as a load broker. The witness stated that when he was advised by the Ministry of Transportation that the Applicant's CVOR certificate had been suspended, he called Richard Meyers who acknowledged the suspension.

Mr. Stulp stated that he considered that a CVOR certificate was required in order for the Applicant to fulfill its arrangement with Here 2 There.

The witness testified that the document appearing at Exhibit 7, Tab 5, pages 25, 26, 27 and 28, constituted a carrier profile which was kept on record at Here 2 There and indicated the carrier's address, CVOR certificate number, insurance particulars and WSIB clearance.

Mr. Stulp stated that the certificate of insurance at page 28, Exhibit 7, Tab 5, indicates that the Applicant was insured for cargo and that such insurance would not be acquired by a load broker but would only be placed for a "carrier". The witness also testified that a load broker does not take out automobile liability insurance as was indicated by the said Exhibit as being in place for the Applicant.

Mr. Stulp stated that Load Link was used by Here 2 There to arrange for transportation and it was his belief that Here 2 There's profile on Load Link would identify Here 2

There as a “freight broker”. He acknowledged that in certain situations Load Link may indicate that a party was both a freight broker and a carrier.

On cross examination, Mr. Stulp was referred to the carrier confirmation form at Exhibit 6, Tab 29, page 312, and acknowledged he would not have prepared a bill of lading for that load. The witness testified that the carrier confirmation information indicated that the Applicant was carrying the load that a manufacturer was shipping to a construction company in Summerset, Maine.

The witness testified that he met with Inspector Lavalle, who asked questions about the relationship between Here 2 There and the Applicant. Inspector Lavalle recorded Mr. Stulp’s answers to those questions and Mr. Stulp signed the document. The witness testified that a load broker would not have licences and would not have US authorities. When the witness was asked again about “double brokering”, he replied that in such arrangements there were too many middle men, a situation which created problems.

Sherry Atallah

Ms. Atallah is a carrier safety rating administrator employed with the Ministry of Transportation since 2001. Her employment includes investigating complaints against carriers, interviewing carriers and preparing files for the issuance of orders against carriers. Ms. Atallah stated that Greig Beatty, the Deputy Registrar of Motor Vehicles, makes the decisions on suspensions, but that she analizes records for potential suspensions and reviews CVOR applications which may be refused.

Ms. Atallah referred to the document at Exhibit 6, Tab 31, which is the Ontario CVOR and Carrier Safety Rating publication and explained the commercial vehicle operators registration program and the point system. Ms. Atallah stated that the CVOR system evaluates a carrier based on the “events” on its CVOR record including collisions, driver and carrier convictions, commercial vehicle safety alliance standard inspections and detentions and the results of facility audits.

The first step in evaluating a carrier is to assess its "on the road" performance based on three separate safety indicators which are the total collision points accumulated in a 24 month period; total conviction points accumulated in a 24 month period and the total inspection points accumulated in a 24 month period. The points accumulated in each category are compared to the point threshold values to determine the percentage of threshold. The witness stated that, when a carrier’s percentage of threshold is in excess of 100%, concerns were raised about that carrier’s compliance. In the case of the Applicant, it was the review of the Applicant’s safety record, including collisions, convictions and vehicle inspections, that gave rise to the issuance of the suspension and seizure order dated the 6th day of June, 2008 (Exhibit 5, Tab 1).

Ms. Atallah stated that the June 6th, 2008, suspension and seizure order had been appealed to the Tribunal and the decision of the Tribunal appears as Exhibit 5, Tab 2. This decision led to the issuance of the suspension and seizure order dated April 14,

2009, (Exhibit 5, Tab 3). Subsequently, the Notice of Cancellation and Seizure dated December 7, 2009, was issued for the reasons set forth in that order.

Ms. Attallah testified that the safety record review dated December 2009 (Exhibit 5, Tab 5) was prepared by Adele Di Paolo who is a carrier safety rating administrator employed with the Ministry of Transportation and who gave evidence at the hearing before the Tribunal on February 23, 2009. Ms. Atallah testified that according to the Integrated Court Offences Network inquiry system ("Icon"), the Applicant has outstanding fines which total $28,426.12 as at May 11, 2010.

Ms. Attallah testified that the first offence identified on the Icon Fine Report (Exhibit 5, Tab 6, page 17), referred to Section 107 of the Act, and the status "F" indicates a default in the payment of fines. The witness referred to Exhibit 5, Tab 6, page 19, and noted that the total fine for the offence referred to on that page was $25,055.00 as set forth on page 35 of that tab.

The witness explained that "IRP" stood for International Registration Plan, which is a treaty with the United States under which fees are paid based on the kilometres travelled.

Ms. Atallah referred to the documents appearing at Exhibit 5, Tab 7, pages 63 and 64 and testified that there was outstanding a total of $15,318.00 in unpaid amounts in the Applicant's IRP account and that amount remains the same as of May 11, 2010.

Ms. Atallah referred to the commercial vehicle operator summary appearing at Exhibit 5, Tab 9, page 7 and stated that the overall safety violation rate for the Applicant as at December 3, 2009 was 80.4% which is less than 100%. However, the witness stated that the Ministry of Transportation expected a decrease because the Applicant had not been operating and therefore there should be no events added to the record. Ms. Atallah indicated that although 100% was the bench mark, each case was examined individually to determine if there were significant events which required interventions.

The witness referred to a specific event which is recorded in the document at Exhibit 5, Tab 9, page 80, as a result of an inspection on September 11, 2009, which recorded "drive after 16 hours elapsed time" and "logs-false record of duty status". The witness stated that the inspection reports appearing at Exhibit 5, Tab 10, are imported into the CVOR report. Ms. Atallah noted that the inspection report appearing at page 144 of that tab refers to the Applicant as the operator/owner and one R.S. as the driver and is dated October 21, 2009. The inspection report at page 149 contains the statement that the lease agreement shows the operator as the Applicant which has a suspended CVOR certificate. An inspection report appears at page 146 of the same tab, dated September 8, 2009, identifies the Applicant as the operator/owner and one J.O. as the driver. The witness stated that this report indicates that the driver was unable to surrender a CVOR certificate and that the lease, manifest, IFTA, log book and truck all refer to the Applicant as the carrier.

Ms. Atallah testified that a driver can have a CVOR certificate and that the Applicant's drivers all have CVOR certificates. Confusion arises where a driver has a CVOR certificate and the truck is plated to that certificate; however when the logs and other documentation are reviewed, the Applicant is shown as the operator. The witness testified that the term "operator" refers to the party that is responsible for the conduct of the driver, the vehicle and the goods and cargo. Ms. Atallah testified that the situation involving the Applicant results in some events being recorded on the driver's record and some on the Applicant's record which impacts on the violation rates for both the driver and the Applicant.

The witness referred to the facility audit dated October 23, 2006 (Exhibit 5, Tab 13) and noted that the compliance rate for drivers was 22.2% whereas 55% was the minimum percentage needed. Ms. Atallah reviewed the various orders and steps that had been taken with respect to the Applicant, as referred to in the Background section of this decision, which led to the issuance of the cancellation and seizure order dated January 15, 2010, which is the subject matter of this appeal.

Ms. Atallah acknowledged, on cross examination, that the suspension and seizure order dated the 6th day of June, 2008, (Exhibit 5, Tab 1) does state, in the third recital, that outstanding fines against the Applicant were paid to the Courts. The witness acknowledged that the suspension in the order of June 6, 2008, did not take effect while the matter was under appeal and that the Applicant would be permitted to operate during the appeal period.

The witness was referred to the *Truck Transportation Act*, R.S.O. 1990, c. T.22, which was repealed on January 1, 2006. This Act required a person providing load brokerage services to have a load brokerage certificate. This Act also provided for special licences referred to a "single source" authority for commercial vehicles owned or leased by the person being granted the authority and the driver of such vehicles under one or more contracts or an "owner/driver authority" which authorizes the person being granted the authority to provide one commercial vehicle of which the licencee is the owner or lessee and the driver under one contract at any given time. The witness acknowledged that there was no restriction on the number of vehicles to which such authorities would apply.

Ms. Atallah was referred to page 19 of the Icon report appearing at Exhibit 5, Tab 6, and specifically the second record of conviction wherein a notation had been written of $25,050.00 and confirmed that under Section 190(8) of the Act the maximum fine was $20,000.00. The witness stated that the additional amount is with respect to a victim impact surcharge. Ms. Atallah acknowledged that she had never seen such a large fine.

Ms. Atallah acknowledged that the Applicant was not prohibited from acting as a load broker but disagreed that this was the Applicant's status in Ontario. As to the status of the Applicant with regards to being a licenced carrier in the United States or if the

Applicant had received a satisfactory report from the United States Department of Transportation, Ms. Atallah had no direct knowledge.

With reference to the CVOR record (Exhibit 5, Tab 9) Ms. Atallah acknowledged that the rating of 80.4% was less than 100% and that according to the performance summary (page 78, Tab 9) on the vehicle side the results were very good; however, on the driver side, the results were poor for the 24 month period from November 4, 2007 to November 3, 2009.

Ms. Atallah testified that, at the time of those inspections, the logs indicated that the carrier was the Applicant and the driver would produce his own CVOR certificate.

The witness testified that a log book was to be in the name of the operator/carrier pursuant to O. Reg. 555/06 under the Act, Section 19(1) item number 9 which requires that the contents of the daily log shall set out the name of the operator for whom the driver is driving during the day. The witness acknowledged that the US carriers are required to carry logs.

The witness was referred to the documents at Exhibit 6, Tab 25 and acknowledged that one L.G. holds a CVOR licence. With respect to the commercial vehicle inspection report appearing at page 147 of the same tab, the witness confirmed that one A.M. has his own CVOR licence. The witness confirmed that the commercial vehicle inspection report appearing at pages 148 and 149 of the same tab indicated that there were no problems found during those inspections.

Marc Lavalle

Mr. Lavalle is an enforcement officer with the Ministry of Transportation in the Hamilton District Central Region and his responsibilities include conducting audits of log books, trip sheets, trip envelopes and receipts which are maintained by the driver and delivered to the operator at the end of a trip to ensure compliance with the Act .

Mr. Lavalle testified that he conducted a compliance verification of the Applicant on September 21, 22 and 23, 2009 and referred to his facility audit notes appearing as Exhibit 6, Tab 18. The witness stated that he was notified by the Ministry of Transportation that the Deputy Registrar wanted a facility audit conducted of the Applicant.

The witness testified that those facility audit notes were made by him of the facility audit of the Applicant. Mr. Lavalle stated that the opening portion of the audit notes referred to an e-mail sent to the United States Department of Transportation with the result that an audit was conducted by Adrian Cerras, a United States auditor, with Mr. Lavalle in attendance on September 21, 2009. The witness stated that Mr. Cerras conducted an “entrance interview” and advised that the two audits would be conducted at the same time. As set forth in the audit notice, Richard Meyers, the president of the Applicant, was present.

Mr. Lavalle testified that the bills of ladings he examined identified the Applicant as the carrier as did the log books. The witness stated that the Applicant maintained the log books at its address. During the course of the audit the Applicant provided Mr. Cerras with a driver and vehicle list, a copy of which was given to the witness and is part of the audit notes which appear at Exhibit 6, Tab 18, page 193. Mr. Lavalle stated that trip envelopes were provided by the carrier to the driver to keep records and other relevant documentation for each trip that the driver makes and, in the present situation, all such documentation showed the Applicant as the carrier, including fuel receipts.

Mr. Lavalle testified that where the driver is an operator/carrier, logs which are to be maintained at the place of business of the carrier, should be maintained at the place of business of each of the drivers. The logs for those drivers that were examined by the witness were at the Applicant's offices in Mississagua, Ontario.

The witness testified that the fact that the drivers had their own insurance did not change the witness's position that the Applicant was the carrier as indicated in the logs, trip envelopes, bills of lading, load confirmation sheets, fuel receipts and custom stamps.

Mr. Lavalle stated that within the Applicant's place of business there was a dispatch area which contained a black board and three to four people who were giving instructions where to pick up cargo. The witness stated that in his experience the dispatch office is the biggest part of any carrier's office operation whereas a load broker did not have the same need for a dispatch office.

Mr. Lavalle testified that he made copies of the contents of the trip envelopes as they were found in the offices of the Applicant.

The witness referred to the documents appearing at Exhibit 6, Tab 19, which were extracted from the trip envelope for one M.G. which started with a driver's daily log dated May 31, 2009. The following pages (pages 195 to 200) set out each day's activity until the driver returned to the Mississauga office on June 6, 2009. The document appearing at page 201 was identified as being a gas receipt for fuel issued in the name of the Applicant.

Mr. Lavalle identified the document appearing at page 202 of the same tab as being a fax confirmation sheet which showed a third party confirming that the Applicant was the named carrier for a load going to Rockland, Massachusetts. Page 203 of the same tab was identified by the witness as being a bill of lading which contains a bar code with a pre-arrival review ("PAR") number in the name of the Applicant. The witness explained that each item travelling into Canada would have a PAR number.

The witness identified the document appearing at page 207 of the same tab as being a custom manifest which again had a PAR number in the Applicant's name, and the manifest showed the Applicant's name and address as the name and address of the

owner of the truck. This document was identified as a “carrier’s certificate”. The witness referred to various other documents contained within the same Tab 19, Exhibit 6, all of which, in various ways, indicated that the Applicant was the carrier of record and it was the Applicant’s bar code that was used for all PARs on the load.

Mr. Lavalle explained that pursuant to a lease contract, one party may be allowed to use the PAR numbers of another party when moving a load, however, the witness was not sure if such a lease contract was applicable to the load referred to in Tab 19.

Mr. Lavalle referred to the documents appearing at Exhibit 6, Tab 20, page 217 which were drawn from the trip envelope of J.O. The first document was a copy of the front of the trip envelope and was followed by copies of the driver’s daily trip logs, each of which identified the Applicant as the carrier. Other documents from the trip envelope, included an electronic manifest, carriers certificates from the United States Custom Service, order confirmations, carrier booking confirmations and bills of lading, all of which identified the Applicant as the carrier.

Mr. Lavalle reviewed the documents contained in the trip envelopes of the other drivers, all of which indicated that the Applicant was the carrier of record.

Mr. Lavalle made note of the fact that in each case the trips that were reviewed occurred over a period of May, June, August and September of 2009. The witness noted that in the driver’s daily logs, in virtually every instance, the Applicant or its address was shown as the home terminal and as the principal place of business.

Mr. Lavalle indicated that as part of his responsibilities he conducted audit interviews with various parties who had dealings with the Applicant. The witness referred to the audit interview appearing at Exhibit 6, Tab 30 and specifically the document appearing at page 317 of the tab whereby a company confirmed that the Applicant is the carrier for a shipment from another company in Etobicoke to a company in Claysburg, Pennsylvania. The witness noted that the document stated, under the heading “Attention Carrier” that “this shipment must be carried by the <name deleted> assigned carrier”. The witness stated that this documentation was obtained from the files of the Applicant and was not included in a trip envelope.

The witness referred to documents appearing at Exhibit 7, Tab 6, which are extracts from the records of the Ministry of Transportation and in particularly the commercial vehicle inspection report appearing at page 31, which identifies the Applicant as the carrier with respect to a truck tractor which had problems with its brakes and led to the equipment being impounded. Included with this documentation is a copy of a insurance binder (page 44), which shows the Applicant as being the insured and the coverage as being motor truck cargo coverage form, carriers liability, with the description of operation as being “Common Carrier General Freight”.

Mr. Lavalle made reference to a contract agreement appearing at Exhibit 7, Tab 6, page 46, between the Applicant, operating in the United States under motor carrier numbers

and a Department of Transportation number, and an Ontario numbered company which agreement contains the statement that the Applicant is in business as a “freight carrier”. The witness referred to various obligations of the Applicant as set forth in the contract and particularly subparagraph 5.1(c), paragraphs 5.3 and 5.7 and stated that such obligations are consistent with the Applicant being an operator under the Act.

Mr. Lavalle referred to the Ministry of Transportation Inquiry Services search which indicated that as at April 29, 2010, that numbered company was not found in the carrier data base which means that that company did not have a CVOR certificate.

On cross examination, Mr. Lavalle testified that a carrier is required to keep driver’s logs for six months and thereafter stores them on site. The requirement is that during the first six months the logs must be stored at the place of business. The witness stated that there was no accommodation for records to be stored with a company with whom a driver has a contract for storage of records.

The witness acknowledged that the Ministry of Transportation had no authority to inspect the documents of a load broker; however, the Ministry does have authority if the company holds a CVOR certificate.

Mr. Lavalle acknowledged that he did not give prior notice of the September 2009 facility audit and stated that it was not necessary as Mr. Cerras had already made arrangements with the Applicant to conduct a Department of Transportation audit. The witness stated that on September 21, 2009, he entered the offices of the Applicant and explained that he was conducting a compliance verification audit. Mr. Lavalle acknowledged that Mr. Meyers, the president of the Applicant, seemed surprised and was advised by Mr. Lavalle that Mr. Lavalle would check that all drivers had commercial vehicle CVOR certificates. When asked if any charges had been laid as a result of the inspection which is recorded at Exhibit 7, Tab 6, page 31, the witness stated that he had no knowledge of any charges.

Mr. Lavalle acknowledged that he was aware that the Applicant’s drivers were to have CVOR certificates. The witness stated that he did not know if Mr. Cerras issued a satisfactory rating for the Applicant.

Mr. Lavalle stated that he has not seen a load broker identified as a operator/carrier on documentation he reviewed when doing other facility audits.

With respect to the bill of lading dated July 31, 2009, appearing at Exhibit 6, Tab 20, page 236, Mr. Lavalle acknowledged that he did not know who prepared the bill of lading and could not comment on why the Applicant was shown as “Carrier”.

The witness was referred to the document that appears at Exhibit 6, Tab 23, page 272, where a company sent an e-mail to Mr. Meyers of the Applicant, which contained the statement “Customs paper work to be forwarded upon receipt of confirmation from Over the Road”. Mr. Lavalle acknowledged that it did not indicate in what capacity the

Applicant was acting with respect to this shipment. The witness stated that it was not necessarily the shipper who prepares the bill of lading and related documents. Mr. Lavalle stated that he had advised his superiors of the manner in which he was conducting the compliance audit.

Mr. Lavalle, having expressed the opinion that load brokers did not have a dispatcher, was referred to the copy of a business card appearing at Exhibit 6, Tab 29, page 313, which is a copy of the business card of Mr. Stulp, who is identified as being "Sales & Dispatch".

Mr. Lavalle acknowledged that there is no statute against allowing other carriers to use one carrier's PAR numbers or PAP numbers, the United States equivalent.

Richard Meyers

Mr. Meyers, president of the Applicant, testified that the business had originally started out as a courier service and grew in size to the point that they continued the business in the name of the Applicant and ceased using On the Double . Mr. Meyers stated that the Applicant had started to focus its trucking activities on the US in 2004.

The witness stated that the suspension order dated June 6, 2008 (Exhibit 5, Tab 1) ordered the Applicant's CVOR certificate be suspended for 30 days even though the order acknowledges, in the third recital, that outstanding fines were paid. The witness stated that the amount paid was $9,290.00 and confirmed that it was this suspension order that was appealed to the Tribunal.

Mr. Meyers testified that he missed the trial date with respect to the trial that imposed the fine of $25,050.00 and therefore the fine was imposed without hearing the Applicant's position.

The witness testified that the Applicant's CVOR certificate was surrendered on April 20, 2009, in accordance with the suspension order dated April 14, 2009 and that any vehicles operated by the Applicant under leases were returned to the lessor.

In reference to the list of drivers and vehicles (Exhibit 6, Tab 18, page 193) Mr. Meyers confirmed that it was a list of drivers, all of whom own plates and have their own CVOR certificates.

The witness stated that in a letter received from the US Department of Transportion on January 4, 2006 (Exhibit 4, Tab 15), the Applicant received notification that it had met all the requirements of the United States regulations to receive registration to operate interstate commerce within the United States.

Mr. Meyers identified a document referred to as "Company Snapshot" for the Applicant issued by the United States Department of Transportation, which was admitted as

Exhibit 9, which showed a satisfactory rating for the Applicant according to the United States Department of Transport's rating system as of May 9, 2010.

Mr. Meyers testified that the Applicant was operating as a load broker in order to survive and the only alternative once its CVOR certificate was suspended, was to shut down the business. Mr. Meyers stated that the Applicant functioned as a load broker in Ontario and a carrier in the United States.

The witness stated that the drivers owned or leased their vehicles, had their own CVOR certificates and carried their own insurance. The Applicant granted permission for the owner/drivers to use the Applicant's PAR and PAP numbers when entering and leaving the United States. Mr. Meyers stated that trip leases were issued which gave the owner/drivers permission to operate under the Applicant's US authorities which were in the name of the Applicant. The witness stated that magnetic decals with the Applicant's logo, motor carrier number and United States Department of Transportation numbers were affixed when the trucks crossed into the United States. The witness stated that the Applicant must maintain logs so that the US Department of Transportation Inspectors could perform audits.

Mr. Meyers referred to copies of the CVOR certificates appearing at Exhibit 4, Tab 16, and specifically the CVOR certificate issued to J.K. and stated that this individual has his own CVOR licence and engaged the driver R.S. as a driver. The witness identified the certificate of insurance for J.K. which appears as the second page of Exhibit 4, Tab 17 as an example of the insurance carried by owner/drivers.

Mr. Meyers identified a copy of the invoice appearing as the third page of Exhibit 4, Tab 18, being invoice number 3 from an Ontario corporation with the address of J. K. addressed to the Applicant as being an invoice for carrying freight. The Applicant referred to the standard truck lease, a copy of which is at Exhibit 4, Tab 20 and stated that this was the approved form of lease used to permit one party to use another party's US authorities. The witness referred to paragraph 9 of the standard truck lease which requires that the lessee remove all signs and indications and other evidence of names and certificate numbers belonging to the lessee upon the termination of the lease and stated that this was the reason why the magnetic signs were removed.

Mr. Meyers referred to the letter of the Ministry of Attorney General to the Tribunal dated November 4, 2008 in which the Applicant's violation rate was recalculated based on a reduced number of convictions which resulted in an overall safety violation rate of 108.67%. The witness stated that it was shown in the Commercial Vehicle Operator Summary dated December 3, 2009, that the overall safety violation rate had fallen to 80.4%. The witness stated that the reduced overall safety violation of 108.67% was not taken into consideration in the decision of this Tribunal dated March 31, 2009, wherein the evidence given by the witness for the Respondent was that the violation was 176% which was extremely high even though the Ministry knew at the time that the rate had been reduced.

Mr. Meyers testified that he hired Larry Kopp, who previously worked for the Applicant, and who has a proven record for managing transportation companies, to maintain safety and compliance standards for the Applicant.

Mr. Meyers testified that with Mr. Kopp's assistance the Applicant was introducing new systems to ensure that logs were properly maintained and to implement safety measures.

Mr. Meyers stated that the financial position of the Applicant had not allowed it to pay its fines but that they were planning to do so over the next 12 months.

With respect to the past conduct of the Applicant, Mr. Meyers acknowledged that errors had been made but felt that the new procedures being introduced would avoid such mistakes in the future.

On cross examination, Mr. Meyers stated that the Applicant surrendered its CVOR certificate and plates in April 2009 and required its drivers to obtain their own CVOR certificates. The witness acknowledged that when its CVOR certificate was suspended, the Applicant became a load broker.

Mr. Meyers stated that the financial loss suffered by the Applicant from returning leased vehicles when its CVOR certificate was surrendered affected the ability of the Applicant to pay its fines.

Mr. Meyers referred to the list of drivers appearing at Exhibit 6, Tab 18, page 193, and acknowledged that the units assigned to the drivers were the same both before and after the Applicant surrendered its CVOR certificate. Mr. Meyers stated that the drivers were independent entities and as owner/operators they do what they want. The witness admitted that nothing had changed for the owner/operators after April 2009, if they had their own plates, CVOR certificates and insurance.

Mr. Meyers stated that in Ontario the Applicant acted as load broker and in the United States as a carrier. The witness stated that he never told anyone of the change in status after April 2009, as it never came up.

It was the witness' testimony that the Applicant was shown as a "carrier" on Load Link as it did not separate the US portion of its activities from its Canadian activities for the purposes of the profile on Load Link. The witness stated that he told Mr. Lavalle that the Applicant was a load broker after the suspension had become effective.

Mr. Meyers expressed the opinion that the inspections which occurred in Vineland were overly aggressive in comparison, by way of example, with inspections in London where the Applicant did not have problems with inspectors.

Mr. Meyers stated that truck leases, also referred to as trip leases, were signed before the first trip and kept on file and that there was one truck lease per truck.

Mr. Meyers explained that the standard truck lease, an example of which appears at Exhibit 4, Tab 20, was in effect from the date the lease started to the end of the year. Mr. Meyers stated that the truck lease was only applicable to the Applicant with respect to its motor carrier number and only as a motor carrier in the United States.

The witness referred to the first recital under terms and conditions wherein reference is made to the lessee as being a motor carrier engaged in the transportation of property in interstate commerce and stated that this meant the lease was only applicable to the U.S. With respect to the issuance of insurance, Mr. Meyers stated that insurance was necessary for its activities in the United States and that the Applicant had to have insurance in place to use the United States authorities.

Mr. Meyers explained that under US regulations it was a requirement that logs be maintained by the Applicant and that it is his understanding that Mr. Lavalle had no problem with the records being maintained at the Applicant's office. The witness explained that each driver had copies of his own logs and kept his own set of records. Mr. Meyers acknowledged that if a driver required assistance in obtaining licences, the Applicant would provide such assistance.

Larry Kopp

Mr. Kopp is a vice-president of the Applicant and is responsible for safety, compliance and dispatch and has held that position since December 2009. Mr. Kopp testified that he has over 30 years in the trucking industry in various capacities.

Mr. Kopp testified that before taking the position, he obtained a firm commitment from Mr. Meyers that the Applicant was committed to a new approach to compliance matters. An example of this new approach, Mr. Kopp referred to a document appearing at Exhibit 3, Tab 7, which is an e-mail from consultants who will process the trip reports; file tax returns; audit driver's logs and issue letters if errors were found. Mr. Kopp stated that the previous company did obligatory checks but there was no follow up.

The witness referred to the document appearing at Exhibit 3, Tab 8, which explains in greater detail the services offered by Transaudit Tax Consultants Inc. Mr. Kopp referred to the document appearing at Tab 9 of the same exhibit titled "Owner Operator and Driver Administrator's Manual" as an example of the new policies which would be implemented when the Applicant has its CVOR certificate back. Mr. Kopp stated that these types of policies had been used with other companies and proven successful.

In addition, Mr. Kopp referred to the contractor's hand book (Exhibit 3, Tab 10) a PowerPoint presentation (Exhibit 3, Tab 11), trip planning PowerPoint presentation (Exhibit 3, Tab 12) and preventative maintenance PowerPoint presentation (Exhibit 3, Tab 13) as further examples of the actions that the Applicant would take to ensure compliance once it has its CVOR certificate. The witness also referred to the contractor/driver application form (Exhibit 3, Tab 14) and the attachments to this

application which would be required from all drivers for the Applicant. Mr. Kopp stated that it made more sense for the Applicant to control all aspects of its operations rather than merely be an overseer.

On cross examination, Mr. Kopp testified that he had previously worked for the Applicant in 2006 for 3 or 4 months from February to April to address specific problems, but that now he was working full time for the Applicant. Mr. Kopp testified that he saw his role as bringing the Applicant into compliance and part of that was to have the Applicant pay its outstanding fines.

On cross examination, Mr. Kopp stated that the various manuals referred to above had not been distributed to the drivers and that the PowerPoint presentations had not been conducted as the drivers were not under the control of the Applicant. The witness stated that the lease agreements were being revised to improve compliance.

Mr. Kopp stated that the standard truck lease (Exhibit 4, Tab 20) grants the right to use the Applicant's authorities whereas the Contractor Agreement (Exhibit 7, Tab 6, Page 46) ensured that the owner/operator operating under the Applicant's US authorities followed the rules and regulations. Mr. Kopp stated that the owner/operators worked independently, subject to the right to use the Applicant's US authorities and the obligations which were attached to such use. The Contractor Agreement was not applicable in Canada as the owner/operators were operating under their own authorities. Mr. Kopp was referred to Paragraph 1.2 of the Contractor Agreement which obligated the owner/operator, defined as being the "contractor", to make at least two round trips per week and the witness explained that the purpose of that paragraph was for the benefit of the owner/operator.

When asked to explain the purpose of subparagraph 5.1 c) of the Contractor Agreement, Mr. Kopp explained that as the Applicant was a Canadian company and the owner/operators were being paid by the Applicant in Canada, the Applicant had to ensure that the owner/operators complied with Canadian legislation.

Mr. Kopp stated that a customer would not be told that the Applicant was not the carrier and many of the documents were filled in by the shipper, who may not be aware that the Applicant's CVOR certificate was suspended.

LAW

The applicable sections of the Act are:

> 16 (1)
>
> "CVOR certificate" means a Commercial Vehicle Operator's Registration Certificate issued under this Act;

> "operator" means the person directly or indirectly responsible for the operation of a commercial motor vehicle including the conduct of the driver of, and the carriage of goods or passengers, if any, in, the vehicle or combination of vehicles;
>
> "safety record" means the safety record of an operator determined in accordance with the regulations;
>
> (2) No person shall drive or operate a commercial motor vehicle on a highway unless the operator is the holder of a valid CVOR certificate.
>
> 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
> (b) a driver's licence; or
> (c) CVOR certificate, on the grounds of,
> (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
> (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
> (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
> (g) any other sufficient reason not referred to in clause (d) ,(e) or (f).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

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

DECISION

Although the Respondent raised a variety of reasons for issuing the cancellation and seizure order dated January 15, 2010, which is the subject matter of this hearing, it is clear from the evidence introduced and the closing argument that the Respondent's primary reason for cancellation and seizure is that it believes that the Applicant is carrying on the business of a carrier at a time when its Commercial Vehicle Operators Registration Certificate has been suspended in contravention of the Act.

The Applicant maintains that it is doing business in Ontario as a load broker and therefore is not required to have a CVOR certificate or any other authorities, and carries on business in the United States as a carrier where it does hold appropriate authorities. The difficulty confronting the Applicant is the definition of an "operator" as set forth in Section 16 of the Act. The party that needs to have a CVOR certificate is the party who

directly or indirectly is responsible for the operation of a commercial motor vehicle including the conduct of the driver, the vehicle and the carriage of goods.

The factual issue to be determined is whether or not the Applicant is directly or indirectly responsible for the conduct of those persons who are its drivers and the vehicles which they drive.

It is interesting to note that in the decision of this Tribunal dated March 31, 2009, the Tribunal stated at paragraph 37;

> 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 oversight necessary to meet his obligations under the Act *(emphasis added)*.

The evidence produced during this hearing leads to the conclusion that the Applicant has not changed its methods of operation from what existed at the time of the Tribunal hearing in February 2009, except that instead of operating under its own CVOR certificate, the Applicant now requires each of its drivers to have their own CVOR certificate. In page after page of the documentation, the Applicant is recorded as being the carrier and although it is possible in certain situations that third parties may have completed this documentation, it is clear from the evidence produced that even the drivers, in certain circumstances, looked to the Applicant as the “carrier”. Mr. Meyers acknowledged that customers were not told that the Applicant’s CVOR certificate was suspended with the result that they would believe that the Applicant was carrying on the business as it had in the past.

The dilemma that the Applicant finds itself in is that it did not exert sufficient control over its trucks and drivers when they were operating under the Applicant’s CVOR certificate to ensure compliance, but maintains sufficient control over the trucks and drivers that it falls within the definition of an “operator”.

When reviewing the evidence of Mr. Skelton and that of Mr. Stulp, it is clear that the difference in their business activities is reflected in the documentation that is generated when a shipment is arranged. Such a distinction does not exist between the activities of the Applicant when it operated under its own CVOR certificate and when it operated as a “load broker”.

Although the standard truck lease and the Contractor Agreement may be considered by the Applicant as “agreements of convenience” to enable the Applicant to operate as a carrier under its US authorities, both documents place obligations upon the Applicant which do not terminate when the drivers cross back into Canada from the United States and those obligations are inconsistent with the activities of a load broker.

Indeed, it may be that the necessity to meet certain requirements of the United States Department of Transportation precludes a company from acting as a carrier in the United States and merely as a load broker in Canada. A simple matter such as the location of logs would create contradictions between the US Department of Transportation requirements and those of a CVOR certificate holder in Ontario.

After considering the evidence produced at this hearing, the Tribunal finds that the Applicant is an "operator" carrying on business without a CVOR certificate contrary to the provisions of the *Highway Traffic Act*.

ORDER

Pursuant to the authority vested in the Tribunal under Section 50 of the Act, the Tribunal confirms the decision of the Registrar of Motor Vehicles to issue the cancellation and seizure order dated January 15, 2010.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

RELEASED: August 19, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ANPRO EXCAVATING AND GRADING 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 THE CVOR CERTIFICATE AND TO SEIZE THE PLATE PORTION OF PERMITS

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: MARK REYNOLDS, Paralegal, appearing on behalf of Anpro Excavating and Grading Ltd. (the "Applicant")

DOUGLAS LEE, Counsel, representing the Registrar of Motor Vehicles ("the Registrar")

DATES OF HEARING: July 8 and September 2, 2010 Toronto

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 fourteen (14) days. The decision also provides for the seizure of the plate portion of permits issued by Ontario.

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

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 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.

BACKGROUND

On January 12, 2010 the Deputy Registrar issued a Notice of Cancellation and Seizure of the CVOR certificate issued to Anpro Excavating and Grading Ltd. and to seize the plate portion of the permits (Exhibit 3, Tab 10).

The Notice was followed by a Show Cause meeting, which occurred on February 11, 2010 and the details of that meeting are found in Exhibit 3, Tab 17. As a result of that meeting and Anpro Excavating and Grading Ltd. ("Applicant") submissions, the Deputy Registrar issued a revised decision wherein he states that while he has:

> "considered your submissions and your safety record I remain concerned for highway safety."

He had reduced the original Notice of Cancellation and Seizure to a Suspension and Seizure Order for a period of 14 days dated March 10, 2010. It is this Order that is the subject of this Appeal.

THE EVIDENCE

Counsel for the Respondent, Douglas Lee, provided an opening statement in which he referred to the poor safety record of the Applicant. He indicated this company had been subject to previous notices due to its poor safety record and poor safety performance

ratings. He noted that an original Notice of Cancellation and Seizure had been revised to a 14 day Suspension Order.

The Applicant's agent, Mark Reynolds, provided an opening statement in which he indicated the Applicant does not deny that the record is poor. However, he stated this company has turned the corner and has taken steps to improve. Thus, the Applicant believes the sanction is unwarranted.

Summary of Testimony of Jim Kirchner

The witness for the Deputy Registrar was Jim Kirchner, who testified that he has been employed with the Ministry of Transportation (the "Ministry") as a Carrier Safety Rating Administrator since July 2007. He stated this position entails analysis of safety records and file documents, attending the show cause hearing and keeping records of the content of the meeting. He reviews file documents, performs interviews and develops action plans to assist carriers to improve their record. He testified that he had prepared the file concerning the Applicant and presented it to the Deputy Registrar for possible sanction. During cross-examination he stated he had worked as an enforcement/field officer for several years prior to commencing his present position. Furthermore, Mr. Kirchner in his testimony explained the Carrier Safety System through a brief review of the Ministry's publication titled "Commercial Motor Vehicle Operator's Registration (CVOR) and Carrier Safety Rating Public Guideline (Exhibit 3, Tab 21). This publication describes the ratings that are applied to operators of commercial motor vehicles using Ontario's roadways.

These ratings identify the safety performance of commercial vehicle operators. The five ratings, which the Registrar may assign, are:

- Excellent
- Satisfactory
- Satisfactory – Un-audited
- Conditional
- Unsatisfactory

These ratings are calculated by an automated system that contains information on a carrier's performance by tracking convictions, inspections, and other relevant information. He testified that this document outlines the responsibility of the CVOR carrier which includes the conduct and qualifications of the driver and resolving safety issues (Exhibit #3 Tab.21, page 210 for a more complete list).

The Registrar takes all the information, including violation rates and accidents involving property damage or injuries and convictions resulting from a driver's performance into account when reviewing and analyzing an operator's performance and rating. Violation rates are based upon accidents, convictions, inspections and mileage of an operator, as well as other factors over a 24 month moving window period. 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.

Mr. Kirchner testified that a violation rate exceeding 35% of the operator’s threshold will trigger a warning letter, and an operator’s violation rate exceeding 65% of its threshold will trigger a facility audit and a violation rate of 85% means an interview is required. A violation rate that exceeds 100% of its threshold will result in sanctions being considered. A conditional rating will be applied to an operator where the violation rate of that operator is in excess of 65% but less than 100%. Such a rating he stated is considered a very poor rating, close to the stage of sanction. The "threshold" represents 100% of a carrier’s allowable violation rate based on industry performance data.

He testified the violation rate is the measure of a carrier’s safety performance as compared to the carrier’s threshold, and expressed as a percentage of the threshold. Until April 2, 2007, the threshold level was calculated on the basis of the carrier‘s fleet size and kilometres travelled in Ontario. Since that date, it has been based on kilometres travelled in Canada.

Mr. Kirchner testified that during a facility audit it was found that the affiliate company of the Applicant had over $8,500.00 in unpaid fines. He stated this is not a matter for this hearing.

Mr. Kirchner during his history review of the Applicant stated in July 2008 the Registrar had issued a Notice of Suspension and Seizure based on a Safety Record review dated July 2008, a Commercial Vehicle Operating Record, a Facility Audit findings dated May 14, 2008 and an ICON report of unpaid fines. This Order was set aside on July 29, 2008, as the operator paid these fines. He stated during cross-examination when an order is set aside it is not a sanction until closed as a sanction, but, it can be used as an intervention when reviewing a carrier history.

Mr. Kirchner testified the Registrar had issued warning letters to the Applicant regarding the safety record in 1991,1999, 2004 and 2007 and they had interviews in 2003 and 2010.In addition there were facility audits in 1999 which the company passed but on the facility audit in May 2008, the Applicant failed.

Mr. Kirchner drew to the attention of the Tribunal the detailed documentation at Tab 13, pages 37 through 99 outlining the safety record over the past five years which demonstrated a recurring theme of a significant number of collisions, convictions and weight infractions. Some of these collisions caused injuries and one was a major incident involving several vehicles and personal injuries. These incidents resulted in charges and convictions which affected the point system and the Applicant’s poor performance rating.

The Commercial Vehicle Inspection Reports (Tab #15) for a period from December 6, 2007 to December 5, 2009, shows the Applicant’s vehicles being overloaded, axle overweight and load in excess of the permit. Mr. Kirchner testified this is a concern to

the Registrar and to public safety as these loads take longer to stop and damage road surfaces. These infractions and convictions also have a negative effect on the Applicant's rating.

In the minutes of the Show Cause meeting dated February 17, 2010, the action plan stated the Applicant had initiated driver training, implemented a policy on no cell phone use while operating company vehicles, as well as installing side mirrors with a better viewing range. This did result in fewer convictions in 2009. Furthermore, this improvement allowed the Registrar on March 10, 2010, to significantly reduce the sanction.

During cross-examination, Mr. Kirchner stated the Ontario CVOR and Carrier Safety Rating: Public Guideline ("Guideline") is partially available on the Ministry web-site. He stated the full document is available to the public upon request at the Sanctions and Investigation Office.

When asked if the system had changed Mr. Kirchner stated it had changed in 2007 and the assignment of the points system was done in conjunction with the National Safety Code and with the stakeholder, namely some carrier representatives. He continued stating the Registrar used the collision rating as a predictor of future collisions.

When asked if other excavators who load their own trucks have as high an infraction rate as the Applicant. Mr. Kirchner replied he had not seen any as high as that of the Applicant.

During cross-examination Mr. Kirchner was asked why no interventions, like warning letters or interviews, had been issued since 2008 and yet the Registrar moved to the sanctions such as the Notice of Suspension and Seizure. His response was that the Registrar had tried interventions in the past including the Set Aside Order and they did not achieve the desired outcome, specifically a significantly improved safety record. He continued stating the violation rate was high, over 100% so the Ministry took action when the sanction was warranted.

During cross-examination Mr. Kirchner explained the inspection levels: level 1 = full mechanical and full driver inspection; level 2 = walk around the vehicle and driver inspection; level 3 = driver only; level 4 = result of police investigation and/or special investigation; level 5 =inspection of vehicle. Mr. Kirchner stated the Applicant has 28 vehicles in his fleet and that vehicle maintenance is not an issue.

Summary of Testimony of the Applicant's President

The President of the Applicant testified. Prior to the company restructuring nearly 10 years ago he was Vice-President of Anpro Excavating Contractors Ltd. He acknowledged that the company has a poor safety record.

He stated that he remembered the facility audit completed by the Ministry auditor in May 2008 and they failed the audit because they had not completed the paperwork required to record the hours of work for the drivers. But he continued there were no drivers who had exceeded the hours of work limitation. He testified he was not aware the Ministry had required a new form of record keeping. He stated that since then, he had hired an ex-MTO officer to train the drivers, his service manager and him so the records are properly completed now.

The Applicant testified that his company was the subject of a Notice of Suspension and Seizure Order in July 2008, for record keeping and unpaid fines in the amount of $8,518.40. Upon review, he agreed to pay $2,040.00 in unpaid fines because they applied to his present CVOR, but he refused to pay the balance as they applied to the prior company called Anpro Excavating Contractors Ltd. and it terminated existence in 1990.He stated after the Registrar advised him that his present CVOR would be suspended he decided he would reluctantly pay the outstanding balance of these fines. Once he had paid the fines in full the Registrar set aside the Notice of Suspension and Seizure dated July 27, 2008.

He stated he did not understand why he had to pay the fines from the prior company and now thought his present CVOR was valid until he received the Notice of Cancellation and Seizure from the Registrar dated January 12, 2010, indicating the Registrar was not satisfied with the Applicant's safety record.

He testified he attended the Show Cause meeting in February 2010 with the Registrar who wanted to know why his points were so high and what was his plan to resolve these safety concerns. He acknowledged he recognized there were some problems and made a commitment to improve. He stated he had some overload tickets in 2008 and had contracted with and paid an organization to represent his company in court. However, he testified the company went out of business and never represented him. They would not represent the Applicant in court or advise him of the court dates and thus the high number of points for convictions.

The Applicant testified that since his show cause meeting he has arranged a defensive driving course for his drivers, replaced the mirror system on his trucks to correct the vision problems and purchased new trucks with better vision lines over the hood. He stated he has made his loader operators aware of the overloading issue and his brothers and foremen are aware to watch and ensure the loads are not overweight and that the weight is equally distributed on each axle. These measures, he testified, have improved his conviction points from 77 in 2008 to 17 in 2009 and 11 in the last year. He stated in 39 inspections he has only had one out of service for a flat tire and he agreed with the witness for the Registrar that the maintenance of company vehicles is not an issue and he stated it will not be an issue in the future.

He testified that every three months he makes his drivers aware of conduct on the roads and the need to report any defects in the trucks such as ripped tarps. As well, twice a year he reviews the driver's record with the service manager.

During cross-examination, he stated this company is a family business. He is president, his wife manages the office and two or three of his brothers are managers. They work in the office and can supervise the loader operators and the drivers if they see issues that need to be addressed.

When asked about the high number of accidents/collisions by two of his drivers he testified that the Tribunal those two drivers are no longer employed by his company and this will help improve his point rating in the future.

He agreed that his drivers may have been on a cell-phone at the time of the accident but there is no proof of this. He stated the drivers denied they were using their cell-phones at the time and there is no way to prove otherwise unless with the new law, which came into effect in March 2010, they are charged by the police. He stated he has a "no cell-phone while driving" policy and the drivers are aware of it but it is difficult to enforce.

The Applicant stated he has a discipline policy but when asked by the Tribunal he could not explain it and indicated it depended on the circumstances. No written evidence of this policy was presented to the Tribunal.

When questioned regarding his company's overall violation rate increasing by 2% after the set aside order the Applicant stated it had a lot to do with the convictions registered against his company when the agency he hired to defend them in court failed to show and the appeal time had elapsed before he became aware of the decision of the court.

Submissions

In his closing submission, Mr. Lee explained this Applicant was subject to the scrutiny of the Registrar not for vehicle maintenance issues or hours of work violations but for a poor safety record and lack of meaningful response during the time period. He advised the Tribunal that this company reacts to situations and is not proactive in preventing collisions and convictions. He explained the discipline policy is inconsistent and has no meaning since a driver involved in two accidents in a month was only suspended from work for one day and yet a driver operating a vehicle with an expired licence was suspended for three days. He pointed out there is no redress regarding chronic problems concerning overloading, collision and convictions.

Mr. Lee referred the Tribunal to the Court of Appeal for Ontario decision *R. v Nickel City Transport (Sudbury) Ltd. (1993),14 O.R.(3d)115* paragraph 38 which states:

> "The Crown argues that it should be the obligation for the commercial carrier to put in place a reasonable system to avoid a contravention of the law. According to the Crown, reliance on the shipper to load the vehicles properly was an abdication of this responsibility, and therefore incapable of amounting to due diligence as a matter of law. The Crown further argues that the respondent was fully aware that a driver could not accurately determine weight distribution visually, and therefore should have provided

> some method of weighing the vehicles, such as providing a portable scales or making arrangements with an owner of a commercial scales."

And paragraph 39 the Court states:

> "Allowing an operator to argue that, by conducting a visual inspection he has shown due diligence in the circumstances, would be setting the standard too low…..At the very least, a method of checking compliance before travelling should be used which is more reliable than a mere visual inspection."

Mr. Lee explained that casting blame for the numerous convictions in court was due to the lack of representation by the contracted agency does not excuse the Applicant from its responsibility to follow up and if necessary appeal the decisions within an extended time frame. The Applicant, he argued, decided to "bite the bullet" when it should have tried to get the convictions overturned.

Mr. Lee explained that the measures taken by the Registrar before issuing the Notice of Suspension and Seizure do not seem to be enough for the Applicant to take corrective action and improve the company's overall performance to a level where the Registrar believes safety is not an issue. He indicated the Registrar did reduce the sanction from cancellation to a fourteen day suspension after the show cause hearing in February 2010.

In his closing submission, Mr. Reynolds argued there is some monitoring of the cell-phone use when the Applicant and his managers are driving around either with the driver on occasion or viewing the drivers near the job site. He indicated the design of the hoods on some trucks were a possible cause for some of the accidents. Therefore, the Applicant has now changed many of the company trucks to a different model with significantly improved visual lines. In addition, the trucks have had the mirror system changed to provide better visibility. This was completed before the Notice of Suspension and Seizure was issued.

Mr. Reynolds advised the Tribunal that although there is no written action plan, he foresees actions to improve the company safety record and provided the example that there has been only one weight violation in 2009.

Regarding collisions, Mr. Reynolds argued that there were eleven collisions with no charges being laid, yet the points were arbitrarily assigned to the company record.

He submitted that:

> "it takes two years for a violation rate to go to 0%".

In summary, he said there has been significant improvement and there should not be a sanction, or if so, the company should be allowed to keep four trucks, namely the float, the water, the fuel trucks and one dump truck on the road so the that excavator operators are not penalized.

ANALYSIS

Without repeating evidence at length, the Tribunal notes that it made significant review of and also gave due consideration to the facts contained in Exhibits 3. The evidence regarding the Applicant's safety record and poor performance was not disputed and the details documented by the Registrar are accepted as fact. The Agent for the Applicant based his evidence and submissions on the Applicant's improving performance and the measures the company has taken since the Notice of Suspension and Seizure Order has been issued, specifically the driver defensive training day in March 2010.

The matter of the non-payment of fines by the Applicant is not an issue for this hearing other than to demonstrate the Applicant's history and that it does not act until it has no other alternatives to protect the business and the registration. The matter for consideration at this hearing is whether the safety performance record of the Applicant is acceptable and whether the proposed sanction is appropriate. It is evident the Registrar took reasonable steps to bring this poor performance to the attention of the Applicant through its program of escalating notice, specifically starting with the warning letter of October 22, 2004 which asked for "immediate action". Also in 2007 a warning letter was issued and in 2008 there was a facility audit which, the company failed and this lead to a Notice of Suspension and Seizure being issued and eventually being set aside. Then after the unpaid fines had been satisfied the safety concerns remained. In fact, the overall performance rating got worse by almost 2%. The evidence is that the CVOR record of the Applicant accumulated additional convictions and collisions which increased the overall safety VR to an unacceptable level.

The Registrar's efforts were not able to improve the record. On the other side, the Applicant's position is that its recent remedial attempts indicate the sanctions proposed by the Registrar are unnecessary to achieve the goal of highway safety. It submits that it is improving its safety record but additional time is needed in order that the 24 month sliding window can move forward. The fact that a carrier has finally reacted to a Notice of Cancellation and Seizure or a Show Cause meeting should not shield it from the poor record that triggered those events in the first place. The Registrar's reconsideration after the Show Cause meeting and his decision to reduce the sanction from cancellation to suspension notice gives the Applicant the opportunity to prove it is able to continue on a path to improve its overall performance rating by significantly reducing its number of incident, accidents and convictions. As well the facility audit appears now to be acceptable.

The Tribunal notes that the present performance is commendable but it is outside the timeframe that the Notice of Suspension and Seizure as considering and outside the limits of this hearing. The Act looks forward by looking back at the safety record and an operator should be proactive in their practices rather than "reactive". Many of the practices and responses to charges and convictions taken by the Applicant must be considered reactive by the Tribunal.

Therefore, where the safety record warrants regulatory intervention, as it does here, the Tribunal will confirm and order that intervention but with consideration of all the facts. While the record between the issuance of the Suspension and Seizure Order and this hearing may be considered as a mitigating factor, it does not excuse the earlier behaviour or eliminate the need for intervention. The Tribunal is concerned with public safety and believes the sanction is required to ensure the Applicant is aware of the seriousness of his poor safety record.

DECISION

Having considered all of the evidence and having listened to the submissions of Counsel for the Registrar and the Agent for the Applicant the Tribunal concludes that the Applicant has made some progress towards improving its safety performance record since the Show Cause meeting. It is noteworthy that the Show Cause meeting outcome recognized the Applicant intended progress and therefore resulted in reducing the original Cancellation and Seizure Order to a 14 day Suspension and Seizure Order.

In arriving at its decision, the Tribunal notes that the Registrar has already recognized the Applicant's action toward reducing the VR by changing the original Cancellation Order to a Suspension Order. The Tribunal recognizes there have been some recent actions taken by the Applicant to attempt to improve the overall performance rating but the real test will occur over the next several months and by the end of 2010 there should be a significant improvement as indicated at the hearing. This is beyond the timeframe presently before the Tribunal.

When the Tribunal reviewed the Commercial Vehicle Operator Record of the past five years there are numerous reports outlining a variety of incidents ranging from collisions, charges, convictions as well as speeding, axle overload, and disobeying legal signs. Many of the collisions involved inattentive drivers. The Applicant should have taken corrective action including developing a written policy regarding staff expectations and discipline on his own initiative rather than waiting for the Registrar's notices. There was no evidence presented to the Tribunal that driver training or loader operator training to resolve the concerns were completed before the Notices of Cancellation in 2008 or in 2010. Given the frequency of the incidents involving this company and the staff it is difficult to understand why no corrective action was undertaken other than changes to the truck sight lines. It appeared obvious to the Tribunal that if the required training had occurred earlier there may have been a major reduction in incidents and thus an improved overall rating for the Applicant and potentially no need for this hearing.

The Tribunal believes the Registrar has now shown the Applicant that he will not tolerate the poor safety record of the Applicant. In addition, the Registrar has demonstrated the Applicant's necessity to avoid collisions and convictions, as well as develop written policies regarding discipline and company expectations of staff and to comply with Ministry direction.

ORDER

Though the Tribunal was provided with and considered substantial evidence regarding the Applicant's safety performance including the sworn evidence from the Applicant that the Applicant has taken pro-active measures to improve the overall performance and safety record, the focus of this decision remains on safety, in accordance with the Act. 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 to carry out the terms of the Suspension and Seizure Order dated March 10, 2010 commencing on a date to be set by the Registrar.

LICENCE APPEAL TRIBUNAL

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Donald Benninger, Presiding Member

RELEASED: September 23, 2010

This decision may also be available on QuickLaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

SHINEY EXPRESS LTD. AND C D TRANSPORT CORP.

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

TO CANCEL THE COMMERCIAL VEHICLE OPERATORS' REGISTRATION CERTIFICATES AND TO SEIZE THE PLATE PORTION OF THE PERMITS

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: MARK REYNOLDS, Paralegal, representing the Applicants

PATRICK MOORE, Counsel, representing the Deputy Registrar

DATE OF HEARING: November 25, 2010 Toronto

DECISION AND ORDER

On July 20, 2010, the Deputy Registrar under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act") ordered the cancellation of the Commercial Vehicle Operator's Registration ("CVOR") certificate and the seizure of the plate portion of the permits of Shiney Express Ltd., C D Transport Corp. ("CD Transport") and four other companies on the grounds that the Deputy Registrar had concerns about the safe operation of these entities. This is an appeal by Shiney Express Ltd. and CD Transport to the Licence Appeal Tribunal (the "Tribunal") from that order. At the outset of the hearing, Mr. Reynolds, Paralegal for the Applicants, advised that Shiney Express Ltd. had withdrawn its appeal.

FACTS

The regime for granting CVOR certificates and monitoring highway safety focuses on three principal measurements, which the Ministry of Transportation ("MTO") 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 MTO. The MTO measures collisions, convictions of drivers and inspections of both drivers and vehicles and arrives at a weighted violation rate which is measured over a rolling 24-month period and which is compared to a threshold rate. If the weighted violation rate reaches 35% of the threshold rate, then the CVOR holder is issued a warning letter. Only 4.2% of the carrier population of 60,185 exceeded this violation rate as of September, 2010. If the weighted violation rate is between 50% and 84% of the threshold then a facility audit is undertaken, which may result in further action being required. If the weighted violation rate is between 85% and 100% then the registrant is called in to the MTO for an interview and is expected to produce an action plan for significant improvement. Sanctions may result. If the weighted violation rate exceeds 100% of the threshold rate, which occurs in fewer than 0.2% of trucking fleets, then the MTO 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 cancellation of the CVOR certificate. When suspensions are proposed, the CVOR certificate holder has an opportunity to show cause why the suspension should not occur. Currently, 80% of registrants who have received some form of intervention improve their performance to an acceptable standard, which includes a violation rate below 35%.

It is within this regulatory regime that CD Transport is conducting business under the direction of its current President, Mr. Balour Pandher. Mr. Pandher's history as the owner/operator of CVOR companies has been an unhappy one. A previously registered company which was operated by Mr. Pandher achieved an overall safety violation rate in April, 2007 of 170.9%. In 2007, it is alleged that Mr. Pandher attempted to obtain CVOR certificates for two other companies without disclosing his involvement. Mr. Pandher denied this allegation at a show cause meeting but did not give evidence at this hearing and neither he nor the witness he called denied the allegation. The applications were refused by the Deputy Registrar on the grounds that the companies were under the direct or indirect control of Mr. Pandher and that the safety record of his existing CVOR company was not satisfactory. The Deputy Registrar pointed to the fact that one of the applicant companies had the same address as Mr. Pandher's company and that the principal of the other applicant company lived at the same address as did Mr. Pandher. Neither company appealed the refusal of their applications. While these facts certainly raise suspicion, the Tribunal finds that the Deputy Registrar has not met the standard of proof required to demonstrate that Mr. Pandher tried twice in 2007 to obtain a CVOR registration without disclosing his involvement with the applicants.

The operations of Mr. Pandher's CVOR company continued to deteriorate and by January 2008, had a catastrophic overall safety violation rate of 202.4%. As a result, the company faced a proposed suspension of its operations when, in February/March, 2008, Mr. Pandher voluntarily terminated his registration on the grounds that he could not obtain insurance.

At the end of March, 2008, Mr. Pandher purchased CD Transport, an established carrier. It is alleged, and not denied by Mr. Pandher, that he attempted to conceal his ownership of CD Transport from the Deputy Registrar. The change in ownership was

not reported to the MTO as required under the Act. When, in August 2008, the company applied for a renewal of its CVOR certificate, the application was purportedly signed by a previous director of the company, one of the men who had sold the company to Mr. Pandher. A comparison of the signature on this application and the signature of the same man on another document shows the signatures are markedly different. It is alleged by the Deputy Registrar and not denied by Mr. Pandher, that someone within CD Transport signed the application form incorrectly to conceal Mr. Pandher's involvement with the company. It is alleged, and not denied by Mr. Pandher, that the same process was used in 2010 when the company again applied for a renewal of its CVOR certificate. Again, a visible comparison of the purported signature of the former director on the renewal application with the actual signature of the same man on another form shows striking differences. The Tribunal finds as fact that Mr. Pandher did attempt to conceal his ownership of CD Transport from the Deputy Registrar.

While Mr. Pandher was successful in concealing his involvement with CD Transport from the Deputy Registrar, he was less successful in managing the company. CD Transport had been operating within acceptable safety standards with a violation rate of approximately 18% at the time Mr. Pandher acquired it. However, its safety record quickly deteriorated and by November, 2008, the Overall Violation Rate had risen to 39.5% and a warning letter was issued. Despite this, the safety record of the company deteriorated to 115.7% in March, 2010. At this point, the officers of the company were called in for a show cause meeting. At this meeting the MTO became aware for the first time of Mr. Pandher's involvement with the company. At that time, Mr. Pandher explained that he had bought the company two years earlier but that his accountant had not made the required changes. A second show cause meeting was called in July 2010 specifically to deal with the purchase of CD Transport by Mr. Pandher and his history of non-compliance. At that meeting, Mr. Pandher asserted that he had not notified MTO of his ownership of CD Transport because he had not yet notified the Ministry of Government Services of the change. However, MTO showed Mr. Pandher a copy of a profile report by the Ministry of Government Services showing the correct ownership. Mr. Pandher said he was unaware that the changes had been filed. Mr. Pandher's explanations are not credible.

In August 2009, Mr. Pandher hired an outside consultant to attempt to improve the safety rating of CD Transport. A representative of this company gave evidence of multiple changes in the procedures of the company, in particular the hiring of drivers, their testing, the inspection of their log books and their discipline. Based on these changes, CD Transport believed that it could lower its overall safety violation rate to approximately 65% by October, 2010 as prior driver infractions dropped off CD Transport's record. However, due primarily to a new driver conviction, this result was not achieved and CD Transport's overall safety violation rate remains at slightly under 100% at last measure.

The consultant does review driver logs and has instituted basic management processes. However, the consultant company does not have a representative on site at CD Transport and depends on Mr. Pandher for some of the information on which it

relies. As well, it is Mr. Pandher who conducts the road tests of new drivers. This is relevant because it is the road safety record of the drivers of CD Transport that is the principal factor in the unacceptable safety rating of the company.

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.

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 CD Transport, and the other evidence that the Tribunal considers relevant, that CD Transport will not operate a commercial motor vehicle safely or in accordance with the law? Secondly, if the answer to the first question is yes, then what ought to be done?

The Tribunal has a number of concerns about the operation of CD Transport. The rapid deterioration of the overall safety violation rate of CD Transport when Mr. Pandher assumed control provides strong evidence that Mr. Pandher has not learned the lessons of his earlier CVOR experience. Mr. Pandher did hire an outside consultant in August of 2009, before he faced sanctions for the safety record of CD Transport. However, he had already been forced out of business once because he could not get insurance and he had received a Warning Letter from the Deputy Registrar about the operations of CD Transport. This cannot be regarded as proactive management.

Mr. Reynolds, the Paralegal for CD Transport, also noted that the safety record had improved since the consultants were hired and this ought to be considered in determining whether there are legitimate grounds for concern about CD Transport. It is true that the safety record has improved. However, the Tribunal is concerned that these improvements are fragile. There is no safety and compliance employee or consultant on site. The consultant who gave evidence has no formal training in safety and compliance. Instead, the consultants depend on Mr. Pandher to perform key tasks including conducting driver road tests. In fact, the consultants simply take Mr. Pandher's word that these tests are being done. Given Mr. Pandher's record of mismanagement of CVOR companies, this is not an acceptable arrangement. The results of the changes made by the consultants are that CD Transport's overall safety violation rate is slightly below 100%, an unacceptable rating.

Mr. Reynolds noted that MTO relied on the police reports in determining why drivers had been convicted of offences, a key problem at CD Transport. He argues that this reliance is misplaced as the police on the scene may sometimes misjudge the situation. However, if the driver feels the facts have been misrepresented in the police report, the driver is free to contest the matter in court. The fact is that entirely unacceptable levels of driver convictions have been entered against drivers at CD Transport. Further, there continue to be driver related safety infractions and this directly impacts public safety on the road.

The Tribunal is also troubled by the conduct of Mr. Pandher. Rather than address the problems that plagued his earlier business, he engaged in repeated deceptions to obtain CD Transport without the MTO being aware of his involvement. This pattern of deception is a serious matter and cannot give confidence that Mr. Pandher intends to operate his business in accordance with the law. As well, the Tribunal has no confidence that Mr. Pandher is sincere in his efforts to improve the safety of CD Transport.

There can be no assurance that Mr. Pandher will continue to implement needed driver training and safety management processes if he is permitted to remain in business. There was no evidence given as to the term of contract Mr. Pandher has with the consultants, for example.

Given Mr. Pandher's deceptive dealings with MTO, his recurring record of unacceptable safety operations and the lack of results achieved as a result of his attempts to improve the situation, the Tribunal has strong evidence to believe that CD Transport will not operate a commercial motor vehicle safely or in accordance with the law.

CD Transport is currently operating below the required safety levels and, as long as Mr. Pandher is managing the company, it is not realistic to expect the safety of the operations to improve to acceptable levels. In light of this, the Tribunal believes that the CVOR certificate of CD Transport must be cancelled.

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 Cancellation and Seizure Order of July 20, 2010, against the Applicant C D Transport Corp.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice-Chair

RELEASED: January 12, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1811519 ONTARIO INC. o/a BESTWAY WASTE MANAGEMENT-Order

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

TO REFUSE TO ISSUE A COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: RANDALL BURCH, Agent, representing the Applicant

DOUGLAS LEE, Counsel, representing the Deputy Registrar

DATES OF HEARING: November 10, 2010
January 21, 2011 Toronto

INTERIM ORDER

On July 20, 2010, the Deputy Registrar under the *Highway Traffic Act,* R.S.O. 1990, c. H.8 (the "Act") refused to issue a Commercial Vehicle Operator's Registration ("CVOR") certificate to 1811519 Ontario Inc. o/a Bestway Waste Management ("Bestway") on the grounds that the Deputy Registrar had concerns about the safety records of related companies and on the grounds of unpaid fines by both Bestway and the predecessor company, Western Waste & Recyclers Inc. ("Western Waste"). On August 16, 2010 the Deputy Registrar issued a Notice of Cancellation and Seizure affecting Bestway and two other companies. This is an appeal by Bestway to the Licence Appeal Tribunal (the "Tribunal") from those decisions and orders as they affect Bestway.

During closing submissions, Mr. Lee, Counsel for the Deputy Registrar, and Mr. Burch, Agent for Bestway, were given the opportunity to make written submissions on any terms and conditions that might be attached to the CVOR certificate of Bestway if the Tribunal, after reviewing the evidence and considering the closing submissions, decides that a refusal to issue the CVOR certificate is not appropriate.

For further clarity, any terms and conditions would need to address the following areas of concern. First, there would need to be an ongoing commitment by Bestway to

operate with an acceptable overall safety violation rate. The Tribunal is interested in knowing whether an action plan to achieve this would be appropriate and if so, how such an action plan would be prepared, submitted and approved by the Deputy Registrar. Second, terms and conditions would be required to address the outstanding fines owed by the predecessor company to Bestway, Western Waste. Specifically, at a minimum, the terms and conditions would need to set a schedule of repayments or some other timely repayment provision and, if practicable, provide for regular reporting to the Ministry of Transportation of payments made. If any fleet restrictions are proposed as a condition of issuing a CVOR certificate to Bestway, then the proposed duration of such fleet restrictions and any preconditions to lifting the restriction should be detailed. The consequences of a failure to meet any of the terms and conditions should be specified.

The Tribunal would appreciate any submissions on the question of the jurisdiction of the Tribunal to impose any terms and conditions and any consequences for the breach of such conditions. The above is in addition to any other submissions the parties wish to make concerning the appropriate penalty that should apply to Bestway.

Accordingly, the Tribunal orders that by January 31, 2011, the Deputy Registrar may make written submissions as to penalty and by February 16, 2011, Bestway may make written submissions as to penalty in reply. Submissions should be sent both to the Tribunal and to the other party.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice-Chair

RELEASED: January 24, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

2105360 Ontario Inc. Lee Trans Corporation, and 1565262 Ontario Inc.

APPEAL FROM AN ORDER DATED SEPTEMBER 14, 2010, OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES MADE PURSUANT TO SECTION 47 and 47(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8

TO CANCEL AND SEIZE THE CVOR CERTIFICATES AND THE PLATE PORTION OF ALL PERMITS

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: MARK REYNOLDS, Agent, representing the Applicants

DOUGLAS LEE, Counsel, representing the Registrar of Motor Vehicles, Respondent

DATE OF HEARING: December 13 and 14, 2010 Toronto

DECISION AND ORDER

BACKGROUND

This is an appeal of an order of the Deputy Registrar of Motor Vehicles (the 'Registrar'), dated September 14th, 2010, to cancel the Commercial Vehicle Operator's Registration (CVOR) certificates 155-643-257, 125-495-116, 144-940-283 issued to 2105360 Ontario Inc., Lee Trans Corporation and 1565252 Ontario Inc.,(the 'Applicants'), and seize the plate portion of permits issued pursuant to s. 47 and 47(1) of the *Highway Traffic Act* (the 'Act'). .

The two Applicants 2105360 Ontario Inc. and 1565252 Ontario Inc., were issued CVOR certificates in 2006 and 2003 respectively, and currently operate a gravel hauling business out of the same location. The Applicant Lee Trans Corporation was in the same business but there has been no recorded activity for it since 2006. The President of 2105380 Ontario Inc. and Lee Trans Corporation are the same individual and he is the father of the President of 1565252 Ontario Inc.

The CVOR certificate for Lee Trans Corporation was previously suspended for a period of 24 days in 2004.

ISSUES

1. Does the Tribunal have reason to believe, having regard to the safety record of the Applicants and any other relevant information before it, that the Applicants will not operate a commercial motor vehicle safely or in accordance with the Act, the regulations and other laws relating to highway safety?

2. If the answer to this question is yes, what Order should the Tribunal Make?

EVIDENCE

The evidence of the Respondent consisted of documentation and the testimony of Sherry Atallah, Carrier Safety Rating Administrator.

The evidence of the Applicant consisted of documentation and the testimony of Freda Dimopoulos, an industry consultant.

The following is a summary of the relevant evidence.

Testimony of Sherry Atallah

Ms. Atallah is employed with the Ministry of Transportation (MTO) as a Carrier Safety Rating Administrator. It is her job, among other things, to analyze a carrier's record to determine if a sanction should be recommended, to meet with carriers who have reached their threshold in order to develop an action plan, and to attend 'show cause' meetings. She has been employed with the MTO since 2001 and has been previously involved with the Applicants, including the suspension issued against the Applicant Lee Trans Corporation in 2004.

The CVOR and the Carrier Safety Rating system is in place for the purpose of promoting the safe operation of commercial vehicles on Ontario Roads. The details of how the CVOR system works is set out in "Ontario's CVOR and Carrier Safety Rating Public Guideline"[1] (the 'Guideline') which is available to the public on line and at MTO offices. The Guideline sets out the numerous responsibilities of an operator which include the monitoring its CVOR record, and being responsible for the conduct of its drivers and the mechanical safety condition of its vehicles.

The CVOR system monitors a carrier's CVOR record over a twenty-four month period. It is an automated computer system and contains information that includes details of

[1] Exhibit 3, tab 25

fleet size, kilometers travelled, commodity transported, overall violation rate and safety rating for each operator. It also includes convictions, reportable collisions, Commercial Vehicle Safety Alliance ('CVSA') safety inspection results and any Ministry interventions that have occurred. CVSA inspection standards are a set of standards applied by all jurisdictions across North America.

The kilometer travel of a carrier is used in determining violation rates and is provided to the MTO by the carriers. Every carrier can monitor its own CVOR record by obtaining a level II abstract. It is available for a fee of five dollars off the internet. It is also provided to a carrier by the MTO in a number of circumstances, for example when a warning letter is sent by the Ministry, when a carrier is requested to come into a meeting or when a sanction is proposed.

Road side inspections conducted according with CVSA standards provide details of the number of defects, out of service defects or critical defects, (the latter type of defect will lead to an impoundment) found on to the vehicle at the time of inspection, Defects might also be found with respect the Driver and his industry required documentation.

The CVOR record also includes the results of any 'Facility Audits', which involves the examination of vehicle and driver records on site. As with the results of inspections and collisions and convictions, a facility audit is done with a scoring component. All these results are taken into consideration in determining a carrier's violation rates.

A carrier's 'threshold' is the safety performance standard, (violation rate) that it is expected not to exceed and is based on industry performance data. The CVOR system calculates a carrier's violation rate for collisions, convictions and inspections and then compares it to the threshold (violation rate) it is expected not to exceed and is expressed as a percentage of the threshold. An increase in the percentage of threshold, indicates an increasingly poor violation rate.

Although CVOR system is an automated system the record of a carrier is reviewed by individuals prior to any action being taken against a carrier. When a carrier is at 35% of threshold, a letter of warning is sent. When 50 % of threshold is reached, an audit may be triggered. When the violation reaches 85% a meeting is requested– when over 100%, a sanction initiated. Each step may not always be followed in each instance, it is up to the discretion of the Registrar. Less than 1% of carriers reach the sanction stage.[2]

The most severe sanctions include seizure, fleet reduction, or cancellation. Another sanction is the assigning of an unsatisfactory safety rating, which is a public label. The 'rating' is based on a carrier's safety record. When a carrier's violation rate exceeds 70%, its rating can go down to a 'Conditional rating. 'Unsatisfactory' is assigned when a sanction is ordered. The safety record of 2105360 indicates that it only achieved a 'satisfactory' safety rating between March 10, 2009, to July 26, 2009.

[2] Exhibit 3 tab 26

Ms. Atallah clarified the difference between having an ‘excellent’ rating for a facility audit, which is based on the on-site examination of a carrier’s records and an excellent ‘safety rating’ which relates to the actual on-road performance. A carrier would have to have a violation rate between 0 to 15%, and a low collision rate in order to be given an ‘excellent’ safety rating.

Following the notice of the cancellation, a ‘show cause’ meeting was held on August 31, 2010. . This meeting is viewed as an opportunity for the carrier to provide submissions as to why the Registrar should not go forward with the sanction. Ms. Atallah attended the meeting At the end the Registrar remained concerned that the Applicants were in the same position, as a result of the same issues, as in 2004. Nothing seemed changed. The fact that the Applicant’s consultant in attendance at the meeting had only recently been engaged and the safety plan presented was the same as in 2004 caused concern. .

Although the two numbered companies have each passed facility audits during the twenty four month period being examined, the on road performance did not show, in the Registrar’s opinion, that the safety requirements that were on the books were in fact being done. The collisions, convictions and inspections results showed otherwise. Inspection results indicated the same defect was found on the same truck only a couple of months apart, suggesting that the inspections records were not being handed in by the drivers so action could be taken. The approach to driver problems appeared the same: the same memos were issued to drivers regarding safety issues in 2004 and in 2010. Driver training seemed to be taken in reaction to accidents, rather than as proactive measures, and the additional training undertaken did not seem to make a difference as further accidents occurred.

Explanations given by the President of 2105380 Ontario Inc., and Lee Trans Corporation, at the show cause meeting were similar to those given by him prior to the sanction of Lee Trans Corporation in 2004. These explanations included that the driver’s did not hand in the tickets and therefore he did not know about them and that there was a language barrier with the drivers. Many of the same drivers work for both numbered companies. The driver discipline policy is the same for all the Applicants and is the same that was in place in 2004. The Registrar’s concern is that policies are not being enforced, and training programs are not being effective. Lee Trans Corporation has already been given a suspension over the same issue. The fact that the sanction did not bring about improvement was of real concern.

During the two year review period the vehicles of 2105360 Ontario were in 9 collisions, 6 involving driver impropriety. Some details of these accidents were reviewed by Ms. Atallah as follows:

1. May 18, 2010, the driver of the Applicant’s vehicle swerved into a lane and hit another vehicle; the Applicant’s vehicle had no damage, the other vehicle some. The driver was charged with improper lane change.

2. May 3, 2010, the accident was reported at a reporting centre where an officer determined that the driver of the Applicant's vehicle was following too close and struck the vehicle ahead when traffic came to a stop.

3. January 18, 2010, the same driver who was involved in the May 18, 2010 accident side-swiped another car, causing it to spin out into ditch. The Applicant's Driver was charged with an improper lane change. The Applicant's vehicle was slightly damaged;, the other car involved was demolished.

4. October 6, 2009, the driver for the Applicant's vehicle was charged with disobeying a traffic light after his vehicle struck another. There was minor damage to the truck and moderate damage to the second vehicle.

5. July 20, 2009, there was single vehicle accident. The driver of the vehicle turned a corner too fast; the vehicle rolled on its side and spilt its load. The driver was charged with making an unsafe move.

During this same period 1565252vehicles were involved in 3 collisions, 2 involving driver impropriety.

Ms. Atallah reviewed some of the results of the road side inspections and suggested that there are recurring themes: overweight loads, tires, brakes, suspensions. There also appeared to be repeated defects of the same nature, (tires, out of service), on the same vehicle, in a relatively short period of time.[3]

The out of service rate for 1565252 Ontario Inc. was 44.74%, or,almost one out over every two vehicles inspected is put out of service.

Freda Dimopoulos

Ms. Dimopoulos was hired as a consultant by the Applicants (specifically the numbered companies) approximately 2 and a half years ago to help them with their hours of service and trip inspections. She was previously employed by the MTO as an enforcement officer. She has approximately 24 years experience working the scales, then as an investigator and auditor. She left the Ministry in 2005.

Ms. Dimopoulos attends the Applicants' business on a regular basis, 2 to 3 times a month, at which time she reviews the hours of service and trip inspection documentation to ensure compliance. She also does some disciplinary work with the drivers; she calls them in if she discovers any issues. She looks at trip inspection reports to make sure all the items are filled in and discusses any problems with the drivers. It was her opinion that the drivers have improve considerably in filing the appropriate documentation in the past two and a half years. At the time she began her work with drivers they were not filling out any kind of documentation.

[3] Exhibit 3, pgs 246 and 262

Ms. Dimopoulos reviewed the Applicants' discipline policy set out in the "Company Manual"[4]. It is a three strike policy, the first incident involving a driver results in a verbal review of the problem with the driver and a two week probationary period. The manual also indicates that if warranted the more serious action of a written warning may be given. This written warning is to be placed in the employee's file and registered as their 'first strike', and to remain so for "no less than six months". On the second incident, there is a written warning and a company fine of $100 would be levied against the employee. The employee also may be suspended without pay for no less than 3 days. The Manual suggests either or both the fine and suspension may be imposed and a 'permanent' record will be attached to the employee's file for a period of no less than two years. On the third incident the employee may be terminated or possibly retrained, as they (the Applicants) want to try every means to get a driver to come into compliance before they terminate him. The Manual states that any decision of an employee termination shall be brought to the attention of the President of the company and can be overturned.

In terms of hiring, drivers must complete an application, a road test and provide both the CVOR and Driver's abstract. The abstracts are reviewed by the President(s). Ms. Dimopoulos stated that the Applicants are going to be asking prospective employees to provide a criminal check. The Tribunal understood this to be suggesting that this is a next step, however, this appears to be a current requirement as stated in the Company Manual. If a prospected driver has an 'at fault' accident in the last two years they will not be considered or if they have 3 demerit points or more they will not be considered. Ms. Dimopoulos indicated she believes the road test is conducted by the President(s) and that they recently hired a safety compliance officer.

The policy with respect to accidents is for the drivers to call police/ 911 and then call dispatch and provide as much detail as possible. If a driver is found to be "at fault" the policy is that the driver will be put on probation for two weeks. In cross-examination the witness conceded she was not certain as to what this implies. The witness also testified that the drivers receive memos regarding safety concerns and that safety meetings have been implemented. The witness was not completely clear on the frequency of the meetings. She indicated that these meetings were mandatory for all drivers, although in cross-examination it was agreed that some drivers had not attended the meetings.

The Applicants also have a program for preventative maintenance which the witness has helped to set up and monitor, to ensure that the program is being documented. There is a policy re unpaid fines; currently all fines have been paid.

In March of 2010 Ms. Dimopoulos suggested to the President(s) of the numbered companies that additional driver training should be undertaken. Two courses were pursued, one on defensive driving and one on air brakes systems. This was around the same time the Applicants began the safety meetings. This initiative was in response to

[4] Exhibit 5, tab B

the violation rate and the witness testified that it has been of help that the drivers were trying to improve. Her assessment was that it was a matter of the Presidents being stricter with the drivers.

Ms. Dimopoulos also recommended that the Applicants obtain a CVOR abstract on a regular basis. She recommends every 6 months.

Ms. Dimopoulos reviewed the two favourable 'Facility Audit Findings', the first dated July 23, 2008, for 2105360 Ontario Inc. in which the operator scored 94.4% compliance. [5] It passed all areas: Drivers 88.9%, Vehicles 100% and Safety Programs and Training 62.5%. The second related to 1565252 Ontario Inc., dated July 27, 2009. [6] This operator achieved an overall compliance rate of 97.5%. In her opinion it was very rare for an operator to score so high, and she testified that the audit tells you that the operator is operating in compliance and that if he scores high he is obviously doing something right. When asked how it can be determine that the maintenance is actually being done, she indicated it was through the road side inspections, done by MTO or local police.

Ms. Dimopolous has seen a progressive improvement. Drivers were not marking defects on trip inspections but now are and having on sight maintenance means drivers can give defect reports directly to maintenance. This improvement was achieved through discipline and explaining the importance of trip inspections. Her testimony was that the drivers were a "little bit more conscientious" concerning inspections

With respect to any language barriers, the witness testified that on the whole there are several drivers who speak English well and are able to translate for the others. Overall the witness indicated that she was hoping to see improvement, and the main area to be addressed is driver error, which, she acknowledged, seems to be a problem.

Ms. Dimopoulos confirmed she has had experience carrying out CVSA inspections. She reviewed some of the particulars set out in the CVOR printout for Applicant 210560 Ontario Inc. [7] and provided some comments and further explanation of the results.

1. An inspection done on 2010/06/07 indicated there were 4 defects, although no out of service. Two related to the lighting system on the truck tractor, she pointed out that this type of defect could happen at any time and therefore raises the question whether they were preventable. Other defects identified as 'suspension system' and 'wheels/RIMS" were not clear as to what they were but were not a danger or would have been categorized differently, they were not 'OOS' or 'out of service'. It is a problem that should be corrected but not an immediate concern.

2. With respect to the inspection report dated 2010/04/13, two defects were

[5] Exhibit 5 tab O
[6] Exhibit 5 tab N
[7] Exhibit 3, tab 7, pgs 99 to 160

noted, one relating again to a stop lamp on the trailer which was categorized as OOS, the other relating to the air supply to the brake system. According to the inspection report there was an air leak although the truck passed the air loss test and it was not found to be an 'OOS' defect. The witness testified that this could be a small leak or it could be a hose 'chaffing'. and putting it on the report is a way to bring attention to the issue as it can lead to problems. But, unless it is 'down to the cord' air loss is not necessarily a defect. It is at an officer's discretion as to whether it is a defect. If the compressor can keep up to the air leak it would not be put OOS.

3. The inspection dated 2010/03/12 gave rise to 4 defects, two relating to axle weights. It was pointed out that the CVSA does not speak to axle weights as an 'OOS' defect. This issue comes about when the shipper loads the trucks, not necessarily where the driver wants it, Loading is something the driver does not have control over and the driver is not allowed to readjust the load at most gravel pits, the witness testified. The gross weight was in this instance within what was allowable.

4. The two defects noted at the time of inspection on 2010/03/11 were also relating to axle weights, although the gross weight was within what was allowable. The driver would not know about the axle weights, and the pits would not have the equipment to measure axle weights. .

5. Inspection 2008/08/19 noted that there was two defects, one 'OOS' relating to a flat tire; the other defect was for not having done a pre-trip inspection. The witness pointed out that a flat tire can happen at any time, that the officer was not necessarily obliged to find it an 'OOS' defect, the fact it had not been noted by the driver the does not mean that a pre-trip inspection was not done.

Ms. Dimopoulos stated that, in her experience, gravel companies have a hard time, they often make the same trip four to six times a day and the terrain they travel is very hard with a lot of stones, increasing the chance for all sorts of things happening to the vehicles. And because they travel the same roads, and make so many trips, they get overly inspected. Applicant 210560 Ontario Inc. has a fleet of 15, and had approximately 60 inspections in the 24 month period reviewed. This was not a normal amount of inspections in the witness's opinion but they do travel the same routes more than once a day. The Applicant 1565252 Ontario Inc. has a fleet size of 12 and had 38 inspections in the same period, also a very high number of inspections.

The Witness acknowledged that overall violation rates of 115.18% and 88.6% are problematic, as is the overall OOS rage of 44.74% for 1565252 Ontario Inc.

Ms. Dimopoulos indicated in cross examination that she believed that the Applicants were obtaining a CVOR abstract on a regular basis. She initially prompted the Applicants to get abstracts, not in response to anything other than her belief that they

should be checked to see what the violations rates were. She acknowledged she had probably recommended it before as she regularly recommends this to clients: how frequent is up to them. She acknowledged that the operators should be able to do this without prompting.

THE LAW:

The *Highway Traffic Act,* R.S.O. 1990, Chapter H.8 as amended provides that:

> 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
> (b) a driver's licence; or
> (c) a CVOR certificate,
>
> on the grounds of,
>
> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
> (e) conviction of the holder for an offence referred to in subsection 210 (1) or (2);
> (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
> (g) any other sufficient reason not referred to in clause (d), (e) or (f).
>
> (2) As an alternative to a suspension or concellation 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 certificiate during the period that the Registrar stipulates.

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ANALYSIS

The material facts of this case are not in dispute. The Applicants are related companies and the accuracy of the information contained in the CVOR safety record for the two numbered companies has not been challenged. It has been suggested that some of the defects noted in the inspection reports for 2105360 Ontario Inc. were items that had an element of discretion, which was simply not exercised in the company's favour. It was also suggested that these companies have been subjected to a much higher rate of inspection than normal. This may be true. The explanation for this appears to relate to the nature of the Applicants' business which requires frequent trips on the same roads. This may be frustrating to the Applicants but it was not obvious to the Tribunal that this should be taken as a reason to discount the inspection findings.

It has also been acknowledged that the collision and conviction rates for the Applicant 2105360 Ontario Inc. are problematic. There were 6 accidents involving driver error in a two year period. The evidence of both parties suggests that this high violation rate

relates to the issue of driver discipline or the lack thereof. This problem is not new; it was an identified problem 6 years ago at the time of the suspension of Lee Trans Corporation.

The Tribunal agrees with the Registrar that the two related numbered companies, 1565252 Ontario Inc. and 2105360 Ontario Inc., in particular the latter, now appear to be in the same position with the same issues as Lee Trans Corporation had been in at the time of the previous sanction. The CVOR system is simply a monitoring system, it is up to the operators to ensure that drivers are qualified and vehicles are maintained. The Applicants have had ample warning of what their responsibilities are, and ample time to figure out a way to ensure that those responsibilities were met, yet they have failed to do so. The Tribunal sees no reason why they should be held to a lesser standard than other carriers in the industry, to do so jeopardizes public safety.

It has been argued that the Applicants are not “beyond redemption”; however, there was little or no evidence before the Tribunal as to how they are trying to accomplish this redemption and given their history it cannot simply be assumed. Ms. Dimopoulos indicated that when she first started working with the Applicant, about two and a half years ago, the Applicant’s drivers were hardly doing any of the required documentation. One would have thought that the previous suspension and appeal process would have made the Applicants intimately aware of all that needed to be done to be in compliance, and would have given the Presidents a clear understanding of the importance of maintaining a good safety record.

Although the Tribunal has noted that things improved with Ms. Dimopoulos’s involvement and that both numbered companies have scored ‘excellent’ on a facility audit, there is little or no evidence that the improvement in compliance in this area has translated to an improved safety record as one would have expected. In view of this fact, this achievement is not adequate evidence, in the Tribunal’s opinion, to provide confidence that improved road safety is achievable by these Applicants and there was no other evidence put forward to satisfy the Tribunal that there have been or will be permanent changes in policy or in the approach to safety. The Tribunal finds that the evidence submitted by the Registrar provides reasonable grounds to believe that the Applicants will not operate a commercial motor vehicle safely or in accordance with the law.

It was argued that a sanction other than cancellation would be more appropriate. However, a suspension has not worked in the past. The Tribunal is unable to come up with any reason why a reduced fleet size would address the concerns raised and there were no submissions made on this point to convince the Tribunal otherwise.

ORDER

The Tribunal, by the authority invested in it under Section 50(1) of the Act, orders the

Deputy Registrar to carry out the Cancellation and Seizure Order dated September 14, 2010 cancelling the CVOR certificates of the Applicants and seizing the plate portion of permits issued for their vehicles.

LICENCE APPEAL TRIBUNAL

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ELIZABETH SPROULE, Vice-Chair

RELEASED: January 17, 2011

This decisio may also be available on Quicklaw.

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1811519 ONTARIO INC. o/a BESTWAY WASTE MANAGEMENT

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

TO REFUSE TO ISSUE A COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: RANDALL BURCH, Agent, representing the Applicant

DOUGLAS LEE, Counsel, representing the Deputy Registrar

DATES OF HEARING: November 10, 2010
January 21, 2011 Toronto

DECISION AND ORDER

On August 23, 2010, the Deputy Registrar under the *Highway Traffic Act,* R.S.O. 1990, c. H.8 (the "Act") refused to issue a Commercial Vehicle Operator's Registration ("CVOR") certificate to 1811519 Ontario Inc. o/a Bestway Waste Management ("Bestway") on the grounds that the Deputy Registrar had concerns about the safety records of related companies and on the grounds of unpaid fines in the amount of approximately $27,000. On August 16, 2010 The Deputy Registrar issued a Notice of Cancellation and Seizure affecting Bestway and two other companies. This is an appeal by Bestway to the Licence Appeal Tribunal (the "Tribunal") from those decisions and orders as they affect Bestway.

FACTS

Mr. Paolo Rossi is the President of Bestway and he also had control of the two other companies referred to in the Deputy Registrar's August 23rd refusal to issue a CVOR certificate. One of those companies is Western Waste and Recyclers Inc. ("Western Waste") and the other is The Young Disposal Co. Ltd. ("Young Disposal").

All CVOR certificate holders operate within a regulatory regime. Currently, the regime for granting 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 both drivers and vehicles and arrives at a weighted violation rate which is measured over a rolling 24-month period and which is compared to a threshold rate. If the weighted violation rate reaches 35% of the threshold rate, then the CVOR holder is issued a warning letter. If the weighted violation rate is between 50% and 84% of the threshold then a facility audit is undertaken, which may result in further action being required. If the weighted violation rate is between 85% 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. Sanctions may result. If the weighted violation rate exceeds 100% of the threshold rate, 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 cancellation of the CVOR certificate. When suspensions are proposed, the CVOR certificate holder has an opportunity to show cause why the suspension should not occur. Over 80% of show cause meetings result in CVOR certificate holders reforming their operations to the point where no further intervention is required. Fewer than .01% of carriers require further sanctions.

Mr. Paolo Rossi began operating Western Waste as its President in 1995. In 1996, the company was issued a warning letter, which did not produce the desired result. In 1999, the company failed a Facility Audit and was assigned a Conditional Safety Rating. The safety record of Young Disposal was also of concern and that company underwent two facility audits before voluntarily terminating its CVOR certificate in 2005.

Following the 1999 Facility Audit of Western Waste, there was no further intervention required until 2004, when the company's safety record again deteriorated to the point where a warning letter was issued. By March, 2005, the Overall Safety Violation Rate for Western Waste had risen to 94.5% and Mr. Rossi was called in for a sanction meeting and produced an action plan. Nevertheless, two years later, the company's performance again deteriorated and in March, 2007 a warning letter was issued. In April, 2009 another warning letter was required and in June of that year, the CVOR certificate of Western Waste expired and was not renewed.

In 2007, after two orders to desist had been issued by the Ontario Ministry of the Environment, Western Waste was convicted under the *Environmental Protection Act,* R.S.O. 1990, c E.19 (the "EPA") of offences related to the illegal operation of a waste transfer site. Western Waste was ordered by the Superior Court of Justice to close the site and remove the waste by June, 2007. In 2008, Mr. Rossi was found by the Superior Court of Justice to be in contempt of an earlier order concerning some equipment that had been leased to Western Waste. In 2009, both the company and Mr. Rossi were convicted of failing to remove waste from the company's property and failing to ensure that no further waste was deposited at the company site. Further fines were

imposed. These fines include approximately $20,000 that are due and owing now and a further substantial amount that will become due in the summer of this year. In addition, Western Waste has fines totalling approximately $7,300 for offences under the Act. Mr. Rossi has been making payments towards these fines since the fall of 2010 and has expressed his determination to pay all fines that are owed by him. Given that Western Waste and Young Disposal are no longer operating, there is some question as to what fines remain owing by Mr. Rossi personally. However, Mr. Rossi stated that he intended to seek clarification of the amount he was liable for under the EPA.

It is unusual that one company would incur four warning letters, even over a span of 14 years and this, together with the extremely poor safety record of the company in 2005, causes the Deputy Registrar concern about the safe operation of Bestway, given that Mr. Rossi will also be operating that company. As well, the Deputy Registrar is concerned about the unpaid fines under the EPA and the Act. Further, the Deputy Registrar is concerned that Bestway is operating despite not being granted a CVOR certificate.

Mr. Rossi testified that the past 7 years of his life have been a nightmare. There has been a catastrophic combination of serious health issues, business reverses and marital problems that have left him unable to focus on the management of his CVOR business. Increasingly, other people were operating the business as Mr. Rossi cycled in and out of hospital. There is no evidence that Mr. Rossi appointed an experienced manager to care for the business in his absence. Instead, he left inexperienced and untrained people to conduct his business while he was unable to do so. He felt he had no choice but to try to continue operating his business during this time in part due to the financial pressures he is under. One of the financial pressures he has felt has been the need to make court ordered alimony payments.

Mr. Rossi concedes that he has been operating Bestway while his CVOR certificate was pending. He also testified that, in an effort to hold his business together, he has driven heavy equipment, including a truck, while on a morphine patch. He conceded that while on morphine, his judgment was sometimes “somewhat clouded.” He is off morphine now although still on pain killers. He is now out of the hospital, although he does expect to undergo one more operation in 2011.

Mr. Rossi wants to get back to basics with his new business, Bestway. Bestway has four trucks now, two in operation and two on stand-by. He and a long time driver of his are the only carriers of the new operation and he inspects the trucks personally. He has a mechanic in twice a week to look over the equipment. The last time he was pulled over at a weigh scale he was told that there was a big improvement and he is determined to stay on top of his business.

As of the last measurement, in September, 2010, Bestway had an overall violation rate of 8.85% and Mr. Rossi advises that the company has not had an accident or other incident since. As of July, 2010, the Overall Violation Rate of Western Waste was 34.6%. The company had not operated for approximately a year at that point.

During closing argument, Mr. Lee, the counsel for the Deputy Registrar, referred to a statement in the documents submitted by the Deputy Registrar. The reference is to a "system note" dated June, 2009 which indicates that the CVOR certificate of Western Waste was revoked due to an attempted payment of some amount owing that was refused due to insufficient funds. Mr. Lee advised that that rejected payment was for a renewal fee and that under the Act a cheque submitted for a renewal fee that is not honoured is grounds for cancellation of the CVOR certificate at the discretion of the Registrar. However, the Deputy Registrar's witness did not mention this in her testimony and neither did Mr. Rossi address it. He was not cross-examined about it. Further, the system note is not specific about what the rejected payment was for and there is evidence that suggests that it was not for a renewal fee. The chronology of events submitted by the Deputy Registrar says that the CVOR certificate of Western Waste expired in 2009 and it does not refer to a dishonoured cheque. It would not be fair to use the ambiguous evidence against Mr. Rossi when he was not given an opportunity to deny or explain it. Therefore, this evidence was not relied upon by the Tribunal.

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.

Under subsection 16(2) of the Act, no one may operate a commercial vehicle without a valid CVOR certificate. Under subsection 17(2):

> The Registrar may refuse to issue a CVOR certificate to an applicant if the Registrar has reason to believe, having regard to the applicant's safety record and any other information that the Registrar considers relevant, that the applicant will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

Subsection 17(3) grants the Registrar the discretion to refuse to issue a CVOR certificate to any person related to a person whose CVOR certificate which has been cancelled. Mr. Lee advises that the Registrar rarely grants a CVOR certificate to any related person following a cancellation. Section 47 of the Act contains similar provisions to those of subsections 17(2) and 17(3) regarding the cancellation of an existing CVOR certificate.

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.

DECISION

There are two questions before the Tribunal. First, to paraphrase subsection 17(2) of the Act, does the Tribunal have reason to believe, having regard to the safety record of Western Waste and Bestway, and the other evidence that the Tribunal considers relevant, that Bestway will not operate a commercial motor vehicle safely or in accordance with the law relating to highway safety? Secondly, if the answer to the first question is yes, then what ought to be done?

The safety record of Western Waste was a marginal one while the company was operating. While the safety violation rate only once approached 100%, it has repeatedly gone above 35%, triggering four Warning Letters. However, at present, the safety violation rate of Western Waste is below 35% and the safety violation rate of Bestway is below 10%. Therefore the Tribunal concludes that having regard only for the safety record of Western Waste and Bestway, there is no compelling reason to believe that Bestway will not operate a commercial motor vehicle safely.

The Tribunal does have concerns about whether Bestway will operate in accordance with the law relating to highway safety. Mr. Rossi is the owner of Bestway and he is also the sole director of Western Waste, a company which is insolvent. Western Waste was operating under the EPA regulatory system for the maintenance of an approved waste disposal facility. The company defied two ministry orders to stop dumping waste and remove the waste from an unapproved part of the property. The company subsequently defied a Court order to close the site and incurred a further conviction for that. Mr. Rossi was found to be in contempt of a Court Order relating to the lease of certain equipment to Western Waste. This conduct raises concerns about whether Mr. Rossi will comply with a regulatory scheme such as the one which governs CVOR operations. The fact that Mr. Rossi has been operating Bestway despite not having a CVOR certificate also raises concerns about whether Mr. Rossi will comply with the Act. Mr. Rossi, in his testimony, demonstrated no remorse for operating Bestway in violation of the Act. Rather, he explained that he had been able to obtain insurance and he seemed to regard that as sufficient to continue operation. Mr Rossi appears to be a sophisticated businessman. As such, he may be expected to understand that any claim made under an insurance policy that is predicated on his having a valid CVOR certificate is going to be problematic. Mr. Rossi expressed no concern for the consequences that might arise if Bestway were involved in a serious accident while it was operating in violation of the Act. Instead, he insisted that he needed to operate his business in order to pay his bills, including his court ordered alimony payments.

Mr. Rossi has been through a terrible period in his life and it is clear that he is desperate to hang on to his business and to rebuild it. Despite the old saying that “desperate men do desperate things”, desperate people of good judgement and a respect for the law do very different things than people who lack that judgement and respect. Mr. Rossi has

shown disrespect for the law both in his conduct under the EPA regulatory scheme and in operating without a CVOR certificate in violation of the Act. He has also shown startlingly bad judgement, not only in his disregard for the law but also in operating heavy equipment and a truck while on a morphine patch. Here again, it does not appear to have occurred to Mr. Rossi that someone might have been badly injured because he was driving under the influence of morphine. He explained that he had to hold his business together, as though this were a full justification for his actions.

Therefore, there are legitimate grounds for concerns about Mr. Rossi's ability to operate in accordance with the regulatory scheme in the Act. However, there are also real reasons to believe that Mr. Rossi is determined to face the consequences of his previous behaviour. He is determined to pay any fines he owes under the EPA and the Act for the operations of Western Waste. More importantly, he has begun to make these payments. Further, he has reduced the size of his operation and is involving himself directly in the safe operation of his trucks. It is important to note that the last time his truck was inspected, the inspector noted a big improvement.

Mr. Rossi submitted terms and conditions that he stated he would be prepared to adhere to if he is permitted to continue his operation. However, the Tribunal believes that there are at present legitimate concerns about Mr. Rossi's ability to be governed by the Act. Given his inability to comply with orders issued under the EPA and by the Court, there is reason to doubt that he would be bound by any terms and conditions ordered by this Tribunal. Mr. Rossi must demonstrate that he understands the importance of complying with the Act before he can be trusted to comply with terms and conditions that may be attached to a CVOR certificate. One way that Mr. Rossi can show this is by paying the fines that he currently owes under the Act and the EPA.

The Deputy Registrar has refused to issue a CVOR certificate to Bestway, in part because of the unpaid fines under the Act and the EPA. For the reasons noted above, this would seem to be an appropriate response. It is true that it will be more difficult for Mr. Rossi to pay his fines if he is denied the ability to conduct a CVOR operation. However, the payment of those fines is the best evidence that Mr. Rossi is prepared to submit himself to a regulatory regime.

The Deputy Registrar is also proposing to cancel the CVOR certificate of Bestway, Western Waste and Young Disposal. The Registrar will not ordinarily grant a CVOR certificate to anyone related to a person whose CVOR certificate has been cancelled. A cancellation of a CVOR certificate effectively excludes someone from the business of operating a commercial vehicle forever. This is an excessive sanction under the circumstances. Neither the safety record of Western Waste nor that of Bestway warrants the cancellation of a CVOR certificate, given the finality of such an action. The CVOR certificates of Western Waste and Young Disposal have expired. Therefore there is no concern that they will resume operations. If Bestway is refused a CVOR certificate, then it too will be unable to operate.

If Mr. Rossi pays any fines owing by him under the EPA and the Act arising from the operation of Western Waste and Bestway, then he ought to be entitled to apply again for a CVOR certificate. In this eventuality and assuming there have been no further violations of the law, the Tribunal hopes that the Registrar will give his application favourable consideration.

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 Refusal to Issue a Commercial Vehicle Operator's Registration Certificate to 1811519 Ontario Inc. o/a Bestway Waste Management, dated August 23, 2010. The Tribunal further directs the Deputy Registrar of Motor Vehicles not to carry out his Cancellation and Seizure Order of August 16, 2010 against the Applicant 1811519 Ontario Inc. o/a Bestway Waste Management, Western Waste & Recyclers Inc. and The Young Disposal Co Ltd.

LICENCE APPEAL TRIBUNAL

_____
Laurie Sanford, Vice-Chair

RELEASED: March 2, 2011

This decision may also be available on Quicklaw.

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

Ontario

1772065 ONTARIO INC.

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 47(1)

TO CANCEL THE COMMERCIAL VEHICLE OPERATORS' REGISTRATION CERTIFICATES AND TO SEIZE THE PLATE PORTION OF ALL PERMITS ISSUED

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: MANJIT GARCHA, Agent, representing 1772065 Ontario Inc. (the "Applicant")

PATRICK MOORE, Counsel, representing the Registrar of Motor Vehicles (the "Respondent")

DATE OF PRE-HEARING: February 8 and 28, 2011 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals to this Tribunal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act"), from an order of the Registrar of Motor Vehicles (the "Registrar") issued pursuant to section 47(1) to cancel Commercial Vehicle Operators Registration ("CVOR") certificate number 163-912-947 issued to the Applicant and to seize the plate portion of any permits issued.

The grounds relied on by the Registrar relate to the Applicant's affiliation with a group of four former CVOR holders that were referred to loosely as the Khalistan Group. In the view of the Registrar, the Applicant is a front for the Khalistan Group and is not an independent corporation as it asserts. The Registrar points to the Applicant's safety violation record and takes the view that, when considered with the safety violation record of the Khalistan Group, there are grounds to believe that the Applicant will not operate safely.

BACKGROUND FACTS

To understand the present appeal, it is necessary to review actions taken by the Registrar in January 2009 to cancel the CVOR certificates of 4 holders: Maninder Gaur Gosal, Khalistan Transport Co. Ltd., a corporation owned by Ms. Gosal, 2075497 Ontario Inc., a corporation owned by a daughter of Ms. Gosal, and 2075498 Ontario Inc., a corporation owned by a second daughter who has a role to play in this appeal, Tanjit Gosal (collectively referred to as the "Khalistan Group"). All of the CVOR holders appealed to this Tribunal but, prior to the hearing, three of the holders withdrew their appeals and the hearing proceeded with respect to one of the corporations, 2075498 Ontario Inc. The safety record of the Khalistan Group is fully reviewed in the decision of Vice-Chair Macklin in *2075498 Ontario Inc.* O.L.A.T. decision released on July 9, 2009. The applicant was given a suspension for 21 days largely on the evidence of Tanjit Gosal that she was no longer talking to her parents and she had totally separated her operations from the rest of the Khalistan Group. As the evidence unfolds it will become clear that Tanjit Gosal has had a reconciliation with her parents.

It is also necessary to appreciate the structure of CVOR regulation. The Province operates a safety rating system for CVOR holders. A CVOR holder is given a safety rating based on the number of trucks it operates and the number of miles that it operates in Canada in any given year. If and when there is a violation, whether because a truck has been involved in an "at fault" accident, has been charged with breach of the Act or has been found to be defective while operating on the public highway, points are assessed against the company's violation record ("VR"). The VR is then expressed as a percentage of the overall record. Violations remain on the record for two years such that at any given time the VR represents the record of the company over the preceding 24 months.

There are a number of interventions by the Registrar that may be triggered by a rising percentage. At 35% VR the Registrar may send a letter drawing an operator's attention to the rising trend and informing the operator that efforts are required to counter the trend. At 60% VR there may be an audit of the operator's records to confirm that the operator is using qualified drivers, maintaining maintenance records and logging the hours of work of its drivers. As the VR approaches or exceeds 100%, the Registrar may call the operator to a meeting to explain why its CVOR certificate should not be suspended or cancelled. While this policy is set out in various publications and legislation, it is subject to the Registrar's duty to take appropriate steps at any time in the interests of promoting highway safety and protecting the public from unsafe operators.

The Registrar assigns a rating to each CVOR operator ranging from Excellent to Unsatisfactory. The Applicant currently has a "Conditional" rating and that rating will become unsatisfactory should the Tribunal uphold the Proposal of the Registrar or impose a suspension.

In considering the safety record of the Khalistan Group, Vice-Chair Macklin had this to say in the second paragraph of his decision:

> The Khalistan Group had an abysmal safety record as a transport concern….The issue on this appeal is whether the steps taken by the Applicant are "too little too late" to get it out from under the collective safety record that, by all objective standards, warrants a cancellation and seizure order.

The abysmal record to which Vice-Chair Macklin refers included interventions by the Registrar dating back many years. There had been suspensions levied against more than one of the Group. By January 2009 the Group's collective safety record had reached a VR of 210%, a level described by the witness, Sherry Atallah, as the worst she had ever seen in 11 years working in CVOR regulation.

The president of the Applicant, Charanjit Garcha, had been a driver for the Khalistan Transport Co. Ltd., one of the Khalistan Group. He incorporated the Applicant in the summer of 2008 and the Applicant applied for a CVOR certificate in January 2009. The certificate was issued about 2 weeks before the cancellation of the three Khalistan Group CVOR certificates and the suspension of the fourth. Khalistan Group trucks were then leased to the Applicant and the Applicant proceeded to operate the trucks under its CVOR certificate. The Applicant's sole customer is the Khalistan Group, particularly Khalistan Transport Co. Ltd. All of the Applicant's truck maintenance is carried out in a repair shop, Khalistan Truck & Trailer Repair, that is part of the extended Khalistan Group.

By the summer of 2010 the Applicant's VR rating had reached approximately 66%. The Registrar requested a facility audit and particularly asked the auditor to determine if the Applicant was operating independently or whether it was a shell corporation created to permit the Khalistan Group to circumvent the earlier cancellation order. The auditor attended the Applicant's head office and it is the audit and its findings that are in dispute in the appeal.

FACTS

The Tribunal heard evidence from three witnesses, including Sherry Atallah, a Carrier Safety Rating Administrator, and Joseph Daniel, a Highway Carrier Safety Inspector and Facilities Auditor. Both witness work in the office of the Registrar. The third witness was the president of the Applicant, Charanjit Garcha. The evidence above concerning the CVOR system came from Ms. Atallah. In addition, Ms. Atallah stated that less than one tenth of one per cent of carriers reach the 100% VR level and three tenths of one percent reach the 70% level and another three tenths of one per cent exceed the 85% level. Of these carriers, 80% improve after intervention by the Registrar.

The Registrar is wary of attempts to circumvent enforcement. Accordingly, when the Applicant, a former Khalistan driver, commenced operation using Khalistan Group trucks, Ms. Atallah approved the transfer of Khalistan's trucks to the Applicant's CVOR but decided to monitor the Applicant for signs of affiliation. According to Ms. Atallah there is no authority to block the transfer of trucks when a CVOR has been cancelled. The next opportunity to monitor arose when the Applicant's safety record warranted a facility audit.

The audit was carried out by Joseph Daniel. Mr. Daniel was assigned the audit file on July 22, 2010. He attended at the Applicant's head office on July 27 but met only the president's sons who had no information. He obtained the e-mail address of one of the sons and returned to his office and drafted and e-mailed a letter stating that he would return the next morning to conduct the audit. The letter outlined the documents he wished to see. When he arrived in his office early the next morning he had a voicemail message from a person who identified herself as Tani. Tani stated that she was calling on behalf of the president of the Applicant and that she wanted to postpone the audit. Mr. Daniel declined to do so and subsequently arrived at the Applicant's head office to carry out the audit. He was met by Mr. Garcha and by Tanjit Gosal. Ms. Gosal advised Mr. Daniel that she was there to answer questions due to Mr. Garcha's poor knowledge of the English language. Mr. Daniel determined that Tanjit Gosal was the owner of 2075498 Ontario Inc., the corporation given a 21 day suspension by this Tribunal on its representations that Ms. Gosal had disassociated herself from dealings with her family and the Khalistan Group.

Mr. Daniel requested the records. He was informed that all of the records were at Ms. Gosal's place of business. He was told that Ms. Gosal did the books for the Applicant. Mr. Daniel gave Ms. Gosal the opportunity to attend her place of business to retrieve the records. He then completed the audit based on the records he was given. There are three segments to the audit. The Applicant passed one segment, that relating to driver qualifications, failed the maintenance segment and scored zero on the driver hours of work segment. When discussing business operations, Mr. Daniel was informed that, not only did Ms. Gosal do the book-keeping but her father, a former president of a Khalistan Group company, provided the dispatch function. Mr. Garcha also maintained that he carried out the dispatch function in the evenings along with Ms. Gosal's father. No dispatch records were available.

The vehicle lease agreements caused Mr. Daniel some concern. One lease was from the president of Khalistan Transport Co. Ltd., in her personal capacity and the others were from Khalistan Transport itself. The leases were identical and did not have any financial terms. In addition there were terms that seemed unusual. Clause 4 prohibited a change in commodities carried without permission from the Khalistan Group. Clause 5 required permission to carry passengers. Clause 8 required all invoices and other documentation to be delivered to the Khalistan Group. While Mr. Daniel could understand why repair invoices might be important to a lessor to ensure the trucks were being well maintained, he had difficulty understanding why a lessor would want payroll and fuel use information.

At a later date, Tanjit Gosal provided Mr. Daniel with further records including invoices and a monthly accounting reconciliation of amounts billed by and paid to the Applicant from Khalistan. On reviewing the reconciliation, Mr. Daniel was of the view that the Applicant would be incapable of paying its bills and payroll. Mr. Daniel also noted that there were no payroll records for the drivers and significant bills were being paid out of Khalistan Transport's account. In particular, Khalistan Transport paid $7,166.00 for the first insurance installment on behalf of the Applicant. Mr. Garcha stated that he paid his drivers in cash and sometimes H. would make the payment in his behalf. Mr. Daniel formed the opinion that either Khalistan Group or Tanjit Gosal was in fact controlling the Applicant.

The Registrar issued a Notice of Cancellation and Seizure and invited the Applicant to a show cause meeting in St. Catharines. Ms. Atallah was present and took notes. The meeting was held on September 22, 2010 but the notes were not transcribed until later, October 23 in fact. It was Ms. Atallah's evidence that the typed notes are copies of her handwritten contemporaneous notes. Manjit Garcha, the Applicant's agent at this hearing, attended with Charanjit Garcha. It is clear from a reading of the notes that Charanjit Garcha demonstrated an almost total lack of knowledge about his company and its financial state. He had no idea how much money the company earned or how much it paid out. This lack of knowledge was continued in his evidence before the Tribunal where he stated that Tanjit Gosal told him at the end of the month how much money he was entitled to and he accepted that figure because he trusted Khalistan Group not to cheat him.

One outcome of the meeting was an undertaking by the Applicant to produce an action plan to address its worsening safety record. The action plan was to be produced to the Registrar by October 15, 2010. The Applicant complied with the undertaking and sent an action plan to the Registrar. The Registrar's office did not reply to the action plan and it was Ms. Atallah's position that it was not the Registrar's function to do so. Responsibility to comply with the law and operate safely resides with the Applicant and it would be improper for the Registrar to endorse any particular course of action. Notwithstanding the preparation of an action plan, the Registrar concluded that the Applicant's CVOR certificate should be cancelled and issued the appropriate order giving rise to this Appeal.

In cross-examination of both Ms. Atallah and Mr. Daniel, Mr. Manjit Garcha explored the possibility that the Registrar had pre-judged the case. Mr. Daniel was forthright in admitting that he was asked to determine if there was an improper relationship between the Applicant and the Khalistan Group but he denied that he was directed to find such a relationship, come what may. He was asked to review the facts and make a determination. He concluded an improper relationship existed. Both Mr. Daniel and Ms. Atallah were shown a certificate from the Registrar giving the Applicant a "Conditional" rating. It was dated on the day before Mr. Daniel's audit. Ms. Atallah was more familiar with the procedure and explained that the conditional rating was generated by the computer once the Applicants VR exceeded 70%. It was coincidental that this occurred on July 27, the day before the audit, but she stated that it was triggered by the same facts as those that triggered the audit, a high VR. It should be noted that based on facts raised by the Applicant during Ms. Atallah's evidence, Ms. Atallah stated that one series of violations for out of service defects may have been caused by an accident and that the effective VR rate is more likely 66%, not in excess of 70%. She did point out that the Applicant had not raised its concerns with the Registrar prior to the hearing.

As stated above, Mr. Chanarjit Garcha demonstrated a total lack of knowledge about the financial operations of his company. When it was drawn to his attention that in many months he would not have enough to pay his drivers he answered that he borrowed money from friends and relatives. He had no idea how his maintenance bills were paid. He stated that he had borrowed $7,166.00 from Khalistan Transport to pay his insurance and that it had been repaid. Monthly installments thereafter were paid by him. He was of the view

that maintenance costs were just deducted by Tanjit Gosal from his final cheque but he did not know.

He was shown the reconciliation prepared by Ms. Gosal. He stated that he did not understand financial statements or how to read them. Mr. Daniel had previously identified the line items. The first line in each month was the total invoiced by the Applicant. The second line was the deduction of lease payments. The third line in each month was the amount Khalistan charged for dispatch services and the final line was the amount payable to the Applicant. Mr. Garcha testified to two lease rates, $7,500.00 and $7,000.00. He said about $6,000.00 at the show cause meeting. He finally insisted it was $7,000.00 per month. When it was pointed out to him that the amount charged was never reflective of $7,000 per month he had no explanation. The same answer was given with respect to the dispatch charge. He stated that he was charged 6% for dispatch services but the actual amount set out in the reconciliation is closer to 20% each month. He had no explanation other than he trusted Tanjit Gosal to pay him what he was entitled to. He felt the final amount would reflect various loans but did not know how these were calculated.

With respect to fuel, Mr. Garcha stated that sometimes he used Khalistan fuel and sometimes he would pay for it himself. He borrowed money to pay for fuel when it was necessary. He is not sure how payment is made to Khalistan for fuel used but thinks it must all be included in the monthly reconciliation. Mr. Garcha explained that the Applicant's trucks are parked each night on a site owned by the Khalistan Group. His wife looks after all of the invoicing.

Mr. Garcha admitted that Tanjit Gosal is a manager at the Applicant. In addition to book-keeping she has handled driver discipline matters. He had no explanation why Tanjit Gosal used another company name in writing to the Applicant's drivers. He also admitted that he deals with Ms. Gosal in all his dealings with Khalistan Transport but would not go on to say she was also a manager there. He did not know her role.

When questioned about the action plan, Mr. Garcha stated that it had been prepared by Manjit Garcha. The witness does not read or write English so he relied on Manjit Garcha to prepare the plan. When the witness was taken to an area in the action plan that was his responsibility, the monthly receipt and review of the CVOR record, he was unaware that that it was his responsibility to carry out this task. He was aware that he was responsible for accident reporting and analysis but he was totally unaware of the discipline policy set out in the action plan.

THE LAW

The Act provides:

> **16.** (1) In this section and in sections 17 to 23.1, "commercial motor vehicle" does not include,

(a) a commercial motor vehicle, other than a bus, having a gross weight or registered gross weight of not more than 4,500 kilograms, an ambulance, a fire apparatus, a hearse, a casket wagon, a mobile crane, a motor home or a vehicle commonly known as a tow truck,
(b) a commercial motor vehicle leased for no longer than thirty days by an individual for the transportation of goods kept for that individual's personal use or the gratuitous carriage of passengers,
(c) a commercial motor vehicle operated under a permit and number plates issued under a regulation made under clause 7 (24) (g) or (h) that is not transporting passengers or goods,
(d) a commercial motor vehicle operated under the authority of an In-Transit permit, and
(e) a bus that is used for personal purposes without compensation; ("véhicule utilitaire")

"compensation" includes any rate, remuneration, reimbursement or reward of any kind paid, payable or promised, or received or demanded, directly or indirectly; ("rémunération")

"CVOR certificate" means a Commercial Vehicle Operator's Registration Certificate issued under this Act; ("certificat d'immatriculation UVU")

"goods" includes all classes of materials, wares and merchandise and livestock; ("biens")

"operator" means the person directly or indirectly responsible for the operation of a commercial motor vehicle including the conduct of the driver of, and the carriage of goods or passengers, if any, in, the vehicle or combination of vehicles; ("utilisateur")

"safety record" means the safety record of an operator determined in accordance with the regulations;

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.

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).

Interpretation

(2.1) Subsection 17 (4) applies, with necessary modifications, for the purpose of determining who are related persons under clause (1) (f).

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.

ISSUE

The issue before the Tribunal is to determine if the there is 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 Tribunal 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. In doing so, the Act asks the Tribunal to determine if there are persons related to the holder and then to consider the safety record of those persons in making its findings.

ANALYSIS

There is extensive evidence indicating a close relationship between Tanjit Gosal and the Applicant. Mr. Garcha in his testimony confirmed that Ms. Gosal is a manager of his company. She handles the book-keeping, she keeps the company's records at her place of business and she handles discipline for the Applicant. There is also evidence that Ms. Gosal is still closely involved with Khalistan Transport Co. Ltd. This evidence runs directly counter to the position she took before this Tribunal where she stated that she was disassociating herself from her parents trucking operations. Ms. Gosal did not testify before the hearing so her current involvement with Khalistan Group has not been tested by evidence given under oath. For the purpose of the current appeal, the evidence discloses that Ms. Gosal is the person with whom the Applicant deals when it needs to deal with Khalistan Transport. In his testimony Mr. Garcha stated that he did not know her role at

Khalistan but his evidence suggested she is an active and senior member of its management.

The evidence also discloses that the Applicant is totally dependent on the Khalistan Group for its customers, its maintenance and its truck parking. The evidence of its financial independence does not withstand close scrutiny. Mr. Garcha testified that he has no idea what funds his company earns and what amounts it is charged. He did state that he relies totally on Ms. Gosal to tell him what he is entitled to receive each month. The Applicant is then responsible to pay drivers, insurance and fuel and all other operating expenses. Mr. Garcha said that drivers are paid $18.00/hour. Insurance costs an initial payment of $7,166.00 and monthly installments of $3,438.95. There are lease costs and dispatch costs. Ms. Gosal provided Mr. Daniel with financial figures. Mr. Garcha confirmed in his evidence that he relied on the numbers given him by Ms. Gosal. An analysis of these numbers indicates that the Applicant is not financially viable. The numbers span several quiet months in the construction industry, February, March and April but they also include May and June. The Tribunal concludes that they are fairly representative of the seasonal fluctuations in the Applicant's business. 80% of the Applicant's income was made in May and June. The overall figures indicate that the business was operated at a loss of approximately $22,000.00 before fuel charges were incurred. It is not clear from Mr. Garcha's evidence whether there are also further deductions for maintenance which would render the business even more of a financial disaster.

Counter to the financial evidence above, Mr. Garcha stated that he was financially better off from running the Applicant than when he was simply a driver. Clearly, as a driver, he had positive cash flow to the extent of $18.00 an hour. On the figures given, any profit is being siphoned off to Khalistan Transport as lease costs and dispatch fees. The Tribunal must conclude from this evidence that the financial figures advanced by Ms. Gosal are false and are for the purpose of creating the appearance of an independent operation and that the fact is that the Applicant is a front for the Khalistan Group.

Having reviewed all of the evidence, the Tribunal finds that, at a minimum, Khalistan Transport Co. Ltd. and 2075498 Ontario Inc. are related companies to the Applicant. In her capacity as a manager for all three companies, Tanjit Gosal effectively controls the operations of the Applicant. In doing so she is aided by her father, H., who provides dispatch services at great cost to the Applicant. The Tribunal finds that, contrary to Mr. Garcha's evidence that he does dispatch in the evenings, the amounts charged to the Applicant for dispatch services would indicate that his role in that context is minor to non-existent.

The relationship extends further. The President of Khalistan Transport is Maninder Gaur Gosal, Tanjit Gosal's mother and H.'s husband. Maninder Gaur Gosal has had her own CVOR and it was the VR of 210% with respect to that CVOR that led to cancellation of the certificates of three of the Khalistan Group companies and the imposition of a sanction on Ms. Gosal's corporation. The Tribunal finds that the Applicant is related to the whole Khalistan Group through the interrelationship of Maninder Gaur Gosal, Tanjit Gosal, H. and the three corporations as that term is used in s. 17 (4) of the Act.

Having determined that the Khalistan Group is related to the Applicant, the statute directs the Tribunal to consider its safety records together with the Applicant's when determining if there is reason to believe that the Applicant will not operate safely or in accordance with the Act and regulations.

Violations on a CVOR safety record are counted against the record for a two year period. Unscrupulous operators, at one time, incorporated several companies and applied for a CVOR certificate for each company. They would rotate operations through the companies such that, as the VR rate became sufficient to attract sanctions from the Registrar, that company would cease operations and a related company would simply take over and carry on business as usual. After two years, the original company could recommence operations with a clean record. It is this avoidance technique that s. 17 (4) of the Act is designed to prevent.

The factual review by Vice-Chair Macklin in the earlier appeal goes on to discuss the plans the Applicant had to disassociate itself from the Khalistan Group and its "abysmal safety record." The facts outlined are tantalizing:

> The extent to which leniency will be bestowed on 2075498 will depend, to a considerable extent, on the credibility of Ms Gosal.
>
> In Ms Gosal's view, she has been the manager of a transport business only since January 2009. 2075498 owns/leases six trucks. The company employs six drivers. The trucks are stored on Claireport Crescent, Toronto, Ontario. The trucks have been stored at that address since January 2009. Her operations are at a different address than Racine Road (her parents place of business), because of Ms Gosal's desire to disassociate herself from her parents businesses. She is currently not on speaking terms with her parents.

The facts outlined by Vice-Chair Macklin are exactly parallel to the facts concerning the Applicant. The Applicant's operations commenced in January 2009 with six leased trucks. The audit report indicates that all trucks, except one out of service truck, were parked at Claireport Crescent. The out of service truck was parked at Racine Drive. Both Claireport Crescent and Racine Drive are locations owned by the Khalistan Group. Given Ms. Gosal's involvement in the management of the Applicant, it is possible she was actually referring to the Applicant earlier. There is no evidence before this Tribunal how she effected the reconciliation with her parents, but it is clear from Vice-Chair Macklin's decision that his leniency in levying a 21 day suspension as opposed to a cancellation was predicated on a separation between 2075498 and the rest of the Khalistan Group. This separation now appears to be at an end.

Looking at the Applicant's safety record, it appears that few steps had been taken up to the Show Cause meeting to address safety. The Applicant had failed the facility audit. It had amassed sufficient violations in a period of 19 months that its VR was in the region of 66% allowing for the variation that came out in evidence. It had virtually no records or safety program. It was not until Manjit Garcha became involved that it began to establish policies covering discipline, review of its CVOR record and recording of driver hours of work. Even so, as of the date of the hearing, Charanjit Garcha did not know the policy for progressive driver discipline or that he was responsible for monthly review of the CVOR record. The

Tribunal finds that the steps taken by the Applicant are insufficient to mitigate the "abysmal safety record" of the Khalistan Group. It appears to be business as usual using the Applicant as a shell corporation.

ORDER

Pursuant to the provisions of s. 50 (2) of the Act, the Tribunal orders the Registrar to carry out the Cancellation and Seizure Order dated October 20, 2010 and to cancel CVOR certificate 163-912-947 issued to 1772065 Ontario Inc. and to seize the plate portions of the permits.

LICENCE APPEAL TRIBUNAL

David Gregory Flude, Vice-Chair

RELEASED: March 8, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

A & W X-PRESS INC.

APPEAL FROM AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES UNDER THE *HIGHWAY TRAFFIC ACT,* R.S.O. 1990, c. H.8

TO CANCEL THE COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE AND TO SEIZE THE PLATE PORTION OF ALL PERMITS

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: DOUGLAS LEE, Counsel, representing the Registrar of Motor Vehicles

No one appearing for the Applicant, A & W X-Press Inc.

DATE OF HEARING: March 7, 2011 Toronto

REASONS FOR DECISION AND ORDER

OVERVIEW

The Applicant appeals to the Licence Appeal Tribunal (the "Tribunal") from a Cancellation and Seizure Order made by the Deputy Registrar of Motor Vehicles (the "Registrar") under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act"). The Order is dated November 30, 2010. Section 47 of the Act empowers the Registrar to suspend or cancel a commercial vehicle operator's registration ("CVOR") certificate. In an appeal, the Tribunal decides "afresh" as to the appropriate order in respect of the CVOR.

APPLICANT FAILS TO ATTEND

An Appointment for and Notice of Hearing "(Notice of Hearing") in respect of the appeal was faxed to the parties on January 21, 2011. The cover letter that accompanied the Notice of Hearing confirmed that the Applicant's request for an electronic hearing in respect of the appeal could not be accommodated on account of the lack of consent of

the Registrar. Thus, the hearing of the appeal was confirmed as in-person for the date of March 7, 2011 (see Exhibit 4). The parties attended an electronic pre-hearing on February 4, 2011. At the pre-hearing, the Tribunal ordered, amongst other things, that:

> 4. The hearing in this matter will commence on March 7, 2011 at 9:30 am at the Tribunal's Chambers, 1 St. Clair Ave. West, Toronto, Ontario. (see Exhibit 5)

The Applicant failed to attend at the hearing on March 7, 2011. The Tribunal stood the matter down to 10:00 a.m. and, upon the Applicant's not showing up by that time, conducted the hearing of the appeal as if each allegation in the Notice of Cancellation and Seizure, dated October 20, 2010 and Cancellation and Seizure Order dated November 30, 2010, was contested. The hearing concluded at 11:30 a.m. and the Applicant had still not appeared.

THE FACTS

CVOR System

The CVOR system has been established by the Ministry of Transportation and is monitored by the Registrar. The system is aptly described in the decision of Vice-Chair Jane Weary, in *Thistletown Motor Freight (2003) Inc. (Re)* [2006] O.L.A.T.D. No. 580 ("*Thistletown*"), starting at page two:

> Mr. Miller explained that in order to effectively regulate licensed operators, the Ministry establishes thresholds for safety records of each operator. This is based on a computer analysis derived from points assigned to a given carrier for each driver impropriety determined in a conviction, accident or mechanical inspection of that carrier, the latter derived from system audits as well as on-road inspections. Accidents only trigger the imposition of points where they are "reportable" in that they involve property damage over $1,000.00 and/or personal injury. The points are assigned based on the information included by the Police Officer in the Accident report generated and depend on notations of improper driver action and/or condition and/or vehicle condition.
>
> Points in each category remain on the record for a floating two-year period. The average in each category, and the overall weighted average, are compared to those of all CVOR carriers in order to establish a "threshold" of 100%. As a carrier approaches this threshold, the Ministry will be alerted to take intervening actions such as a warning letter or a facility audit. When the threshold is exceeded, sanctions will normally be imposed which may range from a specified suspension period to the cancellation of the CVOR certificate.
>
> Information concerning the computation of a fleet's threshold, and hence evaluation, are disclosed to carriers as well as the public in a document entitled *Ontario's Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline*, published by the Ministry of Transportation.
>
> As well as sanctions, the Ministry is required to assign each carrier a Safety Rating. These range from Excellent to Unsatisfactory, the latter assigned to any Carrier under sanction for the duration of the sanction period. On completion of the period, the carrier is assigned a Conditional rating, the second lowest available.

The Applicant's CVOR History

The Applicant's CVOR certificate was issued on January 21, 2008. The Applicant is based in Taylor Michigan but, as required under the *Act*, has obtained and maintained a CVOR licence on account of its doing trucking business in Ontario (approximately 133,000 kilometers travelled in Ontario every two years).

As a general rule, trucking concerns are in compliance with their safety obligations so long as their overall safety violation rate is less than 35% of threshold. An overall safety violation rate above that number is considered out of compliance under the CVOR system. Various steps short of sanction are employed when the safety rate is between 35 and 100% of threshold. Sanctions are contemplated when that rate exceeds 100% of threshold.

The Applicant's overall safety violation rate reached in excess of 35% of threshold within a three month period of CVOR issuance, resulting in a warning letter from the Ministry. The Applicant's overall safety violation rate continued to climb and exceeded 70% of threshold by March 2008.

By January of 2009 (one year from CVOR issuance) the Applicant's overall safety violation rate exceeded 100% of threshold and the Registrar commenced sanction proceedings. Specifically, at February 2009 the company had an overall safety violation rate of 153.16% of threshold for the 13 month period starting January 21, 2008. The action plan to address these shortcomings, as confirmed at an in-person show cause meeting of February 10, 2009, included: the hiring of a new shop manager, termination of poor drivers, additional truck inspections and extensive training and orientation on Canadian regulations. The Registrar was not persuaded by the Applicant's proposed action plan and a Suspension and Seizure Order dated March 12, 2009 was issued, suspending the Applicant's CVOR for 30 days. The Applicant initially appealed the Suspension and Seizure order, but that appeal was subsequently withdrawn.

As noted above, a Notice of Cancellation and Seizure was issued against the Applicant on October 20, 2010. As at that date, the Applicant was still operating in an unsafe manner. Its overall safety violation rate was 107.23% of threshold (August 2008 to August 2010) and 110.21% (September 2009 to September 2010). A show cause hearing was conducted by the Registrar by way of written submissions from the Applicant (the Applicant had been offered an opportunity to appear in person) (see Exhibit 3, Tab 3). The proposed solutions to the ongoing safety concerns, as set out in the written submissions, were largely the same as they had been in February 2009. Specifically, the Applicant hired a Transportation Safety Compliance Officer, promised more training of staff and supervisory personnel and the termination of poor drivers. The Registrar was not persuaded by the written submissions of the Applicant and the Notice of Cancellation and Suspension, as noted above, was confirmed by the Cancellation and Seizure Order dated November 30, 2010.

No concrete evidence of any effective remedial steps taken by the Applicant was tendered at this hearing.

THE LAW

Legislation and General Principles

The statutory authority for the actions of the Registrar and the jurisdiction of the Tribunal is set out in sections 47, 47.1 and 50 of the Act. The key provisions are as follows:

> **Suspension and cancellation of licence, etc., general**
>
> 47. (1) Subject to section 47.1, the Registrar may suspend or cancel,
>
> (a) the plate portion of a permit as defined in Part II;
>
> (b) a driver's licence; or
>
> (c) a CVOR certificate,
>
> on the grounds of,
>
> (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
>
> (e) conviction of the holder for an offence referred to in subsection 210 (1) or (2);
>
> (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
>
> (g) any other sufficient reason not referred to in clause (d), (e) or (f).
>
> (2.1) Subsection 17(4) applies, with necessary modifications, for the purpose of determining who are related persons under clause (1) (f).
>
> **Power to seize number plates**
>
> (8.1) If the plate portion of a permit is suspended or cancelled under clause (1) (a), the Registrar may order that the plate portion of the permit or the number plates issued in connection with the plate portion of the permit be seized and any police officer or officer appointed for carrying out this Act may seize the plate portion of the permit and the number plates and deliver them to the Ministry.
>
> **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.
>
> **Appeal**

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.

The CVOR system operates in the public interest to protect motorists from unsafe trucks and truck drivers. The standard to be met by a commercial operators is compliance, not incremental improvements that fall short of compliance (see *Muscillo Transport Ltd. v. Ontario (Licence Suspension Appeal Board)*, [1997] O.J. No. 3111 (O.C.G.D.) at paras. 52, 58, aff'd (1998) 110 O.A.C. 174 (C.A.)).

Conclusion

In this case the Cancellation and Seizure Order proposed by the Registrar is justified on the following grounds:

i) the Applicant has not, since it received its CVOR in January 2008, operated in safe manner for any material period of time. Indeed, the Applicant has operated at a safety rating of above 100% of threshold since at least January 2009;

ii) the Applicant has had sufficient notice that a serious sanction may be applied. It received a warning letter, its officer met with the Regisrar's staff, and its CVOR certificate and plate portion of its permits were previously suspended for a significant period of time (30 days);

iii) the Applicant has not offered any evidence that it has rectified its unsafe practices;

iv) the Applicant has not offered evidence of any concrete steps that it intends to take that might have the effect of a systemic improvement in its safety performance. It has merely offered, in writing, a recycling of previous steps that have, to date, not worked.

(see generally *R & S Transportation Inc. (Re)*, [2002] O.L.A.T.D. No 278 at paras. 22-23 and *2105360 Ontario Inc. (Re)*, [2011] O.L.A.T.D. No. 26 at paras. 44 and 46).

ORDER

The Tribunal, by the authority vested in it under s. 50(1) of the *Act*, orders the Registrar carry out the Cancellation and Seizure Order dated November 30, 2010, cancelling the CVOR certificates of the Applicant and seizing the plate portion of permits issued for its vehicles.

LICENCE APPEAL TRIBUNAL

_____
Richard Macklin, Vice-Chair

RELEASED: March 8, 2011

This decision may also be available on Quicklaw.

Decisions under the Highway Traffic Act

Section 48.3(2) - Administrative Driver's Licence Suspension - (ADLS)

Fiscal Year 2010 - 2011

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

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- 5999-ADLS-MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/adls/apr/5999.ad
  s.reasons.pdf>
- 5954-ADLS-MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/adls/apr/5954.ad
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- 6047-ADLS-LUNG
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/adls/jun/6047.adl
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- 6312-ADLS-LUNG
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- 6367-ADLS-HYPO
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- *<http://www.ontario.ca/lat/english/Pages/Decisions/2010/hta-adls.aspx>* 6512-ADLS
  -MED
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/adls/mar/6512.ADLS.Reasons.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5999-ADLS-MED

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: WILLIAM FINNEGAN
Agent for the Applicant

KYLE BIEL
Agent for the Registrar of Motor Vehicles

DATE OF HEARING: April 22, 2010 *Teleconference*

DECISION RELEASED: April 23, 2010

REASONS FOR DECISION

A hearing was held on April 22, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA" or the "Act").

The Tribunal released its Decision on April 23, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 48.3 of the HTA for the following reasons.

BACKGROUND

The Applicant appealed, by way of a Notice of Appeal under section 50.1 of the HTA, dated and received by the Tribunal on April 6, 2010. The Applicant appeals from the order of the Registrar effective February 20, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> I was unable to provide the required breath/blood sample because of a medical reason.

PRELIMINARY MATTERS

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

O. Reg. 574 to the Act at subsections 15 (1), (2) and (3) require that a medical report must contain:

> 15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
>
> (a) the name, telephone number and address, with the postal code, of the medical practitioner;
>
> (b) the name, date of birth and address of the person who is the subject of the report;
>
> (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
>
> (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
>
> (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
>
> (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
>
> (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
>
> (3) The report shall be signed by the medical practitioner.

Finally, section 13 of O. Reg. 574 provides:

> A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS

<u>The Applicant's Evidence</u>

The Applicant's driver's licence was suspended on February 20, 2010.

The Applicant relied on information provided by his legal Consultant, as well reports from his health care providers.

The Applicant's Legal Consultant provided a declaration of exemption from the Law

Society on the grounds that he is part of a group of "Persons who are not in the business of providing legal services and occasionally provide assistance to a friend or relative for no fee".

In a letter dated March 4, 2010, the Applicant's Agent details the events of the incident as well as how the Applicant was feeling at the time:

> "...(the Applicant) began to vomit mucus and blood …Was uneasy on his feet and feeling pain and tension in his chest area. He then requested the officer call for an ambulance for transport to the hospital."

With respect to a medical condition the Applicant through his agent provided a letter dated February 24, 2010 from the Applicant's Oncologist stating:

> "He is an unfortunate gentleman who has metastatic rectal carcinoma with metastases in the thorax. He was initially diagnosed with a T3 NO MO rectal cancer in 2000. He has had two subsequent resections from the chest metastases. He was noted to have a right hilar mass that was treated with radiation to a dose of 4000cGy in 15 fractions followed by chemotherapy (FOLFIRI). The most recent imaging shows that he has two nodules, one in the right lung, one in the left lung and changes in the right hilar area post radiation."

With respect to the breathalyser session, Dr. D'Souza states:

> "the purpose of this letter is to document the fact that the patient does in fact have medical conditions that would affect his ability to blow effectively. This includes the two lung resections for which he likely would have chronic chest wall pain, decreased lung function. He also has a history of coronary artery disease with a prior myocardial infarction and a prior history of pulmonary embolus."

Excerpts from a "History of Condition" prepared by a physician on February 24, 2010 indicate:

> "He does suffer from 2 primary cancers, one of the bowel and another of the lung, unfortunately for him both of these cancers are progressive and he now (sic) a secondary spread lung of the bowel cancer in addition to his primary lung disease… He does have difficulty with forced expiration with some appreciable bronchospasm associated with his damaged lungs."

A hand written note from the Applicant's home health care provider confirms the Applicant's sate of health suggesting that the condition:

> "has made his tidal volume very decreased and shortness of breath is quite common."

The ambulance report describes the Applicant's "General Appearance:

> "Pt in moderate distress, speaking short sentences with difficulty, guarding his chest with his hand and c/o chest tightness and SOB… coughing up blood occasionally"

According to the Ambulance report the Applicant developed "angina like discomfort" on the way to the hospital.

Under the category “Physical Exam”, the following notations are entered:

> “Chest Air Entry” marked as “Decreased”,
> Chest tightness and heaviness substernal radiating to L arm. 5/10”

At the hearing the Applicant’s Agent opted not to allow the Applicant to testify and proffered a statement instead.

The Applicant’s Agent reiterated the information provided in his letters regarding the details of the incident where the Applicant was stopped and demanded a breathalyser test.

The Applicant’s Agent further described the Applicant’s medical condition as per medical information submitted by the Applicant and entered as Exhibit # 3.

According to the Applicant’s Agent, the Applicant was transported by ambulance to a local hospital where he requested a blood sample be taken to prove he had no alcohol in his system. He was advised that this was not possible as any request for a blood sample regarding alcohol would have to be made by a police officer.

The Applicant’s Agent pointed out that the Applicant did not refuse to provide a sample but rather was unable to do so.

The Registrar’s Agent rebutted the Applicant’s Agent comment regarding a surgery supposedly undertaken by the Applicant around Easter. The Registrar’s Agent contends that there is no written evidence of this surgery, and emphasizes that it not up to the Applicant’s Agent to provide evidence.

<u>The Registrar’s Evidence</u>

Constable Wayne Plaquet the officer who made the breath demand was called as a witness. He confirmed that he has about nine years of experience in the job.

Constable Plaquet described the events that led to the Applicant's breath sample being demanded. He then testified that at first glance the Applicant did not exhibit any signs of discomfort, nor did he initially ask for medical assistance.

The officer described the Applicant’s attempts to provide a sample. Although three demands were made, only one attempt was made. During the attempt the Applicant blew for approximately one second and began coughing. At this time he advised the constable that he could not blow as he was “sick”, and asked for an ambulance.

Constable Plaquet attested that the Applicant was coughing during his bursts of yelling, but his notes did not indicate that the Applicant was vomiting or coughing up blood.

Regarding the Applicant’s comments with respect to his health, Constable Plaquet

admitted that he was suspicious of the Applicant's claims, and stated that he called an ambulance in order to "cover my bases".

In cross-examination, the Applicant's Agent questioned the officer as to the Applicant's previous involvement with the police earlier the same day and his subsequent release. Constable Plaquet acknowledged that the Applicant was taken to hospital, but refused to admit that his condition was serious enough to warrant hospitalization.

Asked why he did not ask for a blood sample, Constable Plaquet denied that he had the option. According to Constable Wayne Plaquet the situation did not warrant a blood sample as there were no grounds under statute.

Constable Plaquet asked the Tribunal if he could make a statement. There being no objection he was allowed to continue. Constable Plaquet proceeded to inform the Tribunal of the Crown Attorney's position in this matter. Constable Plaquet asserted that since it is doubtful that any of the Applicant's health care providers have legal training or training in the roadside breathalyser device, whatever anyone says in the reports regarding the lung cancer is of no consequence. Constable Plaquet claimed that: "They can say whatever they want" he was informed by the Crown that the Applicant must prove lung capacity.

APPLICATION OF THE LAW TO FACTS

In his closing remarks, the Applicant's Agent summed up by highlighting the medical information submitted by the health care providers which, in his view, clearly states that the Applicant's lung capacity limits his ability to comply with a breath demand. Given that he was taken to hospital by ambulance and the length of time he was kept at the hospital, there is no doubt that he was in need of medical attention.

The Applicant's Agent continued by pointing out that the Applicant has no criminal record and that he needs his licence in order to attend the various medical appointments he must keep due to his condition.

The Registrar's Agent, in his closing remarks, confirmed that it is not the intention of the Registrar to challenge the Applicant's medical history. Albeit the medical condition might have been present in the past, in the view of the Registrar's Agent, it was not a medical condition that caused the Applicant to refuse to provide a breath sample.

The Registrar's Agent maintained that the Applicant had no intention of providing a breath sample, and consciously made a decision not to do so. The eyewitness evidence from the officer is that, other than for the coughing, there was no reason why the Applicant could not provide a breath sample.

The Registrar's Agent disputed that the Applicant was in any distress as he was not coughing prior to the breath demand and only asked for an ambulance after he was actually charged. According to the officer, the Applicant had no trouble yelling and

cussing.

With respect to the medical reports, the Registrar's Agent questions why the Applicant did not have page two of the Appeal form completed by his physician and opted instead to provide a history of the condition. Referring to the document dated February 24, 2010, the Registrar's Agent points out that the physician's comments were made without the benefit of eyewitness evidence. The physician offers no dates of surgeries to corroborate the history, nor does he provide clinical evidence to indicate that the Applicant would have impaired ability to provide a breath sample. Neither physician has deemed it necessary to request pulmonary function tests.
Further both physicians are vague in their comments using words like "likely and may". The Registrar's Agent asked that the Tribunal not be swayed by the cancer diagnosis. The question is whether the condition would prevent the Applicant from providing a breath sample.

The Registrar's Agent called attention to the fact that the Applicant was able to complete three attempts earlier in the day, and yet was able to drive home without incident. Subsequently after only one attempt he requested an ambulance.

In summary the Registrar's Agent noted that there are no hospital admission records to substantiate the Applicant's grounds for appeal.

The Applicant's possible state of intoxication or degree of impairment is not within the Tribunal's mandate and does not influence the Tribunal's decision.

With respect to the Applicant's offer to provide a blood sample, the Tribunal would like to clarify that subsection 48.3(3) of the Act is clear in its provision, in that the concentration of alcohol in the blood may be obtained "by an analysis of breath or blood taken". Although the option is available, the decision to request a blood sample remains at the discretion of the officers. According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. Accepting policy, as per norm, since there were no such signs, the Tribunal deems the issue of a blood sample irrelevant.

The Registrar's Agent has not disputed the Applicant's medical condition, as stated in the medical records; thus, the medical condition is proven.

The Tribunal agrees with the Registrar's Agent that there are two components to Section 50.1 (2) (b). It does not suffice to establish that an individual has any type of a medical condition. The crux of the issue is whether the medical condition was manifesting at the time of the breathalyzer and caused the individual to fail or not comply with a breath sample demand.

The only evidence available to the Tribunal in this matter are the Applicant's written submissions and the eyewitness testimony of the officer involved in the incident. Normally

the Tribunal would accord considerably more weight to eyewitness evidence, yet the medical evidence in this matter cannot be dismissed easily.

Both the officer and the Registrar's Agent inferred that the medical reports and the Applicant's present condition are suspect. No evidence of collusion between the Applicant and his physicians was introduced. Thus the Tribunal will not entertain the notion.

The Registrar's Agent maintains that the Applicant medical history is just that, "history". The Registrar's Agent contends: that the condition was in the past; that the physicians' opinions with respect to the Applicant's ability to provide a breath sample are pure conjecture which is clearly demonstrated by the evasive tone of the reports and that the lack of pulmonary function reports render the reports useless.

The Tribunal does not share the Registrar's Agent view that the lack of pulmonary function reports devalue the reports, nor with the suggestion that the Applicant's condition is in the past. According to Dr. D'Souza: "The most recent imaging shows that has two nodules, one in the right lung, one in the left lung." Dr. Colin Bryan notes that "both cancers are progressive". However dated the Applicant's medical history may be, his condition is not likely to go away. Nonetheless, there is evidence of the Applicant's state of health at the time of the breathalyser session. According to the Ambulance Report the Applicant was "coughing up blood occasionally". The Tribunal is satisfied that the Applicant must have been in some distress at the time. This premise is further validated by the physical exam performed by the paramedics which also confirms:

> "Chest Air Entry" as "Decreased", as well as: "Chest tightness and heaviness substernal radiating to L arm. 5/10"

The Tribunal finds the medical reports conclusive, and is satisfied that the condition was present at the time and could have prevented the Applicant from providing an adequate sample.

The onus is on the Applicant to establish the merit of the appeal and the Tribunal finds that he has done so. Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that he was able to demonstrate that at the time of the breath demand, he was suffering from a medical condition which would prevent him from providing a breath sample.

DECISION

Upon the application by the Applicant to appeal the Registrar's Suspension Order, February 20, 2010, pursuant to section 48.3 of the Act, and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under subsection 50.1(4) of the HTA, the Tribunal orders the suspension **set aside.**

LICENCE APPEAL TRIBUNAL

_____
Antoine Aouad, M.D.
Presiding Member

RELEASED: April 29, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5954-ADLS

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: KENNETH W. KOPROWSKI, Vice Chair

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 31, 2010 Windsor

REASONS FOR DECISION

A hearing was held on March 31, 2010, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("HTA").

The Tribunal released its Decision on April 6, 2010 with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section of the 48.3 of the HTA for the following reasons.

REASONS

BACKGROUND

The Applicant appealed by way of a Notice of Appeal, filed as Exhibit 2, under section 50.1 of the HTA. The Applicant appeals from the order of the Registrar of Motor Vehicles (the "Registrar") dated January 16, 2010, filed as Exhibit 1.

Reason for the Appeal

The reasons for the appeal set out in the Notice of Appeal are summarized as follows:

The Applicant states that he was unable to provide the required breath sample because of a medical reason.

Part of the Notice of Appeal is a medical report, dated March 11, 2010, from the Applicant's family physician. The report states that the Applicant has been the doctor's patient for nineteen years and that the Applicant suffers from acute asthma and that his condition prevented "adequate exhalation", as quoted from the report. The family physician does not provide further particulars.

In support of the family physician's report there are copies of pulmonary function test ("PFT") results, but they are all dated January 31, 2002. The incident occurred on January 16, 2010, and is two weeks short of being eight years after the date of the PFT results. There were not any more recent PFT results that were filed in support of the Applicant's appeal.

The family physician's report gives no details of the date of the Applicant's last visit with him.

Preliminary Matters

There were no preliminary matters raised by either party.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the HTA states:

> 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 to the Act, at subsection 15(1), (2) and (3), requires that a medical report must contain:

> 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
>
> (a) the name, telephone number and address, with the postal code, of the medical practitioner;
>
> (b) the name, date of birth and address of the person who is the subject of the report;
>
> (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
>
> (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
>
> (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
>
> (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

> (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
>
> (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 provides:

> "A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS

The Applicant argued that, because of his breathing problems arising from his acute asthma condition, he could not provide a sample of his breath. Therefore, he could not blow enough air into the approved roadside breathalyzer that the police had given to him. On the other hand, the Registrar's witness, an officer of the Ontario Provincial Police ("OPP") who tried to have the Applicant provide a breath sample, stated that the Applicant was refusing to blow properly into the unit, despite the officer having shown the Applicant how to blow into it properly.

Evidence of the Applicant

The Applicant stated that, a short while after having left a relative's residence by car on the evening of January 16, 2010, he began to have difficulty breathing at about 9:15 p.m., while he was driving. He experienced tightness in his chest, as he has experienced from time to time in the past because he suffers from asthma. For this condition, he takes Ventolin, when needed, to help with his breathing, but takes Symbicort on a daily basis. On this occasion, he had only Symbicort with him in the car. After taking one inhalation of the Symbicort, as he was still driving, he obtained minor relief, but he wanted to hurry home to take his Ventolin.

He passed another vehicle which he felt was travelling very slowly. The evidence revealed that the speed limit on the highway at that location was fifty kilometres an hour. The Applicant admitted that he exceeded the speed limit in passing the vehicle. The evidence revealed that he was travelling so fast that the police officer who pursued him, and who was the Registrar's only witness at this hearing, charged the Applicant with "stunt driving" under the *Highway Traffic Act* of Ontario. That charge involves exceeding the speed limit by fifty kilometers an hour or more.

The Applicant eventually pulled into the driveway of his residence, followed closely by the officer's police cruiser. The Applicant stated that he did not see the cruiser until it pulled into the driveway. The Applicant had to exit his vehicle from the passenger's side, because the cruiser was pulled up close to the driver's door of the Applicant's vehicle.

The Applicant testified that he was placed in handcuffs and was placed in the rear seat of the officer's cruiser. By this time, he stated that about four other cruisers had pulled into the Applicant's driveway. When the police officer asked the Applicant if he had been drinking, he stated that he had not. This is contrary to the subsequent testimony of the police officer. When the police officer stated that he smelled alcohol on the Applicant's breath, the Applicant again stated that he had not been drinking. Nevertheless, the officer obtained a portable breathalyzer unit and asked the Applicant to blow into it. The Applicant stated that he attempted to provide a breath sample, but the unit indicated that a sufficient sample was not provided. The officer then changed the mouthpiece and demonstrated to the Applicant how he was to blow into the unit. Then, using a different mouthpiece, the Applicant stated that he attempted again to provide a sample of his breath. That attempt, as well, failed. The officer then accused the Applicant of refusing to blow properly.

The Applicant responded that he did not refuse. He testified that his position in the rear seat of the cruiser prevented him from providing a proper sample. He stated that he was still in handcuffs, with his hands behind his back, and was slightly bent forward, sitting sideways in the rear seat. The officer, in his testimony, further elaborated that the Applicant was, in fact, sitting sideways, but his feet were touching the ground, and the Applicant was sitting on the side edge of the rear seat. The police officer held the unit as the Applicant was blowing into it. The Applicant claimed that this uncomfortable position did not allow him to adequately expand his diaphragm to provide a proper breath sample.

The police then took the Applicant to the nearby OPP detachment. The Applicant emphasized that he was not under the influence of alcohol, was not staggering while walking, and his speech was not slurred. However, the Tribunal had to remind the Applicant that the issue before this Tribunal was not whether he had been drinking but, rather, whether the he failed or refused to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason.

While at the detachment office, the Applicant stated that he was out of breath but was still able to walk. Sometime after being placed in a holding cell, the Applicant began to feel more distressed, so that the police called the Applicant's girlfriend, who brought a Ventolin inhaler about ten minutes later. After taking the Ventolin, the Applicant was able breathe better. The police also called paramedics, as a precaution, according to the subsequent testimony of the investigating officer. When the paramedics arrived, they gave another Ventolin treatment to the

Applicant, and took him to a nearby hospital. After being seen first by a triage nurse, the Applicant eventually left the hospital without being seen by a doctor.

In support of his case, the Applicant referred to the PFT results attached to his Notice of Appeal. Those tests are dated January 31, 2002. The Applicant did not have any more recent test results to file with this Tribunal.

On cross-examination, the Applicant stated that, after he had taken the Symbicort while still driving home that evening, he was feeling good enough to continue driving home. He did not feel that he had to stop his car or that he should call the emergency telephone number, 911. When the police officer pulled up beside the Applicant's vehicle in the Applicant's driveway, the Applicant did not tell the officer that he needed the Ventolin inhaler that was in his residence. The Applicant stated that the reason for not telling the officer was that the Applicant was not, to quote the Applicant, in any "dire straits" after he had taken the Symbicort.

The Applicant acknowledged that the officer instructed him to take deep breaths and then blow into the breathalyzer unit and to keep a seal over the mouthpiece with his lips. The Applicant further admitted that he did not have any problems with his lips or his mouth that would prevent him from making a proper seal around the mouthpiece.

Even after having been taken to the OPP detachment, the Applicant did not tell anyone that he needed medication and did not feel that he had to be taken to a hospital or that he needed any medical attention. It was his testimony that it was not until about one-half hour from the time that the Applicant unsuccessfully blew into the breathalyzer that he asked for any medication, by which time he was in the holding cell at the OPP detachment. The testimony of the OPP officer confirms that the time was actually one hour and twenty minutes, and not one-half hour. The Applicant then further admitted that, after the paramedics had taken him to the hospital, the triage nurse deemed him to be stable and placed him in the waiting room. After two hours, no doctor had yet seen the Applicant. The Applicant was experiencing no difficulty, so he left the hospital without seeing a doctor.

After this incident, the Applicant admitted that he saw his own family physician about two days later, but his doctor did not examine him. In February, the Applicant saw his doctor again, but, again, his doctor did not examine him. Finally, the Applicant again saw his doctor on March 11, 2010, at which time the doctor filled in the report, previously referred to as being part of the Notice of Appeal, Exhibit 2. On March 8, 2010, the doctor wrote a letter, also filed as part of Exhibit 2, which states that the Applicant had been treated for asthma over the past twenty years, and that he currently takes Symbicort and Ventolin. The letter is addressed "To whom it may concern." The Tribunal notes that neither the report of March 11 nor the letter of March 8 indicates that the Applicant would

have had difficulty in providing a breath sample into a breathalyzer on January 16.

Evidence of Constable Daniel Pillon

Constable Pillon has been a member of the OPP since April 2006.

On January 16, 2010, he was on moving radar patrol. This means that his approved directional radar was not a stationary unit, but, rather, one that allows a police officer in a moving police cruiser to determine the speed of any on-coming vehicle. On the night in question, Constable Pillon noticed that his radar reading for the Applicant's vehicle was, on a first reading, 110 kilometres per hour ("kph") and, on the second reading, 118 kph, in an area where the speed limit was 50 kph. The Constable then activated his cruiser's emergency lights as the Applicant's vehicle passed by. When the Applicant failed to stop, the Constable turned his cruiser around and pursued the Applicant's vehicle at speeds exceeding 120 kph. The Constable followed the Applicant's vehicle onto the driveway of the Applicant's residence. At that point, the Constable had the Applicant exit his vehicle by way of the passenger door, placed him in handcuffs with his hands behind his back, and placed him in the rear seat of the cruiser. Four other cruisers arrived at the scene; a procedure that Constable Pillon stated was standard for cases involving vehicle pursuits.

The Applicant alleged that his asthma condition prevented him from providing a sample of his breath into the breathalyzer. The Registrar's Agent disputed that allegation on several grounds, one being that the Applicant did not complain about his condition or seek medication for it until a significant time after the demand for the breath sample was made. Therefore, in these Reasons, the Tribunal considers it to be necessary to set out the specific times at which the officer stated that events occurred on January 16.

At 9:48 p.m., while at the Applicant's driveway, Constable Pillon charged the Applicant with fleeing police and dangerous operation of a motor vehicle.

While confronting the Applicant on those charges, Constable Pillon also noticed an odour of alcohol on the Applicant's breath. When he asked the Applicant if he had been drinking, he stated that he had "a shot" at his brother's house. There was no evidence as to what drink the "shot" involved or how long before this incident he had taken it. But, at 9:50 p.m., Constable Pillon made a demand for a sample of the Applicant's breath, to be given into an approved breathalyzer unit that plugs into a 12-volt outlet in the police cruiser. At 9:52 and 9:53 p.m., Constable Pillon demonstrated to the Applicant how to blow properly into the unit. In response to this demonstration, the Applicant, using a vulgar profanity, stated that he was an ER (emergency room) nurse and knew what to do.

At 9:53 p.m. the Applicant was told to provide a breath sample. But, the Applicant did not seal the mouthpiece with his lips, so that air was being expelled around the mouthpiece. He also interrupted the flow of air so that, although the unit made a tone periodically to indicate that air was flowing in, the tone went off and on, indicating a periodic stoppage of air. The Constable concluded that the Applicant was using his tongue to cover the mouthpiece at different times. The Applicant challenged the officer on cross-examination, arguing that the officer did not actually see the Applicant's tongue cover the mouthpiece. However, the evidence revealed that there was nothing else in the Applicant's mouth at the time. Furthermore, the officer was only about one foot away from the Applicant during the use of the breathalyzer unit and since the officer could detect a puffing sound whenever the air was stopped, the Tribunal considers that the officer's conclusion was a reasonable one under the circumstances. The unit registered an "error" signal, confirming that a suitable sample of breath was not provided.

During this first episode, the officer did not detect any breathing difficulties on the part of the Applicant. As well, the officer did not detect that the Applicant exhibited signs of shortness of breath, or wheezing or coughing. The Applicant made no complaints about his breathing ability. He did not ask for any medication.

At 9:58 p.m., Constable Pillon inserted a new mouthpiece into the breathalyzer unit, and again asked the Applicant to blow into it. The results were the same as they were after the first demand; that is, the Applicant did not seal the mouthpiece, air was expelled around it, there was the same periodic stoppage of air, and the unit registered "error" once again. As before, the Applicant did not make any complaints about his medical condition.

Before the officer administered the breathalyzer test for a third time, he warned the Applicant that, if he did not provide an adequate breath sample for a third time, he would charge him with failing to provide a breath sample. Again, however, the results were the same as they were for the two previous attempts. The constable charged the Applicant with refusing to provide a breath sample, to which the Applicant responded, "Whatever."

At 10:01 p.m., the police officer and the Applicant left the Applicant's driveway and travelled to the OPP detachment. The Applicant was still in the rear seat of the police cruiser. At 10:12 p.m., the Applicant was lodged in a cell. He talked to his lawyer at 10:34 p.m. by telephone, privately, outside the cell, and at 10:39, he returned to his cell.

At 11:10 p.m., approximately one hour and twenty minutes after the Applicant was first asked to provide a sample of his breath, the Applicant asked for his inhaler, prompting a call to this girlfriend at 11:15 p.m. to bring the inhaler and also prompting a call to paramedics as a precaution. At 11:33, the Applicant used his inhaler. At 11:45 p.m., the paramedics arrived. At two minutes after midnight,

the police released the Applicant on a Promise to Appear in Court. The paramedics took him to a nearby hospital.

At 1:00 a.m., Constable Pillon received a telephone call from that hospital and was advised that the Applicant had left on foot without seeing a doctor. Constable Pillon then notified the local police services to make them aware that there was a person in the community who might be in need of medical attention. However, there was no evidence of any further police or paramedic involvement with the Applicant.

On cross-examination, the Applicant stressed that he was in an awkward position in the police cruiser when the officer asked him to provide a breath sample. In response, the officer stated that the Applicant's position was conducive to providing a sufficient sample. The officer explained that the Applicant was sitting sideways in the rear seat of the cruiser, his hands were behind his back, and his feet were touching the ground, and he was bent slightly forward. There was no evidence before this Tribunal that supported the Applicant's contention.

In addition, the Applicant questioned the officer on why he did not ask the Applicant about any medical condition he might be suffering from. In reply, the officer stated that he did not ask about the Applicant's medical condition because, during his interaction with the Applicant before they went to the detachment office, there were no physical signs that he was in any kind of distress.

APPLICATION OF THE LAW TO FACTS

The reports from the Applicant's family physician fall short of saying that the Applicant was unable to provide a sample of his breath into the roadside breathalyzer unit on January 16, 2010. The Applicant's doctor states only that the Applicant suffers from acute asthma. There is nothing in his two reports that substantiates the Applicant's contention that his breathing problems prevented a successful breathalyzer test. The Tribunal acknowledges that the doctor, in his report of March 11, does state that the Applicant's acute asthma "prevents adequate exhalation." However, that still does not answer the question as to whether the Applicant could properly blow into the breathalyzer on January 16. Even the PFT results attached to the March 11, 2010, report, are almost eight years old. There were no recent test results closer to January 16, 2010.

In contrast, the report from Dr. Goldstein dated March 24, 2010, and attached to the Respondent's submissions, Exhibit 3, is quite persuasive. His report states that the vast majority of individuals, even with a Forced Expiry Volume in 1 second (FEV 1) of 0.7 are able to satisfactorily provide a breath sample into the unit notwithstanding their respiratory condition. On the Applicant's PFT results attached to Exhibit 2, this Tribunal notes that the Applicant's FEV 1 both before and after the Applicant used a bronchodilator are well over 3.00. Those readings

are all higher, and therefore better, than the 0.7 reading that Dr. Goldstein states would be sufficient to provide a breath sample.

In addition, this Tribunal does not accept the Applicant's argument that the PFT results of January 31, 2002 give rise to the "possibility," to quote from his argument, that he might not have been able to provide a sufficient sample of his breath on January 16, 2010. The reason is that, attached to the Respondent's submissions, Exhibit 3, there is a Notice to Registrar dated February 15, 2002, just fifteen days after the Applicant's PFT results on January 31, 2002. As the Registrar's counsel argued, the Notice confirms that the Applicant's licence was suspended under the ADLS provisions of the *Highway Traffic Act* of Ontario for having blown "over 80." Therefore, if the Applicant could successfully provide a sample of his breath within fifteen days after his PFT results on January 31, 2002, it is not logical to hold that the test results from January 31, 2002, can support the Applicant's contention that he could not provide a sample of his breath almost eight years later. The absence of any recent PFT results that might have demonstrated that he could not have provided such a sample on January 16, 2010 supports the Tribunal's decision.

Furthermore, the Applicant has the onus of proving his case based on a balance of probabilities, and not based on mere possibilities.

In addition, there is other evidence to support the Registrar's argument that the Applicant was not in such distress so as to prevent him from providing an adequate sample of this breath, summarized as follows:

At the time Constable Pillon attempted to have the Applicant provide a sample of his breath at the Applicant's residence, there was nothing in the Applicant's behaviour that indicated that he was experiencing any medical problem, let alone a shortness of breath. What the officer did see, however, was that the Applicant did not form a seal around the mouthpiece, resulting in air being expelled from around the mouthpiece. He also observed that Applicant interfered periodically with the flow of air into the breathalyzer. Yet, the Applicant confirmed, in his testimony, that he had no problems with his lips or his mouth that would prevent him from blowing properly into the breathalyzer. The Applicant himself stated that he was not in "dire straits" when he was asked to blow into the breathalyzer.

The Applicant did not ask for medical attention until approximately one hour and twenty minutes after he was first asked to provide a breath sample.

The Applicant was an ER nurse, and would have known to ask for medical assistance, if he needed it; yet he did not ask for any help when he was asked to blow into the breathalyzer.

Even when the Applicant was taken to a nearby hospital, there is no evidence that he needed any medical assistance, after being assessed by the triage nurse. The Applicant, in fact, left on his own accord, without being seen by a doctor.

The Applicant's condition is under control. The family physician who prepared the report of March 11, 2010, does not even give the date of the Applicant's last visit to his office.

For all the above reasons, this Tribunal concludes that the Applicant has not shown that he was unable to provide a sample of his breath on January 16, 2010 for a medical reason.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated January 16, 2010, pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, **the Tribunal confirms the suspension.**

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski
Vice-Chair

RELEASED: April 8, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

6065-ADLS-MED-Medical

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D, Presiding Member,
D. GREGORY FLUDE, Vice-Chair

APPEARANCES: PETER V. DeJULIO, Solicitor, representing the Applicant

KYLE M. BIEL, Agent, representing the Registrar of Motor Vehicles
MICHAEL T. DOI, Counsel for the Intervener A. G. of Ontario

DATE OF HEARING: June 9, 2010 Toronto

REASONS FOR DECISION

A hearing was held on June 9, 2010 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 ("HTA").

The Tribunal released its Decision on June 10, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section of the 48.3 of the HTA for the following reasons.

BACKGROUND

The Applicant appealed by way of a Notice of Appeal under section 50.1 of the HTA. The Applicant appeals from the order of the Registrar of Motor Vehicles (the "Registrar") dated March 28, 2010.

REASON FOR THE APPEAL

The reasons for the appeal set out in the Notice of Appeal are summarized as follows:

The Applicant's appeal is grounded in ss. 50.1 (2)(b), that is, that he was unable to provide a breath sample on the grounds that he had a medical condition that rendered him unable to blow. The Applicant further argues that certain police behaviour infringed his rights under s. 7 of the *Canadian Charter of Rights and Freedoms* which states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW

Pursuant to the provisions of s. 48.3 of the Act, the Applicant's driver's licence was suspended for a period of 90 days. The Applicable provisions of s. 48.3 state:

> **Suspension of licence, alcohol testing**
>
> **48.3** (1) Where a police officer is satisfied that a person driving or having the care, charge or control of a motor vehicle or operating or having the care or control of a vessel meets one of the criteria set out in subsection (3), the officer shall notify the Registrar of that fact, or cause the Registrar to be so notified, in the form and manner and within the time prescribed by the regulations.
>
> **Suspension of driver's licence for ninety days**
>
> (2) Upon being notified under subsection (1), the Registrar shall suspend a person's driver's licence for a period of ninety days.
>
> **Criteria**
>
> (3) The criteria for the purpose of subsection (1) are:
>
> 1. The person is shown, by an analysis of breath or blood taken pursuant to a demand made under subsection 254 (3) of the *Criminal Code* (Canada) or pursuant to section 256 of the *Criminal Code* (Canada), to have a concentration of alcohol in his or her blood in excess of 80 milligrams in 100 millilitres of blood.
>
> 2. The person failed or refused to provide a breath or blood sample in response to a demand made under section 254 of the *Criminal Code* (Canada).

The Applicant appeals to this Tribunal pursuant to the provisions of s. 50.1 of the Act. S. 50.1 provides:

Appeal of ninety-day suspension

50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.

Grounds for appeal

(2) The only grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3 (3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

Supporting material

(3) A person who appeals to the Tribunal under subsection (1) shall file such written material in support of the appeal as may be required by the regulations made under clause 49 (4) (c), together with such other material as the person may wish to submit, and the Tribunal shall not hold a hearing until all the supporting material is filed.

Powers of Board

(4) The Tribunal may confirm the suspension or may order that the suspension be set aside.

Licence reinstated

(5) If the Tribunal orders that the suspension be set aside, it shall give written notice of the order to the appellant and the Registrar and, upon receipt of such notice, the Registrar shall reinstate the appellant's driver's licence, subject to any other suspension under this Act.

Decision final

(6) The decision of the Tribunal under this section is final and binding.

Suspension not stayed

(7) The suspension under section 48.3 continues to apply despite the filing of an appeal under this section unless the Registrar reinstates the licence pursuant to the Tribunal's order that the suspension be set aside, and this subsection prevails over the *Statutory Powers Procedure Act*.

FACTS:

The Applicant was taken to his local police station on March 28, 2010 and asked to provide a breath sample. The officer who administered the breath test concluded that the Applicant

was deliberately refusing to blow into the device for the required five second period and, after several unsuccessful attempts to have the Applicant blow as required, charged him with refusal to provide a breath sample.

The Tribunal heard evidence from the Applicant and from the two police officers involved in his arrest, Officer Steven Bebee and Officer Michael Aaslay. The Applicant testified that he has a chronic medical condition known as *angioedema*. As a result of the condition, the Applicant suffers from periodic episodes of swelling in various parts of his body. It was the Applicant's evidence that he experiences attacks at least once a month. The severity changes from attack to attack. He stated that it normally takes about 10 hours for the swelling to go down once he starts his medication. He also stated, in cross-examination, that the condition may last three days.

On the morning of March 28, 2010, the Applicant stated that he awoke at around 6:00 a.m. with a swollen tongue, right cheek and gums. He self-medicated in accordance with advice from his physician. He took Prednisone, Reactin and Benadryl. He experienced some improvement in his symptoms. He then remained at home all day with two exceptions. Around noon he went to the grocery store. In the early evening, he went around to his girlfriend's house which was 90 seconds' drive away to see her kids. He stayed only a few minutes with his girlfriend because they had a dispute. He left and drove home. On arrival at his home, he was arrested by two police officers on unrelated charges.

The Applicant testified that on his arrest he immediately informed the officers that he had a medical condition and required medication from his car. He testified that the police officers ignored his requests for access to his medication. They also ignored his repeated requests to be taken to hospital. At the station, after he was processed and placed in a cell, he was taken to the breathalyzer room where a demand was made from him to provide a breath sample. Use of the breathalyzer device was demonstrated. He advised the officer of his medical problem. The officer ignored the medical information. The Applicant stated that he noted video recording equipment in the breathalyzer room. He asked the officer if the audio portion was working and was told that it was. He testified that he then walked over to the camera and said aloud that he was not refusing to blow but that his medical condition was such that he could not blow. Despite this fact, he tried his best to blow. After a couple of failed attempts, the officer charged him with refusal to provide a breath sample.

At a later date, the Applicant attended court on the charges relating to his refusal to blow. He was given disclosure by the Crown, including the video of his time in the breathalyzer room. It was at this time that he discovered that the video had no audio.

Officer Steven Bebee was an acting sergeant on March 28, 2010 on community patrol in a marked police cruiser. Over the radio he heard a call concerning an individual leaving a local bar and staggering to his car. The car was registered to the Applicant. Officers were dispatched to the bar to try to intercept the Applicant but he had already left. Officer Bebee was in the vicinity of the Applicant's residence so he parked his cruiser on the route he expected the Applicant to take home. After several minutes, the Applicant's car passed. Officer Bebee activated his roof lights but not the siren. Officer Bebee formed the impression that the Applicant speeded up when he activated his lights although his overall speed remained moderate. Because of potential danger to the public resulting from a high-speed chase, Officer Bebee decided not to initiate a pursuit. Instead he dropped back. He observed the Applicant's vehicle turning onto his street and pulling into the driveway. Officer Bebee parked his cruiser across the driveway in such a manner that the Applicant's car was locked in between his cruiser and a car already parked in the driveway.

Officer Bebee gout out of his cruiser and approached the driver's side door of the Applicant's car. The Applicant got out of the car and walked up his driveway to the house. Officer Bebee arrested the Applicant for impaired driving. He grabbed the Applicant's left arm at which point the Applicant spun to face him. Officer Bebee felt this move was aggressive so he spun the Applicant and locked him against a car in the driveway. He then tried to cuff the Applicant but due to the Applicant's struggles was unable to do so. The Applicant had freed one hand and was trying to put it in his waistband. Officer Bebee called for assistance and, once Officer Aaslay arrived and provided assistance, he was able to restrain the Applicant and arrest him. The Applicant was informed of his right to counsel and a demand for a breath sample was made of him.

Officer Bebee was able to smell alcohol on the Applicant's breath almost immediately after he approached him. While the Applicant's speech was slurred, Officer Bebee had no difficulty understanding him. The Applicant's eyes were red. Once he was restrained, the Applicant was taken to Officer Aaslay's cruiser. Officer Bebee stated that the Applicant was sufficiently unsteady on his feet to require assistance walking. He acknowledged that the Applicant had his hands cuffed behind his back and that this fact would interfere with walking but felt the Applicant's inability to walk was excessive in the circumstances.

The Applicant was searched following the arrest and his keys and wallet were removed from him. Officer Bebee found no medication on the Applicant's person. He knocked on the Applicant's door. It was answered by the Applicant's sister. He turned over the Applicant's personal belongings to his sister.

Throughout the arrest, Officer Bebee stated that the Applicant was yelling. He continued to yell: "Let me blow into the machine, I'm not drunk" in the back of Officer Aaslay's cruiser. According to Officer Bebee, at no time did the Applicant raise medical issues or ask for medication. Officer Aaslay then took the Applicant back to the police station. When Officer Bebee returned to the station later, Officer Aaslay informed him that the Applicant had refused to provide a breathalyzer sample. Officer Bebee then prepared and served the 90 day suspension notice on the Applicant.

Officer Aaslay testified that he was one of the officers dispatched to the bar after the report of the individual staggering to a car. The car having already left the bar, Officer Aaslay drove towards the Applicant's home address. On the way there he received Officer Bebee's call for assistance. On his arrival at the Applicant's home he observed Officer Bebee struggling with the Applicant in the driveway. He assisted Officer Bebee in taking the Applicant to the ground and restraining him. He then drove the Applicant to the police station.

At the station, the Applicant was processed by Staff Sergeant Doherty. The booking procedure involves questions about medical conditions. The Applicant did not complain about any medical conditions either in the cruiser or to Staff Sergeant Doherty. The Applicant was then taken to the cells and Officer Aaslay prepared the breathalyzer room. Officer Aaslay then took the Applicant from the cells to the breathalyzer room where he made a demand for a breath sample and informed the Applicant of his right to counsel. He demonstrated the use of the mouthpiece and the manner in which to give a sample.

The Applicant was not wheezing or coughing during this period. He was not drooling. He put the mouthpiece in his mouth and started blowing. He had no problem forming a seal and blowing and Officer Aaslay got a reading, but the Applicant stopped blowing just before the required length of time. Officer Aaslay readjusted the mouthpiece and asked the Applicant to blow again. The Applicant did not blow properly. He just stopped blowing. He pointed to the mouthpiece and said: "I'm trying." He made no complaint about a medical condition that interfered with his ability to blow. Officer Aaslay determined that the Applicant was not willing to give the required sample and charged him with refusal to provide a breath sample.

Officer Aaslay has been a certified breathalyzer for two and a half years. During that time the breathalyzer room has been equipped for audio/video recording. It activates automatically with motion sensors when someone enters the room. There is no procedure for him to check the functioning of the audio/visual equipment prior to entry to the room. He assumed it was working properly when he tested the Applicant and advised the Applicant that the test was being recorded. Following the test, he filled out a request to seize the recording which was forward to the Inspector. The recording was seized and put in the evidence room for use in future court proceedings. Officer Aaslay has not seen the recording.

The medical evidence put forward by the Applicant establishes that he does suffer from episodic *angioedema* and has done so since October 2006. There are several emergency admission reports ranging from a Triage Report of October 8, 2006 to an Emergency Admission Report dated April 4, 2009. The April 2009 report details an *angioedema* episode involving his tongue. That report indicates no wheezing and a clear chest. He was tested at Hospital but no allergens were identified that triggered his condition. The Hospital report recommends the use of Reactin and Benadryl when episodes of swelling occur, as the condition responds easily to these medications.

Approximately two weeks after his arrest, The Applicant was seen by his family physician. With respect to that visit, the physician wrote:

> *[The Applicant]* suffers from episodic angioedema which causes swelling of his tongue and upper lip. He tells me that he was experiencing this problem when asked to do a Breathalyzer on March 28, 2010. In theory the swelling of his tongue and upper lip could interfere with his ability to comply with the Breathalyzer.

Some time later, the Applicant's family physician was asked for a fuller report on the Applicant's condition. He expands on the theoretical musings in his earlier letter.

> On that night [*March 28, 2010*] [*The Applicant*] reports that he was experiencing swelling of his tongue to a degree that he could not comply with a breathalyzer. This is possible in theory however if this is truly what [*The Applicant*] was experiencing at the time then his speech would be markedly garbled and very difficult to understand. If the officer who charged him states [*The Applicant's*] speech was essentially normal then I very much doubt that the tongue swelling the he was experiencing would prevent him from complying with the breathalyzer.

ANALYSIS

A review of the totality of the evidence indicates that the Applicant has been less than forthcoming with the Tribunal. His evidence lacks consistency. He stated that he awoke at 6:00 a.m. with swelling in his mouth. He self-medicated. According to the Applicant, it takes about 10 hours for the swelling to go down although he said it may last three days on occasion. By the time of his arrest approximately 13 hours after he awoke, it was his evidence that his condition had improved. All of that day, while under no pressure or duress, the Applicant chose not to attend hospital or seek an appointment with his physician, yet, it was his evidence that he immediately asked the police to take him to hospital when he was arrested and repeated that request when he was taken in for processing and prior to giving his breath sample. There is an inconsistency in the Applicant suddenly needing to attend the hospital with improving symptoms.

Not even the Applicant suggests that he was unable to blow into the breathalyzer or to make a good seal. Nor does the Applicant argue that his words were so slurred that the arresting officers could not understand them. While Officer Bebee testified that the Applicant's speech was slurred from the effects of alcohol, and while he used the term, "very slurred" in his notes at the end of his shift, both he and Officer Aaslay testified that they were able to understand him clearly. There is no evidence that the Applicant's speech was "garbled and very difficult to understand." The Tribunal concludes that, on a balance of probabilities, the Applicant was not suffering from a medical condition on the evening of March 28, 2010 that rendered him unable to provide a breath sample when the police made the demand.

The Applicant argues that the failure of the police to have the audio recording in operation constitutes a breach of his rights under the *Canadian Charter of Rights and Freedoms*. According to the Applicant's argument, the contradiction between the evidence of the officers and the evidence of the Applicant regarding his medical condition and the officers' knowledge of it raises issues as to credibility. As can be seen from the analysis above, the Tribunal has reviewed the Applicant's evidence without reference to the police evidence and found it to be internally inconsistent. The Tribunal has found that, even accepting the Applicant's evidence about his medical condition, he raised no complaint about an inability

to communicate his medical condition to the officers. Indeed, it is his evidence that he stated quite clearly to the camera in the breathalyser room that he was not refusing to blow but could not because of some undefined characteristic of his swollen tongue; a characteristic not supported by the medical evidence and the fact of his clear speech. The Applicant's statements that he had a medical condition carry very little probative weight about the possibility that he had a condition of such severity that he could not form a seal and blow into the test apparatus. It is the balance of the Applicant's evidence, and the agreement of that evidence with the evidence of Officer Aaslay, that form the basis for the Tribunal's conclusions. Even if the Tribunal resolves the evidentiary dispute in favour of the Applicant - that he did complain about his condition - his appeal must fail.

Finally, the specific section of the *Charter* relied on by the Applicant, s. 7, addresses the fundamental right of all Canadians to "*life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*." For the Applicant to succeed he must demonstrate that administrative suspension of a driver's licence is a matter of life, liberty or security of the person. This question was considered by the Ontario Court of Appeal in *Horsefield v. Ontario (Registrar of Motor Vehicles)* [1999] O.J. No. 967. Justice Finlayson speaking for the Court stated at paragrahs 53 and 54:

> I hardly think that losing for 90 days the privilege or license to drive a motor vehicle is in the same category as suffering the state to dictate one's place of residence. The suggestion does trivialize the Charter, which is intended to protect fundamental liberties, not insulate the citizen from inconvenience, no matter how great that inconvenience may be in the individual case…..
>
> For the reasons set out above, I am of the opinion that s. 48.3 of the HTA establishing the ADLS Program does not interfere with a liberty protected by s. 7 of the Charter.

Based on the *Horsefield* decision, the Applicant's *Charter* argument must fail.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated March 28, 2010 pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Antoine Aouad, M.D., Presiding Member

RELEASED: June 22, 2010

This decisionay also be available on Quicklaw at a later date.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6055/ADLS

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: DR. KEVIN FLYNN
Presiding Member

APPEARANCES: RABINDRA BADRINARAYAN
Self- represented

KYLE M.BIEL
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: June 3, 2010

DECISION RELEASED: June 3, 2010 Toronto, Ontario

REASONS FOR DECISION

A hearing was held on June 3, 2010 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 ("HTA").

The Tribunal released its Decision on June 3, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section of the 48.3 of the HTA for the following reasons.

REASONS

BACKGROUND

The Applicant appealed by way of a Notice of Appeal under section 50.1 of the HTA. The Applicant appeals from the order of the Registrar of Motor Vehicles (the "Registrar") dated April 25, 2010

Reason for the Appeal

The reasons for the appeal set out in the Notice of Appeal are summarized as follows: The Applicant claims that he was unable to complete the demand for a breath sample due to sudden shortness of breath and high blood pressure.

Preliminary Matters

At the onset of the hearing the Tribunal ordered that witnesses, except for the parties, be excluded during the testimony of other witnesses. The witnesses were cautioned not to discuss their evidence with the parties or other witnesses during the period of exclusion of witnesses.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the HTA states:

> 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 to the Act, at subsection 15(1),(2) and (3), requires that a medical report must contain:

15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS

The Applicant, accompanied by his wife was returning to Canada from a casino on the U.S.

side at approximately 02:00 hours on April 25, 2010. He entered the bus lane and was stopped by Border Service Officer Lorne Hamilton, an officer of the Canadian Border Service Agency. The officer detected the odour of alcohol from the driver and noted that he had bloodshot eyes. He asked if the driver had consumed alcohol that evening and was told that he had three drinks. He issued a demand for a breath sample, under authority of Section 48.3 of the *Highway Traffic Act*. This officer is trained to administer a roadside breath test.

He identified the Applicant as the driver.

He escorted the driver to an office and explained how the test is performed. He demonstrated the technique on himself. At each test the driver interrupted the blow and the machine showed “ERROR”. After the seventh attempt he advised the driver that he had one more chance to comply. He failed, was cautioned, placed under arrest for failing to supply a sample of breath on demand and was allowed to speak to Duty Counsel. He was placed in a holding cell pending the arrival of a Regional Police officer who would complete the requirements for arrest and release.

While in the cell the driver requested medical assistance regarding his blood pressure and an ambulance was called.

The officer informed the Tribunal that the driver show no signs of breathing difficulty or physical distress such as trembling or sweating. He did not ask for medication.

An ambulance arrived and the paramedics performed an assessment. Regional Police Officer Constable. Matthew Whitely arrived at 03:20 as the driver was being placed in the ambulance. The Officer briefed Constable Whitely. and informed him of events leading to the charge. Officer Hamilton accompanied the ambulance to the Emergency Room and Constable Whitely followed in his car.

The paramedics documented normal breath sounds and a rapid heart beat. They administered Oxygen and noted improvement on arrival at the E.R.

While the driver was awaiting assessment at the E.R. Constable Whitely observed no evidence of breathing difficulty. The driver was cooperative and expressed concern for his wife who had been left at the bridge.

The Medical record from the ER noted at 04:20 was difficult to decipher due to poor copy quality but shows blood pressure 168/116, heart rate 98, no shortness of breath, and the driver was given a sedative by mouth.

Constable Whitely completed documentation and released the driver from custody.

The Applicant discharged himself from the E.R at 06:50 hours.

Applicant denies that he told Officer Hamilton that he had taken any alcohol and informed the Tribunal that he had not been drinking. He stated that he asked for a blood test for alcohol upon failing to complete the demand for a breath sample. He was advised that there was no indication for a blood test. Constable Whitely advised the Tribunal that the circumstances did not call for a blood alcohol test to be demanded.

Medical evidence provided by the Family Physician in Reasons for Appeal states:

(a) Details and Diagnosis of Patient's Present Condition:

Hypertension, Non-Alcoholic

(b) History of Condition Precluding Patient from providing Breath or Blood Sample:

None. As per patient, he was willing to give blood sample

(c) Type of Measurements or recent test taken (dater indicated)

Blood work for glucose, liver enzymes, cholesterol elevated, liver enzymes within normal limits.

(d) Relevant details of last visit, including date of Patient's last visit

High blood pressure April 29, 2010, previous April 7, 2010, also has blood pressure.

(e) How long has the Applicant been your patient?

3 years.

A letter written by his regular family physician on May 12, 2010 states in part:

His blood pressure was very high when they checked him at the border and later in the emergency. This may have been the reason why he wasn't able to complete the breathalyzer test.

The Applicant stated that he was distracted by construction on the bridge and he drove by mistake into the bus lane. He attributes the rise of blood pressure and rapid heart rate reaction to being stopped by the officer and the demand for a breath sample. He states that he was unable to complete the breath sample because of his rising blood pressure and rapid heart rate. He denies that he had consumed alcohol and believes that he should have been tested by a blood sample as he requested.

The Respondent relies on sworn police evidence that the Applicant admitted to having

three drinks during the evening before being stopped. The Applicant failed to complete the breath test after eight attempts and two demonstrations by the officer. The applicant asked for emergency assistance only after he was charged. On arrival in the Emergency Room there was no evidence to support his claim of shortness of breath.

The Tribunal finds that:

1. The Applicant is the driver who failed to comply with a demand for a breath sample on April 25, 2010 when requested by a Peace Officer under Section *48.3* of the Highway Traffic Act.

2. Medical evidence produced by the Applicant in Reasons for Appeal under Regulation 574 to the Act, subsection 15(1)(2) and (3), fails to preclude the Applicant was medically incapable of providing a breath sample on demand under Section 254 of the Criminal Code

3. There was no indication for a demand for a blood sample from the Applicant under Section 50.1(b) of the *HTA.*

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated April 25, 2010 pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension

LICENCE APPEAL TRIBUNAL

_____
Kevin Flynn, M.D.

RELEASED: June 9 , 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6047-ADLS-LUNG-Lungs

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: KEVIN FLYNN, M.D., Member

APPEARANCES: A FAMILY MEMBER OF THE APPLICANT, Agent, representing the Applicant

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

DATE OF HEARING: May 31, 2010 Toronto

DECISION RELEASED: June 1, 2010

REASONS FOR DECISION

A hearing was held on May 31, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

The Tribunal released its Decision on June 1, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 48.3 of the Act for the following reasons.

BACKGROUND

The Applicant appealed by way of a Notice of Appeal under section 50.1 of the Act, and it was received by the Tribunal on May 14, 2010. The Applicant appeals from the order of the Registrar, effective February 22, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> I was unable to provide the required breath or blood sample because of a medical reason.

The Applicant claims that he was unable to complete a roadside breath test on demand, on February 22, 2010, on the ground of a pre-existing medical condition.

PRELIMINARY MATTERS

At the onset of the hearing, the Tribunal ordered that witnesses be excluded during the testimony of other witnesses. The witnesses were cautioned not to discuss their evidence with the parties or other witnesses during the period of exclusion of witnesses.

The Registrar's disclosure materials were sent by courier on May 25, 2010, to the Applicant's home address as noted in the Applicant's Notice of Appeal form, but were undeliverable. The Applicant was served with copies when the hearing commenced, and he agreed to continue.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension ("ADLS") under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

The Act states under section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574, R.R.O. 1990, to the Act at subsections 15 (1), (2) and (3) require that a medical report must contain:

15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 provides that:

A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS

The Applicant was driving his vehicle southbound on a provincial highway on February 22, 2010, when he lost control of his vehicle and ended up in a ditch. A civilian telephoned the regional police for emergency assistance, and Police Constable Jansen attended at the scene at approximately 2100 hours.

Police Constable Jansen gave evidence and identified the Applicant as the driver.

On the day of the incident, it was snowing and he found tire tracks leading to the vehicle. The lights were on and the engine of the vehicle was running. The civilian who had called informed the police that the Applicant had asked the civilian if he had any whiskey.

The driver informed Police Constable Jansen that his vehicle had "spun out" when he was returning from his destination (slang name of town deleted). He had a cooler in the vehicle containing two bottles - one was empty and the other contained water. Police Constable Jansen took the driver to his cruiser and noted that the driver was unsteady and appeared confused. The officer was also suspicious of the Applicant's mispronunciation of the town name (referred to above). He did not detect the odour of alcohol from the driver. The driver did not at any time request medical assistance. Police Constable Jansen sat with the Applicant in the cruiser and did not see evidence of medical distress.

He suspected that the driver had been drinking so he made a demand to the Applicant for a roadside test for alcohol.

He allowed the driver six attempts to blow into the Alcotest. The first two attempts showed "error", indicating insufficient blowing. On the third attempt, the driver failed to make a tight seal around the mouthpiece, and on the fourth attempt, the sample was too shallow to sound the tone. Police Constable Jansen cautioned the driver about the implications of failing to blow, and on the sixth attempt, the breath sample was again too weak and shallow. At 2126 hours, Police Constable Jansen arrested the driver, handcuffed him and took him to the police station. He informed the driver of his right to a lawyer but the offer was declined.

The Applicant contacted his family physician, Dr. V., several days after the incident.

Dr. V. had investigated the Applicant for a chest condition and a diagnosis of lung cancer was made by biopsy on April 13, 2010. Dr. V. prepared a letter on April 6, 2010, in accordance with the Regulation.

The doctor's letter states:

> <The Applicant> is under my medical care. In the past two months <the Applicant> has experienced increasing shortness of breath. This is associated with a chronic cough. <The Applicant> is a long time smoker. He underwent investigations which revealed, chronic lung disease as well as a nodule in his right upper lobe. <The Applicant> has been referred to a

> thoracic surgeon for further pulmonary assessment and biopsy of his lung nodule.
> On March 9, 2010 (*sic*) <the Applicant> was unable to adequately breathe into a breathalyzer.
> <The Applicant>'s poor respiratory and expiratory efforts are related to all of the aforementioned medical issues.

On May 12, 2010, Dr. V. completed the section on the Notice of Appeal form titled "Applicant's Medical Information". It notes as follows:

(a) Details and diagnosis of patient's present condition:

> Increasing shortness of breath, increasing cough, currently under investigation for lung cancer.

(b) History of condition precluding patient from providing breath or blood sample:

> This question was unanswered.

(c) Type of measurements or recent test taken with (date indicated):

> CXR - Chest X-Ray March 4/10, Lung CT Scan - March 19, 2010, Biopsy confirms lung cancer

(d) Relevant details of last visit, including date of patient's last visit:

> March 4/10 presented with cough, shortness of breath. Last visit - April 6/10

(e) How long has the Applicant been your patient?

> 6 years 2 months

(f) Physician's information:

> General Practice

The Applicant informed the Tribunal that he had a Pulmonary Function Test at the regional hospital on April 13, 2010. He agreed that this test was similar to the breathalyzer and confirmed that he had no problem completing it. A copy of the Pulmonary Function Test was not provided to the Tribunal. Also, the test was not referred to by Dr. V., in the section of the Notice of Appeal form completed by her.

The Applicant stated that he was a heavy smoker, since age 15, of one pack per day until about one month ago. He worked in construction in the 70s and 80s with exposure to asbestos.

He has been using a puffer for his breathing since he was seen by Dr. V., after the road accident in February 2010. He claimed that the breathalyzer can be adjusted to make it more difficult to blow. He stated that he told the officer that he had trouble breathing. He did not recall asking the civilian if the civilian had any whiskey.

An excerpt of the Applicant's Extended Driver Record shows the following convictions:

- February 1979 - Impaired Driving
- April 1979 - Impaired Driving
- October 1982 - Impaired Driving
- July 1984 - Fail/Refuse Roadside Breath Test
- July 1990 - Fail or Refuse to Provide Breath or Blood Sample
- July 1990 (x2 convictions) - Impaired Driving

APPLICATION OF LAW TO FACTS

The Tribunal finds that:

1. The Applicant was the driver charged on February 22, 2010, pursuant to the provisions of the *Criminal Code* of Canada, R.S.C. 1985, c. C-46 (the "*Criminal Code*"), and referred to in subsection 48.3(3).

2. The Applicant failed or refused to comply with a demand made under section 254 of the *Criminal Code* to provide a sample of breath, without a valid medical reason.

3. The medical evidence produced by the Applicant in his reasons for appeal under Regulation 574 to the Act, subsection (15)(1), (2) and (3), fails to prove the Applicant was medically incapable of providing a breath sample on demand under section 254 of the *Criminal Code*.

The results of the Pulmonary Function Test, performed on April 13, 2010, were not provided to the Tribunal.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar, effective February 22, 2010, pursuant to section 48.3 of the Act, and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the Act, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

_____

Kevin Flynn, M.D., Member

RELEASED: June 9, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6136-ADLS-MED

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL
Agent for the Registrar of Motor Vehicles

DATE OF HEARING: July 12, 2010 Cornwall

DECISION RELEASED: July 13, 2010

REASONS FOR DECISION

A hearing was held on July 12, 2010, at Cornwall, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA" or the "Act").

The Tribunal released its Decision on July 13, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section of the 48.3 of the HTA for the following reasons

BACKGROUND

The Applicant appealed, by way of a Notice of Appeal under section 50.1 of the HTA, dated and received by the Tribunal on June 25, 2010. The Applicant appeals from the order of the Registrar effective May 9, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> "I was unable to provide the required breath/blood sample because of a medical reason".

PRELIMINARY MATTERS

There were no preliminary matters. All documents were entered as exhibits with the consent of both Parties.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

O. Reg. 574 to the Act at subsections 15 (1), (2) and (3) require that a medical report must contain:

> 15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
>
> (a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of O. Reg. 574 provides:

> A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS

The Applicant's Evidence

The Applicant's driver's licence was suspended on May 9, 2010, as per the Notice of Appeal, filed as Exhibit #2.

The Applicant's written submissions were in the form of a typewritten letter dated June 22, 2010, and addressed "To Whom It May Concern". In her letter the Applicant sets out the reason for appeal as:

> "stressed (sic) induced breathing problems, which occur from Reactive airways disease".

In support of her grounds for appeal due to a medical condition, the Applicant provided the Tribunal with a letter from her physician, dated June 22, 2010. The Applicant's physician states:

> "This note is to confirm that (Applicant) has Reactive Airways Disease of moderate intensity. She has required hospitalization for treatment in the past. This condition would make it difficult for her to provide a breath sample especially in a stress-induced bronchospasm.
>
> (Applicant) was last seen June 10, 2010. At that time examination of her chest was positive for expiatory wheeze in both lungs. She does require ventolin and flovent inhalers and

singulair for management of the condition."

Together with the previously mentioned written submissions the Applicant also enclosed copies of prescriptions for Ventolin, Ration-Salbutamol HFA, Symbicort, Cipralex and Singulair.

At the hearing, the Applicant testified as to the events that led to her being stopped and asked to provide a breath sample. The Applicant attested that she became anxious and was having a hard time breathing when asked to provide a breath sample. She asked the officer for her purse so that she could use the ventolin inhaler and requested to be taken to hospital but the officer paid no attention.

In cross-examination, the Applicant affirmed that she did not recall telling the officer she would fail the breathalyzer and that she believes that she would have passed. The Applicant clarified that she asked the officer for her purse, but did not recall whether it was before or after she had been charged. When asked specifically if she had used the inhaler after retrieving her purse, the Applicant replied that she had already been charged.

As for signs of an asthma attack, the Applicant explained that she just felt tightness in the chest. She admitted to yelling at the officer and being angry because she believed he was being unfair.

The Applicant initially stated that she tried to give a breath sample by putting her "mouth on the thing once or twice". Under further questioning, the Applicant admitted that she tried only "once", and that she did not recall whether or not the mouthpiece was connected to the device. According to the Applicant "nothing happened", the machine did not emit a tone.

The Applicant affirmed that she was not having an asthma attack, that she felt that she "could not expel the air" and that her chest felt tight.

The Applicant insisted that she asked for an ambulance, but the officer did not take her seriously. Once she was released she went home and used her puffers for relief, but did not seek immediate medical assistance.

According to the Applicant she made an appointment to see her physician after finding out the suspension could be appealed. At that time the Applicant was sent for a pulmonary function test, which she was able to complete without medication.

<u>The Registrar's Evidence</u>

Constable Serge Duguay was called as a witness.

The Constable affirmed that he has been a police officer for "eight and half years".

The Registrar's Agent asked the Constable to describe the events that led to the Applicant's breath sample being demanded.
According to the Constable, when asked to blow into the device, the Applicant immediately

stated she would fail. The Constable testified that the Applicant's behaviour was belligerent; she was yelling, using profanity and making racial comments.

Constable Duguay affirmed that the Applicant held the mouthpiece in her hand but made no attempt to provide a breath sample. After she was charged, the Applicant told the officer that she was having an asthma attack, an ambulance was offered but the Applicant denied that one was needed.

Constable Duguay did not see the Applicant use any inhalers after she got her purse but remembers the Applicant stating the medication was not in her purse.

The Applicant opted not to cross-examine the officer.

APPLICATION OF THE LAW TO FACTS

In her closing remarks, the Applicant denied that an ambulance was offered and noted that the officer took her breathing difficulties as a joke.

The Registrar's Agent, in his closing remarks, confirmed that it is not the intention of the Registrar to challenge the Applicant's medical condition. Nonetheless, according to the Registrar's Agent, it was not asthma that caused the Applicant to refuse to provide a breath sample.

The Registrar's Agent maintained that the Applicant had no intention of providing a breath sample, and consciously made a decision not to do so. The Applicant confessed to the officer that she knew she would fail the test. The evidence from the officer is that the Applicant did not make an attempt to blow into the mouthpiece.

According to the Registrar's Agent, the officer did not observe any reason as to why the Applicant could not provide a breath sample. The officer's testimony is that there was no coughing, wheezing and that, in fact, she was yelling and swearing.

The Registrar's Agent continued by pointing out that the medical report, which is dated forty four days after the incident, is sparse and missing crucial information. Further, there are no test results to substantiate the claim that the Applicant could not provide a breath sample. She was able to complete pulmonary function tests, which are similar to the breathalyzer. The Registrar's Agent noted that there is nothing to link the "reactive Airway disease" to the Applicant's inability to provide a sample. It appears that the doctor was not aware that the Applicant did not even attempt the test.

The Registrar's Agent concluded by pointing out that there are inconsistencies in the Applicant's testimony and asked that the Tribunal prefer the evidence of the Constable rather than that of the Applicant.

In rebuttal, the Applicant expressed her disagreement with the Registrar's Agent closing

remarks. The Applicant admits to maybe raising her voice, but insists that the breathing difficulty she was experiencing would have prevented her from yelling. Reiterating her previous statement about not using the inhalers when she was given her purse because she had already been charged, the Applicant explained:

> "may be my breathing got better, that is why I did not need them".

The Applicant claims that she did not refuse to provide a breath sample; she simply believed she was not going to be able to do it because of her condition.

The Tribunal heard evidence from the officer that the Applicant simply refused to make any attempt to provide a breath sample. The Applicant hesitantly stated she tried "once or twice". She could not remember whether the mouthpiece was attached at the time but does remember, "nothing happened". The Tribunal is satisfied that the Applicant refused to comply with the demand for a breath sample. Nonetheless, as the Applicant implied that a medical condition was the cause of her refusal, the Tribunal examined the medical evidence provided.

The Registrar's Agent did not dispute the Applicant's condition, as stated in the medical records. Therefore, the condition is proven.

The Registrar's Agent pointed out that the Applicant failed to consult with a physician until after forty-four days had passed. Further, he argued that the medical report does not offer a detailed explanation, nor link the condition to the failure to provide a breath sample. The Tribunal agrees. The medical report attached to the Notice of Appeal form is vague and inconclusive. The physician mentions prior hospitalizations due to the condition, but offers no details regarding the length of stay or frequency of the asthma attacks.

The Tribunal considered the fact that during the Applicant's last visit to the physician, her chest was found to be "positive for expiatory wheeze in both lungs". Yet, the date of this visit was a full month after the incident. There is no conclusive evidence that the condition was pre-existent.

As there are two components to section 50.1 (2) (b) that must be considered, the Tribunal must point out that it does not suffice to establish that an individual has any type of a medical condition at the time of the breathalyzer demand. The crux of the issue is whether the medical condition caused the individual to fail or not comply with a breath sample demand.

Thus, in order to determine whether or not the Applicant was in fact experiencing respiratory difficulties at the time of the breathalyzer session, the Tribunal must rely on the evidence of the eyewitnesses involved in the incident, the Applicant and the police officer.

The evidence of the police officer is that at no time did he observe the Applicant exhibiting shortness of breath. The Applicant is adamant she was feeling tightness in the chest, perhaps due to anxiety, but confirmed that she was not having an asthma attack.
By her own admission, the Applicant declared that once she had been charged, there was

no need for the use of the inhalers. Further, although she maintains that she asked for an ambulance, she did not seek medical assistance after being released. The Tribunal finds that the actions and comments of the Applicant are not supportive of her claim that she was in a state of severe respiratory distress, which would have precluded her from providing a breath sample. Given the preceding, the Tribunal finds that the Applicant's testimony lacks the consistency required to be deemed credible.

The Tribunal is sympathetic with the Applicant's position that she was in a state of anxiety. Unfortunately, her view is not substantiated in the medical report.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that she has failed to do so.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated May 9, 2010, pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: July 16, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6227-ADLS-MED

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: DR. ANTOINE AOUAD, Presiding Member

APPEARANCES: ADAM LITTLE, Counsel, representing the Applicant

KYLE BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 10, 2010 Toronto

DECISION RELEASED: September 14, 2010

REASONS FOR DECISION

A hearing was held on September 10, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA" or the "Act").

The Tribunal released its Decision on September 14, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 of the HTA for the following reasons:

BACKGROUND

The Applicant appealed, by way of a Notice of Appeal under section 50.1 of the HTA, dated and received by the Tribunal on August 24, 2010. The Applicant appeals from the order of the Registrar effective August 15, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> "I was unable to provide the required breath/blood sample because of a medical reason".

PRELIMINARY MATTERS

Documents tendered were entered into evidence as exhibits with the consent of both parties. There were no preliminary matters in dispute between the parties.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

O. Reg. 574 to the Act at subsections 15 (1), (2) and (3) require that a medical report must contain:

> 15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of O. Reg. 574 provides:

> A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS

The Applicant's Evidence

The Applicant's driver's licence was suspended on August 15, 2010, as per the Notice of Appeal, filed as Exhibit #2.

The Notice of Appeal filed by the client, filed as Exhibit # 2 contains: "Ambulance – Outpatient; Toronto East General Hospital Emergency", report prepared by Dr. S; a blood analysis print out; and an ECG. All documents appear to have the date of August 15, 2010.

The Applicant also relied on several written documents which, were entered as exhibits as follows:

Exhibit 4: Curriculum Vitae of witness Marina Vaisman.
Exhibit 5: An Authorization and Consent form signed by the Applicant under the letterhead of <name deleted>.

Exhibit 6: Consists of two pages from the Doctor's Office, one being a prescription, the other a note from a physician whose signature is illegible and the name at the top of the pad reads "Dr. <name deleted>".

Exhibit 7: A letter dated August 19, 2010 from <name deleted>, confirming the Applicant's employment with the firm for the past "8 years".

The hospital report indicates that no anomalies were noted and that the Applicant was released after a couple of hours.

In a signed handwritten note, dated "AUG 24/10", the physician consulted by the Applicant during the absence of his long time family physician states:

> "Seen today (first visit) (Applicant's name) is currently suffering from depression. He describes a pain episode and was unable to complete a breathalyzer. He is to attend with a psychologist + to start an antidepressant anti-anxiety medication".

At the commencement of the hearing the witnesses were excluded at the request of the Applicant's counsel.

Lead by his counsel, the Applicant answered basic questions regarding his age, status in Canada, status with police, family and health.

The Applicant's health problems began approximately ten years ago when his wife left him. He described his medical condition as "stress" manifesting as rapid heartbeat, shortness of breath, headaches and stomach upset, which occur for no apparent reason.

The Applicant testified that he has been thoroughly checked out by his family physician and that no specific issues were found, other than that he was advised about smoking which could aggravate the shortness of breath.

When asked by his counsel to detail exactly what he feels when he is having a panic attack, the Applicant stated:

> "like now, my hands are getting wet, I am getting short of breath and …pressure in the heart, headache and weakness in the whole body …my whole body 'kinda' shaking, not enough air to breath, have to take some medication for it."

According to the Applicant, he began psychotherapy with a "counselor" about a year ago. The therapist is teaching the Applicant basic life skills.

At the request of his counsel, the Applicant related the events prior to the breath demand. With respect to the breath demand, when told that he might lose his licence if alcohol was found in his blood the Applicant attested that he "panicked …was afraid", because he has never had any dealings with the police and because of all his financial responsibilities. According to the Applicant the officer's loud voice, demeanour and use of profanity made him considerably more edgy and "scared, scared". The Applicant stated that throughout the incident, he felt embarrassed, particularly because the incident occurred in front of his

children; and also considers driving his livelihood and is well known. This led to his hands shaking so badly, that he was unable to open the plastic wrapper around the mouthpiece.

The Applicant explained what happened in each of the eight attempts to provide a sample. He repeatedly asserted that he tried to blow into the device as hard as he could but due to the circumstances, he was feeling

> "pretty bad …heart started pumping …tight …started to have short of breath …head starting hurting …pressure in head …dizzy…could not breath...".

After arriving at the police station and being placed in a cell, the Applicant began to feel pain in his back, similar to what happened in the past, and an ambulance was called.

According to the Applicant, he was unable to visit his physician of twenty-one years after the incident because the physician was on holidays. He did consult his therapist and another physician.

In cross-examination, the Applicant agreed with the Registrar's Agent's list of symptoms he was feeling at the time: "heart pumping, shortness of breath, hands shaking, dizzy, escalated to body shaking, bad headache, shortness of breath as the testing continued less air more trouble breathing".

In reply to the question posed by the Registrar's Agent as to why he did not request medical assistance, the Applicant explained that he was afraid of the officers. The Registrar's Agent countered with the question as to why he did not inform the officers at the police station of his situation when asked how he was feeling. The Applicant responded by stating that the police are all one team and that he was afraid, under stress and not understanding what was happening.

Being asked if he had a problem with his lips, the Applicant testified that he has "sore lips", and that while trying to provide a breath sample his "lips were shaking and may be some air comes out" around the mouthpiece.

At the request of Registrar's Agent, the Applicant admitted that he has never taken prescribed medication, using instead Valerian root as needed. In the past he had never been referred to a psychiatrist or psychologist, choosing only to see a counsellor. The counsellor has taught him techniques to deal with stressful situations which may cause panic attacks.

The Applicant testified that panic attacks have been happening for the past ten years and occur sporadically "once a month, once a week …just happen…". When asked by the Registrar's Agent if he knew he was having a panic attack, the Applicant replied: "I guess so, yeah". The Registrar's Agent pointed out that the hospital report says nothing about anxiety or panic. The Applicant's response was simply that he "told them everything". Further questioning determined that there might be some erroneous information in the hospital report.

No oxygen was administered while the Applicant was in the hospital, nor was there any medication prescribed. The ECG was unremarkable.

The Applicant's witness Marina Vaisman summarized her professional credentials emphasizing that her training and experience includes psychotherapy. She read from a list of widely known symptoms of anxiety, asserting that respiratory problems and pain on the left side are some of the indicators of anxiety or panic which are undetectable. Thus, although the officers were not aware, in her opinion the Applicant suffers from anxiety and was in the midst of a panic attack at the time of a breathalyzer, which caused his inability to provide a breath sample.

Ms Vaisman asserted that people in the throes of a panic attack are not able to talk. When the Applicant's counsel pointed out that the Applicant had no difficulty expressing himself, the witness insisted that his speech would be incoherent.

In cross-examination, Ms Vaisman confirmed the Registrar's Agent's remark that as a psychotherapist she is not able to diagnose, by way of explanation as to her previous testimony regarding the Applicant's condition. Ms Vaisman elucidated that depression is the diagnosis and anxiety and panic are the symptoms which can be determined through assessment.

Ms Vaisman testified that before the incident, she used to see the Applicant once per month but since his condition has deteriorated, she sees him once per week. In her opinion, the Applicant does not need to see a psychiatrist as psychiatrists are medical doctors and he is better served by a psychotherapist. Ms Vaisman noted that the Applicant initially went to see her for a heart condition, but she realized after seeing the ECG that he did not have a heart condition; he was suffering from spasm.

According to Ms Vaisman, the Applicant's last panic attack was around the end of May. In attempting to answer if she had ever seen the Applicant in the throes of a panic attack, she referred to the Applicant's emotional state when she first started seeing him. When asked about the Applicant's behaviour during a panic attack, Ms Vaisman once again referred to the notes on the symptoms of anxiety and panic.

Ms Vaisman believes that the Applicant would not have disclosed his conditions either to officers or the emergency physician due to his being in a crisis situation and therefore unable to think properly. The Registrar's Agent asked Ms Vaisman to describe what she meant by "not thinking clearly". After a lengthy discourse she concluded: "like a mind gone blank".

With respect to the Registrar's Agent's comment that the hospital report makes no mention of anxiety or panic, Ms Vaisman insisted that it did, stressing the words "left side pain".

Ms Vaisman pointed out that only psychotherapists are able to assess when someone is having a panic attack. Doctors in a hospital cannot because by that time the patient is

calm. Thus, by virtue of her knowing the Applicant, she feels she is the only person who can testify as to his condition.

The Registrar's Evidence

Constable Andrew Boyd was called as a witness.

The Constable affirmed that he has been a police officer for ten years.

Both parties agreed upon the events that led to the Applicant arriving on the scene.

The Constable described how he came to ask the Applicant for a breath sample being demanded.

According to the Constable, the Applicant initially attempted to "negotiate" his way out of having to provide a breath sample. In his first attempt, the Applicant did not form a tight seal with his lips. Subsequent attempts to provide a sample were similar. The Applicant blew into the device but allowed air to escape rather than blow into the device. All nine attempts produced the same unsatisfactory result.

Constable Boyd noted that at no time did he notice the Applicant in any physical distress, holding his head or short of breath. The Applicant was transported to the station as the constable believed the Applicant's judgment was too impaired for him to sign the notice to appear.

Once at the station, an ambulance was called even though the Applicant refused to inform the constable of how he was feeling. Paramedics made the decision to take the Applicant to the hospital based on information that he was having chest pains.

In cross-examination, the Applicant's counsel challenged the officer on the indicia of alcohol impairment and what led the officer to demand a breath sample.

A discussion ensued as to the date of the calibration of the device, which was past the fourteen days the Applicant's counsel argued that each device needs to be calibrated. The officer maintained the policy has changed; nonetheless he was satisfied the device was working properly.

The officer denied that the Applicant advised him of any physical distress such as difficulty breathing. The officer acknowledged the Applicant to be nervous but did not notice any other symptoms of distress.
The Applicant's counsel asked the officer to relay the reading found on the device after each breath attempt. The officer testified that the device showed "either nothing or an E/0". The officer explained that if there was nothing registered, it meant that the device was registering no air; if there was an E/0 it meant that some air went into the device but that it was insufficient. According to the officer the results were consistent with the Applicant blowing around the mouthpiece rather than into the device.

The officer admitted to speaking loudly to “speak over” the Applicant but denies the use of profanity.

Police Constable Mark Andrew Baird was called as a witness.

Constable Baird did not administer the breath test but was present during the session. He did notice the Applicant having difficulty opening the package, but not necessarily because he was shaking.

According to Constable Baird, the Applicant appeared to be pleading not to do the test, by explaining that his life was driving. The Applicant was taken back to the station as it was felt that his judgment was impaired, as the Applicant did not appear to understand the consequences of not obeying a demand. The officer testified that the Applicant never asked for medical intervention and did not appear to be in distress. Only at the CIB did the Applicant mention that he was claustrophobic and had pain on his chest.

Constable Baird admitted that Constable Boyd did raise his voice to make a point while the Applicant was speaking, but did not use profanity.

APPLICATION OF THE LAW TO FACTS

In his closing remarks, the Applicant’s counsel asserted that based on a balance of probabilities, his client has met the criteria for an appeal on medical grounds. The counsel pointed out that two completely competing stories were heard, suggesting that the Tribunal had to decide on how much weight to place on the medical evidence introduced versus the evidence of the police officers.

It might appear that the officer’s evidence stands unchallenged, but the Tribunal must also consider the evidence of the Applicant and determine whether that it is more likely than not, that the Applicant has a medical issue that would prevent him from providing a breath sample.

According to the Applicant’s counsel, the relevant facts are these. The Applicant was working all day, goes home takes a glass of wine and goes to bed. At about three o’clock in the morning the stress begins as the Applicant is startled by his future father in law yelling at him that his future step son has been stopped by the police. Arriving at the scene the stress continues to mount bringing on the panic attack which is not an excuse, but a medical justification which meets the burden of onus for the appeal.

The Applicant’s counsel introduced and referred to this Tribunal’s decision issued on February 1, 2010, which deals with anxiety and points out that the concept of panic attacks has been accepted by the Tribunal. The Applicant, his counsel continued, has been treated for depression, anxiety and panic attacks since December 2009, and his “Occupational Therapist/Physiotherapist” testified at today’s hearing.

The Applicant's counsel conceded that the witness was not present at the time of the breathalyzer and formulated her conclusions based on information provided by the Applicant. He also referred to the fact that her testimony may have been lengthy and at times "off the rails", but did offer an explanation as to his oxygen intake and his ability to blow into the device. There is also the triage report which, albeit containing erroneous information, does confirm the Applicant was having a panic attack. The Tribunal heard from the Applicant's witness that the pain on the left side of his body was one of the symptoms of a panic attack.

As far as the officers' testimony regarding the Applicant being too impaired to sign the release form, the Applicant's counsel attributes the apparent impairment to the Applicant being in a state of panic and quotes officer Baird's statement that the Applicant "did not appear to be cognizant of what was going on".

The fact that the Applicant drives for a living may not appear relevant, but according to the Applicant's counsel, played a role in increasing the stress level the Applicant was experiencing.

In conclusion, the Applicant's counsel urged that the Tribunal rule in favour of the Applicant based on paragraphs 46 and 47 of the February 1, 2010 decision.

The Registrar's Agent, in his closing remarks, confirmed that it is not the intention of the Registrar to challenge the argument that the Applicant has a medical condition for which he is being treated. Nonetheless, according to the Registrar's Agent, it was not the medical condition that caused the Applicant to refuse to provide a breath sample. The Applicant deliberately and continuously blew around the mouthpiece. There are no medical reports to show that the Applicant has any sort of mouth problem that would cause him not to form a tight seal around the mouthpiece.

The Registrar's Agent maintained that the Applicant had no intention of providing a breath sample, and consciously made a decision not to cooperate with the police. There is no evidence that the Applicant was having a panic attack at the time and fumbling with a plastic bag is not conclusive evidence of a panic attack.

According to the Registrar's Agent, the Applicant had enough wherewithal to discuss his job and his children, but did not volunteer any information about his medical condition. The Tribunal is asked to believe that this was due to his conditioning in the army or a panic attack, but there is no evidence that the Applicant was experiencing a panic attack at the time of the breathalyzer.

The Registrar's Agent continued by pointing out that the medical information is sparse and missing crucial information, such as whether the Applicant would have been able to provide a breath sample. The Registrar's Agent also noted that no medication was prescribed by the Applicant's physician of 21 years. Referring to the triage report, the Registrar's Agent quoted specific details provided by the Applicant to the intake worker, regarding his

condition, but still made no mention of a panic attack. Further, the triage report shows the Applicant's condition to be unremarkable.

The Registrar's Agent asked the Tribunal to take Ms Vaisman's testimony with caution, stating that she is clearly speculating as she was not present during the breath test session and ultimately the Act requires that medical reports must be provided by a medical practitioner.

The Registrar's Agent concluded, by asking the Tribunal to prefer the evidence of the officers.

In rebuttal the Applicant's counsel reiterated the previous points made with respect to the Applicant's failure to mention his condition.

Although careful consideration was given to the total evidence presented, issues not related to the incident will not be mentioned.

Prior to setting down the reasons for the decision, the Tribunal is compelled to make it clear that the Applicant's possible state of intoxication or degree of impairment is not within the Tribunal's mandate and does not influence the Tribunal's decision.

Further, as the Applicant on several occasions stressed his strong disapproval of the officer's attitude, it is essential that the Tribunal declare its lack of jurisdiction to deal with such concerns and allegations. The Tribunal does recognize and has taken into consideration as suggested by the Applicant's counsel, the possible effect that the officer's alleged behaviour may have had on the emotional state of the Applicant.

Finally, as the Applicant alluded several times to the possible hardship the loss of his licence may cause, the Tribunal needs to point out that although it may sympathize with the Applicant's plight, the Tribunal has no authority to consider hardship in this matter.

The Registrar's Agent has not disputed the Applicant's condition.

The Tribunal accepts the diagnosis of "depression"; nonetheless the Tribunal finds that there is not a shred of medical evidence to substantiate the claim that the Applicant suffers from anxiety or panic attacks, and thus, the condition which forms the basis for appeal has not been proven.
The Registrar's Agent pointed out that medical reports must be provided by a qualified physician. The Tribunal agrees. Section 15 (3) of Ontario Regulation 574, R.R.O. 1990, as amended by Ontario Regulation 510/96, prescribes:

> "That the report shall be signed by the medical practitioner".

The Applicant's counsel in his closing remarks considered the testimony of the Applicant's witness, Ms Marina Vaisman, as medical proof of his client's condition. With all due respect to Ms Vaisman, although she was presented as the Applicant's therapist with knowledge of

his medical condition, not being a medical practitioner, she cannot be accepted as a medical witness.

Nonetheless, as Ms Vaisman has worked with the Applicant in a professional capacity since December 2009, the Tribunal has considered her testimony.

First Ms Vaisman's credentials must be reviewed. Ms Vaisman's Resume indicates that she holds diplomas in nursing and pharmacy science, as well as a Bachelor of Science Degree in Occupational Therapy. Studies in the field of psychology appear to be limited to an "ABI (Acute Brain Injury) workshop, Psychotherapy workshop, in Toronto" in 2004 and perhaps, "Cognition: A Problem Solving Approach to Choosing Assessment Tools" also in 2004.

The Tribunal found Ms. Vaisman's answers to direct questions posed by both the Applicant's counsel and the Registrar's Agent to be vague and evasive.

In her testimony Ms Vaisman contended that although the Applicant's physician was testing him for a heart condition, she "assessed" the Applicant as actually suffering from anxiety and panic attacks. In reply to the Registrar's Agent's questions, Ms Vaisman maintained that anxiety and panic were symptoms of depression, which in her opinion did not need to be treated by a qualified psychiatrist.

In light of Ms. Vaisman's credentials, her demeanour on the stand was arrogant, condescending and disrespectful to the Registrar's Agent. Anxiety and panic attacks are in fact noted as disorders in the Diagnostic and Statistical Manual of Mental Disorders, fourth edition. The Tribunal gives little weight to Ms Vaisman's testimony.

The Applicant's counsel suggested that there are two opposing points of view. The Tribunal agrees that there are certainly two plausible explanations which are in opposition. The Registrar's Agent argues that the Applicant deliberately refused to comply with the breath demand; the Applicant's counsel suggests that a medical reason prevented the Applicant from providing a sample.

The only evidence available to the Tribunal in this matter is the eyewitness testimony of the Applicant and the officers involved in the incident. The officers both testified that they had no reason to assume that the Applicant was in any physical or emotional distress. By his own admission, the Applicant proffered no information to the officers as to any existing medical condition. He noted that he was "scared, afraid". It can definitely be inferred that that the symptoms of fear mimic those of anxiety and panic, but without medical evidence the Tribunal is unable to speculate.

The Tribunal acknowledges the decision submitted by the Applicant's counsel in support of the appeal. First, the Tribunal must emphasize that each case is unique and is treated as such. Nonetheless, as the governing law is established by precedence, the Tribunal must discuss how the cases differ. The Applicant in the case submitted a medical history

substantiated by adequate medical reports. As it has been noted herein before, this case lacks a corroborating medical diagnosis.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that he has failed to do so.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated August 15, 2010, pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

_____

Dr. Antoine Aouad,
Presiding Member

RELEASED: September 21, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6287-ADLS-MED

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL
Agent for the Registrar of Motor Vehicles

DATE OF HEARING: October 26, 2010 Toronto

REASONS FOR DECISION

A hearing was held on October 26, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA" or the "Act").

The Tribunal released its Decision on October 27, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 48.3 of the HTA for the following reasons.

BACKGROUND

The Applicant appealed, by way of a Notice of Appeal under section 50.1 of the HTA, dated and received by the Tribunal on October 08, 2010. The Applicant appeals from the order of the Registrar effective October 03, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> I was unable to provide the required breath/blood sample because of a medical reason.

PRELIMINARY MATTERS

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because she was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

O. Reg. 574 to the Act at subsections 15 (1), (2) and (3) requires that a medical report must contain:

> 15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
>
> (a) the name, telephone number and address, with the postal code, of the medical practitioner;
>
> (b) the name, date of birth and address of the person who is the subject of the report;
>
> (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
>
> (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
>
> (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
>
> (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
>
> (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
>
> (3) The report shall be signed by the medical practitioner.

Finally, section 13 of O. Reg. 574 provides:

> A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS

<u>The Applicant's Evidence</u>

The Applicant's driver's licence was suspended on October 03, 2010.

The Applicant relied on page 2 of the Notice of Appeal prepared by the Applicant's physician on October 7, 2010 as well as an undated letter signed by the Applicant and addressed: "To Whom it May Concern".

In her letter the Applicant confirms the medication she has been prescribed; provides an account the events surrounding the breathalyser commenting that her "*heart was pounding*".

Under “Details and Diagnosis of Patients Present Condition” Dr. F.T., the Applicant’s physician of over “30 years” writes:

> “*Panic Attacks, General Anxiety Disorder, several depression episodes, Bipolar* episodes”

The physician set out the history of the Applicant’s condition as:

> “*During a panic attack, patient becomes short of breath, experiences chest pains, has rapid heart rate, perspires*”

According to the physician “*clinical examination during examination – confirms patient’s history of these attacks under stressful conditions*.”

The Applicant was last seen by her physician on July 29, 2010 at which time medication was prescribed.

At the hearing the Applicant reiterated the information provided in her letter to the Tribunal regarding the details of the incident where the Applicant was stopped and demanded a breathalyser test. The Applicant testified that she was advised that if she did not comply she would be handcuffed and arrested, and that she became very

> “*anxious and nervous …heart was racing*”.

According to the Applicant she asked for water but there was none available. She maintained that she tried her best to provide a sample but was not able to do so.

In cross-examination, the Registrar’s Agent requested the Applicant confirm the medication she is taking and asked whether she has been prescribed any kind of “puffer” or inhaler. The Applicant affirmed that she is taking anti-depressants and medication for her “racing heart” prescribed by a cardiologist, but no respiratory medication.

The Applicant denied the Registrar’s Agent’s suggestion that she became nervous because she was afraid she would be over the legal limit. According to the Applicant she knew one drink would not be a problem. She asserted that she could not complete the breath test because her heart was racing and her chest felt tight,

> “*as if something was sitting on …chest*”.

In reply to the Registrar’s Agent’s questions the Applicant testified that she did tell the Constable how she was feeling, not specifically that she was having a “panic attack”, and that she did not ask for medication. The Applicant claimed she knew what was happening and did not feel that medical assistance was necessary.

According to the Applicant she has had a panic attack in the doctor’s office. The panic attacks just happen any time due to “situations”. Depending on the severity of the panic attacks, the Applicant may or may not be able to control herself. In circumstances where

she is unable to control the panic, she needs to take two tablets instead of just one. The Applicant has never been hospitalized for panic attacks but has seen a psychiatrist.

The Registrar's Evidence

Constable Jim Wallace was called as a witness. Constable Wallace confirmed that he has been a police officer since 1981.

Constable Wallace described the events that led to the Applicant's breath sample being demanded. He then testified that the Applicant did not exhibit any signs of impairment.

The officer described the Applicant's attempts to provide a sample. Although the Applicant was given several opportunities to provide a sample, she did not blow long enough to provide a reading. According to the Officer she would blow for three to five seconds and then stop. The Officer recollected that the Applicant told him several times that she was anxious, but he did not see any signs of distress.

After thirteen unsuccessful attempts the Applicant asked his partner to explain the procedure and try to see if he could get a breath sample. Seven further opportunities were given to the Applicant, each with the same negative results.

The Applicant did not cross-examine the Officer.

APPLICATION OF THE LAW TO FACTS

In her closing remarks, the Applicant stated that she appealed in order to be able to come before the Tribunal to explain in her words what took place.

The Registrar's Agent, in his closing remarks, confirmed that it is not the intention of the Registrar to challenge the Applicant's medical history. Albeit the medical condition might have been present in the past, in the view of the Registrar's Agent, it was not a medical condition that caused the Applicant to refuse to provide a breath sample.

The Registrar's Agent maintained that the Applicant had no intention of providing a breath sample, as she knew she had consumed alcohol and would be over the limit. She consciously made a decision not to blow into the device. The unchallenged eyewitness evidence from the officer is that there was no medical reason why the Applicant could not provide a breath sample.

The Registrar's Agent disputed that the Applicant was in any physical distress. According to the Registrar's Agent she was not having shortness of breath or struggling for breath. All the Officer observed was that the Applicant stopped breathing into the device after a couple of seconds.

The Registrar's Agent continued by arguing that while the Applicant told the Officer she was anxious, according to the Registrar's Agent, everyone is anxious if they know they are likely to fail the breathalyser. Further, being anxious is not the same as having a panic attack.

With respect to the medical report, the Registrar's Agent asserted that the listing of the conditions does not prove the Applicant was having a panic attack at the time. Further the Registrar's Agent maintained that the physician did not link the condition to the breathalyser, nor has he referred the Applicant to a respirologist or prescribed a puffer.

The Registrar's Agent pointed out that the Applicant in her letter does not mention a medical condition but does ask that her licence be returned as she was not intoxicated.

In summary the Registrar's Agent asked the Tribunal prefer the evidence of the Officer as there is no evidence the Applicant's condition is as severe as the Applicant has led the Tribunal to believe.

In rebuttal the Applicant emphasized that after hearing the statement made by the second officer, regarding the possibility of being handcuffed, taken to jail and fingerprinted, she just

> "*sat there frozen*".

She tried to do her best to comply but was very anxious.

The Applicant's possible state of intoxication or degree of impairment is not within the Tribunal's mandate and does not influence the Tribunal's decision.

With respect to the possibility raised by Applicant that she should have asked to provide a blood sample, the Tribunal would like to clarify that subsection 48.3(3) of the Act is clear in its provision, in that the concentration of alcohol in the blood may be obtained "by an analysis of breath or blood taken". Although the option is available, the decision to request a blood sample remains at the discretion of the officers. According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. Accepting policy, as per norm, since there were no such signs, the Tribunal deems the issue of a blood sample irrelevant.

The Registrar's Agent has not disputed the Applicant's medical condition, as stated in the medical record; thus, the medical condition is proven.

The Tribunal does not share the Registrar's Agent view that the omission of pulmonary function tests, a referral to a respirologist or the fact the Applicant has not been prescribed an inhaler, is of consequence. The Applicant's diagnosis is clearly confirmed by her physician:

> "*Panic Attacks, General Anxiety Disorder, several depression episodes, Bipolar* episodes".

A "puffer" may not be the indicated treatment for anxiety. The Applicant is taking medication for her condition as deemed appropriate by her physician of thirty years.

The Registrar's Agent insisted that there is no evidence of how the Applicant's condition could have prevented her from complying with the breath demand. Contrary to the argument put forward by the Registrar's Agent the medical evidence in this matter cannot be dismissed easily. Dr. F.T., having witnessed the Applicant in the midst of a panic attack, is able to specify the symptoms exhibited by the Applicant:

> "…*patient becomes short of breath, experiences chest pains, has rapid heart rate, perspires*".

The Tribunal finds the medical report comprehensive and conclusive.

The Registrar's Agent asserted that there are two components to Section 50.1 (2) (b). It does not suffice to establish that an individual has any type of a medical condition. The Tribunal agrees that the crux of the issue is whether the medical condition was manifesting at the time of the breathalyzer and caused the individual to fail or not comply with a breath sample demand.

Although the Officer did not notice any symptoms of distress, he admitted the Applicant advised him a couple of times, she was "*anxious*" and asked for some water. The Applicant testified that she was "frozen", her heart was pounding, and her chest was tight.

The Registrar's Agent suggests that anyone would likely be anxious after being asked to take a breathalyser test. The Tribunal agrees. There is no doubt that being asked to provide a breath sample can be considered a stressful situation. The Applicant testified that her condition was aggravated by the threat of being hauled to jail in handcuffs. Thus, it is quite probable the Applicant was in the throes of an anxiety attack at the time of the breathalyser. This premise is corroborated by the Dr. F.T. who points out that the Applicant has a

> *"…history of these attacks under stressful conditions*."

The Tribunal is satisfied that the Applicant's condition was manifesting at the time and prevented the Applicant from providing an adequate sample. The Tribunal's decision is based not only on Dr. F.T's compelling report, but also by taking in consideration the Applicant's testimony and demeanour, which, the Tribunal finds was consistent and credible.

The onus is on the Applicant to establish the merit of the appeal and the Tribunal finds that she has done so. Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that she was able to demonstrate that at the time of the breath demand, she was suffering from a medical condition which would prevent her from providing a breath sample.

DECISION

Upon the application by the Applicant to appeal the Registrar's Suspension Order, October 03, 2010, pursuant to section 48.3 of the Act, and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under subsection 50.1(4) of the HTA, the Tribunal orders the suspension **set aside.**

LICENCE APPEAL TRIBUNAL

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Antoine Aouad, M.D.
Presiding Member

RELEASED: October 28, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6266-ADLS-MED-Medical

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: DR. ANTOINE AOUAD, Presiding Member

APPEARANCES: APPLICANT, unrepresented

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

DATE OF HEARING: October 14, 2010 *by teleconference*

DECISION RELEASED: October 15, 2010

REASONS FOR DECISION

A hearing was held on October 14, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA" or the "Act").

The Tribunal released its Decision on October 15, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 of the HTA for the following reasons:

BACKGROUND

The Applicant appealed, by way of a Notice of Appeal under section 50.1 of the HTA, dated and received by the Tribunal on September 20, 2010. The Applicant appeals from the order of the Registrar effective August 16, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> "I was unable to provide the required breath/blood sample because of a medical reason".

PRELIMINARY MATTERS

Documents tendered were entered into evidence as exhibits with the consent of both parties. There were no preliminary matters in dispute between the parties.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The Act states under section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574, R.R.O. 1990, to the Act at subsections 15 (1), (2) and (3) require that a medical report must contain:

> 15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 provides that:

A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS

The Applicant's Evidence

The Applicant's driver's licence was suspended on August 16, 2010, as per the Notice of Appeal, filed as Exhibit #2.

The Notice of Appeal filed by the client, filed as Exhibit # 2 rather than containing the prescribed medical form, included an undated "Without Prejudice" statement signed by the Applicant.

The Applicant also relied on a letter submitted to the Tribunal on October 2, 2010, enclosing: two handwritten notes from Dr. F., one dated August 31, 2010, the other September 30, 2010; a letter from Dr. K.'s office, signed by the Office Manager, also dated September 30, 2010; an undated letter from Dr. D. pertaining to a visit on September 10, 2010.

Two pictures of pillboxes were attached to the Applicant's submissions of October 2, 2010. In his initial letter to the Tribunal the Applicant states:

> "I was never asked to provide a blood sample …I could not provide a breathalyzer sample without endangering myself physically and I was never asked to provide a blood sample."

The Applicant goes on to explain that on the night in question he mistakenly took his wife's seizure medication, which made him "dizzy" and lack concentration. The Applicant lists a "recent septoplasty …and untreated allergies" as two factors which made "getting a breath and catching …breath after each attempt difficult."

Dr. F. notes that the Applicant suffers from exhaustion due to caring for his disabled wife and that the Applicant's mix of medication resulted in an "episode of dizziness".

Dr. K.'s Office Manager confirms the date of the Septoplasty and Bilateral Turbinate Reduction as July 9, 2010 and comments that on August 16, 2010,

> "The Applicant would not have been able to provide a breathalyzer test due to being still in recovery from surgery and would not have been able to breath through his nose."

The letter from Dr. D. supports the Applicant's ability to drive despite his diagnosis and treatment for "bipolar-mood disorder". Regarding the breathalyzer test session, Dr. D. relates the events as described to him by the Applicant concluding that:

> "the amount of medication would obviously leave him dizzy and likely unable to provide a proper breath sample."

At the hearing, the Applicant testified that the events evolved from a "confluence of medical issues" and affirmed that the Crown is amenable to withdrawing the charges. In his testimony, the Applicant reiterated the main causes for his inability to provide a breath sample: still in recovery from his septoplasty which caused shortness of breath; exhaustion aggravated by sleep deprivation due to caring for his disabled wife; the mix up in medications which caused dizziness; argument with daughter which caused anger; frustration due to "limited time"; animosity towards the officer.

The Applicant asserted that he did not refuse. According to the Applicant he endangered his life by making several attempts to provide a breath sample.

In cross-examination the Registrar's Agent quoting from the Applicant's written submissions, disputed the Applicant's assertion of having a "clean driving record", by pointing out a previous conviction.

Continuing to read from the Applicant's "Without Prejudice" statement, the Registrar's Agent asked the Applicant if "dizziness" was the reason for not providing a breath sample. The Applicant explained that it was a contributing factor, as he was also unable to breathe due to nasal surgery. The Applicant attested that he did not ask the officer to sit down nor did he make any mention to the officer regarding the discomfort he was feeling, given the "animosity" with the officer. The Applicant agreed that medical attention would have been beneficial, and that he in fact felt he needed it, but did not ask as he was "not in the mood".

Referring to the letter from Dr. K.'s office, the Registrar's Agent pointed out that it notes the Applicant would not be able to breathe through his nose, and suggested that the Applicant would have been asked to actually breathe through the mouth. The Applicant asserted that he was told to breathe in through the nose and breathe out through the mouth and emphasized that he was unable to comply due to the fact that he was feeling dizzy and was having difficulty following the instructions.

In reply to questions posed by the Registrar's Agent, the Applicant admitted: to being a smoker but denied asking the officer to be allowed to smoke, as he does not smoke cigarettes; being belligerent towards the officer but not yelling; not having the "mindset" to ask for medical assistance nor ask for medical attention as he was very anxious to "hurry up and get home" to care for his wife.

The Registrar's Agent challenged the Applicant to explain why if he could barely breathe while in the cell, he did not ask for medical help. According to the Applicant, he was not given a chance to ask for medical attention after being transported to the station as he was immediately placed into a room and left there. The Applicant denied the Registrar's Agent's suggestion that he was singing while in the cell, but conceded that he might have been humming or "mumbling" in order to relieve anxiety.

Regarding the length of time it took for the Applicant to see Dr. D., the Applicant initially stated that he had no transportation and that he had to wait for an appointment. When asked specifically if the first time he saw Dr. D. was after the event on September 10, 2010, the Applicant replied "No, it actually wasn't"; when subsequently asked why he did not obtain a report, the Applicant noted: "I did not actually see him, I spoke to him to make an appointment." The Applicant further explained that he had an appointment prior to September 10, 2010, but was unable to attend due to his caregiver duties and lack of transportation.

In reply to the Registrar's Agent's questions as to when he first saw his family physician, the Applicant replied that he had to wait as the physician was on vacation. The Applicant testified that after being told by several of his friends what the issue was, "he could not breathe", Dr. F. provided him with a second report on September 30, 2010.

In reviewing the letter from Dr. K.'s office, the Applicant admitted that he did not physically consult with Dr. K., but rather spoke with him on the telephone. As to the letter being signed by the office Manager rather than the doctor, the Applicant stated that she was directed by the doctor to write the letter.

Responding to the Registrar's Agent's comment that nothing in the letter from Dr. K. indicates the Applicant suffers from shortness of breath, the Applicant clarified that he in fact was having difficulty breathing. After further questioning, the Applicant agreed with the Registrar's Agent that he was having difficulty breathing through his nose, not his mouth.

The Applicant called his wife to testify. She confirmed her disability and attested to her previous experiences with the breathalyzer as well as the family's previous contact with the police officer involved at the time of the breathalyzer. The witness was briefly cross-examined by the Registrar's Agent regarding the fact that she was not present at the time of the breathalyzer.

After the cross-examination, the Applicant requested to question his witness. The Tribunal noted the Registrar's Agent objection but allowed the evidence. The Applicant's questioning focused on: the reasons for his exhaustion; the method of pill dispensing in the household; the argument with his daughter; and the reason he was anxious to be home which was to care for his wife.

The Registrar's Evidence

Constable Stephen Welton was called as a witness.

The Constable affirmed that he has been in his present position since August of 2005.

The Constable described how he came to ask the Applicant for a breath sample.

According to the Constable, the Applicant was irritated at being stopped. The first couple of attempts to provide a sample, the Applicant put his mouth over the piece correctly but did not blow into the device. No tone was emitted by the machine, which indicated that no air was going in. At one point the Applicant put the entire mouthpiece into his mouth and blew several times. The device produced error messages, indicative that some air was flowing in, but that it was insufficient to determine a reading.

Constable Welton noted that at no time did he notice the Applicant in any physical distress, he did not appear short of breath, dizzy or unsteady on his feet. Constable Welton asserted that the Applicant did not ask for medical assistance or medication. Throughout the incident, including the ride to the station, the Applicant was loud, obnoxious, swearing and threatening to have the officer fired from his job. Regarding the officer's previous encounters with the family, the officer testified that he harbours no ill will; in fact he drove the Applicant home after the incident.

In cross-examination, the Applicant questioned the officer regarding the instructions given to blow into the device. The Applicant's understanding was that he was to make a tight seal, take a deep breath and blow. The officer could not recall the exact words used, but suggested that the instructions would have been to take a deep breath, make a seal and blow.

APPLICATION OF THE LAW TO FACTS

In his closing remarks, the Applicant referred to the last part evidence proffered by Constable Welton, emphasizing that he would have been unable to carry out the

instructions, as he was at the time unable to breath through the nose. According to the Applicant, the more he kept blowing the dizzier he got. The Applicant further contends that he was anxious to get home to take care of his wife. The Applicant acknowledged harbouring feelings of animosity towards Constable Welton. He further pointed out that Constable Welton has only a few years in the force, not decades and is not medically trained and therefore not able to assess physical distress.

The Registrar's Agent, in his closing remarks maintained that no medical condition, be it exhaustion, sleep deprivation, nasal surgery or shortness of breath caused the Applicant to fail to provide a breath sample. The Registrar's Agent argued that the Applicant had no intention of providing a breath sample, and consciously made a decision not to cooperate with the police. There is no evidence that the Applicant was unsteady on his feet or dizzy. Instead the evidence clearly shows that the Applicant was not following instructions. The Applicant went so far as to put the entire mouthpiece in his mouth and then blow around it. When he did make a seal he failed to blow into the device.

With respect to the Applicant's claim that he did not have the mindset to inform the officer of his difficulties, the Registrar's Agent contends that the Applicant did have the wherewithal and the "respiratory energy" to be argumentative and use profanity. As well the Applicant repeatedly asked the officer for a smoke, which completely undermines the Applicant's claim that he was experiencing shortness of breath.

The Registrar's Agent continued by pointing out that the Applicant did not submit the required form with his Notice of Appeal. Instead, he opted to provide the Tribunal with medical reports which do not conform with Regulation 574. Specifically: none of the reports complies with Section 15. 1 (c) which requires that the medical practitioner provide a link between the medical condition and the inability to provide a breath sample; the reports do not specify how long the physicians had been seeing the Applicant; there are no history details of the condition; no details of last visit and most importantly no test results.

Addressing the medical reports one by one, the Registrar's Agent first quoted from the Applicant's "Without Prejudice" statement, wherein he informs the Tribunal of the medication mix up and the results thereof. In reviewing Dr. D.'s report, the Registrar's Agent suggests that the doctor's comments are merely hearsay as they reflect only what was told to him by the Applicant.

According to the Registrar's Agent, Dr. F.'s original handwritten note dated August 31, 2010, simply reiterates the information given to him by the Applicant regarding the incident. The second note confirms the Applicant may have been suffering from exhaustion and sleep deprivation, but there is no mention as to how these symptoms could have affected the Applicant's ability to provide a breath sample. The Registrar's Agent continued by contending that Dr. F.'s report makes no mention of the Applicant's nasal surgery, allergies, or breathing difficulties.

According to the Registrar's Agent, the letter from Dr. K. is on his letterhead but clearly not written nor signed by him. The report is written and signed by the Office Manager. There

is no indication that he has seen or approved this report. The Registrar's Agent again referred to Regulations 574 which requires a medical report to be signed by a medical practitioner. The Registrar's Agent asks that the Tribunal give no weight to this report.

The Registrar's Agent concluded, by asking the Tribunal to prefer the evidence of the officer.

In rebuttal, the Applicant reiterated the previous points made emphasizing he may not have followed procedures and he was not aware of what was required.

Although careful consideration was given to the total evidence presented, issues not related to the incident will not be mentioned.

Prior to setting out the reasons for the decision, the Tribunal is compelled to make a ruling, for the record, of the Registrar's Agent's objection to the admissibility of the Applicant's testimony regarding the withdrawal of the court proceedings. The Tribunal notes that the Applicant produced no documented evidence to substantiate his claim and court matters are independent of this Tribunal. Thus, no further consideration will be given to the Applicant's statement.

The Applicant appealed his licence suspension by the Registrar under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

> "…person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason…"

In his written statement to the Tribunal, the Applicant wrote: "I was never asked to provide a blood sample". With respect to the Applicant's offer to provide a blood sample, the Tribunal would like to clarify that subsection 48.3(3) of the Act is clear in its provision, in that the concentration of alcohol in the blood may be obtained "by an analysis of breath or blood taken". Although the option is available, the decision to request a blood sample remains at the discretion of the officers. According to established policy, no blood samples are to be demanded unless there are obvious visible physical signs preventing the individual from providing a breath sample. Accepting policy, as per norm, since there were no such signs, the Tribunal deems the issue of a blood sample irrelevant.

The Applicant argued that he did not refuse; he made every possible effort to blow into the device; therefore, he "complied". The Tribunal disagrees. It would completely defeat the purpose of the legislation to exonerate individuals simply because they "attempted" to blow into a breathalyzer. There is a clear anticipation in the demand for a breath sample that a result is to be obtained, i.e. a reading. This Tribunal interprets the words "failed …to comply" as not having met that expectation in that no result is obtained. There is no doubt that the Applicant was unsuccessful in obtaining a reading; thus he failed to comply.

This matter differs from the usual in that both the medical reports as well as the argument presented by the Applicant propose that it was not a specific existing condition that caused

the Applicant‘s failure to provide a breath sample. Rather it was as the Applicant describes it a “confluence of medical issues”.

The Applicant, in appealing on medical grounds, appears to be under the mistaken assumption that he could be acquitted simply by virtue of suffering from a medical condition. It would be ludicrous to absolve all individuals solely on the basis that they have a medical condition.

It cannot suffice to prove that a medical condition exists. The crux of the matter is whether the medical condition could cause the individual to fail or not comply with a breath demand, as the word “precludes” implies. The Registrar’s Agent has disputed the Applicant’s medical condition as presented. The Tribunal agrees. There is absolutely not a shred of medical evidence linking any of the conditions mentioned, to the Applicant’s inability to provide a breath sample.

The Registrar’s Agent pointed out that all medical reports must conform to the provisions of Section 15 of Ontario Regulation 574, R.R.O. 1990, as amended by Ontario Regulation 510/96. Although the Tribunal recognizes that there is no pre-existing condition, other than the recent Septoplasty and Bilateral Turbinate Reduction and possibly allergies, the Tribunal agrees that it is imperative that medical reports conform to the regulation.

Section 15 of Ontario Regulation 574 prescribes as follows:

> 15 (1) “A report of a legally qualified medical practitioner that is submitted in evidence shall clearly state:
>
> (a) the name, telephone number and address, with postal code, of the medical practitioner;
>
> (b) the name, date of birth and address of the person who is the subject of the report;
>
> (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver’s license under section 50.1 of the Act.”
>
> (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
>
> 15 (2): The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.”
>
> 15 (3) “That the report shall be signed by the medical practitioner”.

None of the reports comply with the requirements.

Dr. F. is the Applicant’s family physician. Since allergies were mentioned by the Applicant as one of the reasons for his breathing difficulties, the Tribunal would have expected to see

a report detailing a history of allergies and the respiratory symptoms associated with allergies. No history of allergies or breathing difficulties is provided, no details of the last visit, and most definitely no links to the Applicant's inability to provide a breath sample.

His notes regurgitate what was told to him by the Applicant regarding the events at the time of the breathalyzer. Dr. F. fails to connect the effects of exhaustion, sleep deprivation and the mix of medications to the Applicant's inability to provide a breath sample. The Tribunal cannot and will not contest Dr. F.'s conclusion that the mix of medications can "result in an episode of dizziness". Yet with all due respect to Dr. F., this conclusion cannot be accepted as proof that the Applicant was in fact feeling dizzy at the time of the breathalyzer.

Dr. D., who has been seeing the Applicant "for many years", supports the Applicant's ability to drive in spite of his diagnosis and treatment. He does mention that the amount of medication taken by the Applicant on the night in question "would obviously leave him dizzy and likely unable to provide a proper breath sample". Although Dr. D.'s conclusion appears to be well reasoned, it is based solely on information provided to him by the Applicant. Further, as is the case with Dr. F., he was not present at the time of the breathalyzer.

Most flagrant of all is the report purporting to be from Dr. K. The Tribunal agrees with the Registrar's Agent contention that there is absolutely no indication that Dr. K. authorized this report or is even aware of its existence. No commentary will be made.

Given the lack of medical corroboration in support of the Applicant's medical grounds for appeal, the only other evidence available to the Tribunal in this matter is the eyewitness testimony of the Applicant and the officer involved in the incident.

The officer testified that he had no reason to assume that the Applicant was in any physical distress. By his own admission, the Applicant proffered no information to the officer as to any discomfort he may have been experiencing. He acknowledged that he was "belligerent", frustrated, angry, "not in the mood", and felt animosity towards the officer.

It can definitely be inferred that the Applicant's inability to provide a breath sample was more a "confluence" of his emotional state at the time than a "confluence of medical events" as argued by the Applicant. Nonetheless the Tribunal's decision is not founded on speculation but on the irrefutable lack of medical evidence presented. Also of consideration was the fact that the Applicant's testimony was evasive and riddled with contradicting statements.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that he has failed to do so.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated August 16, 2010, pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the Act, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Dr. Antoine Aouad,
Presiding Member

RELEASED: October 22, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6312-ADLS-LUNG-Lungs

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: PATRICK COFFEY, M.D., Member

APPEARANCES: THE APPLICANT, unrepresented

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

DATE OF HEARING: November 10, 2010 Toronto

DECISION RELEASED: November 12, 2010

REASONS FOR DECISION

A hearing was held on November 10, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

The Tribunal released its Decision on November 12, 2010, with reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 48.3 of the Act for the following reasons.

REASONS

BACKGROUND

The Applicant appealed by way of a Notice of Appeal under section 50.1 of the Act, dated October 12, 2010, and received by the Tribunal on October 25, 2010. The Applicant appeals from the order of the Registrar effective October 1, 2010.

Reason for the Appeal

The basis for the appeal is that there was a medical reason why the Applicant was unable to give the required breath sample that was requested by a police officer.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

FACTS

The Applicant testified that at about 2:30 a.m. on October 1, 2010, he drove through a RIDE program and was stopped by the police and asked when he last had a drink. He answered that it was at about 8:00 p.m. At that time, he stated that while he was working and renovating his condominium and finishing the floor, he had one beer. The police officer then asked the Applicant to step out of the vehicle and come with him to his car for a breathalyzer test. The police officer then explained to the Applicant how to use the breathalyzer. The Applicant noted that he did his best to breathe into the breathalyzer repeatedly, but found that he could not keep breathing long enough. He told the police officer that the work he had been doing in his condominium involved him breathing in dust from drywall, fibreglass and other chemicals.

The Applicant was asked at the hearing what he was doing prior to being stopped by the police. He replied that he went to a club at about midnight and when he left there, he was on his way home. He stated that he was feeling alright when he went to the club. He did not have any alcohol at this club.

The Applicant then spoke about what he did later that day (October 1, 2010). He and his wife tried to make an appointment for him to see his wife's family physician, but the physician was away. The Applicant needed to see a doctor because he was wondering if there was any reason why he had difficulty breathing into the breathalyzer. He was not aware that he suffered from any respiratory illness. So, the Applicant went to an After-Hours medical clinic and saw Dr. A. at about 6:00 p.m. This doctor gave him a prescription for an inhaler, and put him through some pulmonary function tests.

The Applicant completed his testimony by explaining that he needs to drive his truck for his work, which is his only source of income.

Police Constable Dan Scobie stated that he has been in the police force since 1991. He is a qualified breathalyzer technician. He was conducting a RIDE program on the morning of October 1, 2010. At 2:10 a.m. the Applicant came through the RIDE program and when P.C. Scobie spoke to the Applicant, he smelt alcohol off his breath and he also smelt alcohol in the car. He asked the Applicant when he last had a drink and the reply was that he had not had anything to drink. (The officer then added more information, saying that not long after, the Applicant stated that his last drink was at about 7:00 p.m. the previous evening). So, he asked the Applicant to pull over. He explained carefully the way to use and breathe into the breathalyzer. It seemed to P.C. Scobie that the Applicant "did not put enough effort" in to breathing into the machine. He had the Applicant attempt to use the breathalyzer a total of 19 times. In the early attempts, there was no tone at all; then there was an audible tone for less than a second, and latterly, after he explained to the Applicant the consequences of not completing the test, the highest the Applicant was able to get to was four seconds, not high enough for completion of the test. The police officer checked that the breathalyzer was working satisfactorily.

Dr. A. completed page two of the Notice of Appeal form, dated October 8, 2010, regarding the Applicant, writing as follows:

> Diagnosis - Obstructive Lung Disease. Patient has shortness of breath and wheezing.
>
> History - Patient was exposed to varnish and had asthmatic reaction to it.
>
> Recent Tests Taken - Spirometry or Pulmonary Function Test – October 1, 2010
>
> Last Visit Details - …did poorly on pulmonary test and placed on medication – Advair Diskus.

Dr. G., a consultant respirologist, sent in a report to the Ministry of Transportation on November 8, 2010, regarding the Applicant. He reviewed the results of the Applicant's spirometry tests in detail. In his concluding sentences, referring to the tests done, he wrote:

> At these flow rates, however, it would be straightforward to provide a breath sample. The unknown issue is whether these flow rates were likely to have been encountered at the time the patient declined the test.

LAW

The legislation governing the Administrative Driver's Licence Suspension ("ADLS") under subsection 50.1(1) and (2) of the Act states:

> 50.1(1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

The Act states under section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 to the Act at subsection 15(1), (2) and (3) require that a medical report must contain:

15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 provides:

A person appealing a suspension has the onus of establishing the merit of the appeal.

APPLICATION OF THE LAW TO FACTS

The Tribunal finds the following facts of importance:

1. On the night of September 30/October 1, 2010, the Applicant felt well enough to go to a club at about midnight and left after about two hours to go home. On his way home, he was stopped by the police at 2:10 a.m. and was told that a breathalyzer test was required. In spite of not showing any symptoms of wheezing or shortness of breath or difficulties with breathing, there were 19 failures to provide a satisfactory breath sample, so that the police officer decided that the test was not completed; and his words were, "He did not put enough effort in to it".

2. Dr. G. is not just a consultant respirologist, but also, he has been the medical advisor to the pulmonary function laboratories for over 19 years. In the concluding remarks of his November 8, 2010 report he wrote (concerning the pulmonary function tests):

> At these flow rates, however, it would be straightforward to provide a breath sample. The unknown is whether these flow rates were likely to be encountered at the time the patient declined the test.

The Tribunal notes that at the time that the Applicant took the breathalyzer test, the police officer present did not notice any abnormal breathing signs and nor did the Applicant complain of wheezing or shortness of breath. Therefore, the Tribunal concludes that the results of the pulmonary function tests do not show any inability on the part of the Applicant to provide a satisfactory breath sample.

The onus being on the Applicant to establish the merits of the appeal, the Tribunal finds that he has not done so, and, accordingly, the appeal is dismissed.

DECISION

Upon the application by the Applicant to appeal the Registrar's suspension order, effective October 1, 2010, pursuant to section 48.3 of the Act, and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the Act, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Patrick Coffey, M.D., Member

RELEASED: November 24, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6367-ADLS-HYPOG- hypoglycaemia

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: APPLICANT, unrepresented

RUSSELL MCKNIGHT
Agent for the Registrar of Motor Vehicles

DATE OF HEARING: December 20, 2010 Toronto

REASONS FOR DECISION

A hearing was held on December 20, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "*HTA*" or the "Act").

The Tribunal released its Decision on December 21, 2010, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 48.3 of the *HTA* for the following reasons.

BACKGROUND

The Applicant appealed, by way of a Notice of Appeal under section 50.1 of the *HTA*, dated and received by the Tribunal on December 2, 2010. The Applicant appeals from the order of the Registrar effective November 17, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> I was unable to provide the required breath/blood sample because of a medical reason.

PRELIMINARY MATTERS

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because she was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The *HTA* states under section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

O. Reg. 574 to the Act at subsections 15 (1), (2) and (3) requires that a medical report must contain:

15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of O. Reg. 574 provides:

A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS

The Applicant's Evidence

The Applicant's driver's licence was suspended on November 17, 2010.

The Applicant relied on page 2 of the Notice of Appeal prepared on November 29, 2010, by his physician; a typewritten letter, dated November 29, 2010 explaining the reasons for appeal; information downloaded from several internet sites expounding the similarities between the symptoms of hypoglycaemia and intoxication; as well as a copy of a purported wallet card providing information to Healthcare Professionals about the Applicant's condition.
In his letter the Applicant relates that his car veered off the road due to the roads "being a bit slick". According to the Applicant he "was going into diabetic shock during the event…"

Under “Details and Diagnosis of Patients Present Condition” Dr. F.T., the Applicant’s physician of “2 years” writes:

“*Type I Diabetes”*

The physician set out the history of the Applicant’s condition as:

“*If blood sugar low would be incapable of cooperation*”

The Applicant was last seen by his physician on November 15, 2010 for depression.

At the hearing the Applicant reiterated the information provided in his letter to the Tribunal. The Applicant testified that he is now working very closely with his team to prevent the recurrence of another hypoglycaemic incident.

In cross-examination, the Registrar’s Agent asked the Applicant to address the reasons for appeal as stated in his letter. The Applicant confirmed that the reason he did not blow is that he knew he was in trouble and in need of medical assistance as he had been without medication for sometime.

According to the Applicant, his condition caused him to go into shock and become irrational. He admitted that he initially was afraid of blowing a false positive, as he is aware that a diabetic shock can cause a false reading.

The Applicant was taken from the station to the hospital and was released after two hours into police custody.

The Registrar’s Agent questioned how the physician knew the Applicant’s blood sugar at the time of the incident. The Applicant explained that the physician read the hospital reports. According to the Applicant he knew he was in trouble at the roadside but was unable to voice his need for medical attention.

The Applicant testified that he had no recollection of being asked for a breath sample, nor of his response to the officer.

The Registrar’s Evidence

Constable Cory Markle was called as a witness. Constable Markle confirmed that he has been a police officer since May 2010. Constable Markle is not a Qualified Breath Technician but was the investigating officer.

Constable Markle described the events that led to the Applicant's breath sample being demanded. He then testified that there was no issue with communication when he approached the Applicant, but his speech was slurred. The Constable confirmed that he needed to repeat himself several times to get the Applicant to follow instructions, but felt that the Applicant understood the requests being made.

The officer affirmed that the Applicant was arrested at the scene for impairment and taken to the station. Constable Markle asserted that while he was reading the breath demand, he was interrupted by the Applicant who stated clearly “I refuse …I refuse.” According to the officer the Applicant was aware of the possible suspension, but that there was no indication of a medical issue.

While at the station the Applicant refused to allow his necklace to be taken from him, explaining that it was his life line. Yet, he did not ask for medical attention. Eventually the items were removed at which time the Applicant became combative. During a scuffle it was noticed that the Applicant was wearing an insulin pump. As he was placed in the cell in handcuffs the Applicant complained that he had been assaulted by the officers. He demanded to see Dr. Morgan but did not elaborate on the reason why he needed a doctor.

The paramedics were called when the Applicant was found passed out in his cell, but he refused assistance. He was then taken to hospital by three officers, and subsequently returned approximately an hour and a half later.

After being discharged the Applicant walked home.

Constable Markle concluded his testimony by confirming that there was no indication the Applicant did not understand what was happening.

In cross-examination the Applicant asked the officer if he understood hypoglycaemia. The officer noted that he is aware of the condition but not the symptoms.

In response to the Applicant’s question regarding his attempt to show the officer his wallet card, the officer denied the card was ever mentioned.

The Applicant questioned the officer regarding the bruises on his head before he arrived at the station. The Officer replied that the scuffle arose after the Applicant became combative at the station.

The Applicant pointed out that he was calling for his doctor, and suggested that his asking should have been a signal he was in medical distress. The officer replied that the only time the Applicant mentioned his condition was after he had been asked for a breath sample, after he was asked to take off his necklace, and the only time he asked for Dr. Morgan was after the fight with the police officer.

APPLICATION OF THE LAW TO FACTS

In his closing remarks, the Applicant stated that his memory may be sketchy, but he knows that there was lot of information left out of the Constable’s testimony and that all he said was “lie after lie”. The Applicant commented on the officer’s short tenure on the force and stated that he believes a lot of mistakes were made.

The Registrar's Agent, in his closing remarks, confirmed that it is not the intention of the Registrar to challenge the Applicant's medical history. Nonetheless it was not a medical condition that caused the Applicant to refuse to provide a breath sample.

The Registrar's Agent disputed that the Applicant was in any physical distress. According to the Registrar's Agent there was no medical reason why the Applicant could not provide a breath sample.

The Registrar's Agent continued by arguing that the Applicant does not recall what took place the evening he was stopped, however Constable Markle does remember and has clear notes detailing what transpired. With respect to the demand, the Applicant does not recall being asked to provide a sample, yet the Constable insists that the Applicant understood what was being demanded and that the Applicant refused. In fact the Applicant refused twice, once as the demand was being read, the second time after being told he would be charged with failing to provide.

The Registrar's Agent pointed out that the Applicant has not provided a link between his condition and the refusal.

In summary the Registrar's Agent emphasized that the similarities between the condition and intoxication have nothing to do with the Applicant's inability to provide a sample. The Registrar's Agent maintained that the paramedics "weren't interested in taking him to the hospital", and that the police had to take him to hospital from where he was released.

As for the medical report, the Registrar's Agent contends that the physician simply notes "if" the blood sugar was low. According to the Registrar's Agent there is no evidence the Applicant's blood sugar was low at the time. The Applicant knew what the consequences of his actions would be and chose to refuse to provide a breath sample.

In rebuttal the Applicant added that he is sorry that he does not recall all the events, but is adamant that he was in an insulin shock. The Applicant claims that he does not even recall why he left his house and that he was in his slippers at the time.

The Applicant's possible state of intoxication or degree of impairment is not within the Tribunal's mandate and does not influence the Tribunal's decision.

The Registrar's Agent has not disputed the Applicant's medical condition, as stated in the medical record; thus, the medical condition is proven.

The Tribunal shares the Registrar's Agent concern as to the lack of specific evidence as to whether or not the Applicant was in an insulin shock at the time of the demand for a breath sample. Nonetheless, the Tribunal must and does accept the Applicant's physician assertion that with low blood sugar the Applicant "would be incapable of cooperation".

The Tribunal normally relies on the eyewitness account of the events surrounding the breathalyzer. Constable's Markle's testimony, although discrepant at times, does suggest that the Applicant was highly uncooperative.

The Tribunal notes that the officer claims not to have noticed any signs of medical distress, yet agrees that the Applicant informed him of his condition, had a necklace which he called his "life-line", called for a doctor, was found passed out in his cell and was taken to hospital.

The Registrar's Agent contends that the paramedics "weren't interested in taking the Applicant to the hospital". The Tribunal cannot ascertain the basis for this premise. The fact remains that the Applicant was found passed out in his cell and taken to hospital.

There is of course no way of knowing the cause of the Applicant's behaviour without tests at the time. Therefore, the Tribunal accepts the Applicant's argument, which is supported by the physician's statement, and the fact the he passed out.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1(2)(b), in that he was able to demonstrate that at the time of the breath demand, he was suffering from a medical condition which would prevent him from providing a breath sample.

DECISION

Upon the application by the Applicant to appeal the Registrar's Suspension Order, November 17, 2010, pursuant to section 48.3 of the Act, and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under subsection 50.1(4) of the *HTA*, the Tribunal orders the suspension **set aside.**

LICENCE APPEAL TRIBUNAL

_____
Antioine Aouad, M.D., Member

RELEASED: December 30, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6479-ADLS-MED-Medical

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: DR. ANTOINE AOUAD, Presiding Member

APPEARANCES: DOUGLAS ALLEN, Agent for the Applicant

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

DATE OF HEARING: March 02, 2011 Toronto

DECISION RELEASED: March 03, 2011

REASONS FOR DECISION

A hearing was held on March 02, 2011, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA" or the "Act").

The Tribunal released its Decision on March 03, 2011, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 of the HTA for the following reasons:

BACKGROUND

The Applicant appealed, by way of a Notice of Appeal under section 50.1 of the HTA, dated and received by the Tribunal on February 09, 2011. The Applicant appeals from the order of the Registrar effective December 31, 2010.

Reason for the Appeal

The reason for the appeal set out in the Notice of Appeal is summarized as follows:

> I was unable to provide the required breath/blood sample because of a medical reason.

PRELIMINARY MATTERS

The Applicant's Agent submitted documentation for which the Respondent had no copies. The hearing was paused for a few brief moments in order for documents to be photocopied.

All documents were entered as exhibits with the consent of both parties.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Act states:

> 50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the *Criminal Code* (Canada) referred to in subsection 48.3(3); or
>
> (b) that the person failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The Act states under section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Rule 15.3(b) and (c) of the Tribunal's Rules of Practice states:

> 15.3 In addition to the provisions of Rule 15.2, the following Rules apply to appeals pursuant to Section 50.1 of the Act:
>
> (b) A report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
>
> (i) the name, telephone number and address, with the postal code, of the medical practitioner;
>
> (ii) the name, date of birth and address of the person who is the subject of the report;
>
> (iii) That the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's licence under section 50.1 of the Act;
>
> (iv) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
>
> (v) whether the medical practitioner is the family physician of the person who is the subject of the report; and
>
> (vi) whether the medical practitioner is a specialist and, if so, the field of specialty.
>
> (c) The report referred to in subrule (b) shall
>
> (i) provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests, and
>
> (ii) be signed by the medical practitioner.

Finally, Rule 15.3(a) the Tribunal's Rules of Practice states of states:

> (a) The Applicant has the onus of establishing the merit of the appeal.

FACTS

The Applicant's Evidence

The Applicant's driver's licence was suspended on December 31, 2010, as per the Notice of Appeal, filed as Exhibit #2.

The Applicant's written submissions consisted of page 2 of the Notice of Appeal signed by his physician together a list of herbal medication taken by the Applicant, as well as downloaded information as to possible adverse effects.

In support of his grounds for appeal due to a medical condition, the Applicant provided the Tribunal with page 2 of the Notice of Appeal, wherein Dr. T dates the Applicant's first visit as "Dec 30/10".

On the form, signed on February 04, 2011, Dr. T. confirms the Applicant's condition as "chronic back pain", and the reason for the last visit on "January 11, 2011" as "complaints of side effects from Tylenol".

Dr. T. also mentions in the history of the condition as "difficulty breathing, dry mouth, adverse effects from medication."

In a letter dated January 22, 2011, the Applicant's physician states:

> (Applicant) …visited my clinic on December 30, 2010 with complaining of severe back pain, neck, and chest pain. (Applicant) has history of low back pain for years; he has been working in a construction company that involved a lot of dry wall tapering and sanding. (Applicant) has been doing a lot of lifting and carrying of heavy materials. (Applicant) frequently contact with dust, sand and he is suffering from difficulty breathing as a result.

According to the physician the Applicant was prescribed with Tylenol #3 and "Eucomia ulmoides Oliv." for back pain.

The Applicant was not present at the hearing. Mr. D. Allen as Agent represented him.

At the hearing, the Applicant's Agent advised the Tribunal that he is not relying on the written package other than the letter from the physician.

Mr. Allen stated that the law is quite simple in that it allows for an appeal in the event of a medical condition interfering with an individual's ability to provide a breath sample. According to the Applicant's Agent, which, he based on Section 1 of the Charter of Rights, there is no need to prove "reasonable doubt". Mr. Allen argues that it suffices that the Applicant's doctor has stated the Applicant suffers from breathing difficulties and maintains that if the Doctor's diagnosis is to be challenged, the Respondent should have summoned the physician to attend the hearing.

<u>The Registrar's Evidence</u>

PC Liz Newton was called as a witness.

She related her observations while PC Yeoman was dealing with the Applicant. She subsequently approached the Applicant to see if she could be of assistance. While in close proximity to the Applicant the officer witnessed that the Applicant was not making a tight seal around the mouthpiece and could hear the air escaping.

PC Newton allowed the Applicant five attempts to provide a breath sample and obtained the same result as her partner, since air was escaping around the mouthpiece rather than going into the device.

Nothing in the officer's observation led her to believe that the Applicant was in any type of physical distress at the time of the breathalyzer session.

In cross-examination, the Applicant's Agent focused his questioning on: the cooperation of the Applicant; his ability to speak or understand the English language; the officer's knowledge of s. 50.1 of the Highway Traffic Act; the procedure and workings of the alcotest device; the lung capacity required to activate the device; and the Applicant's identity.

PC Newton testified that had she observed the Applicant in any type of physical distress she would have called an ambulance. She noticed nothing out of the ordinary other than the fact the Applicant was not blowing long enough to activate the device.

PC K. Yeoman was called as a witness.

The Applicant's Agent questioned the officer regarding his recollection of the notes and was satisfied that the officer recalled the Applicant.

PC Yeoman detailed the events that led to the Applicant being stopped and demanded a breath sample, as well as his observations with respect to the Applicant's breathalyzer session.

The Applicant's Agent cross-examined the officer as to when the device was last calibrated; the resistance presented by blowing into the device; the Applicant's cooperation at the time, and the officer's confirmation of the Applicant's job.

APPLICATION OF THE LAW TO FACTS

In closing the Applicant's Agent maintained that both officers' testimony is consistent with the uncontested medical evidence. The Applicant's Agent explained that while the Applicant was able to blow into the unattached mouthpiece, he was unable to blow into the device due to resistance, which is a fact as confirmed by the officer.

According to the Applicant's Agent, the Applicant was not uncooperative in any way. He told the officers he wanted to try, and did not stop trying. There is no evidence that he resisted, refused, or that he did not make his best effort.

Mr. Allen asserted that the evidence is clear in that the Applicant works with drywall. The officers are neither judges nor able make pronouncements on medical conditions. Mr. Allen pointed out that the officer was in a quandary as to the reason the Applicant was not able to provide a breath sample.

The Applicant's Agent emphasized that the officers had no reason to believe the Applicant was intoxicated and that the Applicant had no genuine reason to be afraid to provide a breath sample. What the Applicant had, according to the Agent, was a respiratory condition not apparent to the officers, and his inability to provide a sample lies in the design

of the machine. Furthermore, Mr. Allen argued, had the officers believed the Applicant was over the limit a blood sample could have been obtained.

The Registrar's Agent maintained that the Applicant had no intention of providing a breath sample, and consciously made a decision not to do so. Neither officer saw anything out of the ordinary with respect to any difficulty breathing. Further, according to the Registrar's Agent, blowing around the mouthpiece has nothing to do with a medical condition.

The Registrar's Agent quoted Dr. T's letter, which refers to back problems and suggest that the medical condition could not have been too serious as the Applicant was on his way to Casino Rama.

The Registrar's Agent emphasized that a medical condition does not automatically exempt anyone from providing a breath sample, there has to be a link between the condition and the refusal. The medical evidence provided is sparse and missing crucial information as to decreased pulmonary function. There are absolutely no clinical tests to confirm the Applicant's respiratory capacity.

In rebuttal, Mr. Allen alluded to the presumption of innocence which places the onus on the Registrar to prove the case. He also pointed out that the threshold of medical burden of proof does not require a link; it simply requires a condition.

Mr. Allen, the Applicant's Agent, vocal, at times argumentative, eloquently raised issues, some of which are outside of the Tribunal's mandate in an appeal on medical grounds, but which, in the interest of fairness, transparency and edification, the Tribunal feels compelled to address, particularly as the possibility of an appeal was mentioned.

After concluding his opening statement the Applicant's Agent suggested that according to the Rules of Procedure, the Tribunal need not proceed with the hearing, if it were to accept the physician's letter as sufficient to establish the Applicant's case.

Section 2.10 (1) of the Licence Appeal Tribunal's (LAT) Rules of Practice Effective: January 1, 2008, Revised: July 1, 2008; January 1, 2011, does indeed allow the Tribunal to dismiss a proceeding without a hearing, if it finds the hearing:

(a) is frivolous, vexatious or is commenced in bad faith

(b) relates to matters that are outside the jurisdiction of the Tribunal;

(c) some aspect of the statutory requirements for bringing the proceeding has not been met, or

(d) the party filing the appeal has abandoned the proceeding.

Since none of the criteria required was present, the Tribunal ruled in favour of proceeding.

The issue of a request by Mr. Allen for a voir dire, after PC Liz Newton's was sworn in, was resolved by an agreement to proceed with the understanding that Mr. Allen would have an opportunity to raise the issue of qualifications at any time during the testimony.

With respect to the use of the Officer's notes to reinforce her memory of the incident involving the Applicant, the Applicant's Agent questioned the Officer to determine her "independent recollection" of events regarding the Applicant. It was agreed that the Officer would proceed without referring to her notes.

The Applicant's Agent objected to the PC Newton's testimony regarding the odour of alcohol emanating from the Applicant. In his closing remarks the Applicant's Agent referred to the fact that the officers did not seek to obtain a blood sample, therefore, according to Mr. Allen, they did not believe the Applicant was intoxicated. The Applicant's state of intoxication or degree of impairment is not within the Tribunal's mandate. It has no bearing on the Tribunal's decision; thus, any evidence pertaining to the Applicant's possible impairment is inconsequential.

Although the rules of evidence are often more relaxed in a quasi-judicial setting, than in a court of law, the Tribunal nonetheless sustained the Applicant's Agent's objection to the Respondent leading the witness.

The objection to PC Newton's testimony regarding air escaping around the mouthpiece was dealt with by having the officer proffer her testimony in the form of her observations rather than an apparent opinion.

An issue arose as Officer Newton was attempting to testify regarding her observations of the Applicant's physical condition. The Applicant's Agent argued that the officer's qualifications had not been established. The witness was allowed to continue once she clarified to the Tribunal that she had been a medic in the armed forces.

The Respondent's Agent questioned the relevance of cross-examining PC Newton on her knowledge of the manual. The Applicant's Agent retorted that the law in Ontario requires users to be familiar with the manufacturer's set standards, otherwise readings obtained cannot be used in proceedings. As previously stated, this Tribunal is not concerned with an actual reading but rather with an Applicant's inability to provide a sample solely on medical grounds. As any other criteria would be outside the Tribunal's jurisdiction, this Tribunal will not consider evidence pertaining to the workings of the device. Similarly the Tribunal disregarded the further discussions regarding the device brought to the hearing or the device used at the site.

The Applicant's Agent raised the issue of identification of the Applicant by pointing out that the PC Newton had only accepted information from her partner and had not herself identified the Applicant. The Respondent suggested that if there was an issue of wrong identification the Applicant could have appealed on the grounds of mistaken identity. The Tribunal agrees and accepts PC Newton's evidence as relating to the Applicant.

A further point of contention occurred during PC Yeoman's testimony regarding the date of the incident. The Applicant's Agent maintained that the onus is on the Respondent to prove their case, therefore the Respondent may not correct his witness. The Applicant's Agent requested that the officer's testimony be struck from the record, and that he not be allowed to continue. The Tribunal points out that in a quasi-judicial Tribunal the onus is on the Applicant to prove his case. The Tribunal refers Mr. Allen to Rule 15.3 which is clear in its provision that:

> The Applicant has the onus of establishing the merit of the appeal.

As the date of the event does not appear to have been an issue of dispute, the Tribunal allowed the officer to stand corrected and proceed.

Several times during the hearing the Applicant's Agent referred to the Charter of Rights. In the opening statement Mr. Allen referred to Section 1; during the Registrar's Agent closing remarks Mr. Allen interjected suggesting the wording used by Registrar's Agent invited the Tribunal to accept that the Applicant's absence should be held against him, which according to Mr. Allen is "in violation of the constitution and against the Charter"; in his rebuttal Mr. Allen reiterated his belief that the according to the Charter the onus is on the Registrar to prove the case.

The Rules of Procedure with respect to Constitutional challenges prescribe as follows:

> Section **8.1** Where a party intends to raise a question about the constitutional validity or applicability of legislation, a regulation or by-law made under legislation, or a rule of common law, or to claim a remedy under the Canadian Charter of Rights and Freedoms, then pursuant to section 109(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. *Revised: July 1, 2008; January 1, 2011 16*
>
> (1) notice of a constitutional question shall be served on the other parties, the Tribunal, the Attorney General of Ontario, and the Attorney General of Canada as soon as the circumstances requiring notice become known and, in any event, at least 15 days before the question is to be argued before the Tribunal, and
>
> (2) under clause (1) above notice shall set forth,
>
> (i) the particular legislative provision or particular rule of common law,
>
> (ii) the material facts giving rise to the constitutional questions, and
>
> (iii) the legal basis for the constitutional question, setting out concisely the legal basis for each question and identifying the constitutional principles to be argued,
>
> (3) where a party fails to comply with Rule 8.1(1) or Rule 8.1(2), the Act, regulation, by-law or common law shall not be found to be invalid or inapplicable or the remedy shall not be granted, as the case may be.

> Section **8.2** Where the Attorneys General of Canada and Ontario are entitled to notice of a matter referred to in Rule 8.1, he or she is entitled to adduce evidence and make submissions to the Tribunal regarding the constitutional question.

Although this Tribunal is familiar with the wording of the Charter, as it appears that the procedures for a constitutional challenge were not followed, this Tribunal is precluded from dealing with the points mentioned by the Applicant's Agent.

The Applicant appealed his licence suspension by the Registrar under Section 50.1 (2) (b) of the Highway Traffic Act, which prescribes:

> …person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason…

The argument inferred by the Applicant's Agent is that the Applicant did not refuse; he was cooperative and made every possible effort to blow into the device; the assumption being he "complied". The Tribunal disagrees. It would completely defeat the purpose of the legislation to exonerate individuals simply because they "attempted" to blow into a breathalyzer. There is a clear anticipation in the demand for a breath sample that a result is to be obtained, i.e. a reading. This Tribunal interprets the words "*failed …to comply"* as not having met that expectation in that no result is obtained. There is no doubt that the Applicant was unsuccessful in obtaining a reading; thus he failed to comply.

The Registrar's Agent did not dispute the Applicant's condition, as stated in the medical records. Therefore, the diagnosis provided by the Applicant's physician: "chronic back pain …difficulty breathing, dry mouth, adverse effects from medication", is proven.

The Applicant's Agent insisted that all that is required by the Tribunal is for an Applicant to establish a medical condition. Absolving all individuals with a medical condition from providing a breath sample would render the legislation useless. It cannot suffice to prove that a medical condition exists. The crux of the matter is whether the medical condition could cause the individual to fail or not comply with a breath demand, as the word "*precludes*" implies. The, applicable legislation provides Tribunal members with specific guidelines within which to determine whether a medical condition could have affected the failure to provide a breath sample.

The Tribunal decision with respect to this matter was made solely on the basis of the medical evidence, or in fact, the lack thereof.

Neither the information provided by Dr. T in page 2 of the Notice of Appeal nor in his letter conforms to Section 15 (2) of Ontario Regulation 574, which is unambiguous, plainly setting out the essential information that must be present in all medical reports:

> The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.

The Registrar's Agent argued that the medical report does not offer a detailed explanation, nor link the condition to the failure to provide a breath sample. The Tribunal agrees. The medical report attached to the Notice of Appeal form is vague and inconclusive. The physician mentions "breathing difficulties" but fails to provide details as to history and severity of the condition. Furthermore, there is no indication that the Applicant has undergone pulmonary function tests; nor is on any medication for a respiratory condition.

A proven medical condition does not suffice to establish that the condition was manifesting at the time of the breathalyzer. In order to determine whether or not the Applicant was in fact experiencing respiratory difficulties at the time, the Tribunal relies on the evidence of the eyewitnesses involved in the incident, the Applicant and the officers.

The evidence of the police officers is that at no time was anything out of the ordinary observed.

The onus being on the Applicant to establish the merit of the appeal the Tribunal finds that he has failed to do so.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated December 31, 2010, pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the Act, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: March 7, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6512-ADLS-MEDICAL

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: APPLICANT, No One Appearing

KYLE BIEL,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 14, 2011

DECISION RELEASED: March 15, 2011 Toronto

REASONS FOR DECISION

A hearing was held on March 14, 2011, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 ("HTA").

The Tribunal released its Decision on March 15, 2011, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section of the 48.3 of the HTA for the following reasons.

BACKGROUND

The Applicant appealed by way of a Notice of Appeal under section 50.1 of the HTA. The Applicant appeals from the order of the Registrar of Motor Vehicles (the "Registrar") dated February 6, 2011.

Reason for the Appeal

The reasons for the appeal set out in the Notice of Appeal are summarized as follows:

> I was unable to provide the required breath/blood sample because of a medical reason.

Preliminary Matters

The Applicant not being present at the time scheduled for the hearing, the usual thirty-minute grace period was granted.

A telephone call was made to the Applicant's number on record. There was no reply.

Given that the Applicant signed for the notification of hearing, the hearing proceeded in absentia.

All documents were entered as exhibits.

ISSUE

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the HTA states:

> 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
>
> (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
>
> (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

> The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Rule 15.3(b) and (c) of the Tribunal's Rules of Practice states:

> 15.3 In addition to the provisions of Rule 15.2, the following Rules apply to appeals pursuant to Section 50.1 of the Act:
>
> (b) A report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
>
> (i) the name, telephone number and address, with the postal code, of the medical practitioner;
>
> (ii) the name, date of birth and address of the person who is the subject of the report;
>
> (iii) That the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's licence under section 50.1 of the Act;
>
> (iv) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
>
> (v) whether the medical practitioner is the family physician of the person who is the subject of the report; and
>
> (vi) whether the medical practitioner is a specialist and, if so, the field of specialty.
>
> (c) The report referred to in subrule (b) shall
>
> (i) provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests, and
>
> (ii) be signed by the medical practitioner.

Finally, Rule 15.3(a) the Tribunal's Rules of Practice states of states:

> (a) The Applicant has the onus of establishing the merit of the appeal.

FACTS

The Applicant's Evidence

The Applicant's driver's licence was suspended on February 06, 2010, as per the Notice of Appeal, filed as Exhibit #2.

The Applicant's written submissions consisted of: page 2 of the Notice of Appeal, completed by his physician; a typewritten account of events from the Applicant; 2 letters from the William Osler Centre; and a letter from a Community MD.

In his typewritten note addressed "To whom it may concern" the Applicant explains that he informed the officer that he had a previous back injury and that his back hurt and his chest felt like it was "caving in".

Both letters from the William Osler Centre contain the results of BCH Magnetic Resonance Imaging, dated 18/11/2007 and 10/10/2008.

The letter from the Community MD dated September 09, 2009, is regarding the Applicant's back pain, and is addressed to Ministry of Labour.

The physician, who completed page 2 of the Notice of Appeal confirms that he has been attending the Applicant for "3 years and 4 months". The Applicant's condition is diagnosed as "severe depression, severe back pain".

With respect to the Applicant's inability to provide a breath sample the physician writes: "Patient stated to me that he felt 'chest was caving' 'in severe back pain'"

The physician last saw the Applicant on "February 15, 2011" for "his condition".

The Registrar's Evidence

Constable Christian Pelletier was called as a witness.

The Constable affirmed that he has been with the Toronto Police since 2002.

The Registrar's Agent asked the Constable to describe the events that led to the Applicant's breath sample being demanded.

According to the Constable, when asked to blow into the device, the Applicant either blew out his cheeks but did not supply sufficient air volume to activate the device, or broke the seal around the mouthpiece. Each attempted resulted in a no reading with the machine producing an error message.

Constable Pelletier did not see the Applicant in any type of respiratory distress.

Constable Amrinder Sandhu, who has been a police officer for two years, was called as a witness.

The Constable testified as to his involvement in the incident. At no time did he observe the Applicant either having breathing difficulties nor was he "wincing" or seemingly in pain.

APPLICATION OF THE LAW TO FACTS

The Registrar's Agent, in his closing remarks, confirmed that it is not the intention of the Registrar to challenge the Applicant's medical condition. Nonetheless, according to the Registrar's Agent, it was not a medical condition that caused the Applicant to refuse to provide a breath sample.

The Registrar's Agent maintained that the Applicant had no intention of providing a breath sample, and consciously made a decision not to do so. The evidence from the officers is that the Applicant did not make a satisfactory attempt to blow into the mouthpiece. Neither officer witnessed the Applicant having any physical problems.

As far as the medical report is concerned, the Registrar's Agent maintained that it is entirely hearsay, sparse and missing crucial information, as there are no test results to substantiate the claim that the Applicant could not provide a breath sample.

The Registrar's Agent did not dispute the Applicant's condition, as stated in the medical records. Therefore, the condition is proven.

The Tribunal decision with respect to this matter was made solely on the basis of the medical evidence, or in fact, the lack thereof.

The information provided in page 2 of the Notice of Appeal does not conform with the criteria of Rule 15.3(c)(i) of the Tribunal's Rules of Practice, which is unambiguous, plainly setting out the essential information that must be present in all medical reports:

> The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests…

The Tribunal agrees with the Registrar's Agent argument that the medical does not offer a detailed explanation, nor link the condition to the failure to provide a breath sample. The medical report attached to the Notice of Appeal form is vague and inconclusive. The physician merely confirms what he was told by the Applicant about severe back pain and the chest "caving in". Furthermore, there is no indication that the Applicant has undergone pulmonary function tests; nor is on any medication for a respiratory condition.

A proven medical condition does not suffice to establish that the condition was manifesting at the time of the breathalyzer. In order to determine whether or not the Applicant was in fact experiencing difficulties at the time, the Tribunal relies on the evidence of the eyewitnesses involved in the incident, the Applicant and the officers.

As the Applicant was not present to testify in his own behalf, the Tribunal relied on the testimony of the police officers that at no time did they notice the Applicant in any physical distress.

The onus being on the Applicant to establish the merit of the appeal the Tribunal finds that he has failed to do so.

DECISION

Upon the application by the Applicant to appeal the suspension order of the Registrar dated February 06, 2011 pursuant to section 48.3 of the HTA and having considered the evidence filed with the Tribunal and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: March 17, 2011

This decision may also be available on Quicklaw.

Decisions under the Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

Fiscal Year 2010 - 2011, April - June

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

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- 6007-NUSP-DUDI-Not Under Suspension & Due Diligence <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/6007.mia.dudi.nus.pdf>
- 6000-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/6000.MIA.exhp.pdf>
- 5991-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/5991.mia.exhp.pdf>
- 5988-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/5988.mia.exhp.dudi.pdf>
- 5986-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/5986.mia.exhp.pdf>
- 5974-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/5974.mia.exhp.dudi.pdf>
- 5950-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/5950.mia.exhp.pdf>
- 5935-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/apr/5935.mia.exhp.pdf>
- 6084-MVIA-EXHP-Consent Order <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/may/6084.nvia.exhp.consent.order.pdf>
- 6031-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/may/6031.nvia.exhp.pdf>
- 6030-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/may/6030.nvia.exhp.dudi.pdf>
- 6028-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/may/6028.nvia.HaltonForming.pdf>
- 6021-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/may/6021.MVIA.exhp.pdf>
- 5977-MVIA-EXTENSION OF TIME <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/may/5977.nvia.motion.pdf>
- 6102-MVIA-PREX-Préjudice excessif <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jun/6102.mia.prex.pdf>

- 6101-MVIA-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jun/6101.m
  ia.exhp.pdf>
- 6078-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jun/6078.m
  ia.exhp.pdf>
- 6073-MVIA-STLN-Stolen
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jun/6073.M
  IA.stln.pdf>
- 6069-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jun/6069.m
  ia.exhp.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6007-NUSP-DUDI-Not Under Suspension & Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: KAMRAN TAHERI, Agent representing the Applicant

RUSSELL McKNIGHT, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: APRIL 23, 2010 Toronto

REASONS FOR DECISION

A hearing was held on April 23, 2010, in Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	Toyota CBA 2010
Date of Appeal:	April 7, 2010

The owner appeals on the basis that the driver's licence was not under suspension and the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended as provided in sections 50.2(3)(b) and (c) of the Act.

This matter came before this Tribunal on April 23, 2010 and proceeded as an oral hearing.

The Respondent submitted a set of certified copies of documents. 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 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 owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Agent for the Applicant was affirmed before giving testimony.

The Applicant conducts a daily car and truck rental operation. The Applicant currently has a fleet of about 40 vehicles available to rent. This number increases to about 60 vehicles during the summer months.

The Agent is the manager and part franchise owner. He runs the franchise with another partner and also has one employee. The Agent has owned the franchise for the past seven years.

The suspended driver at the time the vehicle was impounded was one of the Applicant's regular customers. The Agent has known the suspended driver for the past 2 ½ years.

The Agent assisted the suspended driver on the day the impounded vehicle was rented. The suspended driver was returning a rented vehicle for servicing and rented the impounded vehicle for one week. The suspended driver provided his driver's licence card as well as a credit card. According to the rental agreement, the suspended driver paid a $200 cash deposit as his credit card limit had been exceeded.

Two days later, the Agent received a call from the Sudbury police advising that the rented vehicle had been impounded as it was being driven by the customer on the rental agreement and that costumer was a suspended driver.

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;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until September 25, 2010.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(b) and (c).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

> Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,
>
> (a) notify the Registrar of the fact or cause the Registrar to be notified; and
>
> (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

> Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,
>
> (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized snow vehicle Act;*
>
> (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
>
> (e) referred to in a predecessor to this sub-section,
> is thereupon suspended ....

> Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,
>
> (a) upon the first conviction, one year; and
>
> (b) upon a subsequent conviction, two years,
>
> in addition to any other period for which the licence is suspended and consecutively there to.
>
> (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
>
> (a) an order directing that the accused be discharged is made under section 730 of the Criminal Code (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
>
> (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

> **Due: A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling *to* by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).
>
> **Diligence:** 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

> **Due diligence:** Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS

Appeal – Not Under Suspension

The issue before the Tribunal is whether 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.

At the onset of this hearing, the Tribunal asked the Applicant whether he had received and reviewed the Ministry of Transportation's submissions, which were sent to him by courier. The Agent acknowledged that he had reviewed the driving record of the suspended driver who was, in fact, a disqualified driver. He had been convicted under the *Criminal Code* of Canada for Impaired Driving and is currently serving three suspensions in total.

The Tribunal wishes to point out that the Applicant has the right to seek compensation from the suspended driver, as stated in subsection 55.1(21) of the HTA:

> The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order.

The Tribunal finds that this ground of appeal has no merit.

Appeal – Due Diligence

The second issue to be considered in this appeal is whether the Applicant exercised due diligence, in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made, was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle, or its Agent, must exercise due diligence and the onus of proof is on the Applicant, or its Agent, to establish that due diligence was performed, which is required under this section of the Act.

By his own admission, the Applicant advised the Tribunal that he had "heard about the website", but was "not clear" on how to use it. He further advised the Tribunal that "it is not possible to do a driver's licence check on each driver, it is not routine in this industry" unless there is suspicion surrounding the customer. The Agent may be of the view that if he inconveniences the customers by asking them to wait while he verifies the validity of their driver's licence, they may not be returning customers. He does not view this process as protecting the Applicant's property and assets.

The clause in the rental agreement states:

> The undersigned lessee or the signatory to this rental agreement certifies that he or she holds a valid driver's licence for the operation of the vehicle(s) referred to in the agreement and agrees to ensure that any person who operates the vehicle holds a valid driver's licence of the proper class.

Merely relying on the customer's attestation is not sufficient. Viewing the picture and expiry on the driver's licence card does not constitute due diligence. At no point in time did the suspended driver advise the Agent that he was a suspended driver.

The evidence before the Tribunal was that the Agent did not take any measures to ensure that the suspended driver had a valid driver's licence, but merely assumed that the

suspended driver had a valid driver's licence since he had been a customer for 2 ½ years.

Due diligence requires that the Applicant and/or its agent take further steps to verify the validity of the driver's licence. This can be accomplished, for a nominal fee, by contacting the Ontario Ministry of Transportation (seven days a week, 24 hours a day) with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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 28, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6000-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: ELIZABETH SPROULE
Presiding Member

APPEARANCES: APPLICANT, unrepresented

SONIA De SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 23, 2010 *by teleconference*

REASONS FOR DECISION

A hearing was held on April 23, 2010, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1994, Chevrolet, Lumina (the "vehicle")
Date of Appeal:	April 6, 2010

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.

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 has five children who require transportation to school, medical appointments, extracurricular activities and social commitments. Four of the children are school age and are currently walking to school. Two of the children have been referred to specialists for monitoring of different health issues. Since the Applicant's car was impounded one appointment, of an undisclosed nature, has been missed. There is 911 service available to the Applicant.

In addition to staying at home to care for her family, the Applicant is currently taking correspondence courses in order to complete her high school diploma. She began this endeavour in 2005. Although the courses are by correspondence, she is required to submit work in person to an independent learning centre which is a 30 minute walk from

her home. It had also been the intention of the Applicant to continue her studies at a college, in a different community, simultaneously with working on her high school diploma. Her college studies have previously been interrupted by various other factors but she hoped to be registered for the summer semester. The Applicant believes that her ability to complete the necessary courses, within the time frame required by the college, will be jeopardized if she does not have the use of a car. This will prevent her from successfully graduating in September of 2012.

The Applicant testified that the alternative forms of vehicular transportation available are too costly, particularly given the size of her family, and that she needs to use a vehicle for tasks such as grocery shopping. Local bus service is $2.25 per person regardless of age. The cost of a taxi to and from the grocery store is $20: she has used a taxi once for this purpose since the impoundment. The Applicant has investigated both renting and leasing a car and has determined that she can not afford either. The cheapest car to be leased is $68 per week. Extended family has not been advised of the impoundment but would not, in any event, be available to assist and the Applicant has no friends in the vicinity. The Applicant clarified that the two cars that appear to be registered in her name, in addition to the impounded car, are cars which she has disposed of and should no longer be registered in her name. The car currently registered in the driver's name, (the driver is the Applicant's spouse), is not in working condition.

The Applicant expressed concern that she will not be able to meet the future health and nutritional needs of her family without the impounded vehicle. The Applicant stated that she will not be able to pay the fees to retrieve her vehicle and will not be able to afford to buy another vehicle. Not only will this cause a significant financial strain, but ultimately it will prevent her from completing her educational program and obtaining decent employment which will have a catastrophic financial effect in the end.

At the time of the hearing the Applicant's spouse was employed. He works from home but is required to attend meetings. Since the impoundment he has cycled, walked and been driven by a co-worker to his meetings.

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 ('the driver') had been convicted of the offence of having a blood/alcohol content in excess of .08 under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until September 17, 2010.
5. Copies of Ministry of Transportation records indicating two vehicles, in addition to the impounded vehicle are currently registered in the name of the Applicant, and one vehicle is currently registered in the name of the driver.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> “Owner” means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, 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

Pursuant to s. 22(1) of Regulation 574, in determining whether an impoundment will result in exceptional hardship the Tribunal must consider whether there is an alternative to the impounded vehicle and if not, whether the impoundment will result in a threat to the health or safety of any individual normally transported by that vehicle.

The evidence of the Applicant establishes that there are a number of alternatives to the impounded vehicle for the transportation of the Applicant and her family. The children are able to walk to school, the Applicant is able to walk to the independent learning centre, and there are buses and taxis services in the community which can be used for acquiring groceries and attending appointments. Since the impoundment the Applicant has been able to attend all scheduled appointments using the alternative means available, with one exception, and there was no suggestion that this missed appointment was a threat to anyone's health or safety.

The Tribunal understands that there may be costs associated with some of the alternative means of transportation as there are with any form of transportation involving a vehicle, including the impounded vehicle. However, the Tribunal is not satisfied by the evidence that the potential costs will prove prohibitive.

The Applicant has stated that the impoundment will ultimately result in an economic catastrophe as she cannot afford to retrieve the car and she will never be able to afford a new one. This will then impact on her education and consequently her future job opportunities. Pursuant to s.22(3) of Regulation 574 the Tribunal may consider financial and economic loss in determining whether exceptional hardship will result, provided such loss is immediate, significant and lasting. The fact that the impoundment may interfere with the future employment of the Applicant does not meet this criteria.

Although the evidence before the Tribunal establishes that the impoundment will cause significant inconvenience and potentially added expenses to the Applicant and her family, the evidence does not establish that the impoundment will result in exceptional hardship.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Elizabeth Sproule, Presiding Member

RELEASED: April 29, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5991-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: APRIL 19, 2010 *Teleconference*

REASONS FOR DECISION

A hearing was held on April 19 2010, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	2002 Honda Uex (the "vehicle")
Date of Appeal:	March 31, 2010

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 19, 2010 and proceeded as an electronic hearing.

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 testified that he is married with four children living at home. He works as a machine operator and his wife and children attend school. He agreed that he was driving while his licence was suspended, but was merely test driving the vehicle to see if it was in good order because he had not been driving it for a while.

He did not present any evidence as to exceptional hardship and on cross examination by Ms. Bedrossian admitted the following:

a) he has been able to get to work by bus or a friend sometimes drives him;
b) everyone in his house is healthy, so there were no doctors' appointments missed;
c) his wife and children have been able to attend school by bus.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 11, 2010.

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.

O. Reg.631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, 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 simply did not present any evidence to support a finding of exceptional hardship.

His answers on cross examination establish clearly that there are alternatives to the impounded vehicle available to them. Neither he nor his family has suffered any exceptional hardship as a result of the impoundment of his motor vehicle.

He is able to get to his work by bus or through a friend. His wife and children have not missed any school as they are able to get there by bus. No member of the family has been ill, so no medical appointments have been missed. The Tribunal notes that the Applicant lives in a community, where “911” service is available in an emergency.

In summary, the onus was on the Applicant to adduce evidence that he or anyone else in his family would suffer exceptional hardship if the impoundment order were confirmed. He has failed to do this.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

Terrance Sweeney, Vice-Chair

RELEASED: April 21, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5988 - MVIA - EXHP-DUDI-Exceptional Hardship & Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: April 19, 2010 *Teleconference*

REASONS FOR DECISION

A hearing was held on April 19, 2010, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	2007 Hyundai Tib (the "vehicle")
Date of Appeal:	March 30, 2010

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 19, 2010 and proceeded as an electronic hearing.

There were no preliminary matters in dispute between the parties.

The hearing proceeded.

ISSUES

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.

<u>Evidence for the Applicant</u>

A summary of the Applicant's evidence follows.

She gave brief testimony about each issue.

Issue # 1: Due Diligence

The Applicant testified that, at the time the vehicle was impounded on March 13, 2010, she was on a trip out of the country with a friend. She admits that the vehicle in question was hers and that, while she was away, she left it at the home of her parents where she and her boyfriend both lived. It was her boyfriend who had been driving her vehicle at the time he was stopped by police on March 13, 2010. She had known her boyfriend for only about five months before the impoundment order was made.

She emphasized that, before she left on her trip, she did not know that her boyfriend would use her vehicle. The only time he used it before her trip was the time that he had to drive her to the local hospital where she had to receive emergency treatment. She did not know that, while she was away, he had taken her car keys and had driven her car to his place of employment. She stated that, before she left on her trip, she did not give him any instructions to use the vehicle. On the other hand, the Tribunal notes that there was no evidence that she had told him not to use it. This observation is of significance to the Tribunal considering that she stated, on cross-examination, that when she went on her trip she "probably" left the keys on a table at her parents' house, thereby leaving them easily accessible by anyone.

She further testified that she did not know that her boyfriend's driver's licence was suspended. She never asked him whether he had a valid licence, did not ever see his driver's licence, nor did she take any other steps to inquire whether his licence had been suspended. The topic never came up between them because, as she stated, she did not allow other people to use her vehicle, except for the one time that her boyfriend drove her to the emergency department of the local hospital. His use of her vehicle on March 13, 2010, was, in her words, "unexpected." In addition, she stated that she did not know a lot about him. She candidly stated that she was "under the assumption that he had a driver's licence," to quote her testimony.

It was only about 28 hours after the impoundment order was made that she returned from her trip. It was then that her boyfriend told her of the impoundment.

The Agent for the Registrar questioned the Applicant about a statement she had made in her Notice of Appeal that would indicate that she did, in fact, give her boyfriend permission to use her vehicle. On page two of the Notice of Appeal, the Applicant stated, among other things: "I was out of the country at the time of this incident, and was under the assumption that the person *I lent the car to* had a valid driver's licence." (emphasis is added).

In response, the Applicant stated that her wording was incorrect and that she did not lend the vehicle to her boyfriend. She used that wording in error because of her nervousness in completing the Notice of Appeal form.

Issue #2: Exceptional Hardship

The Applicant stated that the impoundment of her vehicle caused her exceptional hardship because she could not use it to go to and from her places of employment during the period of impoundment. She holds down two jobs. One is that of a waitress in her community at a local restaurant where she has worked for almost thirteen years. The other, which she has held for about the last two years, is that of an assistant to a local caterer who caters to functions both within and outside the Applicant's community. In order to get to work at the restaurant, she has been able to use the vehicles that her parents own, but must alternate from one vehicle to the other, because her parents need their own vehicles, as well, for their own purposes. She stated that using their vehicles creates an inconvenience for both her and her parents.

As a waitress, she works nights, and earns minimum wage plus tips. In her small community, there is no bus service that she can use, inasmuch as the service does not run seven days a week and ends at 5:00 p.m. each day that it does operate. She either has to use her parents' vehicles to get to and from work, or has to pay for an expensive taxi fare of $27.00, one-way, or rely on co-workers to provide her with a ride. Sometimes, her parents take her to work and then pick her up at the end of her shift.

As an assistant to the caterer, she works during her time off from the local restaurant and earns significantly more money. However, the caterer works at different places during the week, and at different times, so that the Applicant needs her car to get to those places. For some of those places there is no public bus service whatsoever. Sometimes the caterer himself can pick her up and return her to her home, but not always. She stated that she has lost out on some small catering jobs because of the impoundment. However, the major catering jobs will begin about April 30th. She will have the use of her vehicle by that time, since the period of impoundment ends April 27. Once she recovers her vehicle, the Applicant will be able to go to the out-of-town catering functions.

She also stated that the costs of the impoundment will be about $2,000.00 and she will have to go further into debt in order to have her vehicle released. In addition, she is still paying for her vehicle and also must incur expensive taxi fares occasionally. She argued that having to incur these additional expenses meant that she is the one who has to suffer financially as a result of the impoundment, whereas it was the driver of the vehicle who caused the impoundment order to be made.

On cross-examination by the Agent for the Registrar, the Applicant confirmed that there is no issue about her health and safety or that of anyone else who might have to use the vehicle. There is a 911 emergency call service in her community. She has not had to miss any medical appointments as a result of the impoundment.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record as Exhibit 3 were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 milligrams of alcohol per 100 millilitres of blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until April 27, 2010.

The Agent for the Registrar called no witnesses. Instead, she relied on the documentation filed as Exhibit 3. The Applicant at no time questioned the accuracy of that documentation.

The Agent for the Registrar submitted that the Applicant did not demonstrate due diligence in attempting to determine whether or not the driver's licence of the driver of her motor vehicle at the time that the impoundment order was made was under suspension. The Agent for the Registrar emphasized that the Applicant never asked the driver, her boyfriend, whether he had a valid driver's licence. She did not ever see or attempt to see his driver's licence. She did not ask her boyfriend or take any other steps to find out whether his licence had been suspended.

In addition, when she left on her trip, she left the keys on a table, at her parents' house, where her boyfriend also lived. The keys were exposed and readily available to anyone who wanted to use them.

As for the Applicant's contention that she suffered exceptional hardship, the Agent for the Registrar emphasized that there were alternatives to the impounded vehicle available to the Applicant, so that the ground of exceptional hardship could not succeed. She had access to her parents' two vehicles. She could take a taxi cab, although, the Applicant considered the fare to be expensive, and she could obtain rides from either her co-workers at the restaurant or from her employer in the catering business.

In addition, the Agent for the Registrar also submitted that there was no threat to the health or safety of any person ordinarily transported by the motor vehicle. Also, the financial loss that the Applicant testified to was not immediate, significant and lasting, for she did not lose any employment. Lastly, the inconvenience to her and to her parents was not a matter that this Tribunal could consider.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3) (c) 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 English Dictionary*, 3rd ed. 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, 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

Issue # 1 Due Diligence

The evidence is clear that the Applicant took no steps whatsoever to either determine the status of her boyfriend's driver's licence or to protect her keys from improper use while she was on her holiday. There was, as well, no evidence that she told her boyfriend that he was not to use her vehicle while she was on her trip.

The definition of "due," referred to earlier, is defined as, among other things, "proper" and "adequate." The term "diligence" is defined as "careful attention", "heedfulness", and "caution". The definition of "due diligence" found in Black's law dictionary, quoted earlier, requires the Applicant to take:

> "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 merely assumed that her boyfriend had a driver's licence even though, as the Applicant herself stated, she did not know much about him. Therefore, her belief that her boyfriend's licence was not suspended, founded on her lack of inquiries and on her assumption that he had a valid driver's licence, cannot be considered to be honest and reasonable, on the facts of this case.

Having regard to all those factors, the Tribunal considers that the Applicant falls short of having taken all reasonable steps that a prudent person should have taken in these circumstances to determine that the driver's licence of her boyfriend was not then under suspension. As a result, the Tribunal does not consider that the Applicant has satisfied her onus of proving on a balance of probabilities that she exercised due diligence.

On that ground, the Applicant's appeal fails.

Issue #2 Exceptional Hardship

The evidence of the Applicant was that there were alternatives to the impounded vehicle available to her, a matter that this Tribunal must consider, according to section 22 (1) of Regulation 574, referred to earlier. She had her parents' vehicles available to her. They all lived at the same address. Her co-workers at the restaurant were available and her employer in the catering business was also available, although not all the time. She also had taxi service available to her.

Although the Applicant stated that using her parents' vehicles created an inconvenience both to her and to her parents, the fact that the use of their vehicles may have been an

inconvenience to any person is not a matter that this Tribunal can consider, in accordance with section 22 (2) (a) of Regulation 574, referred to earlier.

The Applicant's evidence indicated that there was some financial loss to her because she missed out on some catering functions, she had to pay taxi fares occasionally and because she will have to pay the large impound fee. However, she did not lose her employment at the restaurant, and she will be able to resume her catering functions after she recovers her vehicle. Therefore, the evidence does not show that such financial loss will be immediate, significant and lasting, as required by section 22(3)(b) of Regulation 574. However, the consideration of whether the financial loss will be immediate, significant and lasting is a factor to be considered only if, among other factors set out in section 22(3), there is no alternative to the impounded vehicle, and this Tribunal has already held that alternatives were available.

The Tribunal has sympathy for the Applicant. However, having regard to all the above factors, and applying to them the applicable legislation, the Tribunal finds that the Applicant has not satisfied her onus to prove on a balance of probabilities that she suffered exceptional hardship as a result of the impoundment of her vehicle.

Therefore, on the ground of exceptional hardship, the Applicant's appeal also fails.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski
Vice-Chair

RELEASED: April 22, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5986-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: April 14, 2010 *by teleconference*

REASONS FOR DECISION

A hearing was held on April 14, 2010, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 180 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 180 days. The owner has appealed that order. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1999 Ford Mustang (the "vehicle")
Date of Appeal: March 29, 2010

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.

ISSUES

1. Whether the Applicant's appeal of the order to impound the Applicant's current motor vehicle is not permitted on the ground of exceptional hardship because an order to impound was previously made with respect to the same motor vehicle then owned by the same owner, the Applicant, as provided in subsection 50.2(4) of the Act?

2. Whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Agent for the Registrar did not make the first issue a matter of a preliminary Motion but was, instead, content to allow the Applicant to give evidence on her own behalf.

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

In her brief testimony, the Applicant stated that her vehicle was impounded on three separate occasions. The Registrar's documents, which the Applicant did not dispute, confirmed that one order to impound was made on February 3, 2009, for 45 days, and a second order to impound was made on June 8, 2009, for 90 days. The Applicant did not appeal the first two orders to impound. The third order to impound, which was the subject of this appeal, was made on March 15, 2010, for 180 days. The three orders to impound were made against the same vehicle. The Applicant was the owner of that vehicle at all relevant times. The Tribunal notes that, before the order was made on March 15, 2010, the two previous orders to impound were made within the two-year period prescribed in section 1 of Regulation 631/98 to satisfy the requirements of section 55.1 (3) of the Act, summarized later in these Reasons.

On all three occasions, the orders to impound were made because the Applicant's common law spouse was driving the vehicle. His licence had been suspended because he had been convicted under the *Criminal Code* of Canada for impaired driving causing death and impaired driving causing bodily harm. The licence suspension was to expire April 14, 2010.

The Applicant testified that she would suffer exceptional hardship because of the order to impound. She stated that the exceptional hardship arose from the fact that she needed her vehicle to drive her teenage son to school and to his medical appointments and sports events. She also needed the vehicle to drive herself and her common law spouse to medical appointments with their family doctor and specialists, outside her community.

Without the vehicle, her son's grandparents were taking turns giving rides to her son. In addition, she acknowledged that she and her spouse had public transportation available to them.

She also stated that she will not be able to afford to pay the impound fee at the time her vehicle will be released from the impound facility on September 11, 2010.

The Agent for the Registrar conducted a very short cross-examination of the Applicant. He established that the Applicant's spouse paid the impound fee after the first impoundment and that her parents paid the impound fee after the second impoundment.

With regard to the events leading up to the third impoundment, the Applicant stated that her spouse insisted on driving both himself and the Applicant to a medical appointment in another community. The Applicant did not like the idea, but felt compelled to go along with his demand. She admitted that she should have called the police, but was worried about not making her medical appointment on time. Nevertheless, she still missed her appointment after the police stopped her vehicle en route.

<u>Evidence for the Registrar</u>

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record as Exhibit #3 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 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 Causing Death and Impaired Driving Causing Bodily Harm under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until April 14, 2010.

The Agent for the Registrar emphasized that two previous orders to impound had already been made against the vehicle owned by the Applicant within the two-year period prescribed in section 1 of Regulation 631/98. He further submitted that the ground of exceptional hardship was not available to the Applicant because of the previous impoundment of her vehicle, according to section 50.2(4) of the Act. He also submitted that it was because of the provision in section 50.2(4) that he did not have to challenge the testimony of the Applicant relating to her claims of exceptional hardship because the Applicant's claim of exceptional hardship was not even available to her.

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.
>
> (Emphasis is added)

Section 1 of Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

But, the legislation contains a serious restriction on when an Applicant can claim exceptional hardship. 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.**

(Emphasis is added)

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, 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 Tribunal agrees with the submission of the Agent for the Registrar that the ground of exceptional hardship is not available to the Applicant. It is immediately clear, from the evidence before this Tribunal, that the Applicant cannot succeed in her appeal because of the admitted facts and because of the specific and unambiguous provisions of section 50.2 (4) of the Act; that is, the claim for exceptional hardship 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. In this case, there was not just one such previous order to impound the vehicle owned by the Applicant, but two orders. At its core, the appeal is doomed to failure. The Registrar has met the onus of establishing that the Applicant was the owner of a previously impounded vehicle thereby triggering the provisions in section 50.2 (4). The Applicant's case must fail.

In view of this Tribunal's finding on the first issue, it is unnecessary to make a finding on the second issue of whether the order will result in exceptional hardship.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 180 days.

LICENCE APPEAL TRIBUNAL

_____
Kenneth W. Koprowski, Vice-Chair

RELEASED: April 22, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5974-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: GENEVIÈVE BLAIS, Presiding member

APPEARANCES: APPLICANT, unrepresented

SONIA DESANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 12, 2010 *Teleconference*

REASONS FOR DECISION

A hearing was held on April 12, 2010, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	2004 Oldsmobile AGX (the "vehicle")
Date of Appeal:	March 22, 2010

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 12, 2010 and proceeded as an electronic hearing.

There were no preliminary matters in dispute between the parties.

The Respondent submitted a set of certified copies of documents. The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUES

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows. The Applicant was affirmed before giving testimony.

The Applicant was self-represented. She has a two year old child and lives with her boyfriend.

In support of the first ground of appeal, due diligence, she testified that the suspended driver driving the vehicle at the time of the impoundment is a friend of her boyfriend. She has known him for approximately one year. He spends time with her boyfriend at their home using the “gym” equipment in the basement.

On March 6, 2010, the day the vehicle was impounded, the Applicant testified that around 9 or 10 a.m., when she was still kind of sleeping, her boyfriend and the suspended driver took the vehicle to go out for breakfast. Later in the day she received a telephone call from a third party who related that her boyfriend and the suspended driver were allegedly drinking and driving. She immediately went out to look for her vehicle and found it impounded by the police.

The Applicant stated that she believed the suspended driver had a valid driver’s licence. She had in the past few months seen him drive another vehicle. On cross-examination the Applicant confirmed that on the day of the vehicle impoundment she did not see the suspended driver’s licence. She had seen the licence a few days prior to the day of the vehicle impoundment when the suspended driver was visiting with her boyfriend. They were joking about the quality of the photos on licences and she looked at the licence at that time. She noticed that it was issued by another province. She acknowledged that she did not check the expiry date. She testified that she was unaware of the suspended driver’s driving record and had no knowledge of the procedure to contact the Ministry to verify the validity of a licence.

On the second ground of her appeal, exceptional hardship, the Applicant stated she requires the vehicle as transportation to and from work and to drop off her son for babysitting at her mother’s home. Although she had two part time jobs, she can now only handle one job and barely makes ends meet. She has relied on her elderly grandparents to drive her around but feels it is an imposition as they repeatedly drive many other members of her family.

The Applicant works approximately twenty hours a week in a restaurant. She works mostly during the day. She lives approximately four kilometres, about a five minute drive, from her work location, her grandparents and her mother’s home. She cannot afford the cost of a taxi and has at times walked the thirty minute distance. She emphasized that the loss of use of the vehicle has been very stressful and she does not have the financial means to pay the impoundment fees.

In further evidence on cross examination, the Applicant confirmed that she has a second vehicle registered in her name. She stated she is unable to use this vehicle as her boyfriend requires it for employment some distance away and is absent several days in the week. When he is at home he has provided assistance. She has relied on her

grandparents to assist her with transportation to work, to get groceries and to bring her son to her mother who provides babysitting while she is at work.
Since the date of the vehicle impoundment, the Applicant has been able to attend her part time job at the restaurant. Of the 120 hours of work scheduled, she has been absent approximately 17 hours. She acknowledged that she more or less abandoned her second part time job in retail sales as she was finding the loss of use of a vehicle very stressful. She anticipates working more hours at the restaurant during the summer months. She is not in arrears with her rent.

The Applicant has no contact with the suspended driver. She does not anticipate that she will be able to recover from the suspended driver any costs incurred as she believes he is not in the community and has many fines to pay. She has not discussed financial assistance for the impoundment fees with her boyfriend. She confirmed that she and her son are in good health and she has access to 911 emergency services.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4 Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 16, 2010.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3) (c) 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 English Dictionary*, 3rd ed. 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, 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 first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the driver at the time the vehicle was impounded was not then under suspension. Subsection 50.2(3) (c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the

Applicant to establish that due diligence was performed, as required under this section of the Act.

The evidence established that the Applicant has known the suspended driver for approximately one year as a friend of her boyfriend. She did not see the suspended driver's licence on the day of the vehicle impoundment. She acknowledged that as it was early in the morning, she cannot recall whether her boyfriend or the suspended driver took the keys to the vehicle. When she saw the suspended driver's licence three or four days earlier she remembers that it was issued by another province, but could not confirm that she looked at it closely to determine the expiry date. She assumed the licence was valid as she had previously seen the suspended driver drive other vehicles. At no time did the suspended driver tell the Applicant or her boyfriend that he was a suspended driver.

The evidence before the Tribunal indicates that the Applicant did not take any measures to ensure that the suspended driver had a valid driver's licence, but merely assumed that the suspended driver had a valid driver's licence and "trusted that he would be telling the truth". The suspended driver abused the Applicant's trust.

Due diligence requires that the Applicant and/or an agent take further steps to verify the validity of the driver's licence. This can be accomplished by contacting the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca. The applicant testified she was unaware of this service.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by subsection 50.2(3) (c) of the Act.

The second issue to be considered in this appeal is whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

Section 22 of Regulation 574 R.R.O. 1990 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Tribunal considered the written submissions and heard testimony from the Applicant that:

1. her grandparents drive her to her part time employment;

2. her place of employment, her grandparent's and mother's home are a short distance away from her residence, basically five minutes by car and one half hour by foot;

3. while driving her to work, the grandparents stop at her mother's home to leave her young son for babysitting;

4. when her grandparents are not available to drive, she walks the short distance to work and to her mother's home;

5. she has another vehicle registered in her name; however, her boyfriend generally uses this vehicle for work some distance away. Although the boyfriend is absent from the home several days a week due to his work location, he assists her whenever possible;

6. her grandparents drive her to purchase groceries or drop off groceries at her house;

7. she is not able to afford the cost of taxis;

8. she has missed 17 of 120 scheduled hours of work at her part time job since the day the vehicle was impounded. She may be able to increase her hours of work during the summer season;

9. she voluntarily left a second part time job due to the stressful situation resulting from the loss of use of the vehicle;

10. she is up to date with her monthly rent;

11. there are no health issues with herself or her child;

12. her community is 911accessible in the event of an emergency;

The Tribunal finds that the Applicant has alternatives to the impounded motor vehicle.

Evidence was heard that the Applicant has and may continue to experience financial difficulties as a result of the loss of the vehicle. Regrettably, by her own will, she abandoned a second part time employment. The Tribunal heard no evidence that the Applicant's financial situation is more strained than prior to the vehicle's impoundment. Since the conditions in subsection 22(3) have not been met, the Tribunal, although understanding the Applicant's situation, is not permitted to consider this factor in arriving at its decision.

Evidence was heard that the Applicant believes that the suspended driver will not be able to financially help pay the costs associated with the vehicle impoundment. She believes he

is not in the community and has many fines to pay. The Applicant was unable to tell the Tribunal whether or not her boyfriend who was a party in the day's activities that led to the vehicle impoundment will pay some of the costs. 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".

Overall, the evidence presented by the Applicant was not sufficient to prove that she is indeed suffering any immediate, significant and lasting impact because of the impoundment. Her primary concerns relate to the costs of the impoundment and her ability to conveniently travel between home and work. The Tribunal cannot consider the costs of the impoundment or convenience in determining exceptional hardship.

The Tribunal finds that although the Applicant has been inconvenienced by the loss of the vehicle, she has not established exceptional hardship, as defined in 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 Act, 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

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Geneviève Blais, Presiding Member

RELEASED: April 16, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5950-MVIA-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN
Presiding member

APPEARANCES: APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 29, 2010 Teleconference

REASONS FOR DECISION

A teleconference hearing was held on March 29, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 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:	joint ownership between the Applicant and her husband (now deceased)
Motor Vehicle:	2003 GMC, SIE (the "vehicle")
Date of Appeal:	March 10, 2010

The owner appeals on the basis that the loss of the Vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 29, 2010 and proceeded as a teleconference hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant is a widow living by herself in a rural area at various distances from local communities and centres. Ottawa and the Town of Renfrew were said to involve driving times of two (2) hours and just over one (1) hour (respectively) from her home. The Applicant's husband, who is registered as the joint owner of the impounded vehicle, passed away about the time of the impoundment. He had been hospitalized in Pembrooke.

The Applicant said she has no finances to afford any alternative vehicle; she is in poor health due to (3) heart attacks, bad back and high blood pressure. She cannot get to her

doctor whose office is 70km away. Her house is wood heated and she does not have the strength to get the wood for her heating stove; nor is she able to get groceries.

The Applicant has one neighbour but there is no relationship with that neighbour due to past disagreements. She said she has family members but each has their own significant problems which, as she described, include substance abuse, financial and emotional difficulties. She said that there are no helping hands within the extended family group. She did say there was one son who comes from Ottawa and visits her on the weekend but is unable to do anything other than bring “milk” as he has his own financial issues and she has no financial ability to compensate him.

The Applicant did not dispute the fact the driver of the vehicle, at the time it was stopped, was driving without a license and she acknowledged he had been imprisoned due to the charge of driving without a license. She said the driver was her step-son and he had been living with her, helping her around the house but she didn’t know when he would be released. She said the only reason he was driving the vehicle was to help her out at the time her husband was dying. She said she had been unable to get back to the hospital at the end when her husband died because the vehicle had been impounded and she had no alternate means of transportation.

Evidence for the Registrar

A summary of the Registrar’s evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while under a lifetime suspension under the *Criminal Code* of Canada;

The Respondent’s Agent reviewed the facts contained in the Respondent’s Materials and Submissions documents (comprised of 7 tabs and recorded as Exhibit #3).

The Applicant did not dispute any of the evidence submitted by the Respondent. The Respondent's Agent also questioned the Applicant on the alternatives available to her and she testified that:

- there were several vehicles registered to the Applicant's late husband's name and two were validly plated;
- the Applicant also had several vehicles registered in her name but none with valid plates;
- of the two vehicles, registered to her late husband and validly plated, one was not driven at all due to mechanical problems while the other was only used on her lot to ferry wood to the house and take garbage to the dump, about 12 km away, on backwood roads – she confirmed she would not drive the vehicle on highway roads;
- the Applicant did not have a valid driver's permit as her permit had expired in February 2009 – she replied she had forgotten to renew the driver's license as she was completely focused on her ailing husband but pointed out that the impounded vehicle was validly licensed and insured.

The Respondent's Agent also questioned the Applicant about the help which her son in Ottawa was able to provide on his weekend visits with her; as well as help from another son-in-law who could take her for any groceries at a local store about 12km away. She replied the son-in-law from Ottawa was unable to afford to help and, of the other one, she could not expect to ask for anything else but to take her for her license renewal.

In summary, the Respondent's Agent argued the Applicant did have alternatives through the son from Ottawa as well as the son-in-law living in the local area. There had been some alternative vehicles for the Applicant, arguing that if the vehicle could be driven 12 km to the dump, she could have used it for her grocery and banking transportation needs. In addition, he pointed out that as she did not have a valid driver's license, she did not have anyone available to drive the vehicle which had been impounded.

The Respondent's Agent asked that the order to impound be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 574 R.R.O. 1990 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)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
>
> (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
>
> (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
>
> (a) inconvenience to any person;
> (b) financial or economic loss to any person;
> (c) loss of employment or employment opportunity to any person; or
> (d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

(a) no alternative to the impounded motor vehicle is available;
(b) the loss will be immediate, significant and lasting;
(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of exceptional hardship under subsection 50.2 (3)(d). Section 22 of Regulation 574, R.R.O. 1990, is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

The Applicant in this case has argued that the impoundment has caused hardship as described in subsection 22(2) and in order for her appeal to be considered under subsection 22(2), the Applicant must demonstrate that all of subsection 22(3) has been met.

Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Applicant testified she has been housebound since the vehicle was impounded. Since her home is in a rural part of eastern Ontario, she has been unable to get to doctor's appointments, or travel out for groceries. Her husband also died at the time of the impoundment and she stated she was unable to be at the hospital, 70 km away when that occurred.

While the Respondent's Agent noted that she has two other validly plated vehicles available the Applicant said that one has mechanical issues and can not be driven and the other is only used on her property and to drive to a local dump – a distance of 12 km on

country roads – but it is not in good enough condition to take on the highway to local communities such as Ottawa.

Her testimony confirmed she has no alternative as there is no public transit and she does not have the financial resources to rent a vehicle. She referred to herself as “poor” and is fully dependent on her pension as her sole income.

She spoke of an extended family but described the problems within the family such that she must essentially be self-sufficient. She is unable to provide for her needs as she is not in good health, having had several heart attacks, suffers from a bad back, high blood pressure and was dependent upon the help provided by the step-son who had been driving the impounded vehicle and was imprisoned at the time of the impoundment. She did not know when he would be released.

The Respondent’s Agent pointed out that the Applicant’s driving license had expired in February 2009 and that she would be unable to drive the vehicle. Though the Applicant advised she would renew her license, the Tribunal takes the position that the Applicant’s driving license, and whether it is current or expired, is an issue in itself and is for another authority to deal with and therefore, this issue does not influence the matter before it.

In summary, the principal facts influencing the decision to accept the Applicant’s claim of hardship flow from consideration:

(1) her personal health and physical condition

(2) her rural home location and the inability to travel the distances to healthcare, grocery facilities, post office and banking;

(3) the complete absence of public transportation;

(4) her lack of financial capability to obtain a rental vehicle during the impound period;

(5) the description of her family relations and inability to obtain interim help, support, and care;

(6) the financial condition of her Ottawa-based son who was unable to afford to provide her with groceries or for her to be able to reimburse him in the event he did bring her supplies.

After hearing all of the Applicant’s evidence and having heard no compelling evidence to the contrary from the Respondent’s Agent to show the Applicant had options meet her travel and healthcare needs, it is this Tribunal’s conclusion the impoundment did create conditions of exceptional hardship and potential threats to her health and safety.

On the evidence the impoundment has had an immediate impact on her. Considering her financial and health conditions, and that there was no evidence presented to the contrary, the Tribunal is satisfied that the impact of the impoundment of the vehicle demonstrates a lasting and significant impact on her life which would be permanent.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: April 6, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5935-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID CARYLL,
Presiding member

APPEARANCES: APPLICANT, unrepresented

RUSSELL MCKNIGHT, Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 31, 2010 *Teleconference*

REASONS FOR DECISION

A teleconference hearing was held on March 31, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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.

INTRODUCTION

This is an appeal under section 50.2 of the Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	1988 GMC, GM4 (the "vehicle")
Date of Appeal:	March 3, 2010

The Applicant appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(d) of the Act.

This matter came before the Tribunal on March 31, 2010 and as there were no preliminary matters, the hearing proceeded.

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

BACKGROUND FACTS

The following facts are not in dispute.

The Applicant is disabled, unable to work, and lives alone.

On February 4, 2010, the police arrested the Applicant for driving his vehicle while his driver's licence was suspended for a conviction under the *Criminal Code*. The police impounded the vehicle.

The Applicant was held in custody for 18 days waiting for a bail hearing.

On February 23, 2010, the Applicant pleaded guilty to the charge of driving a vehicle, on February 4, 2010, while prohibited from doing so under the *Criminal Code*.

On March 21, 2010, the vehicle was released from the impound facility.

EVIDENCE CONCERNING EXCEPTIONAL HARDSHIP

The Applicant testified that the police had made a mistake in arresting him for driving his vehicle to his mother's residence and back again on February 4, 2010. He said that a friend, rather than himself, was the driver of the vehicle. He was a passenger.

He testified that he made the February 23, 2010 plea bargain merely to escape the terrible conditions he endured during his 18 days in jail.

The Applicant testified that during the impoundment period, when not incarcerated, his

mother or a friend drove him to various appointments and errands, with their own vehicles. He had to cancel some appointments, most of which were rescheduled.

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.

Regulation 574 R.R.O. 1990 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 English Dictionary*, 3rd ed. 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, 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

Before addressing the issue of exceptional hardship, the Tribunal will deal with the issue of the alleged police error in charging the Applicant on February 4, 2010.

It is a matter of law that the Tribunal has no authority to overturn a criminal conviction. Therefore, the Applicant's conviction of February 23, 2010, and relevant details, must be considered by the Tribunal as fact.

As the Applicant appealed on the basis of exceptional hardship, the central issue for the Tribunal to determine is whether;

"… no alternative to the impounded motor vehicle is available."

The Applicant's testimony confirmed that he had alternative transportation to the impounded vehicle, during the impoundment period, namely, that his mother and a friend drove him to his various appointments.

The Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation, namely, "to demonstrate that no alternative to the impounded motor vehicle is available".

Therefore, the Applicant has failed to satisfy the statutory requirements for this appeal.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

_____

David B. Caryll, Presiding Member

RELEASED: April 8, 2010

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

HIGHWAY TRAFFIC ACT
R.S.O. 1990, c. H.8

6084-MVIA-EXHP-Consent Order

IN THE MATTER of the ORDER TO IMPOUND #0500383
to impound a motor vehicle owned by the Applicant
made pursuant to section 55.1 of the *Highway Traffic Act*
- Effective on: April 23, 2010

AND IN THE MATTER of a requirement for a hearing respecting the said Order to Impound pursuant to section 50.2 of the *Highway Traffic Act*

THE APPLICANT

- Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Applicant, and the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Counsel for the Applicant and the Agent for the Registrar of Motor Vehicles, as to the disposition of these proceedings, which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the Order to Impound (#0500383) a motor vehicle is set aside and 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: May 25, 2010

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

SCHEDULE 'A'

Between:

THE APPLICANT

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On April 23rd, 2010, the motor vehicle described in Order to Impound #0500383 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended.

2. The Applicant, <name deleted>, is the owner of said vehicle.

3. The Applicant filed an appeal of the Order to Impound, in accordance with the grounds permitted under clause 50.2(3)(d) of the *Highway Traffic Act*, stating that the order will result in exceptional hardship.

4. Having investigated this matter, the Registrar is satisfied that the order will result in exceptional hardship.

5. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or Consent Orders.

JOINT SUBMISSION

Accordingly, the parties consent to an Order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act*, that the Tribunal set aside the Order to Impound.

The Applicant

_____
(Signature of Applicant)

_____
(Date)

Authorized Delegate for Registrar of Motor Vehicles

_____
(Signature of Respondent)

_____
(Date)

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6031-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: May 12, 2010 *by teleconference*

REASONS FOR DECISION

An electronic hearing was held on May 12, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

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 Chev Trailblazer (the "vehicle")
Date of Appeal: April 19, 2010

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

There were no preliminary matters in dispute between the parties.

The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

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

Evidence for the Applicant

The Applicant and her mother testified.

The Applicant is the mother of five children and divorced. Her licence is currently under suspension, and a friend offered to drive her car. They were pulled over by a police officer who found that the Applicant's friend had been banned from driving for life. The vehicle was impounded.

The Applicant testified that she needs the vehicle to get her children to school. She also testified that her mother has a medical condition, and that she needs to drive her mother to medical appointments.

The Applicant and her former husband have joint custody of three of the Applicant's children. Those children have been living with their father while the vehicle has been impounded and he drives the children to school.

The Applicant's two teenage daughters live with her and walk to school.

The Applicant has not been able to get to work without the vehicle and is currently on stress leave, receiving employment insurance benefits. She will get her job back when the impoundment ends.

The Applicant confirmed that she has no medical appointments scheduled. She also confirmed that there are bus services available in the city where she lives, and pointed out that she cannot afford taxis.
On cross-examination, the Applicant stated that doing without the vehicle had not been easy and stated that she had to contribute gas money in order to get friends to drive her places.

The Applicant's mother testified that doing without the vehicle has been problematic. The Applicant's grandmother has been driving the Applicant's mother to places when needed, but she has now gone out of town. The Applicant's mother conceded that as she has gotten along alright so far during the impoundment, she supposed that she could survive the next few days of the impoundment.

Evidence for the Registrar

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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar 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* pursuant to which the driver's licence of the driver is suspended for life.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22. (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
>
> (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
>
> (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
>
> (a) inconvenience to any person;
>
> (b) financial or economic loss to any person;
>
> (c) loss of employment or employment opportunity to any person; or
>
> (d) loss of education or training or of an educational or training opportunity to any person.
>
> (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the

owner demonstrates that,

(a) no alternative to the impounded motor vehicle is available;

(b) the loss will be immediate, significant and lasting;

(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and

(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of "exceptional hardship" under subsection 50.2(3)(d). Section 22 of Regulation 574 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 has argued that the impoundment will result in hardship as described in subsection 22(2). The Applicant must demonstrate that all of subsection 22(3) has been met. Moreover, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered in respect of an alternative vehicle. The Applicant must show that there is no alternative to the impounded vehicle.

The Applicant conceded that:

1. Three of her children are currently living with their father who drives them to school.

2. Her two teenage daughters walk to school.

3. She has no medical appointments scheduled.

4. She will get her job back when the impoundment ends.

5. There are bus services and taxis available in the city where she lives.

6. She has been able to get rides from friends when she has helped pay for gas.

The mother of the Applicant agreed that she could get along alright for the few days remaining of the impoundment period.
There are alternatives available to the impounded vehicle. The Tribunal, therefore, cannot consider subsection 22(2)(b) respecting financial or economic loss to any person, including the Applicant.

The Tribunal finds that the Applicant has not established exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Terrance Sweeney, Vice-Chair

RELEASED: May 19, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6030 – EXHP-DUDI – Exception Hardship & Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: AGENT, Representing the Applicant

VICTORIA BEDROSSIAN
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: May 6, 2010 Teleconference

REASONS FOR DECISION

A hearing was held on May 6, 2010 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: FRHT/MCV
Date of Appeal: April 16, 2010

The owner appeals on the basis that: (i) the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and (ii) the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

The Registrar 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 Registrar 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 # 2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Agent's submissions and sworn testimony follow.

The Applicant is a seasonal asphalt paving and landscaping contractor which operates during the months of April to October. During the winter months, it occasionally plows snow and salts pavements.

It has been in business since 1996 and currently employs six persons. It also owns six fleet vehicles consisting of two personal vehicles, two dump trucks, two pick-up trucks plus three trailers.

The Applicant's season started during the week of April 12, 2010. On Friday of that same week, the driver of the dump truck was stopped by police for not wearing a seatbelt. The police determined he was a suspended driver and the vehicle was impounded.

The Agent received a call from police from roadside advising of what had transpired. The Agent arrived on scene and was fortunately granted the opportunity to unload the asphalt before the vehicle was taken to the impound facility.

Evidence for the Registrar

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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar 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* pursuant to which the driver's licence of the driver was then under suspension until November 16th, 2010.

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.

Regulation 574 R.R.O. 1990 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 English Dictionary*, 3rd ed. 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

(a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

(b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

(a) inconvenience to any person;
(b) financial or economic loss to any person;
(c) loss of employment or employment opportunity to any person; or
(d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

(a) no alternative to the impounded motor vehicle is available;
(b) the loss will be immediate, significant and lasting;
(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal – Exceptional Hardship

The first issue to be considered in this appeal is whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant's Agent has appealed on the ground of "exceptional hardship" under subsection 55.2 (3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. In order for the Applicant's appeal to be considered under subsection 22(2), it must have demonstrated that all of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

As mentioned above, the Applicant owns two dump trucks. One dump truck is utilized each April at the start of the season. The second is put on the road in May once it is licenced and insured. Since the vehicle's impoundment, the second dump truck was licenced and insured and put on the road sooner than anticipated.

When the vehicle was initially impounded, "machinery, trailer and broken asphalt" was located on a residential road. Other companies and colleagues within the same industry, were able to help the Applicant load, move and relocate the materials off the road. The Agent advised the Tribunal that these companies and colleagues are not able to assist the Applicant on a go-forward basis because their schedules do not permit it as their season is also limited.

The Agent testified that the Applicant has lost a number of corporate contracts worth more than $150,000. It has had to return a number of deposits to residents since it could not meet its obligations. "Some residents will wait, but some won't." Without the second dump truck, the employees are only working on two sites per day. They are currently working on concrete sidewalks as well as small landscaping jobs, curbs and patios. It had to "scale down" and be more selective of the work undertaken due to the vehicle's impoundment. The Applicant also works with larger contractors who call on the Applicant to esthetically complete the project.

By the Agent's own admission, it "has been quite difficult" during the impoundment period. The employees have had to reduce their hours and payroll, at times, cannot be met.

The Applicant cannot afford to broker a vehicle during the interim since it may not have the same electrical hook-up with hitch, but has been able to have materials delivered to the jobs sites.

Since there are alternatives to the impounded motor vehicle, the Tribunal cannot consider the losses under clause 22(2).

The Applicant may pursue compensation from the suspended driver, as is stated in subsection 55.1(21) of the HTA:

> ***"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".***

The Tribunal sincerely sympathizes with the Agent, but the Applicant's employees are continuing to work; they are utilizing the second dump truck and should the need arise, materials can be delivered and colleagues could lend a quick helping hand as they have done in the past.

The Tribunal finds that the Applicant has alternatives to the impounded vehicle and has managed with some difficult to meet some contractual obligations and keep its workers employed.

Accordingly, after considering the criteria set out in subsections 22(3) and (4) of Regulation 340, the Tribunal finds that the Agent on behalf of the Applicant has not established exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

Appeal – Due Diligence

The second issue to be considered in this appeal is whether the Applicant exercised due diligence, in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed, as required under this section of the Act.

The suspended driver provided the Applicant with a licence abstract last April 2009. Since he was a returning employee, an abstract had not been requested. All the new employees have provided the Applicant with current abstracts. The Agent advised the Tribunal that he "relied on the insurance company" to advise him of any licencing issues arising from his employees. The Applicant trusted the suspended driver as he thought he had no reason not to. The evidence before the Tribunal was that the Applicant did not take any measures to ensure that the suspended driver had a valid driver's licence, but merely assumed that the suspended driver had a valid driver's licence.

The Respondent indicated to the Agent that a six month timeframe is an adequate and responsible amount of time for an employer to check the validity of a employee's driver's licence, should the employee have care and control of a company vehicle.

Due diligence requires that the Agent on behalf of the Applicant, take further steps to verify the validity of the driver's licence and it has now done so. This can be accomplished by contacting the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

The Tribunal therefore has no evidence that the Agent exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

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Nives Montano, Member

RELEASED: May 10, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6028-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: ROBERT BONADEO, Agent, Representing the Applicant

RUSSELL McKNIGHT,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: May 7, 2010 Toronto

REASONS FOR DECISION

A hearing was held on May 7, 2010, 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:	2005, Ford, SRW (the "vehicle")
Date of Appeal:	April 15, 2010

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.

The Applicant's Agent advised the Tribunal that it is abandoning the exceptional hardship ground of appeal as provided in subsection 50.2(3) (d) of the Act.

A Supervisor employed by the Applicant, who was responsible for the crew involved with the impounded vehicle, appeared as a witness for the Applicant.

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 # 2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

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 as well as its Agent's and witness's affirmed testimonies follow.

The Applicant has been in business since 1952 and deals with the construction and forming of basements and basement walls for residential and low-rise buildings in Toronto and surrounding areas.

The Applicant employs from 100 to 130 employees. There is a high turnover rate in this industry as well as the construction industry as a whole. It has a fleet of about 51 vehicles. Approximately 35 employees are authorized to drive these vehicles.

The majority of the employees are divided into crews consisting of about five employees. These crews are created amongst the employees. Depending on the contractual obligations, there are between 12 to 25 crews at any given time.

The level of command within the crew starts with the foreman (also known as the crew leader who is usually the driver of a company vehicle and who is also responsible for the crew and task at hand), first man, second man and two labourers. These are all unionized employees. Each foreman takes orders from the supervisor. In rare instances, a second driver on a crew is authorized by the supervisor to have care and control of the company vehicle once an MTO abstract is obtained and it is determined the potential second driver has a valid driver's licence.

On the day the vehicle was impounded, three crews were returning home after having worked out of town all week. The suspended driver at the time the vehicle was impounded had volunteered to drive the crew home after the foreman had voiced that he was tired. The suspended driver was one of the crew's labourers. The suspended driver was not one of the Applicant's authorized drivers. The vehicle was stopped on the shoulder of the highway when police pulled up behind the vehicle. The suspended driver was in the driver's seat and could not produce a driver's licence. The police determined he was a disqualified driver and the vehicle was impounded. The foreman phoned the supervisor to advise him of what had transpired and the foreman was subsequently disciplined.

The supervisor and two other crews had already returned home earlier in the day and could not assist in transporting this crew home. One of the crew member's wives drove to their location and transported everyone home.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of ability impaired under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until October 21, 2010.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> “Owner” means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3) (c).

With respect to an appeal under subsection 50.2(3) (c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

> **Due: A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling *to* by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).
>
> **Diligence:** 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

> **Due diligence:** Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS

Subsection 50.2(3) (c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed, which is required under this section of the Act.

The supervisor for each crew is responsible for, but not limited to:

1. hiring and firing the employees that report to him;
2. ensuring the safety of his crew by reinforcing the policies in place and code of conduct within the scope of the company as well as what is outlined in their union contract;
3. assigning vehicles to foremen;
4. obtaining driver's abstracts from the employees who are authorized to drive fleet vehicles or provide a copy of the driver's licence to the Applicant's insurance company who immediately provides the Applicant with the driver's abstract; and
5. obtaining a copy of the worker's safety certificate which is required by the Ministry of Labour.

At no point in time is the foreman authorized to change the rules without the supervisor's direct instructions.

This crew's foreman was hired in January 2010. A driver's abstract was obtained when he was hired and immediately after this incident. In both instances, his abstract was clear and the foreman had a valid driver's licence.

At the hiring stage, the foreman is verbally instructed by the supervisor regarding his duties and responsibilities involving the work to be undertaken, the safety of his crew and rules concerning the fleet vehicle. Both the foreman and supervisor are responsible for communicating to their crews that no one other than the foreman is permitted to drive the fleet vehicle unless the supervisor personally authorizes it. The Applicant does not have a clearly written and signed agreement in place for all drivers of fleet vehicles regarding the care and control of such vehicles.

Testimony was heard that abstracts are obtained within a six-month interval for those employees who are authorized to drive a fleet vehicle and these abstracts are cross-checked with the Applicant's insurance company. According to the Respondent, this is an adequate timeframe and reasonable amount of time for an employer to check the validity of an employee's driver's licence.

Since the suspended driver was not authorized or directed by the Applicant to drive a fleet vehicle and no authority was given to him by the Applicant or its supervisor, neither the Applicant nor its supervisor could have known if the suspended driver had care and control of the vehicle.

Due diligence in this instance was performed by the Applicant. It is not reasonable to require a corporate vehicle owner to check the driver's licences of persons it specifically has barred from driving its vehicles. There is a system in place to prevent unauthorized drivers, which an employee, without authority, overruled.

On the evidence before it, the Tribunal concludes that the Applicant acted in a reasonable and responsible manner in exercising due diligence.

The Tribunal therefore sets aside the Registrar's decision.

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

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Nives Montano, Presiding Member

RELEASED: May 10, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6021-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Presiding Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: May 6, 2010 *by teleconference*

REASONS FOR DECISION

An electronic hearing was held on May 6, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2007, Mazda, B40 (the "vehicle")
Date of Appeal: April 14, 2010

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.

The Registrar 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 Registrar were entered into evidence as exhibits with the consent of both Parties.

ISSUE

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 Registrar.

Evidence for the Applicant

A summary of the Applicant's submissions and affirmed testimony follow.

The Applicant is a gentleman in his early 60s who is also the owner and suspended driver at the time the vehicle was impounded. He is married and has two adult sons who do not live within the same community as the Applicant. The Applicant and his wife live in an area which is 30 kilometres away from a large town or city. They are surrounded by cottages whose owners return on weekends.

They are both receiving disability benefits and both work part-time to supplement their incomes. The Applicant is self-employed and restores furniture and his wife is a secret shopper.

The Applicant's mother-in-law is 87-years-old and lives on her own in a city two hours away. His wife's sister lives a short distance from their mother and in the event of an emergency, the Applicant's sister-in-law or 911 would be able to respond and attend to their mother quicker than the Applicant's wife who lives quite a distance away. The two sisters look after their mother "by being available 24 hours a day if needed" to assist her with shopping and attending appointments.

On the day the vehicle was impounded the Applicant's sister-in-law picked up the

Applicant's wife and drove to their mother's home two hours away. The Applicant was scheduled to attend a regularly scheduled physiotherapy appointment, needed due to years of extreme back pain. Knowing of his suspension and not having any other means of attending his appointment, the Applicant chose to drive himself to the appointment. The Applicant was stopped by police since the vehicle's licence plate sticker had expired. The police determined he was a suspended driver and the vehicle was impounded.

Evidence for the Registrar

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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar 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* pursuant to which the driver's licence of the driver was then under suspension until November 24, 2010.

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.

Regulation 574, R.R.O. 1990, provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22. (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
>
> (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
>
> (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
>
> (a) inconvenience to any person;
>
> (b) financial or economic loss to any person;
>
> (c) loss of employment or employment opportunity to any person; or
>
> (d) loss of education or training or of an educational or training opportunity to any person.
>
> (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
>
> (a) no alternative to the impounded motor vehicle is available;
>
> (b) the loss will be immediate, significant and lasting;
>
> (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and

(d) the impact of the loss,

(i) will be upon a person **other than** the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

(ii) **will not be a result of a loss by the suspended driver** of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of "exceptional hardship" under subsection 50.2 (3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if, in fact, "exceptional hardship" will result from the impoundment.

The Applicant in this case has argued that the impoundment will result in hardship as described in subsection 22(2). In order for his appeal to be considered under subsection 22(2), the Applicant must have demonstrated that all of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Applicant was convicted of a *Criminal Code* offence and is suspended until November 24, 2010. The Applicant advised the Tribunal that he is aware of his suspension and his wife is the sole driver of the impounded vehicle. Prior to their vehicle being impounded, she would drive him to get furniture restoration estimates, groceries, medication and all appointments. Since they live a fair distance from a neighbouring community, they have had to rely on the Applicant's sister-in-law who delivers food every two weeks. They do not have potable water and therefore must boil their water before use and consumption.

The Applicant has had two doctor's appointments by way of teleconference. Through the kindness of a friend, the Applicant's wife was driven to her doctor's appointment 30 kilometers away. The Applicant's wife was also able to take a taxi to one of her appointments. Since the vehicle's impoundment, the Applicant has missed approximately 12 physiotherapy appointments. Their medications are temporarily being delivered to the Applicant's home at an added cost. In the event of an emergency, he lives in a community, which is 911 accessible.

Although they have had a difficult time during this impoundment period, the Applicant and

his wife have been “getting by”. Sadly, they have not been able to rely on their sons nor their neighbours.

The Applicant’s licence is under suspension due to a conviction of an offence under the *Criminal Code* of Canada. The Applicant was the driver of the impounded vehicle and by his own admission; he wrongfully had care and control of the vehicle knowing that he was a disqualified driver. Therefore, as a disqualified driver he should not be driving under any circumstances. The return of a vehicle to a suspended driver would jeopardize the safety of everyone.

Accordingly, after considering the criteria set out in subsections 22(3) and (4) of the Regulation, the Tribunal finds that the Applicant has not established exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant’s motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Nives Montano, Member

RELEASED: May 13, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

5977-MVIA-EXTENSION OF TIME

IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, Section 50.2;

AND IN THE MATTER of a motion by the Applicant seeking an extension of the time requirements to commence an appeal from an impoundment order of the Registrar under Section 55.1(3) of the *Highway Traffic Act*;

TRIBUNAL: ELIZABETH SPROULE, Vice-chair

APPEARANCES: Spouse of Applicant, Agent, representing the Applicant

RUSSELL McKNIGHT, Counsel representing the Registrar of Motor Vehicles

DATE OF MOTION: May 18, 2010 *by teleconference*

ORDER

A motion was heard by teleconference on May 18, 2010 at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Regulation 574, R.R.O., 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c. H.8 ("HTA").

PRELIMINARY MATTERS

At the outset of the proceedings it was noted that the Applicant did not have a copy of the Registrar's submissions. A copy of the submissions had been sent by courier to the Applicant's Agent, who is also the Applicant's spouse and resides with the Applicant. The Applicant's Agent acknowledged receiving a notice of the courier delivery; however, neither the Agent nor the Applicant chose to respond to the notice.

After reviewing the Registrar's submissions, it was apparent that the Applicant was previously in possession of some of the disclosed documents. Those that were not already in the possession of the Applicant included the vehicle registration record for the impounded vehicle and the driving record of the driver at the time of the impoundment ('the driver'). As neither the registration of the vehicle nor the status of the driver's licence is in issue, the Agent confirmed that the Applicant was willing to proceed.

Evidence

The Applicant's Agent provided oral testimony in support of the motion. As indicated, she is the spouse of the Applicant and has primary use of the impounded vehicle, notwithstanding that it is registered in the Applicant's name. The Registrar called no witnesses.

FACTS

The Applicant left the country at the beginning of January 2010. The impounded vehicle, along with its keys, was left with a daughter for the winter in order that it might be repaired. The daughter had a valid driver's licence; however, her son (the Applicant's grandson) who was living in the same residence did not have a valid driver's licence. The suspended status of the driver's licence was known to the Applicant at the time the car was left in the daughter's care. According to the witness, it was taken for granted that the driver would know that he was not supposed to drive the car and therefore no instructions on that point were given to either the driver or his mother. The witness testified that the driver was not given permission to drive the vehicle. At the time of the impoundment the daughter who had care and control of the vehicle went away, leaving the vehicle at her residence where the driver continued to reside. According to the witness, the daughter did not give the driver permission to take the vehicle. It was acknowledged that the driver had used the keys to access the vehicle.

On February 2, 2010, the car was impounded. The Applicant was not made aware of the impoundment until the Order to Impound was received by mail. As the Applicant was residing out of the country at the time, the notice had to be forwarded through the postal system and was not received until mid to late February. According to the witness, it took a number of attempts to get the appropriate appeal information and forms off the internet at a public library. The witness was not able to provide specific dates as to when the Applicant was aware of the appeal process, except that it was at a point that the notice of appeal could not be filed within the prescribed time.

Ultimately the Notice of Appeal was signed and dated March 13, 2010 and received by the Tribunal on March 24, 2010.

The witness does not believe the car should have been impounded as she believes, based on what she had been told, that the driver was inside a store when approached by police and not in the car. She does, however, concede that the driver had probably driven the vehicle to the store.

Documents submitted by the Registrar indicated that the Release Order issued March 8, 2010, which was sent to the same address as the Order to Impound, was received, signed and returned by fax within 8 days.

The Applicant has identified two grounds of appeal. Both are permitted grounds for appeal set out in Section 50.2(3) of the *Highway Traffic Act.* The first ground of appeal is that due diligence was exercised to determine that the driver's licence was not suspended. The second ground is that the loss of the vehicle will result in exceptional hardship. The Applicant did not indicate that a ground for appeal was that the vehicle was stolen, although it was indicated on the Notice of Appeal that the driver did not have permission.

THE LAW

Section 20(7) of Regulation 574 states:

> 20. (7) Despite subsection (1), the Board may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

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

> 7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
>
> (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
>
> (b) give the directions that it considers proper as a result of extending the time.

DECISION and ORDER

The Tribunal has been granted the authority to extend the time for commencing an appeal under 50.2(3) of the HTA by the two provisions set out above. The wording of Section 7 of the *Licence Appeal Tribunal Act is* somewhat broader than that of Section 20(7) of Regulation 574. Section 7 provides that the Tribunal need only be satisfied that there are reasonable grounds for the extension. The issue before the Tribunal is therefore whether there are reasonable grounds for granting the Applicant an extension of time to file his appeal.

What constitutes "reasonable grounds" was addressed in the case of *Miller Manufacturing and Development Co. v. Alden*, [1979] O.J. No.3109. The Ontario Court of Appeal concluded that there are a number of considerations that may be viewed as important; the emphasis given them will vary with the circumstances. These considerations include the intention to appeal, the length of delay, the prejudice to the other party, and the merits of the appeal.

In the Ontario Court of Appeal decision *Frey v. MacDonald*, [1989] O.J. No. 236, Mr. Justice Blair added to the considerations whether there was an intention to appeal, and a reasonable explanation for the failure to observe the time limits, and a broader rule that extensions should be granted if the justice of the case requires it.

The criteria set out in the *Mille*r and *Frey* decisions were again articulated in the *Re: Billodea*u, [1994] O.C.R.A.T.D. No. 90, as a four part test. To succeed in a motion to extend the time for filing an appeal an applicant must show:

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

The Applicant's appeal was filed approximately 35 days late. The Tribunal accepts the Applicant's evidence that the Notice of Impoundment was not received until after the time limit for appeal. It is unfortunate that the individual who was left with the care and control of the car did not inform the Applicant of the turn of events. The Tribunal finds that the explanations of the delay of several weeks further to complete the appropriate Notice of Appeal were not satisfactory. It would appear that once the Applicant knew the time limit to appeal had passed, the Applicant did not feel a sense of urgency to file the Appeal and therefore the late filing was simply due to a lack of diligence rather than a result of accident, illness, or something beyond the Applicant's control.

However, even if the Tribunal found that the Applicant's delay was excusable, and that there would be no prejudice to the Registrar, there must be a substantial point in issue and the Applicant must have some reasonable chance of success in order to justify the granting of an extension of time. In this case the Tribunal finds that the Applicant does not have any reasonable chance of success, as there is no indication that there are any facts to support either of the permitted grounds of appeal set out in the Applicant's Notice of Appeal. The impounded car was left at a residence where the Applicant knew a suspended driver was residing and the Applicant gave no verbal directions or made any other efforts to ensure that the driver was not allowed access to the vehicle. Clearly there was no due diligence. The Applicant was not intending to use the car during the

impoundment period and therefore the impoundment caused no hardship whatsoever. The Applicant was able to pay to have the car released, although it was indicated that this was not done with ease. Finally, although it was argued that the driver did not have permission to drive, there was no evidence that the car had been stolen and this was not identified at any point as a ground of appeal. In the absence of evidence supporting any of the permitted grounds of appeal the Applicant does not have any reasonable chance to succeed and therefore justice does not require that the Applicant be granted an extension of time to file an appeal in this instance.

Based on above reasons the Applicant's motion for the extension of time is denied.

LICENCE APPEAL TRIBUNAL

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Elizabeth Sproule, Vice - Chair

RELEASED: May 26*, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6102-MVIA-PREX-Préjudice excessif

APPEL EN VERTU DE L'ARTICLE 50.2 DU *CODE DE LA ROUTE*, L.R.O. 1990, c. H.8 À PARTIR D'UNE ORDONNANCE DU REGISTRATEUR DES VÉHICULES AUTOMOBILES EN VERTU DE L'ARTICLE 55.1(3) DE LA LOI.

POUR APPELER D'UNE ORDONNANCE DE MISE EN FOURRIÈRE D'UN VÉHICULE AUTOMOBILE ÉMISE PAR LE REGISTRATEUR DES VÉHICULES AUTOMOBILES

TRIBUNAL: ANTOINE AOUAD, D. M.,
Membre, Président de l'audience

COMPARUTION: REQUÉRANTE, représentée par sa fille

SONIA DE SANTIS, Représentante du Registrateur des véhicules automobiles

STEPHANIE ROY,
Interprète du Registrateur

DATE DE L'AUDIENCE: 28 juin 2010 *par téléconférence*

RAISONS DE LA DÉCISION

Une cause a été entendue par téléconférence le 28 juin 2010 à Toronto, Ontario pour examiner la demande d'appel de la Requérante en vertu de l'article 50.2 du *Code de la route*, L.R.O., 1990, c. H.8 (la «Loi»).

LE TRIBUNAL A DÉCIDÉ DE CONFIRMER l'ordonnance de mise en fourrière délivrée par le Registrateur en vertu de l'article 55.1(3) du CODE DE LA ROUTE. Par conséquent, le véhicule automobile de la Requérante demeurera dans les installations de la fourrière pendant 45 jours.

ANTÉCÉDENTS:

Le Registrateur des véhicules automobiles (le «Registrateur»), a délivré une ordonnance de mise en fourrière d'un véhicule automobile pendant 45 jours, en vertu de l'article 55.1 de la Loi. Le propriétaire a interjeté appel de cette ordonnance. Voici les renseignements concernant le propriétaire, le véhicule automobile et la date de l'appel:

Propriétaire:	la Requérante
Véhicule automobile:	Pontiac 2003 (le «véhicule»)
Date de l'appel:	31 mai, 2010

La Requérante a interjeté appel de cette ordonnance de mise en fourrière auprès du Tribunal d'appel en matière de permis (le «Tribunal»), accompagné des documents d'appui et des frais de 100,00$ exigés payables au Ministère des finances.

Le propriétaire en appelle de la décision en raison du fait que la perte du véhicule engendrera un préjudice excessif tel que déterminé dans les articles 50.2(3)(d) et (d) de la Loi.

Cette affaire a été entendue par ce Tribunal le 28 juin 2010 par téléphone (conférence électronique).

Les documents présentés ont été acceptés avec le consentement des deux parties.

POINT:

Le Tribunal devrait-il casser l'ordonnance du Registrateur pour la mise en fourrière du véhicule en se basant sur le fait que l'ordonnance causera un préjudice excessif?

FAITS:

Le Tribunal a entendu les témoignages présentés en faveur de la Requérante et du Défendeur.

<u>Témoignage de la Requérante</u>

Voici un résumé du témoignage de la Requérante.

La Requérante a décidée de ne pas faire des soumissions écrites, plutôt elle a fourni une lettre autorisant sa fille à agir comme son Agent et témoin.

Durant l'audience, la Requérante n'a pas donné de témoignage.

L'Agent de la Requérante a prêté serment avant le commencent de l'audience comme témoin. À ce titre elle a attesté que bien que le véhicule est registrée sous le nom de sa mère, elle est le conducteur unique. Le jour en question elle a permis quelqu'un elle a rencontrée récemment pour conduire son véhicule ignorant qu'il n'avait pas de permis de conduire valide.

En contre-interrogatoire, l'agent de la Requérante a confirmé qu'elle a besoin du véhicule pour le travail et pour ses enfants. La perte a été pas seulement un dérangement, mais a aussi provoqué sa perte de profits comme elle doit travailler. Le témoin (agent) qui est l'utilisateur du véhicule avait été aidé par sa mère, grand-père et ami, pourtant elle a maintenant dû prendre le transport alternant qui est coûteux et a manqué un total de cinq jours de travail qu'elle ne peut pas se permettre. Elle pourrait être en mesure de récupérer le temps perdu, mais devra mettre ses enfants dans le soin de jour. Il n'y a aucun transport en commun dans sa région.

L'agent (témoin) est en bonne santé mais son fils avait des problèmes d'oreille et vomissait, et a dû être pris à l'hôpital par sa mère (la requérante).

Il y a d'autres véhicules enregistrés à l'adresse de la Requérante, mais aucun des véhicules n'est disponible pour l'agent (témoin).

Témoignage du Registrateur

Les documents présentés par le Registrateur et admis dans l'enregistrement quant au consentement du Requérante étaient les suivants:

1. Copie des enregistrements du Ministère des transports indiquant, entre autre chose, que le véhicule automobile confisqué ci-inclus est enregistré au nom du Requérante à titre de propriétaire;

2. Copie de l'Avis au Registrateur indiquant, entre autre chose, que le véhicule au moment où il était en détention était conduit par la personne reconnue coupable de l'infraction en vertu du *Code criminel* du Canada mis en lumière au point 4 ci-dessous;

3. Copie de l'Ordonnance de mise en fourrière du véhicule, délivrée par le Registrateur des véhicules automobiles;

4. Copie des enregistrements du Ministère des Transports indiquant qu'au moment de la mise en fourrière, le conducteur avait été reconnu coupable de défaut de fourni un échantillon d'haleine ou de sang en vertu du *Code Criminel* du Canada conformément auquel le permis de conduire du conducteur était suspendu jusqu'au 25 juillet 2010.

À l'audience, la Représentante du Registrateur n'a soumis aucune preuve verbale, choisissant de s'en tenir aux informations fournie.

LOI:

L'article 55.1 de la Loi indique que le Registrateur peut rendre une ordonnance de mise en fourrière d'un véhicule automobile et l'article 50.2 indique le droit du propriétaire du véhicule automobile d'en appeler auprès du Tribunal. Sur l'appel, le Tribunal peut, en vertu du paragraphe 50.2(5) de la Loi, confirmer ou casser l'ordonnance de mise en fourrière, et la décision du Tribunal est définitive, en vertu du paragraphe 50.2(8).

Le paragraphe 55.1(3) de la Loi déclare que:

> (3) Sur réception de l'avis prévu au paragraphe (2), le registrateur peut, sans tenir d'audience, rendre une ordonnance de restitution du véhicule automobile ou une ordonnance de mise en fourrière du véhicule automobile que conduisait le conducteur dont le permis de conduire fait l'objet d'une suspension pendant les périodes suivantes:
>
> 1. Pendant 45 jours, si une ordonnance de mise en fourrière prévue au présent article n'a pas été rendue antérieurement, au cours d'une période prescrite, à l'égard d'un véhicule automobile appartenant alors au propriétaire du véhicule en voie d'être mis en fourrière.
>
> 2. Pendant 90 jours, si une ordonnance de mise en fourrière prévue au présent article a été rendue antérieurement, au cours d'une période prescrite, à l'égard d'un véhicule automobile appartenant alors au propriétaire du véhicule en voie d'être mis en fourrière.
>
> 3. Pendant 180 jours, si plus d'une ordonnance de mise en fourrière prévue au présent article a été rendue antérieurement, au cours d'une période prescrite, à l'égard d'un véhicule automobile appartenant alors au propriétaire du véhicule en voie d'être mis en fourrière.

O. Règlement de l'Ontario 631/98, dont il est mention ci-dessus, est de deux ans.

Le droit du propriétaire d'appeler devant ce Tribunal lorsque le véhicule automobile du propriétaire a été mis en fourrière est indiqué dans l'article 50.2 de la Loi, paragraphe 50.2(1):

> (1) Le propriétaire d'un véhicule automobile qui fait l'objet d'une ordonnance de mise en fourrière prévue à l'article 55.1 peut, sur acquittement des droits prescrits, interjeter appel de l'ordonnance devant le Tribunal.

Aux termes du paragraphe 50.2(2) de la Loi, les parties pour un appel sont le propriétaire et le Registrateur. Le « propriétaire » pour les besoins de cet article est défini dans le paragraphe 50.2(11), tel que modifié le 6 décembre 2000. «Propriétaire» est défini comme suit:

> «propriétaire» S'entend de chaque personne dont le nom figure sur le certificat d'enregistrement du véhicule. Cependant, au paragraphe (4), «propriétaire» s'entend de la personne dont le nom figure sur la partie relative à la plaque d'un certificat d'immatriculation dans les cas où le certificat d'enregistrement se compose d'une partie relative au véhicule et d'une partie-plaque et où le nom de différentes personnes figure sur chaque partie.

Le propriétaire peut interjeter appel de l'ordonnance du Registrateur pour seulement quatre motifs spécifiques énumérés dans le paragraphe 50.2(3):

> (3) Les seuls motifs pour lesquels un propriétaire peut interjeter appel en vertu du paragraphe (1) et les seuls motifs pour lesquels le Tribunal peut annuler l'ordonnance de mise en fourrière sont les suivants,
>
> (a) soit le véhicule automobile qui fait l'objet de l'ordonnance était un véhicule volé au moment à l'égard duquel l'ordonnance a été rendue;
> (b) soit le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension au moment à l'égard duquel l'ordonnance a été rendue;
> (c) soit le propriétaire du véhicule automobile a fait preuve d'une diligence raisonnable pour tenter de déterminer que le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension au moment à l'égard duquel l'ordonnance a été rendue;
> (d) soit l'ordonnance causera un préjudice excessif.

Le Requérante interjette appel ici sur les bases des articles 50.2(3)(d).

Quant à un appel en vertu de l'article 50.2(3)(d) alléguant que la mise en fourrière constitue un préjudice excessif, le Shorter Oxford Dictionary définit «préjudice excessif» comme suit:

> **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.

De plus, lorsque le propriétaire interjette appel sur le motif de préjudice excessif, le paragraphe 50.2(4) indique:

> (4) L'alinéa (3) d) ne s'applique pas si une ordonnance de mise en fourrière prévue à l'article 55.1 a déjà été rendue à l'égard de tout véhicule automobile appartenant alors au même propriétaire.

En outre, le paragraphe 55.1(28) de la Loi indique que le lieutenant-gouverneur en conseil peut effectuer des règlements et indique spécifiquement dans l'alinéa (h) du paragraphe 55.1(28),

> (h) prescrire les critères dont le Tribunal doit tenir compte et ceux dont il ne doit pas tenir compte lorsqu'il détermine, dans le cadre d'un appel prévu à l'article 50.2, si un préjudice excessif résultera d'une ordonnance de mise en fourrière qui est rendue en vertu du présent article.

La section 22 du Règlement 574 R.R.O. 1990, donne les critères à considérer et les critères qui ne doivent pas être considérés par le Tribunal pour déterminer si le préjudice excessif résultera d'une ordonnance de mise en fourrière en vertu de l'article 55.1 comme suit:

> 22 (1) Lors de la détermination si un préjudice excessif résultera d'une ordonnance de mise en fourrière en vertu de l'article 55.1 de la Loi, le [Tribunal] devrait considérer si aucune alternative à la mise en fourrière du véhicule automobile est disponible et, s'il n'y a pas d'alternative disponible, que la mise en fourrière résulterait en,
>
> (a) une menace pour la santé ou la sécurité de toute personne qui est d'ordinaire transportée par le véhicule automobile; ou
>
> (b) une menace pour la santé et la sécurité de la population ou de l'environnement ou de propriété d'une communauté pour lequel le véhicule automobile est d'ordinaire utilisé.
>
> (2) Lors de la détermination si un préjudice excessif résultera d'une ordonnance de mise en fourrière en vertu de l'article 55.1 de la Loi, le [Tribunal] ne devrait pas, en vertu du paragraphe (3), considérer si la mise en fourrière résultera en,
>
> (a) un inconvénient pour tout individu;
> (b) une perte financière ou économique pour tout individu;
> (c) une perte d'emploi ou de possibilité d'emploi pour tout individu; ou
> (d) une perte d'enseignement ou de formation ou d'une possibilité d'enseignement ou de formation pour tout individu.
>
> (3) Le [Tribunal] pourrait considérer les critères établis dans les clauses (2) (b), (c) et (d) si le propriétaire démontre,
>
> (a) qu'aucune alternative à la mise en fourrière du véhicule automobile est disponible;
> (b) que la perte sera immédiate, significative et durera;
> (c) que la conséquence de la perte se portera sur une personne d'ordinaire transportée par le véhicule automobile; et

(d) que l'impact de la perte,

(i) se portera sur une personne autre que la personne qui conduit alors que son permis de conduire était suspendu en raison de l'ordonnance de mise en fourrière du véhicule automobile, et

(ii) ne résultera pas en une perte par le conducteur suspendu défini dans la clause (2)(b), (c) ou (d).

(4) Afin de démontrer qu'il n'y avait pas d'alternative disponible à la mise en fourrière du véhicule automobile en vertu du paragraphe (1) ou de la clause (3) (a), le propriétaire doit démontrer que toute option raisonnable a été considérée et vérifiée qui pourrait éliminer ou réduire adéquatement toute menace ou perte pour la personne, incluant l'utilisation d'un autre véhicule pour remplacer le véhicule automobile mis en fourrière et prendre des mesures pour se débrouiller sans le véhicule automobile mis en fourrière ou un remplacement pendant la période de mise en fourrière.

APPLICATION DE LA LOI AUX FAITS:

Bien que tous les éléments de preuve aient été pris en compte, ce qui précède est un résumé des délibérations. Les éléments produits en preuve et qui n'avaient pas de rapport direct avec la question n'ont pas été transcrits.

Dans le sommaire des déclarations finale, l'Agent de la Requérante a supplié son propre besoin pour le véhicule en réitérant l'évidence offerte. La fille de la Requérante est une mère simple qui a besoin du véhicule pour travailler.

L'Agent du Registrateur a montré que l'agent de la Requérante a des modes alternants de transport, comme la famille et les amis l'ont aidée à arriver autour. Quand le fils de l'agent de la Requérante était malade, la Requérante l'a pris à l'hôpital. L'agent de la Requérante a perdu un total de cinq jours de travail et a perdu de l'argent qui n'est pas considéré significatif et durable. Dans sa déclaration finale l'Agent du Registrateur a demandée que la décision du Registrateur soit soutenu.

La Requérante a déposé un appel en invoquant pour motifs le fait que en vertu de l'article 50.2(3)d) du *Code de la route*, «*…la perte du véhicule causera un préjudice excessif…*». Il appartient à la Requérante de prouver le bien-fondé de l'appel.

Pour évaluer la perte financière, le Tribunal doit s'en tenir aux termes de l'article 22(2) du Règlement de l'Ontario 574, R.R.O. 1990, qui prévoit:

> «Pour déterminer si un préjudice excessif résultera d'une ordonnance de mise en fourrière en vertu de l'article 55(1) de la *Loi*, le [Tribunal], sous réserve de la sous-section (3), ne tiendra pas compte des conséquences éventuelles suivantes:

(a) un désagrément subi par qui que ce soit;
(b) une perte financière ou économique subie par qui que ce soit;
(c) la perte d'un emploi ou d'une possibilité d'emploi subie par qui que ce soit;
(d) la perte d'un enseignement ou d'une formation, ou d'une possibilité d'enseignement ou de formation, subie par qui que ce soit.

Les limitations imposées au Tribunal par l'article 22(2), sont supprimées par l'article 22(3), qui établit que le Tribunal:

> «…peut tenir compte des critères définis dans les sections (2) b), c) et d) si le propriétaire peut prouver que:
>
> *(a)* il n'existe pas d'alternative à la mise en fourrière du véhicule…»

La question est de savoir si la Requérante peut disposer un autre mode de transport.

Le Tribunal n'a aucune évidence de la Requérante. L'évidence a été présentée par la fille (agent) de la Requérante qu'elle est la seule personne utilisant le véhicule et qui a subi les conséquences de la perte.

Bien qu'inhabituel, le Tribunal, a considéré l'intention implicite de la Requérante et a accepté l'évidence. Pourtant, dans la considération de l'état critique du témoin (agent) le Tribunal a constaté qu'il y a des modes alternants de transport à sa disposition. En fait, un ami a offert de lui fournir une voiture si elle paie l'assurance.

Le Tribunal a également examiné l'article 22(3)b), qui permet au Tribunal de prendre en compte les pertes qui sont:

> «(b) immédiates, significatives et durables…»

Aucune évidence n'a été donnée à la perte de revenu subi par le Requérante. La fille de la Requérante a vraiment manqué le temps du travail, mais aucune déclaration de revenu et de frais n'a été présentée, le Tribunal n'a aucune évidence documentée qu'à la mesure de l'épreuve financière provoquée par la mise en fourrière.

Comme n'importe quelles pertes que la Requérante peut avoir soutenues n'ont pas été prouvées être significative ou durable, le Tribunal ne peut pas constater qu'il y a un préjudice excessif comme défini conformément au Règlement.

Pour évaluer la perte financière, le Tribunal doit s'en tenir aux termes de l'article 22(2) du Règlement de l'Ontario 574, qui prévoit:

> (d) que l'impact de la perte,

(i) se portera sur une personne autre que la personne qui conduit alors que son permis de conduire était suspendu en raison de l'ordonnance de mise en fourrière du véhicule automobile, et

(ii) ne résultera pas en une perte par le conducteur suspendu défini dans la clause (2)(b), (c) ou (d).

La Requérante n'était pas le chauffeur du véhicule au moment de la mise en fourrière. Bien que l'agent soit la personne affectée, étant donné qu'il n'y a aucune évidence que n'importe quelles pertes soutenues sont immédiates, significatives et durable, le Tribunal ne peut pas constater qu'il y a l'épreuve un préjudice excessif comme défini conformément au Règlement.

La Requérante n'a pas établi, ni présenté de preuve indiquant qu'elle avait subi une perte significative et durable.

Après avoir examiné les preuves présentées, le Tribunal reconnaît que la Requérante a subi des désagréments à la suite de la perte du véhicule, mais qu'elle n'a pas apporté la preuve d'un préjudice excessif justifiant l'appel aux termes de l'article 50.2(3) de la *Loi*.

DÉCISION:

Après considération de la preuve, en vertu de l'autorité conférée dans le Tribunal en vertu de l'article 50.2(5) du *Code de la route*, L.R.O. 1990, c. H8, le Tribunal confirme l'ordonnance de mise en fourrière du véhicule automobile de la Requérante, telle que délivrée par le Registrateur des véhicules automobiles, et le véhicule demeurera dans la fourrière pendant 45 jours.

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

_____

Antoine Aouad, D. M.,
Membre, Président de l'audience

ÉMISE LE: 30 juin, 2010

Cette décision sera aussi disponible ultérieurement sur Quicklaw.

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

Ontario

6101-MVIA-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c.H.8 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

SONIA DE SANTIS, representing the Registrar of Motor Vehicles

DATE OF HEARING: June 22, 2010 Teleconference

REASONS FOR DECISION

A teleconference hearing was held on June 22, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar") made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1998 RBT (the "vehicle")
Date of Appeal: June 02, 2010

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.

All documents 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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal was entered as Exhibit #2. In a typewritten note received by the Tribunal June 02, 2010 the Applicant pleads for the return of the motor vehicle as he is fearful that the impoundment will adversely affect his new business as well as his health "or the health of a dependant".

During the hearing, the Applicant affirmed that all his comments had been made in the Notice of Appeal and chose not to proffer any further evidence.

In cross-examination, the Applicant confirmed that the motorcycle with the keys is regularly kept in a communal area of a motorcycle shop. On the day in question that the motorcycle was taken without permission by the Applicant's friend's father.

Before owning the motorcycle the Applicant had no means of transportation other than "for the most part" his skateboard, which he has been using since the impoundment.

The Applicant is no longer receiving disability as he started his own business.

There have been no medical appointments missed since the motorcycle was impounded, and 911 service is available in the area.

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 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 Failure to Stop for Police Officer under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension for life.

The Registrar 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.

O. Reg. 631/98, provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3) (d).

With respect to an appeal under section 50.2(3) (d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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 opted not to make a closing statement.

The Respondent's Agent pointed out that the Applicant has been able to get around on his skateboard or by asking his friends and family for assistance.

The Applicant is in good health and there is 911 service in the area.

The Respondent's Agent closed by noting that there is no wage loss, as the Applicant is not working, nonetheless the circumstances were pre-existent.

In rebuttal the Applicant pointed out that he was not aware the person found driving his motorcycle was disqualified; nor did he know that the motorcycle had been taken. The Applicant also emphasized that skateboarding is not an adequate means of transportation. He feels like he is the victim in this situation.

The onus is on the Applicant to establish exceptional hardship, as grounds of appeal, as provided in section 50.2(3) (d) of the Act.

In assessing financial loss, the Tribunal is restricted by section 22(2) of Regulation 574 R.R.O. 1990, which provides:

22(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.

The constraint imposed on the Tribunal by section 22(2) 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 impounded motor vehicle is available;

At issue is whether the Applicant has alternative modes of transportation.

Evidence before this Tribunal indicates that, albeit inconvenient, other means of transportation are available to the Applicant. Therefore, the criterion for consideration under section 22(3)(a) is not met.

The Tribunal further reviewed section 22(3)(b) which allows the Tribunal to consider losses provided that:

> (b) the loss will be immediate, significant and lasting;

The Applicant has suffered no loss of income as he is presently not working. Further, as no statement of income and expenses was introduced, the Tribunal has no documented evidence as to the extent of the financial hardship caused by the impoundment.

As any losses the Applicant may have sustained have not been proven to be significant or lasting, the Tribunal cannot find that there is exceptional hardship as defined under the above-noted Regulation.

Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

> (d) the impact of the loss,
>
> (i) will be upon a person other than the person whose driving while his or her driver's 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).

The Applicant was not the driver of the vehicle at the time of impoundment. Although he is the affected party, given that there is no evidence that any losses sustained are immediate, significant and lasting, the Tribunal cannot find that there is exceptional hardship as defined under the Regulation.

After assessing the evidence presented, the Tribunal finds that although the Applicant may have been inconvenienced by the loss of the vehicle, he has not established exceptional hardship, as defined in 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, c. H8, 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: June 30, 2010

This decision may also be available on Quicklaw later.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6078-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: DAVID B. CARYLL, Member

APPEARANCES: APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: June 4, 2010 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on June 4, 2010, at Toronto, Ontario, in the presence of the Applicant and Russell McKnight, Agent for the Registrar of Motor Vehicles (the "Registrar"), to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the Act.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2004 Toyota UXS (the "vehicle")
Date of Appeal: May 19, 2010

The Applicant 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.

ISSUE

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 following facts are not in dispute.

On Friday, April 30, 2010, the Applicant went to bed at around 10:30 p.m. Sometime following that, the gentleman (the "driver") who lives with the Applicant took her vehicle keys and drove the vehicle.

At approximately 11:50 p.m. the same evening, the police identified the driver of the vehicle as an individual whose driver's licence was suspended for a conviction under the *Criminal Code* of Canada, R.S.C. 1985, c. C-46. The police impounded the vehicle, and arrested the driver.

Evidence for the Applicant

The Applicant testified that the loss of the vehicle was causing her exceptional hardship.

She stated that she has a disability and needs her car to shop, keep appointments, and to pick up her children, who live with their father in another city, for their bi-weekly weekend visits with her.

She testified that she has gone shopping and to appointments by taxi, renting a car, and from time to time, with friends. She does not want to keep doing so because of the cost.

The Applicant was scheduled to have her children on two weekends, since the impoundment, but has missed one of the weekends because of the cost of renting a car.

She testified that she has not missed any doctor's appointments: the next one being after the impoundment period, at the end of June.

The Applicant confirmed that the impoundment will not impose any threat to her health and safety, and further confirmed that there are emergency medical services available to her, if needed.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in

subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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

There is no doubt that the Applicant is inconvenienced by having her vehicle impounded, resulting in some financial or economic loss related to her having to assume the costs from renting a vehicle or using taxis. However, the central issue for the Tribunal to determine is whether no alternative to the impounded motor vehicle is available.

The Applicant testified that, during the impoundment period, her source of transportation to shop, attend appointments, and pick up her children was by using taxis, car rentals, and friends. Also, the Applicant has access to 911 emergency medical services.

Under subsection 22(1) of the Regulation, there was no evidence presented to show that the impoundment of the vehicle would result in a threat to the health or safety of any person ordinarily transported by the motor vehicle.

The Tribunal cannot consider, in arriving at its decision, the fact that the loss of the vehicle will cause inconvenience, and financial or economic loss to the Applicant, as described under subsection 22(2)(a) and (b) of the Regulation.

The Tribunal finds that the Applicant has not met the onus under subsection 22(3)(a) of the Regulation, namely, to demonstrate that no alternative to the impounded motor vehicle is available.

Although the Tribunal is sympathetic to the Applicant's situation, the Tribunal's jurisdiction is set out in and limited by the Act. The Applicant has failed to satisfy the statutory requirements in order for this appeal to be successful.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

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David B. Caryll, Member

RELEASED: June 10, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6073-MVIA-STLN-STOLEN

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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

VICTORIA BEDROSSIAN,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: June 14, 2010 Toronto

REASONS FOR DECISION

A hearing was held on June 14, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	2005, Buick, Terraza (the "vehicle")
Date of Appeal:	May 17, 2010

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3)(a) of the Act.

All documents 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 motor vehicle was stolen at the time in respect of which the order was made?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal was entered as Exhibit # 2. It is the Applicant's position that the vehicle was taken without his permission and therefore he considered it stolen. The Applicant alludes to "erroneous" information filed by the officer as to the best of his knowledge does not have a driver's licence.

At the hearing the Applicant reiterated the comments in his written submissions, describing the events that led to the vehicle being impounded.

The Applicant questioned the length, location and cost of the impoundment, and strenuously objected to his suffering the consequences of the behaviour of a known criminal. The Applicant emphasized that the officer did not know that the vehicle did not belong to the person who was found in the driver's seat. He insisted that the loss of the

vehicle caused immense hardship but he did not believe that the hardship clause applied as he does own another vehicle.

In cross-examination, the Applicant confirmed the facts as previously proffered. The Applicant did not advise his friend that he was not to lend the vehicle to anyone else, and his friend has not explained why he allowed a suspended driver to drive.

The Applicant's wife was sworn in as a witness. She testified that both the person to whom the vehicle was lent and the suspended driver have said that they would assist with the cost of the impound.

By way of clarification the Tribunal asked whether the Applicant charged the suspended driver with theft. The Applicant stated that he did not.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until June 12, 2022.

The Registrar 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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3) (a).

With respect to an appeal under subsection 50.2(3) (a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act.*

The *Shorter Oxford English Dictionary*, 3rd ed., provides the definition of “stolen” as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* of Canada (the "Code") R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

> “steal” means to commit theft…

Section 332(1) of the Code states:

> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
> (b) to pledge or deposit it as security;
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of “stolen” only to an intention to take the vehicle permanently. The Court held that the term “stolen” could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> "In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily."

APPLICATION OF LAW TO FACTS

In his summary statement, the Applicant stated that the incident has placed the family in extreme hardship due to familial circumstances.

In her summary statement, the Registrar's Agent maintains that the vehicle was properly impounded.

The Registrar's Agent noted that the suspended driver has not been charged with theft.

In rebuttal the Applicant suggested that there has been exceptional hardship but he chose not to use that option as he does have another vehicle.

It is unfortunate that the Applicant did not appeal under due diligence. The Tribunal sympathizes with the Applicant's indignation and understands the feeling that he does not deserve the consequences of this incident. Nonetheless the onus is on the Applicant to establish the merits of the grounds for appeal.

The gist of the Applicant's evidence is that the vehicle was taken without his knowledge or consent, and was therefore stolen. In order to determine whether the vehicle was stolen at the time of impoundment, the Tribunal must consider the meaning of the word "*stolen*". As the *Highway Traffic Act* offers no definition, the Tribunal looked to the definitions referred to above and to Black's Law Dictionary for reference as to what is commonly accepted by the judiciary as constituting theft.

According to Black's Law Dictionary, "*stolen*' is defined as follows:

> "Acquired or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently."

The Applicant, in his defense, asserts that permission was never given, yet there is no evidence that the vehicle would not be returned as it was originally lent to a friend of the Applicant.

The Tribunal finds that Applicant has failed to meet the essential criteria as to intent, necessary to deem the vehicle stolen at the time of impoundment.

After assessing the evidence presented, with respect to section 50.2(3)(a), the Tribunal finds that the Applicant's vehicle had not been stolen at the time of impoundment.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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: June 16, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

6069-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID CARYLL,
Presiding member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Representative for the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: May 31, 2010 *Teleconference*

REASONS FOR DECISION

A teleconference hearing was held on May 31, 2010, at Toronto, Ontario, in the presence of the Applicant and Sonia De Santis, representative for the Registrar, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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.

INTRODUCTION

This is an appeal under section 50.2 of the Act.

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor

vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	2005 Chev, VTR (the "vehicle")
Date of Appeal:	May 21, 2010

The Applicant 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 the Tribunal on May 31, 2010 and, as there were no preliminary matters, the hearing proceeded.

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

BACKGROUND FACTS

The following facts are not in dispute.

On Monday, May 3rd, 2010, the Applicant drove her vehicle to work. She lent her vehicle to a friend (the "friend") to conduct some personal matters. Both the Applicant and the friend had valid driver's licences.

Around 2:30 p.m., the same day, the police stopped the vehicle which was being driven by an individual (the "driver") whose driver's licence was suspended for a conviction under the *Criminal Code*. The police impounded the vehicle.

EVIDENCE CONCERNING EXCEPTIONAL HARDSHIP

The Applicant testified that she lives approximately one hour drive from her place of employment. She said the loss of the vehicle was causing her exceptional hardship.

Prior to the hearing she had been scheduled to work 28 days during the impoundment period. She missed two of those days of work. She testified that she got to and from work by having friends, relatives and acquaintances drive her. On a couple of occasions she could not get a drive so she hitch hiked or stayed over night in a motel.

She testified there was no regular bus service, and that renting a car was out of the question as she does not have a credit card. She confirmed that there is Emergency Medical Services available where she lives.

She said that if she had to stay in town, her 13 year old son had adult supervision and travels to school, each day, by school bus.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, 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

There is no doubt that the Applicant is inconvenienced by having her vehicle impounded, resulting in associated financial or economic loss related to her missing some days from work.

However, the central issue for the Tribunal to determine is whether;

> "… no alternative to the impounded motor vehicle is available."

The Applicant testified that her source of transportation to work was from the goodness of friends, relatives and acquaintances. In fact, except for two days, the Applicant has not missed any work.

The Tribunal finds that the Applicant has an alternative to the impounded vehicle to get to work. As far as medical emergencies she has access to 911 Emergency Medical Services.

Under subsection 22(1), there was no evidence presented to show that the impoundment of the vehicle would result in,

> "a threat to the health or safety of any person ordinarily transported by the motor vehicle."

The Tribunal cannot consider, in arriving at its decision, the fact that the loss of her car will cause the Applicant inconvenience, financial or economic loss as described under subsection 22 (2)(a) and (b) of the Regulation.

The Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation, namely, "to demonstrate that no alternative to the impounded motor vehicle is available".

Although the Tribunal is sympathetic to the fact the Applicant lent her vehicle to a friend in good faith, the Tribunal's jurisdiction is set out in and limited by the Statute. The Applicant has failed to satisfy the statutory requirements for this appeal to be successful.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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David B. Caryll, Presiding Member

RELEASED: June 3, 2010

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

Decisions under Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

Fiscal Year 2010 - 2011, July - September

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

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- 6143-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jul/6143.mva.%20exhp.pdf>
- 6137-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jul/6137.MVA.exhp.pdf>
- 6111-MVIA-EXHP-Exceptional Hardship
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- 6181-MVIA-DUDI-EXHP-Due Diligence & Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/aug/6181.mvia%20dudi.exhp.pdf>
- 6164-MVIA-Motion-Extension of Time
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/aug/6164%20mvia%20extensiontime%20order.final.pdf>
- 6161-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/aug/6161.mvia.exhp.pdf>
- 6156-MVIA-PODS-Permit Object De Suspension
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/aug/6156.mvia.pods.pdf>
- 6082-MVIA-Motion-Costs
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/aug/6082.mvia.stln.exhp.motion%20re%20-%20costs%20and%20dismissal.pdf>
- 6231-MVIA-EXHP-DUDI-Exceptional Hardship and Due Diligence
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6231-MVIA-EXHP-DUDI-Exceptional%20Hardship%20and%20Due%20Diligence.pdf>
- 6228-MVIA-STLN-Stolen
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6228-MVIA-STLN-Stolen.pdf>
- 6228-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6228-MVIA-EXHP-DUDI-Exceptional%20Hardship%20and%20Due%20Diligence.pdf>
- 6225-MVIA-DUDI-Due Diligence
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6225-MVIA-DUDI-Due%20Diligence.pdf>
- 6224 MVIA-EXHP–Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6224%20MVIA-EXHP-Exceptional%20Hardship.pdf>
- 6220-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6220-MVIA-EXHP-Exceptional%20Hardship.pdf>
- 6217-MVIA-STLN-EXHP-STOLEN-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6217-MVIA-STLN-EXHP-Stolen-Exceptional%20Hardship.pdf>

- 6213-MVIA–EXHP–DUDI–Exceptional Hardship and Due Diligence
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6213-MVIA-EXHP-DUDI-Exceptional%20Hardship%20and%20Due%20Diligence.pdf>
- 6201-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6201-MVIA-EXHP-Exceptional%20Hardship.pdf>
- 6192-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/sep/6192-MVIA-EXHP-Exceptional%20Hardship.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6143-MVIA-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN, Presiding Member

APPEARANCES: AGENT, for the Applicant

SONIA DE SANTIS, Agent, representative for the Registrar of Motor Vehicles

DATE OF HEARING: July 19, 2010 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on July 19, 2010, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 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: GMC, JIMMY, 1999 (the "vehicle")
Date of Appeal: June 29, 2010

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 July 19, 2010, and proceeded as a teleconference hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence is as follows:

The Applicant suffers from back muscle and spinal pain which requires continual medical review and medication to help make his back discomfort bearable. He is unable to walk any distance and requires vehicle transportation to get to work – which is approximately 15 miles for a round trip. While there was no discussion of the lack of transit in his home area, it was stated that there is also no transit route in the area of his work place.

The Applicant does not have any family able to assist him and as there is only one vehicle in the family, being the impounded vehicle, none of the other family members are able to help the Applicant travel to and from work.

The Applicant's Agent confirmed that he has been able to get occasional rides from his employer and co-worker but that is not reliable and a letter from the employer suggests the Applicant's position could be in jeopardy if he is unable to attend work on a regular basis.

The Applicant's family, which is reliant on one vehicle, has been able to get by with the purchase of a hand-pulled wagon to carry groceries home and occasional use of a taxi, though it was referred to as being unaffordable. The Applicant does have access to 911 services and while he has missed doctor's appointments for review of his back condition

and medications, the Applicant's Agent confirmed the appointments were able to be rescheduled.

While the Applicant's Notice of Appeal material stated that "financial means is not a consideration", the Applicant's Agent said there was only one vehicle and that both the Applicant's wife and son needed access to the vehicle for business meetings and employment search purposes, respectively.

Evidence for the Registrar

A summary of the Registrar's evidence is as follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until December 15, 2010.

The Respondent's Agent reviewed the facts contained in the Respondent's Materials and Submissions documents. The Applicant did not dispute any of the evidence submitted by the Respondent.

Through the questions submitted by the Respondent's Agent to the Applicant, it was confirmed that the Applicant had:

- Access to 9-1-1 service;
- Missed medical appointments that were rescheduled;
- Was able to complete grocery errands; and
- Had used taxi service though it was considered unaffordable.

Further the Applicant did not dispute that there was no change from conditions existing prior to the vehicle being impounded, i.e., that the Applicant's son was unemployed, that his wife was able to carry on her business and was in the process of obtaining her driver's licence, and that no new threat to anyone's well-being had resulted from the impoundment.

In summary, the Respondent's Agent submitted that the Applicant did have and was able to manage through the impound period without incurring any threat to his health or well-being or to the well-being of anyone else dependent upon access to the vehicle. Therefore, the Respondent's Agent asked that the order to impound be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
>
> (b) a threat to the public health and safety or to the environment or property of a

community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

(a) inconvenience to any person;
(b) financial or economic loss to any person;
(c) loss of employment or employment opportunity to any person; or
(d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

(a) no alternative to the impounded motor vehicle is available;
(b) the loss will be immediate, significant and lasting;
(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of exceptional hardship under subsection 50.2 (3)(d). Section 22 of Regulation 574, is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

The Applicant in this case has argued that the impoundment has caused hardship as described in subsection 22(2) and, in order for the appeal to be considered under subsection 22(2), the Applicant must demonstrate that all of subsection 22(3) has been met.

Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

While the Applicant's evidence and testimony confirmed the family had been able to get through the impound period already passed, albeit with some stated difficulties, there was no evidence to indicate the remaining 13 days of the impound period would be any different.

Specifically, the evidence was clear that the Applicant knew he should not have taken the vehicle and should have relied on his son, who was in the home at the time the Applicant took the vehicle. In addition, the Applicant and his family have been able to obtain their groceries and he has managed to continue working, whether at his employer's shop or on a construction or installation site.

It was also clear the Applicant has access to emergency services (i.e., 911 service) and taxis, despite the cost. In summary, the evidence showed that while there were no family or neighborhood friends to help the family with transportation needs, there was also no compelling evidence to indicate a condition of hardship upon the family, in accordance with the hardship criteria detailed in subsections 22 (2) and (3).

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Simon Dann, Presiding Member

RELEASED: July 21, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6137 MVIA-EXHP – Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER
Presiding Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL MCKNIGHT,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: July 19, 2010 Toronto

REASONS FOR DECISION

An electronic hearing was held on July 19, 2010 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	2004 Pontiac Sunfire (the "vehicle")
Date of Appeal:	June 25, 2010

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.

The hearing in this matter was originally scheduled to take place on July 14, 2010, however, neither the Applicant nor an authorized representative appeared. The Tribunal issued an Order and Notice of Intent to Dismiss. The Applicant did contact the Tribunal later on July 14, 2010, and provided written reasons explaining why he failed to attend the hearing. The Tribunal accepted those reasons and rescheduled the hearing. The matter then came before this Tribunal on July 19, 2010 and proceeded as an electronic hearing.

There were no preliminary matters in dispute between the parties.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant testified that he requires his vehicle for health reasons. He has a serious medical condition and attends doctors' appointments an estimated average of three times per week.

The Applicant, a suspended driver, was operating the vehicle when it was impounded. He stated that he had received some distressing medical news and that as a result of his

medical condition has had some issues with stress and with managing alcohol in more recent years. He is attending a program to assist him with these issues.

The Applicant has two residences: one an apartment in a major city and another in a small municipality a considerable distance from the city. He sees general practitioners in both places but his more specialized medical appointments are in the city.

Because the Applicant's driver's licence is suspended, the Applicant's partner normally drives the Applicant's vehicle to take the Applicant from the smaller municipality to his city appointments. The partner also drives the Applicant when the Applicant resides in the city. The Applicant's partner, however, is scheduled for surgery in late July and following this surgery will be unable to operate a vehicle during the approximate two week recuperation period.

The Applicant testified that his parents drove him and his partner to the city almost immediately after the impoundment of his vehicle to allow him to file his Notice of Appeal. He has been residing in his city apartment since filing the Appeal on June 25, 2010 and intends to stay at this location until the end of his partner's recuperation period. Some, but not all, of his medical practitioners are located within a few blocks of his residence.

The Applicant stated that because of his health, he is unable to negotiate public transit. Further, because he lives on a fixed disability pension, he is unable to afford the cost of taxis or a rental vehicle. On cross-examination, when asked if he could not redirect the money he would normally have used to pay for the operation of the vehicle towards the cost of taxis, the Applicant testified that he has found those funds useful for other living expenses. The Applicant stated that he has missed no appointments since the impoundment of his vehicle but has rescheduled some. For those he was able to attend, he was able to get assistance from a friend and he has taken taxis occasionally. He further testified that a family member will be moving in with him and his partner to assist them during his partner's post-surgical recuperation period.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while impaired under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until June 3, 2013.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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 issue to be considered in this appeal is whether the loss of the Applicant's vehicle will result in exceptional hardship.

The Applicant in his written reasons accompanying his Notice of Appeal stated "The continued impoundment of my car is a threat to my health".

Section 22 of Regulation 574 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle and if, no alternative is available, can then consider whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle.

The Applicant testified that he has a serious medical condition. Because he is a suspended driver, he relies on his partner to operate his vehicle to transport him to various medical appointments. He testified that he has two residences and medical appointments in both municipalities. Within a few days of the impoundment of the vehicle, the Applicant relocated to his city residence where he intends to stay until his partner has recuperated from scheduled surgery. The partner will be unable to drive during this recuperation period.

The Applicant's parents drove him to the city in order to file his Notice of Appeal and to relocate to his city residence. The Applicant testified that he is unable to negotiate public transportation because of his medical condition and cannot afford to either rent a vehicle or take taxis because he lives on a fixed income. To date, during the period of the impoundment, he has relied on some help from friends and has taken taxis occasionally. He has missed none of his estimated three medical appointments per week but has rescheduled some. He testified that the medical appointments are, with only a few exceptions, located within a few blocks of his residence. The Applicant acknowledged that he has some funds available since he is not operating the vehicle but stated he is using them for other expenses. He also acknowledged that during his partner's recuperation period he would be required to make other arrangements since his partner would be unable to drive. The Applicant lives in an area served by 911.

The evidence indicates that the Applicant does have alternatives available to the motor vehicle and that he has used some of them since the impoundment of his vehicle. His parents and friends have assisted him and he has taken taxis. The evidence therefore does not establish 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 Act, 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

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Mary Ann Spencer, Presiding Member

RELEASED: July 21, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6111-MVIA-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN
Presiding member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent, representative for the Registrar of Motor Vehicles

DATE OF HEARING: June 30, 2010 *Teleconference*

REASONS FOR DECISION

A teleconference hearing was held on June 30, 2010, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	Toyota Corolla (the "vehicle")
Date of Appeal:	June 10, 2010

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 June 30, 2010 and proceeded as a teleconference hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit # 1) identifies the basis of the Applicant's appeal

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence is as follows.

The Applicant is currently in the latter part of maternity leave from her job in the health care/home care field. Before going on maternity leave, she had two full time jobs to "manage expenses". Her husband lost his full time employment, in the same field, in June 2009, and then lost his license in January 2010, which has restricted his ability to obtain full-time work as he continues with part-time placements where he can go with transit and or bicycle.

The Applicant lives in a suburban area some distance away from a major urban centre. She is the mother of 3 children aged 16 and 4 years as well as an 8 month old. The oldest was referred to as being able to assist her with baby-sitting the younger children based on how that would fit around her own working hours. The 4 year old just finished the school year

and does not have a day care place, while the 8 month old child does but it is approximately 18 kilometres away and the Applicant has to get him there for 7:30 A.M. The Applicant said she had to take the placement now in order to have it for the fall.
The Applicant stated her family's income level is "below the poverty line" and that they are on the "verge of losing our home". The Applicant's husband, whose license was under suspension, was driving her vehicle at the time of the impoundment. She said he has a vehicle as well but it is parked in the garage at home and she expects it will be repossessed as the payments are two months behind. She is not insured on the vehicle as the cost was unaffordable based on her husband's driving record and suspension. She is insured on her vehicle with a different insurance company. She added they are already in "collections with other debts" and her credit record would be in the way of any transfer of the vehicle her husband has into her name.

The Applicant acknowledged that while she missed one medical appointment for her 8 month old she has managed to reschedule it, and even on the day of the hearing, she said she had to take a taxi home in order to be on time for the conference call. She said the taxi cost her $32.00 which meant she would have to forego something else.

The Applicant said she has no finances to afford a rental vehicle and no friends in the area and no family relations in Canada to help her out. She said she intends to go back to work full time in September but is reliant on having a vehicle as she also does home visits and cannot rely on transit. If she cannot find a day care spot for her 4 year old she will have to take night shift work. However, there is no night transit in her suburb and without a vehicle she will not be able to take that employment, which puts into question her ability to provide for her family. She is also intending to continue her education in psychology and wants to start in September. This would help her increase her income. She said she does not have the money to pay the impound fee and could therefore lose her vehicle.

Evidence for the Registrar

A summary of the Registrar's evidence is as follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while under a suspension under the *Criminal Code* of Canada;

The Respondent's Agent reviewed the facts contained in the Respondent's Materials and Submissions documents. The Applicant did not dispute any of the evidence submitted by the Respondent.

Through the questions submitted by the Respondent's Agent to the Applicant, it was specifically confirmed that the Applicant had:

- Access to 9-1-1 service and other services as were needed;
- Not missed any medical appointments, other than having to reschedule one;
- Was able to use public transit to get her 8 month old to day care and attend to daily errands, despite the difficulty of having children in tow and the length of time required to complete travel;
- Used taxi service, though she stated it was unaffordable;
- Not considered using a rental car based on her previous experience with the cost and view that it was not affordable;
- No evidence to show the loss of the vehicle posed a threat to the well-being and/or safety of herself and anyone ordinarily transported by the vehicle.

In summary, the Respondent's Agent submitted that the Applicant did have and was able to manage through the impound period already passed, with only 12 days remaining, without incurring any threat to her health or well-being or to anyone else dependent upon her access to the vehicle. Therefore, the Respondent's Agent asked that the order to impound be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
>
> (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
>
> (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
>
> (a) inconvenience to any person;
> (b) financial or economic loss to any person;
> (c) loss of employment or employment opportunity to any person; or
> (d) loss of education or training or of an educational or training opportunity to any person.
>
> (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
>
> (a) no alternative to the impounded motor vehicle is available;
> (b) the loss will be immediate, significant and lasting;
> (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
> (d) the impact of the loss,
>
> (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of exceptional hardship under subsection 50.2 (3)(d). Section 22 of Regulation 574, R.R.O. 1990, is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

The Applicant in this case has argued that the impoundment has caused hardship as described in subsection 22(2) and in order for her appeal to be considered under subsection 22(2), the Applicant must demonstrate that all of the criteria described in subsection 22(3) have been met.

Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Applicant's evidence and testimony confirmed that she and her family had been able to get through the impound period already passed, albeit with some stated difficulties. She did not say anything to indicate the remaining 12 days of the impound period would be any different or lead to any specific hardship other than the conditions which had been experienced in the 33 days passed.

While the Applicant pointed to the exceptional hardship criteria of subsection 22(2) (b) (c) (d) which would result from her inability to afford the impound fees, the Applicant's testimony and evidence did not show that the resulting impacts of the impoundment would be significant and lasting upon the family, in accordance with the hardship criteria detailed in subsections 22 (2) and (3).

Therefore, in the absence of any clear and compelling evidence from the Applicant to show that the loss of the vehicle would have significant and lasting impacts, or posed a threat to their safety and well-being, this Tribunal is unable to conclude that the impoundment created conditions of exceptional hardship.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____
Simon Dann, Presiding Member

RELEASED: July 7, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6181-MVIA-DUDI, EXHP- Due Diligence, Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: August 17, 2010 Toronto

REASONS FOR DECISION

An electronic hearing was held on August 17, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act.

BACKGROUND

This is an appeal under section 50.2 of the Act.

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1998 Honda ULX (the “vehicle”)
Date of Appeal: July 28, 2010

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3)(c) of the Act and that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

The Applicant’s Notice of Appeal filed with this Tribunal (Exhibit #1) identifies the grounds 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 and/or that the order to impound the vehicle will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

The Applicant testified that her vehicle was impounded while she was out of the country for the weekend. Her daughter, the suspended driver, lives in another municipality, but visits her mother’s home occasionally on weekends. On the weekend of the impoundment, the daughter visited the Applicant’s home in her absence, found the vehicle keys and drove the vehicle, resulting in its impoundment. The Applicant became aware of the impoundment when she returned home.

The Applicant stated that she had no knowledge that her daughter’s licence was currently suspended. While she was aware that it had been suspended three years ago, she believed the matter “had been taken care of”. She stated that she hasn’t been concerned about her daughter’s licence since her daughter has not had a vehicle for approximately three years and does not drive her mother’s when she visits. On cross-examination, she stated she has never specifically asked her daughter about the status of her licence since she believed the matter was “over with”. She then added that she would be “more diligent” in the future with her car keys now that she was aware of the suspended licence.

The Applicant runs a catering business from her home and needs her vehicle both to purchase supplies and for deliveries. Since the impoundment, she has had to refuse some orders because of her lack of a vehicle. She stated that this time of year is normally one of her busiest. However, she was able to fulfil some committed orders by finding other means of transportation. On three occasions, she rented a vehicle for the day. On other occasions, either a neighbour assisted by driving her to make deliveries or customers picked up their orders. In the latter case, the Applicant testified that she had to reduce her price since her normal price includes the cost of delivery. As a result, she stated she is losing money. The Applicant does have another vehicle but it is currently not operable. She testified that she does not have the money either to repair this vehicle or to pay the fees to release the impounded vehicle. Her daughter cannot help her since she is currently receiving short term disability.

The Applicant has regular doctor's appointments to monitor health conditions. Since the impoundment, she has cancelled two of these appointments because of the difficulty of reaching them. The area in which she lives is not directly served by public transportation. The Applicant states she would have to walk approximately 15 minutes to catch a bus. The doctor's appointments can be rescheduled but the Applicant has not done so to date. The area in which the Applicant lives is served by 911 emergency services.

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*, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with a blood alcohol level in excess of .08 pursuant to which the driver's licence of the driver was then under suspension until September 11, 2010.

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.

Regulation 574, R.R.O. 1990, 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 English Dictionary*, 3rd ed., 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, 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 first issue to be considered is whether the Applicant exercised due diligence in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made, was not then under suspension. Section 50.2(3)(c) of the Act requires the owner of the vehicle to exercise due diligence. The onus of proof is on the Applicant to establish due diligence was performed

The Applicant testified that she was not aware that her daughter's licence was suspended. While she knew her daughter had lost her licence approximately three years ago, she believed "it had been taken care of". On the weekend of the impoundment, the Applicant was not home but left her car keys there. The Applicant testified that she had never asked her daughter about the status of her licence and stated that she believed she had seen correspondence from the Ministry sending the licence back and that the suspension was "over with". She added that in the future she intended to be diligent about the keys now that she knew the status of her daughter's licence. There is no evidence that the Applicant made any attempt to confirm the status of her daughter's driver's licence. Further, the Applicant testified she was unaware that her daughter would be using her vehicle, making it impossible for her to have made the determination about the licence's status at the time the vehicle was driven.

The Tribunal therefore finds that the evidence is insufficient to indicate that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

The second issue to be considered in this appeal is whether the loss of the Applicant's vehicle will result in exceptional hardship. Section 22 of Regulation 574 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment.

The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle. The Applicant testified that the use of her vehicle is critical to the catering business she runs from her home. She needs transportation in order to purchase supplies and to make deliveries. Since the impoundment, the Applicant has refused some orders because of transportation difficulties. However, she has honoured commitments previously made by having friends and neighbours drive her; by having customers pick up orders; or, on three occasions, by renting a vehicle. The Applicant's income has gone down as a result during the impoundment period but there is no indication that the impact is significant or will be lasting.

The Applicant testified that she has regular medical appointments for monitoring purposes and has cancelled two of these because of the lack of a vehicle. Both appointments can be rescheduled although the Applicant has not done so to date. The area in which she lives is served by 911 emergency services.

In this case, the Applicant has alternatives available to the impounded vehicle. She has rented a vehicle and has had assistance with rides. She also testified that while the area in

which she lives is not directly served by public transportation, bus routes are within a fifteen minute walk of her home.

The evidence indicates that the Applicant has available alternatives to the use of the impounded vehicle and therefore does not establish 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Mary Ann Spencer, Member

RELEASED: August 19, 2010

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

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

Ontario

MOTION

6164-MVIA-Motion-Extension of Time

IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by the Applicant seeking an extension of the time requirements for this Applicant to commence an appeal from an impoundment order of the Registrar under Section 55.1 of the *Highway Traffic Act*;

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent for the Registrar of Motor Vehicles

DATE OF MOTION: August 17, 2010 *By teleconference*

ORDER

A motion was heard by teleconference on August 17, 2010, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of O.Reg. 632/98 amending Regulation 574 R.R.O. 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

The Tribunal denied the extension of time requested by the Applicant to commence an appeal for the reasons set out below.

SUBMISSIONS OF WRITTEN MATERIAL

The Applicant submitted the following documents:

1. Notice of Appeal dated July 9, 2010, received by the Tribunal on July 14, 2010

2. Motion request, e-mail dated June 24, 2007

The Agent for the Registrar of Motor Vehicles submitted the following certified documents:

1. Order to Impound dated June 1, 2010

2. Release Order dated July 4, 2010

THE FACTS

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a single mother who works part-time providing home care and requires the impounded vehicle for that purpose.

The vehicle was impounded on June 2, 2010 when it was being driven by the Applicant's then live-in boyfriend, the suspended driver. The Applicant owns two vehicles. The impounded vehicle was used primarily by the boyfriend until he lost his licence approximately ten days before the impoundment. On the day of the impoundment, the Applicant discovered her vehicle was missing when she came home from work. She was called by her boyfriend who had been held by police and drove to another municipality to pick him up. He told her the vehicle would be impounded in that municipality for approximately 45 days. Through discussions with friends, she learned that the cost of releasing the vehicle could be anywhere from $500 to $3000.

Over the course of the next few weeks, the Applicant attempted to get more information from her boyfriend about how to retrieve the vehicle and the impoundment fee. She testified that because he had been the vehicle's primary driver, she understood he would be taking care of the situation.

The Applicant ended the ten year live-in relationship with her boyfriend on June 30, 2010 because he was drinking and was abusive. On July 2, 2010, she discovered a copy of the Notice to Registrar when she was packing the boyfriend's belongings. She then contacted the towing company named on the Notice and learned where the vehicle was and what the cost of release would be. On July 8, 2010, she called the Ministry of Transportation who directed her to the information about the ability to file an appeal which was contained on the back of the Notice. She also contacted the Tribunal on July 8, 2010 for information on how to file an appeal.

The Applicant signed the Notice of Appeal on July 9, 2010 and it was received by the Tribunal on July 14, 2010. On July 12, 2010, she received a copy of the Ministry of Transportation's Notice to Release dated July 4, 2010. She expressed her concern that the Ministry had in effect only given her four days notice since the vehicle was available for release on July 16, 2010.

The Applicant provided detailed testimony about her financial situation and the loss of household income which occurred when she ended her relationship with her boyfriend. She also testified that her original intent was to borrow funds to pay for the impoundment and then sell the vehicle in order to pay back the loan. However, the vehicle she has been using for work requires extensive repairs and she now needs to keep the impounded vehicle for that purpose. The Applicant's vehicle is still at the impound facility.

On cross-examination, the Applicant testified that she did not receive the copy of the Notice of Impound dated June 1, 2010. She stated that she would have been working days during the time period when it would likely have been delivered. She suggested that her boyfriend, who was at home during the day, may have hidden it from her. She also testified that she did not contact anyone, including police or the Ministry of Transportation, for further information until she found the Notice to Registrar on July 2, 2010, at which time she contacted the towing company. She stated that during the period from June 1, 2010, the date of the impoundment, to June 30, 2010, the date she asked her boyfriend to move out, she believed that the boyfriend was "taking care of it". She stated she was not the person who was responsible for the vehicle's impoundment and that when the boyfriend said it was his responsibility, she believed him, stating "Why would he have a reason to lie to her?"

THE LAW

Section 50.2(3) of the *Highway Traffic Act* states:

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

Section 20(1) of Regulation 632/98 states:

> 20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of $100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

> 20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

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

> 7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
>
> (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
>
> (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS

Section 20(7) of Regulation 632/98, provides the Tribunal with the criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that she, acting in good faith was unable through accident, illness or other cause beyond her control to bring the appeal within the prescribed 15 days.

The Applicant testified that she learned the vehicle was impounded for 45 days and would cost a minimum of $500 to release on June 1, 2010, the day of the impoundment when she was told what happened by her then live-in boyfriend, the suspended driver.

The Applicant testified that she did not file her appeal during the 15 day period specified by regulation because she was unaware she could. She testified that she did ask her boyfriend for details but relied on him when he said he would be responsible for the vehicle. She further testified that she did not see a copy of the Notice of Impound sent June 2, 2010 and suggested that her boyfriend might have taken it. The Applicant asked the boyfriend to move out on June 30th. It was only when packing his belongings on July 2, 2010 that she discovered the Notice to Registrar and called the towing company. The Applicant then did take action, calling both the Ministry of Transportation and the Tribunal on July 8, 2010 and subsequently completing her Notice of Appeal which was received by the Tribunal on July 14, 2010. The Notice was completed on July 9, 2010 more than three weeks after the appeal period had expired.

The Applicant was not unable to file the appeal because of an accident or illness. Rather, the Applicant initially relied on her boyfriend who had indicated he would take responsibility for the release of the vehicle. It was only after the Applicant asked the boyfriend to move out that she attempted to get more details about the impoundment from anyone other than him.

The Applicant clearly attempted to expedite an appeal after the break up of her relationship with the suspended driver. However, she testified that until she asked him to leave on June 30, 2010, she believed it was his responsibility to take care of the situation. While the Applicant did ask some questions initially, she did not pursue the matter with him. At one point, she testified this was because of a history of abuse with the boyfriend. Later, she testified that she had no reason to disbelieve him.

During the period June 1, 2010, the date of the impoundment and June 30, 2010, the date the Applicant ended the relationship with her boyfriend, she could in fact have made inquiries to the police to discover exactly where her vehicle was and what options were available to her. The vehicle is in her name and the Applicant is in fact responsible for it, notwithstanding her stated belief that it was her boyfriend's responsibility since he drove the vehicle while his licence was suspended. It was not beyond the Applicant's control to obtain the information she required in order to file the appeal on time.

There is no evidence before the Tribunal to indicate that the Applicant was unable through accident, illness or cause beyond her control to bring the appeal within the prescribed period.

ORDER

For the reasons set out above, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of O.Reg. 632/98 amending Regulation 574, R.R.O. 1990, is denied.

LICENCE APPEAL TRIBUNAL

_____
Mary Ann Spencer
Presiding Member

Released: August 20, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6161-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: THE APPLICANT'S WIFE, Agent, representing the Applicant

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 6, 2010 *by teleconference*

REASONS FOR DECISION

An electronic hearing was held on August 6, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar) pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2001 Pontiac Montana (the "vehicle")

Date of Appeal: July 19, 2010

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

There were no preliminary matters in dispute between the parties.

The Registrar 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 Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

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 Registrar.

Evidence for the Applicant

A summary of the Agent's, Applicant's and suspended driver's submissions and affirmed testimonies follow.

The Applicant and the Agent are spouses of one another. They have three adult children of which only one lives within the same community. The adult son that lives within the same community also happens to be the suspended driver at the time the vehicle was impounded. The other two adult children live within the province, but many hours drive away.

When the vehicle was impounded, the Applicant and the Agent were in Europe enjoying a 6-week dream vacation, since retiring. They flew back to Canada on July 5, 2010, and stayed with their daughter and family for a few days before returning home on July 10, 2010. Their daughter informed them of their vehicle's impoundment two days after their arrival back from holidays.

The suspended driver was house-sitting the Applicant's home while the Applicant and the Agent were away on holidays. Since the suspended driver had his own vehicle, the thought never crossed the Applicant's mind to deny the suspended driver access to the impounded vehicle. The Applicant and the Agent were not aware he was a suspended driver.

The suspended driver testified that he was aware of his suspension. He had borrowed the Applicant's vehicle, without the Applicant's permission, in order to take his daughters on a road trip. The suspended driver testified that his own vehicle would not have been suitable for the road trip given all the camping necessities, which needed to be packed for the trip. He had returned home from his road trip the night before the vehicle was impounded but did not have a chance to switch the vehicles.

On the night the vehicle was impounded, the suspended driver hit a sign marking a pothole while driving the Applicant's vehicle, which caused a flat tire. Witnesses called the police and the suspended driver was given a 90-day administrative driver's licence suspension since he "blew over" the legal limit of alcohol in his bloodstream. The police also ran the driver's licence of the suspended driver wherein they determined that he was also a disqualified driver. He was arrested and the vehicle was impounded.

Evidence for the Registrar

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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with More than 80 Mgs of Alcohol in Blood under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until December 22, 2012.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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 ground of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 574 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 basis of this appeal was to try to have the impounded vehicle released prior to the Applicant and Agent's four grandchildren coming to visit. The Applicant and Agent used their second vehicle for 21 days prior to their extended families arriving for a visit. The grandchildren and their two sets of parents arrived on July 31, 2010, to spend a week together with their grandparents. There were four vehicles available to the Applicant and Agent when their children and families came to visit (i.e. the Applicant and Agent's second vehicle which seats four persons; plus each of their children's vehicles including the suspended driver's vehicle). The grandchildren will remain for an extended visit, but their parents are scheduled to drive home on August 7, 2010. The impounded vehicle is scheduled to be released from impoundment on August 9, 2010. Therefore, at the time of the hearing, the Applicant and the Agent would have had only two days without the use of their impounded minivan.

Therefore, the Applicant and the Agent have alternative vehicles available to them, other than the impounded vehicle.

The Applicant and the Agent are pensioned and are on a fixed income. Although the Tribunal understands their financial situation, their status pre-existed the vehicle's impoundment. In the alternative, the Applicant may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the 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.

Neither the Applicant nor the Agent have had or missed any medical appointments. Their community is 911 accessible and a hospital is nearby in the event of an emergency. There is no threat to the health and safety of the Applicant, the Agent or their family.

Unfortunately, the Applicant and the Agent do not meet the requirements under this regulation since they have an alternative to the impounded vehicle.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 574, the Tribunal finds that the Applicant has not established exceptional hardship as set out in section 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Nives Montano, Member

RELEASED: August 12, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6156-MVIA-PODS-Permit Object De Suspension

APPEL EN VERTU DE L'ARTICLE 50.2 DU *CODE DE LA ROUTE*, L.R.O. 1990, c. H.8 À PARTIR D'UNE ORDONNANCE DU REGISTRATEUR DES VÉHICULES AUTOMOBILES EN VERTU DE L'ARTICLE 55.1(3) DE LA LOI

POUR INTERJETER APPEL D'UNE ORDONNANCE DE MISE EN FOURRIÈRE D'UN VÉHICULE AUTOMOBILE ÉMISE PAR LE REGISTRATEUR DES VÉHICULES AUTOMOBILES

TRIBUNAL: GENEVIÈVE BLAIS
Membre, Présidente de l'audience

COMPARUTIONS: LA REQUÉRANTE, non représentés

SONIA DE SANTIS, Agent, Représentante du Registrateur des véhicules automobiles

MICHEL CLEROUX
Interprète du Tribunal

DATE DE L'AUDIENCE: 28 juillet 2010 Ottawa

RAISONS DE LA DÉCISION

Une cause a été entendue le 28 juillet 2010 à Ottawa, Ontario pour examiner la demande d'appel de la Requérante en vertu de l'article 50.2 du *Code de la route*, L.R.O. 1990, c. H.8 (la «Loi»).

LE TRIBUNAL A DÉCIDÉ DE CONFIRMER l'ordonnance de mise en fourrière émis par le Registrateur des véhicules automobiles (le «Registrateur») en vertu de l'article 55.1(3) de la Loi. Par conséquent, le véhicule automobile de la Requérante demeurera dans le lieu d'entreposage de la fourrière pendant 45 jours.

ANTÉCÉDENTS

Le Registrateur a émis une ordonnance de mise en fourrière d'un véhicule automobile pendant 45 jours, en vertu de l'article 55.1 de la Loi. Le propriétaire a interjeté appel de cette ordonnance. Voici les renseignements concernant le propriétaire, le véhicule automobile et la date de l'appel:

Propriétaire:	la Requérante
Véhicule automobile:	Toyota 2003 (le «véhicule»)
Date de l'appel:	le 9 juillet 2010

L'avis d'appel de la Requérante précise que le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension au moment à l'égard duquel l'ordonnance a été rendue tels que déterminé dans l'article 50.2(3)(b) de la Loi. La Requérante ajoute qu'il n'y avait pas de conducteur dans le véhicule qui était stationné dans sa cour le jour en question.

Les documents présentés ont été acceptés avec le consentement des deux parties.

POINT

Le Tribunal devrait-il casser l'ordonnance du Registrateur pour la mise en fourrière du véhicule en se basant sur le fait que le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension au moment à l'égard duquel l'ordonnance a été rendue?

FAITS

Le Tribunal a entendu les témoignages présentés à l'appui de la Requérante et de l'Intimé (le «Registrateur»).

<u>Témoignage de la Requérante</u>

Voici un résumé du témoignage à l'appui de la Requérante.

La Requérante témoigne qu'elle est propriétaire du véhicule automobile qui est sujet de la mise en fourrière. La Requérante travaille tous les jours et son travail l'oblige de se rendre à plusieurs endroits. Souvent, elle utilise sa voiture pour le travail, mais à l'occasion elle se fait conduire au travail, avec sa voiture, par un ami qui demeure dans sa maison où elle lui loue une chambre. Cet ami est enregistré sur l'attestation d'assurance-automobile du véhicule. Le jour en question, cet ami la conduit au travail très tôt le matin avec le véhicule. Comme à l'habitude, lors de son retour, il a stationné le véhicule dans le parking et a déposé les clés de la voiture dans la résidence de la Requérante.

La Requérante témoigne qu'un autre ami, le conducteur présumé du véhicule automobile en question, demeure également chez elle où elle lui loue une chambre. Lors de son témoignage, elle insiste que cet ami n'a pas le droit de conduire sa voiture et selon ses connaissances, il ne le fait pas. Elle avoue qu'elle était au travail le jour en question et elle-même n'était pas témoin à l'occasion. Néanmoins, elle accepte les faits fournis par cet ami, le conducteur présumé du véhicule en question.

En contre-interrogatoire, la Requérante atteste qu'elle est au courant que le permis de conduire du conducteur présumé fait objet d'une suspension. Elle insiste que c'est impossible que son ami aurait conduit le véhicule le jour en question. Elle indique que son fils de dix ans lui a confirmé que les clés du véhicule étaient dans la maison lors de l'évènement et que la voiture était stationnée dans le parking à la maison.

La Requérante indique qu'elle est très bouleversée de l'ordonnance de mise en fourrière du véhicule. Elle est une victime innocente. La perte du véhicule lui cause beaucoup d'ennuies. Elle est une mère monoparentale et elle a dû annuler la programmation d'été pour son fils et un rendez-vous pour sa visite médicale annuelle, car elle n'a pas les moyens de s'y rendre. Elle avère qu'elle est en bonne santé et qu'elle a accès au service 911 d'urgence.

La Requérante témoigne qu'elle doit se fier sur l'aide d'amis pour se rendre au travail car elle ne peut pas toujours se permettre les frais coûteux de taxi. Depuis la saisie du véhicule, elle a perdu cinq jours de travail. Malgré le fait qu'elle a accès aux autobus servant le transport en commun, ce service n'est pas toujours raisonnablement possible car elle doit souvent se rendre à plusieurs endroits de travail dans une journée. Jamais qu'elle aurait constaté que la perte du véhicule et les conséquences d'un tel évènement seraient si sévères et avec autant de tribulations. Elle reçoit sa famille de l'extérieur du pays prochainement, et elle doit avoir son véhicule pendant leur visite.

Le premier témoin, désigné sous le nom témoin A, à l'appui de la Requérante, est le conducteur présumé du véhicule automobile qui est sujet de la mise en fourrière. Il témoigne sous serment que, le jour en question, il était à la maison de la Requérante où il se tient toute la journée. Il s'occupait à faire du travail dans la cour avec un ami, un homme à tout faire, lors que l'agent de police, Constable Stevenson, s'est présenté sur les lieux. Il témoigne être tout surpris de la présence du policier qu'il reconnaît d'une autre rencontre quelques temps passé. Il est étonné lorsque le policier le confronte avec le fait qu'il l'a vu conduire le véhicule de la Requérante et lui fait rappel qu'il est sans permis valide. Le témoin A nie sa culpabilité au policier qu'il conduisait le véhicule ce matin. De plus il se dit étonné que l'agent de police lui délivre une citation à comparaître pour conduire sans permis et qu'il entame le processus de saisir le véhicule et le remorquer à une fourrière. Étant donné que la Requérante n'était pas sur les lieux, il a fourni au policier les coordonnées de la Requérante pour qu'il puisse lui communiquer l'évènement par téléphone. Il déclare au Tribunal qu'il n'était pas le conducteur du véhicule car le véhicule était toujours stationné à la maison de la Requérante.

En contre-interrogatoire, le témoin A avoue qu'il a déjà conduit le véhicule de la Requérante mais seulement dans le passé quand il avait un permis de conduire valide. Il avère qu'il ne s'est pas absenté des lieux de sa demeure durant tout le jour en question.

Le deuxième témoin, désigné sous le nom témoin B, à l'appui de la Requérante, est l'homme à tout faire, un autre ami de la Requérante. Il dit, sous serment, qu'il était à la résidence de la Requérante avec le témoin A du mi-matin à la mi-après-midi le jour en question. Peu de temps après son arrivé ce matin, il confirme voir l'agent de police en conversation avec témoin A, mais déclare de ne pas s'en être mêlé. Il témoigne que, de ses connaissances, le témoin A ne conduit pas la voiture de la Requérante. En effet, c'est lui qui le conduit lorsque témoin A doit se présenter à des rendez-vous.

Témoignage du Registrateur

Les documents présentés par le Registrateur et admis dans l'enregistrement quant au consentement de la Requérante étaient les suivants:

1. Copie des enregistrements du Ministère des transports indiquant, entre autre chose, que le véhicule automobile confisqué ci-inclus est enregistré au nom de la Requérante à titre de propriétaire;

2. Copie de l'Avis au Registrateur indiquant, entre autre chose, que le véhicule au moment où il était en détention était conduit par la personne tandis que son permis de conduire est suspendu à la suite d'une déclaration de culpabilité prononcée en vertu du *Code criminel* du Canada, L.R. 1985, c. C-46 (le «Code criminel»), ainsi qu'il est fait mention au point 4 ci-dessous;

3. Copie de l'Ordonnance de mise en fourrière du véhicule, émis par le Registrateur;

4. Copie du résumé de recherche du Ministère des Transports indiquant qu'au moment de la mise en fourrière, le conducteur avait été reconnu coupable de conduire avec une alcoolémie supérieure à 0.08 en vertu du *Code criminel* conformément auquel le permis de conduire du conducteur était suspendu jusqu'au 13 janvier 2013.

À l'audience, le troisième témoin est l'agent de police, Constable Stevenson, à l'appui du Registrateur. Assermenté, le policier atteste qu'il est agent de police avec le Service de police d'Ottawa depuis huit ans et précédemment à Toronto pour treize années. Selon ce témoin, le jour en question, lui et son partenaire travaillaient en état civile dans les environs de la résidence de la Requérante. Il connaissait la résidence à partir d'un évènement antérieure il y à un mois, où il a rencontré le témoin A.

Vers 11h18, le policier voit le véhicule de la Requérante circuler sur la route près de la résidence de la Requérante et stationner dans le parking de cette maison. Il observe derrière le volant de la voiture le témoin A, seul dans le véhicule. Sous peu, le policier confronte le témoin A avec le fait qu'il était chauffeur sans permis valide, d'un véhicule. Il avère que le témoin A était très bouleversé et celui-ci lui prononce qu'il a simplement été se chercher un café, que c'est rare qu'il conduit le véhicule et il plaide avec le policier de ne pas saisir le véhicule, car «il appartient à ma blonde et elle va me tuer».

Le policier témoigne que le témoin A était offusqué que le véhicule serait immédiatement remorqué à une fourrière et entreposé pendant 45 jours.

D'autres recherches de la part du policier Stevenson indique que selon le dossier obtenu du Service de police d'Ottawa, le témoin A s'est présenté en personne, comme requis sous un ordre de la cour, au poste de police d'Ottawa à 10h58 le jour en question. Le poste de police est situé environ huit kilomètres de la résidence de la Requérante.

Compte-tenu des contradictions dans le témoignage, le Tribunal pose quelques questions au témoin A et au témoin B. Le témoin B déclare qu'il n'a pas vu le témoin A dès son arrivé à la maison vers 10h00. Il ne se souvient pas d'avoir conduit le témoin A ce jour au poste de police pour que celui-ci puisse s'y présenter.

Le témoin A, confronté au témoignage du policier Stevenson, indique au Tribunal qu'il s'en souvient maintenant que le jour en question était un mardi. Il modifie son témoignage pour avouer qu'il n'était pas à la résidence de la Requérante toute la journée. En effet, il s'est rendu au poste de police le matin. Il indique de ne pas avoir utilisé l'autobus. Il s'excuse de sa confusion et ajoute qu'il y avait beaucoup de va-et-vient cette journée. Il se trouve perturbé de tout ce qui se passe et insiste que le témoin B a oublié qu'il la conduit au poste de police.

Le Tribunal est de l'avis que les témoignages à l'appui de la Requérante sont fragiles. Leur crédibilité, pour employer un euphémisme, est douteuse. La fiabilité de ces témoignages est questionnable. Les preuves sont faibles et contredites. Le Tribunal trouve que la version des faits de ces témoins est rude à absorber.

LOI

L'article 55.1 de la Loi indique que le Registrateur peut rendre une ordonnance de mise en fourrière d'un véhicule automobile et l'article 50.2 indique le droit du propriétaire du véhicule automobile d'en appeler auprès du Tribunal. Sur l'appel, le Tribunal peut, en vertu du paragraphe 50.2(5) de la Loi, confirmer ou casser l'ordonnance de mise en fourrière, et la décision du Tribunal est définitive, en vertu du paragraphe 50.2(8).

Le paragraphe 55.1(3) de la Loi déclare que:

(3) Sur réception de l'avis prévu au paragraphe (2), le registrateur peut, sans tenir d'audience, rendre une ordonnance de restitution du véhicule automobile ou une ordonnance de mise en fourrière du véhicule automobile que conduisait le conducteur dont le permis de conduire fait l'objet d'une suspension pendant les périodes suivantes:

1. Pendant 45 jours, si une ordonnance de mise en fourrière prévue au présent article n'a pas été rendue antérieurement, au cours d'une période prescrite, à l'égard d'un véhicule automobile appartenant alors au propriétaire du véhicule en voie d'être mis en fourrière.

2. Pendant 90 jours, si une ordonnance de mise en fourrière prévue au présent article a été rendue antérieurement, au cours d'une période prescrite, à l'égard d'un véhicule automobile appartenant alors au propriétaire du véhicule en voie d'être mis en fourrière.

3. Pendant 180 jours, si plus d'une ordonnance de mise en fourrière prévue au présent article a été rendue antérieurement, au cours d'une période prescrite, à l'égard d'un véhicule automobile appartenant alors au propriétaire du véhicule en voie d'être mis en fourrière.

O. Règlement de l'Ontario 631/98, dont il est mention ci-dessus, est de deux ans.

Le droit du propriétaire d'appeler devant ce Tribunal lorsque le véhicule automobile du propriétaire a été mis en fourrière est indiqué dans l'article 50.2 de la Loi, paragraphe 50.2(1):

(1) Le propriétaire d'un véhicule automobile qui fait l'objet d'une ordonnance de mise en fourrière prévue à l'article 55.1 peut, sur acquittement des droits prescrits, interjeter appel de l'ordonnance devant le Tribunal.

Aux termes du paragraphe 50.2(2) de la Loi, les parties pour un appel sont le propriétaire et le Registrateur. Le «propriétaire» pour les besoins de cet article est défini dans le paragraphe 50.2(11), tel que modifié le 6 décembre 2000. «Propriétaire» est défini comme suit:

«Propriétaire» S'entend de chaque personne dont le nom figure sur le certificat d'enregistrement du véhicule. Cependant, au paragraphe (4), «propriétaire» s'entend de la personne dont le nom figure sur la partie relative à la plaque d'un certificat d'immatriculation dans les cas où le certificat d'enregistrement se compose d'une partie relative au véhicule et d'une partie-plaque et où le nom de différentes personnes figure sur chaque partie.

Le propriétaire peut interjeter appel de l'ordonnance du Registrateur pour seulement quatre motifs spécifiques énumérés dans le paragraphe 50.2(3):

(3) Les seuls motifs pour lesquels un propriétaire peut interjeter appel en vertu du paragraphe (1) et les seuls motifs pour lesquels le Tribunal peut annuler l'ordonnance de mise en fourrière sont les suivants,

(a) soit le véhicule automobile qui fait l'objet de l'ordonnance était un véhicule volé au moment à l'égard duquel l'ordonnance a été rendue;

(b) soit le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension au moment à l'égard duquel l'ordonnance a été rendue;

(c) soit le propriétaire du véhicule automobile a fait preuve d'une diligence raisonnable pour tenter de déterminer que le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension au moment à l'égard duquel l'ordonnance a été rendue;

(d) soit l'ordonnance causera un préjudice excessif.

Le Requérante interjette appel ici sur les bases d'article 50.2(3)(b).

Quant à un appel en vertu de l'article 50.2(3)(b) alléguant que le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension au moment à l'égard duquel l'ordonnance a été rendue, l'article 55.1(2) de la Loi indique que:

(2) Lorsqu'un agent de police ou un agent chargé d'appliquer les dispositions de la présente loi est convaincu qu'une personne conduisait un véhicule automobile sur une voie publique alors que son permis de conduire fait l'objet d'une suspension prévue à l'article 41, 42 ou 43, même s'il fait l'objet d'une suspension en même temps pour une autre raison, il fait ce qui suit:

a) il en avise ou en fait aviser le registrateur;

b) il retient le véhicule automobile que conduisait la personne dont le permis de conduire fait l'objet d'une suspension jusqu'à ce que le registrateur rende une ordonnance en vertu du paragraphe (3). 1997, chap. 12, art. 8; 2000, chap. 26, annexe O, par. 5 (2).

L'article 41 du la Loi identifie le type d'appels pour lesquels un permis est suspendu dans les sections 41(1) (a) (b) (c) (d) et (e) et 41(7) et 42(1) et 42(5) comme suit:

41. (1) Sous réserve des paragraphes 41.1 (1), (2) et (3), le permis de conduire d'une personne déclarée coupable d'une des infractions suivantes:

a) infraction visée à l'article 220, 221 ou 236 du *Code criminel* (Canada) commise au moyen d'un véhicule automobile ou d'un tramway au sens de la présente loi, ou d'une motoneige;

b) infraction visée à l'article 249, 249.1, 249.2, 249.3, 249.4 ou 252 du *Code criminel* (Canada) commise alors qu'elle conduisait un véhicule automobile ou un tramway au sens de la présente loi, ou une motoneige, ou en avait la garde, la charge ou le contrôle;

b.1) infraction visée à l'article 253 ou 255 du *Code criminel* (Canada) commise alors qu'elle :

(i) conduisait un véhicule automobile ou un tramway au sens de la présente loi, ou une motoneige, ou en avait la garde, la charge ou le contrôle,

(ii) conduisait un bateau au sens de l'article 48 ou en avait la garde ou le contrôle;

c) infraction visée à l'article 254 du *Code criminel* (Canada) commise relativement :

(i) à la conduite, à la garde, à la charge ou au contrôle d'un véhicule automobile ou d'un tramway au sens de la présente loi, ou d'une motoneige,

(ii) à la conduite, à la garde ou au contrôle d'un bateau au sens de l'article 48;

d) infraction visée à une disposition qui est adoptée par une autre autorité législative, y compris par une municipalité de celle-ci, et qui est désignée dans une entente de réciprocité conclue en vertu de l'article 40;

e) infraction visée à un paragraphe que le présent paragraphe remplace, est suspendu;

f) pour un an, à la première déclaration de culpabilité;

g) pour trois ans, à la première déclaration de culpabilité subséquente;

h) pour une période indéterminée, à la deuxième déclaration de culpabilité subséquente ou à la déclaration de culpabilité subséquente additionnelle. 1997, chap. 12, par. 1 (1); 2001, chap. 9, annexe O, art. 2; 2006, chap. 20, art. 1; 2007, chap. 13, par. 6 (1); 2009, chap. 5, art. 10.

(2) Afin de déterminer s'il s'agit d'une déclaration de culpabilité subséquente ou d'une déclaration de culpabilité subséquente additionnelle, selon le cas, pour l'application des alinéas (1) g) et h), il ne doit être tenu compte que de l'ordre des déclarations de culpabilité et non de l'ordre dans lequel les infractions ont été commises, ni du fait qu'une infraction a été commise avant ou après une déclaration de culpabilité. L.R.O. 1990, chap. H.8, par. 41 (2).

(4) Si le tribunal ou le juge, selon le cas, qui reconnaît la personne coupable conformément au paragraphe (1), est d'avis qu'une telle mesure est opportune pour la protection du public circulant sur les voies publiques, il peut rendre une ordonnance prorogeant la suspension du permis:

a) soit pour une période qui s'ajoute à celle qui est mentionnée au paragraphe (1) que le tribunal ou le juge estime appropriée, si la personne est passible d'emprisonnement à perpétuité pour l'infraction commise;

b) soit pour une période qui s'ajoute à celle précisée au paragraphe (1) que le tribunal ou le juge estime appropriée mais n'excédant pas trois ans, si la personne n'est pas passible d'emprisonnement à perpétuité pour l'infraction commise. L.R.O. 1990, chap. H.8, par 41 (4).

(5) Le présent article s'applique de la même façon que si la personne était déclarée coupable d'une infraction, si cette personne plaide coupable ou est reconnue coupable d'une infraction visée au paragraphe (1) et si, selon le cas:

a) une ordonnance d'absolution de l'accusé est rendue en vertu de l'article 730 du *Code criminel* (Canada) ou aux termes d'une disposition qui est adoptée par un État des États-Unis d'Amérique et désignée dans les règlements;

b) une décision est rendue en application l'article 20 ou des articles 28 à 32 de la *Loi sur les jeunes contrevenants* (Canada), une peine spécifique est imposée en application de l'article 42, 59, 94, 95 ou 96 de la *Loi sur le système de justice pénale pour les adolescents* (Canada) ou une peine applicable aux adultes est imposée en application de la *Loi sur le système de justice pénale pour les adolescents* (Canada), y compris une confirmation ou une modification de la décision ou de la peine.

APPLICATION DE LA LOI AUX FAITS

La Requérante, en mots de la fin, supplie son cas et son propre besoin pour le véhicule en réitérant l'évidence offerte. Elle dit avoir accepté la version des faits fournis par son ami, le témoin A, sans question. Depuis l'évènement, elle se sent punie et la perte financière et le stress émotionnel sont significatifs.

La représentante du Registrateur a démontré que la Requérante était au courant que son ami n'avait pas un permis de conduire valide. Il s'agit qu'elle aurait dû prendre toutes les mesures nécessaires pour s'assurer que son ami n'était pas susceptible d'accéder les clés de son véhicule. Le Tribunal a entendu que la Requérante a utilisé d'autres modes de transport, comme des taxis, l'autobus et des amis au cours du dernier mois. La perte de cinq jours de travail n'est pas considéré significative et durable. Dans sa déclaration finale la représentante du Registrateur demande que la décision du Registrateur soit soutenue.

La Requérante a déposé un appel en invoquant pour motif le fait qu'en vertu de l'article 50.2(3)(b) de la Loi «…le permis de conduire du conducteur du véhicule automobile ne faisait pas l'objet d'une suspension…». Il appartient à la Requérante de prouver le bien-fondé de l'appel et ceci n'a pas été le cas.

Le Tribunal reconnais que la perte du véhicule et les résultats de cet évènement sembleraient avoir eu un effet déplorable pour la Requérante. Dans l'avis du Tribunal, il est regrettable que son ami semble avoir négligé ses responsabilités et a eu un manque de sincérité envers elle. Le témoignage de son ami est un témoignage de complaisance et la modification de son témoignage suite au témoignage du policier, aux yeux du Tribunal, à discréditer ce témoignage.

Le Tribunal accepte le témoignage de l'agent de police et les faits et ces preuves sont dignes de fois. Il n'y a aucune raison de douter la véracité de cette information.

Après avoir examiné les preuves présentées, le Tribunal reconnaît que la Requérante a subi des désagréments à la suite de la perte du véhicule, mais qu'elle n'a pas apporté la preuve nécessaire justifiant l'appel aux termes de l'article 50.2(3) de la Loi.

DÉCISION

Après considération de la preuve, en vertu de l'autorité conférée dans le Tribunal en vertu de l'article 50.2(5) de la Loi, le Tribunal confirme l'ordonnance de mise en fourrière du véhicule automobile de la Requérante, telle qu'émis par le Registrateur, et le véhicule demeurera dans la fourrière pendant 45 jours.

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

_____
Geneviève Blais
Membre, Présidente de l'audience

ÉMISE LE: 5 août 2010

Cette décision pourra être aussi disponible ultérieurement sur Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

6082-MVIA-Motion-Costs

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: No one appearing for the Applicant

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 4, 2010 *by teleconference*

ORDER

The parties to this matter are the Applicant and the Registrar of Motor Vehicles (the "Registrar"). The Registrar requested this motion in order to seek costs against the Applicant pursuant to Rule 14 of the Tribunal's Rules of Practice.

This motion was heard by teleconference. At the time scheduled for the motion to commence, the Applicant did not join the teleconference. The records of the Tribunal indicated that the Applicant did not pick up the Appointment For and Notice of Hearing that had been sent to him by courier. The hearing recessed and staff of the Tribunal unsuccessfully attempted to contact the Applicant. After a thirty minute delay, the hearing of the motion proceeded in the absence of the Applicant.

The Registrar's Agent requested that costs of a total of $765.00 be awarded to the Registrar in respect of the hearings in this matter held on June 22, 2010 and July 6, 2010, which the Applicant failed to either attend personally or to authorize a representative to attend on his behalf.

At the time scheduled for the teleconference hearing on June 22, 2010, neither the Applicant nor a representative joined the teleconference. A representative did join the teleconference after a delay of thirty minutes during which time staff of the Tribunal attempted to reach the Applicant. However, the Tribunal noted that it had received no documentation from the Applicant authorizing the representative to appear on the Applicant's behalf. The hearing was therefore adjourned to July 6, 2010.

The Tribunal issued an Order dated June 25, 2010, stating that "should the Applicant be unable to participate in the hearing on July 6, 2010, he shall provide the Tribunal with **a written document** naming and authorizing an agent to act on his behalf". The Tribunal's records indicate that the Order of the Tribunal was successfully delivered by courier. However, no documentation authorizing a representative to appear on behalf of the Applicant was received by the Tribunal before the rescheduled hearing date.

No representative of the Applicant joined the teleconference at its scheduled commencement time on July 6, 2010. The hearing was delayed and staff of the Tribunal contacted an individual at the phone number on record for the Applicant, who indicated that he would participate in the teleconference hearing. When the hearing commenced, the Tribunal noted that it had received no written documentation authorizing this individual to appear on the Applicant's behalf. Accordingly, the parties were advised that a Notice of Intent to Dismiss the proceedings would be issued.

On July 9, 2010, in accordance with Rule 2.10 (1)(d) of the Tribunal's Rules of Practice, the Tribunal issued an Order and Notice of Intent to Dismiss pursuant to the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The Applicant was provided with ten days from the date of the release of the Order to 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 or have an authorized agent attend on his behalf at both scheduled hearings. The Applicant did not contact the Tribunal in this regard. No reasons have been provided as to why the Tribunal should not dismiss the Applicant's appeal. Therefore, the Tribunal dismisses the Applicant's appeal.

Rule 14 of the Tribunal's Rules of Practice permits the Tribunal to award costs where a party has acted "unreasonably, frivolously, vexatiously, or in bad faith". Rule 14.2 (a) specifically states:

> The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:
>
> (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;

The Applicant in this matter failed to contact the Tribunal regarding his inability to attend both on June 22, 2010 and July 6, 2010, and failed to provide authorization for a representative to appear on his behalf on July 6, 2010, as ordered by the Tribunal on June 25, 2010. Further, the Applicant failed to provide reasons as to why his appeal should not be dismissed in response to the Tribunal's Order and Notice of Intent to Dismiss dated July 9, 2010.

The Tribunal therefore finds that in accordance with Rule 14 of its Rules of Practice, the Applicant has acted unreasonably, frivolously, vexatiously or in bad faith and the motion of the Registrar is granted.

The Tribunal orders as follows:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, 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 subsection 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, this Tribunal confirms the Order of the Registrar, effective May 1, 2010, to impound the Applicant's motor vehicle for 45 days;

3. The Applicant shall pay to the Registrar costs in the amount of $765.00.

LICENCE APPEAL TRIBUNAL

_____
Mary Ann Spencer, Member

RELEASED: August 13, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6231-MVIA-EXHP-DUDI-Exceptional Hardship and Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID B. CARYLL, Presiding Member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Representative for the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: September 16, 2010 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on September 16, 2010, at Toronto, Ontario, in the presence of the Applicant and Sonia De Santis, representative for the Registrar, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	1997 Dodge Truck – Wisconsin plates (the “vehicle”)
Date of Appeal:	August 27, 2010

The Applicant appeals on the basis that he 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 the Tribunal on September 16, 2010 and, as there were no preliminary matters, the hearing proceeded.

ISSUE

The bases for the Applicant’s appeal are:

1. 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?

2. Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

BACKGROUND FACTS

The following facts are not in dispute.

On Friday, August 13, 2010, the Applicant, a resident of both Canada and the USA, lent his vehicle to an acquaintance (the “driver”) for personal reasons.

Later that day, at 11:31 a.m., the vehicle was stopped by the police. The police found that the driver’s licence was suspended because he was convicted for certain offences under the *Criminal Code* of Canada, R.S.C. 1985, c. C-46. The police impounded the vehicle.

EVIDENCE CONCERNING DUE DILIGENCE

The Applicant testified that he thought the driver had a valid licence. This was based on a previous encounter, about a month before, when the driver came to buy a motorcycle from a friend. He was present when the friend asked the driver if he had a licence. The driver said “yes” and showed it to the friend.

Both the Applicant and friend testified that they did not give the licence close scrutiny. In particular, they failed to notice if the licence was expired or not, or if it even showed a photograph of the driver. They did nothing else to determine whether the driver had a valid licence.

When the Applicant lent his car to the driver, on August 13, 2010, he relied solely on this experience.

EVIDENCE CONCERNING EXCEPTIONAL HARDSHIP

The Applicant testified that the primary use for his car is for shopping and other personal matters. As he is on disability, he does not need the vehicle for work.

He said that during the impoundment period his friend, and others, drove him shopping and to other appointments. During this period he said he has not missed any medical appointments. The Applicant is the only person who relies on the vehicle. He has access to 911 emergency services.

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.

The owner may appeal the Registrar's order as set out in subsection 50.2(3):

> (3) [Two of the] grounds on which an owner may appeal under subsection (1) and [two of the] grounds on which the Tribunal may set aside the order to impound are,
>
> (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 section 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, Black's Law Dictionary (sixth edition) at page 457 defines due diligence 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.

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

Due Diligence:

The first issue to be considered in this appeal is whether the Applicant:

> … exercised due diligence in attempting to determine that the licence of the driver at the time the vehicle was impounded, in respect of which the order was made, was not then under suspension.

Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence, and the onus of proof is on the Applicant to establish that due diligence was exercised.

Black's Law Dictionary defines due diligence as:

> "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 …".

In this case, for the Applicant to rely on a defence of due diligence, he must show:

1. that he took all reasonable steps to prevent an individual without a valid licence from driving his vehicle, and

2. that at the time of the impoundment of his vehicle, he had an honest and reasonable belief that his car was being driven by someone with a valid licence.

The Tribunal finds that the Applicant took no prudent steps to ensure that the driver had a valid licence. Basing his belief on the fact that the driver produced a licence, that was not closely scrutinized, does not meet the standard for due diligence.

The onus was on the Applicant to prove on a balance of probabilities that he exercised due diligence.

The Tribunal finds that the Applicant failed to meet this test, as required by subsection 50.2(3)(c) of the Act.

For future reference, one possibility of exercising due diligence would be to contact the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

Exceptional Hardship:

The second issue to be considered in this appeal is, should the Tribunal:

> "… set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship [to the Applicant]?"

In reviewing the evidence, the Applicant has access to other vehicles, during the impoundment period, in the form of his friend and other acquaintances. He has not missed any medical appointments, or been unable to get groceries. The Applicant has access to 911 emergency health services.

After considering all of the evidence, the Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation, namely:

> … that no alternative to the impounded motor vehicle is available

The Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under subsection 22 (2) of the Regulation.

Although the Tribunal is sympathetic to the position of the Applicant, it has no alternative but to adhere to the law and apply it accordingly.

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, c. H8 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

David B. Caryll, Presiding Member

RELEASED: September 24, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6228-MVIA-STLN-Stolen

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN, Presiding Member

APPEARANCES: RICHARD JANSSEN, Agent, representing the Applicant

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 20, 2010 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on September 20, 2010, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 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: Edmonds Chevrolet Pontiac GMC Ltd.
Motor Vehicle: Chevrolet, Avalanche, 2010 (the "vehicle")
Date of Appeal: August 26, 2010

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3)(a) of the Act.

This matter came before this Tribunal on September 20, 2010, and proceeded as a teleconference hearing. All documents were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

A summary of the Applicant's evidence is as follows:

During the course of the hearing, the Applicant's Agent recapped the sequence of events as submitted in his letter of "Reason for appeal" which was attached to the Notice of Appeal.

It was confirmed that the Applicant sold and delivered the vehicle, and had completed the paperwork required to transfer the ownership of the vehicle to the buyer, who was not the driver at the time the vehicle was impounded. The Applicant's Agent confirmed that they were not the registered owner of the vehicle at the time it was being claimed to have been stolen.

At that time, the registered owner ("buyer") was the buyer and the vehicle had been paid for with an NSF cheque (insufficient funds) by a friend of hers. Following the impoundment of the vehicle and the Applicant's discovery that the cheque they had received did not have

the funds required to cover the amount written, the buyer cooperated with the Applicant to return ownership of the vehicle to the Applicant, who is again the registered owner.

The Applicant's Agent acknowledged they had confirmed that the buyer had a valid vehicle insurance policy in effect and that they had accepted a regular cheque in payment … the latter meaning that they had not followed their regular procedure of requiring a certified cheque.

The Applicant's Agent argued that they should not have to suffer the loss of the vehicle nor the impound costs as they had no involvement with its impoundment or decision to allow an individual without a valid licence drive the vehicle. The Agent confirmed no action had been taken to charge either the driver of the vehicle at the time it was impounded, or the buyer. The Applicant's single interest was to recover the vehicle as quickly as possible in order to be able to sell it.

Evidence for the Registrar

A summary of the Registrar's evidence is as 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 a number of offences including driving with more than 80 mgs alcohol in blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension for life.

The Registrar's Agent reviewed the facts contained in the Registrar's Materials and Submissions documents. The Applicant did not dispute any of the evidence submitted by the Registrar. The Registrar's Agent asked that the order to impound be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the

Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal…

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the

time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a).

With respect to an appeal under section 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in the *Highway Traffic Act.*

The *Shorter Oxford English Dictionary*, 3rd ed. defines “stolen” as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* of Canada (the "Code") R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

> “steal” means to commit theft.

Section 332(1) of the Code states:

> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent, (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> (b) to pledge or deposit it as security;
>
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
>
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
>
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
>
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
>
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles),* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of “stolen” only to an intention to take the vehicle

permanently. The Court held that the term “stolen” could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> “In our opinion a vehicle is “stolen” in this context when it is taken without the owner’s consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.”

APPLICATION OF LAW TO FACTS

Essentially, the Applicant’s evidence is that the vehicle was taken from the Applicant without being properly paid for, though that was not discovered until days later; and then the buyer allowed someone to drive whose licence was under a lifetime suspension.

It is important to note that the Applicant’s Agent confirmed the ownership of the vehicle had been transferred to the buyer, who on record was the registered owner of the vehicle and, therefore the Applicant was actually not the registered owner of the vehicle at the time of its impoundment.

In addition, the Tribunal also notes there were no charges laid against the driver of the vehicle at the time of the impoundment, either by the registered owner or the Applicant.

When a vehicle owner appeals the impoundment of their vehicle on the basis of it having been stolen, the Tribunal must consider the meaning of the word “stolen”. As the *Highway Traffic Act* offers no definition, the Tribunal looks to the definitions referred to above and to Black’s Law Dictionary for reference as to what is commonly accepted as constituting theft, which is as follows:

> Acquired or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently..

The registered owner of the vehicle (at the time of its impoundment) has not claimed the vehicle to have been stolen from her possession and has not acted to appeal the impoundment on the ground of it being stolen. The Applicant’s Agent has also confirmed that the vehicle was properly registered in the buyer’s name and that the buyer, subsequent to the impoundment, cooperated in transferring ownership back to the Applicant.

Therefore, the Tribunal can only conclude that the vehicle was not stolen from the Applicant and that the Applicant has failed to meet the essential criteria to confirm the vehicle was stolen at the time of impoundment.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____

Simon Dann, Presiding Member

RELEASED: September 28, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6228-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN
Presiding member

APPEARANCES: JOHN HUGHES, Counsel, representing the Applicant

SONIA De SANTIS, Agent, representative for the Registrar of Motor Vehicles

DATE OF HEARING: September 27, 2010 Toronto

REASONS FOR DECISION

A hearing was held on September 27, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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. These are the reasons for that decision.

BACKGROUND

This is an appeal under section 50.2 of the Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	2000, Ford COF (the "vehicle")
Date of Appeal:	September 8, 2010

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 September 27, 2010 and proceeded as an in-person hearing. There were no preliminary matters in dispute between the parties.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal as being 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.

In addition, the Applicant also appealed on the second ground that the order to impound the vehicle will result in exceptional hardship.

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

<u>Evidence for the Applicant</u>

A summary of the Applicant's evidence is as follows.

The Applicant's situation included being convicted of impaired driving in February 2009 and receiving an immediate three (3) month suspension, which he served without incident.

During this period, the Applicant retained counsel who took action to dispute the toxicology report upon which the suspension was based. The first contact between counsel and the court occurred in April 2009 during a pre-trial telephone conference. A second pre-trial conference occurred in July 2009 but no date was set for a court hearing.

In all, and including the April and July pre-trial conferences, the Applicant's counsel said there were seven (7) court appearances until the final trial date of August 18, 2010. There was no evidence to show that at any time the Applicant was asked to surrender his license or that his license was suspended beyond the initial three month suspension in 2009.

In addition and to complicate matters, the Ignition Interlock ("II") legislation, or program, which was part of the sentence imposed during the August 18, 2010 trial was only proclaimed into law on August 4, 2010. As a result, there was a lack of knowledge at the court that day about how the sentence would be implemented.

The 12 month sentence imposed by the court on that date was comprised of three months of "absolute driving prohibition" and the balance of the time within the II program. A fine of $1400.00 was also imposed and this fine was paid.

The Applicant's counsel claimed the court did not ask the Applicant to surrender his licence and when on the same day (August 18, 2010) he contacted the Ministry to inquire about whether the licence suspension was immediately in effect, he was told the Applicant would receive a letter from the Ministry to confirm all the details.

On August 25, 2010, the Applicant had still not received the Ministry's letter and while out on the road, he was stopped in a random check. The Applicant had not committed any traffic violation and was completely sober. However, his vehicle was impounded after the police officer completed a computer check and saw the Applicant's licence was suspended for the period August 18, 2010 through August 18, 2011.

Counsel referred to the advisory letter from the Ministry of Transportation, which was dated August 23, 2010, and argued that the Applicant could not have known about the Ministry's decision regarding the suspension being imposed for a one year period starting on August 18th because

- after the trial concluded, on the 18th of August, he had called the Ministry to ask about the status of the Applicant's licence and was told a letter would be sent out to the Applicant;
- the court had not asked the Applicant to surrender his licence but had imposed a fine which was immediately paid;
- the letter from the Ministry was dated August 23, 2010 and the vehicle was impounded on the 25th, and there was not enough time for the letter to have arrived at the Applicant's home to inform him of the suspension;
- there was a matter of fairness to consider in the length of time involved in having the trial occur, and that the Applicant had attended seven court dates over the past year to establish the status of the charges;
- the uncertainty among all parties regarding the II program (it had only been proclaimed into law on August 4, 2010) left all parties unclear about how the sentence would be implemented or imposed.

Counsel for the Applicant pointed to these issues as evidence that due diligence had been exercised to establish the status of the Applicant's driver's licence.

On the matter of hardship, the Applicant's counsel submitted that the Applicant needed his vehicle to carry tools and for transportation to job sites. He referred to one particular job which his employer had postponed because the Applicant was assigned to that job but had not been able to travel to the out-of-town site.

In conclusion, the Applicant's counsel asked that the impoundment be set aside.

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 originally 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 August 18, 2011.

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.

Regulation 574 R.R.O. 1990 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 English Dictionary*, 3rd ed. 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, 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

On the matter of due diligence, this case is seen to be somewhat individual for the following reasons:

1. the Applicant was first charged with impaired driving in February 2009 and while he completed an automatic 90 day suspension without incident, the full measure of the charge under the Criminal Code of Canada was not imposed because that required a court hearing which did not occur until August 18, 2010, which was approximately 18 months later;

2. in this period, the Applicant was never asked to surrender his licence at any time (following the completion of his 90 day suspension in 2009) and he remained in possession of his licence;

3. there were a total of seven court appearances in the overall time period but no final decision by the court until August 18, 2010;

4. on August 18, 2010, the court imposed a sentence comprised of a period of absolute suspension and the balance of time with an II control on the Applicant's vehicle;

   How this full sentence was to be implemented was not clarified as the II legislation had only been proclaimed into law on August 4, 2010 and the authorities involved with this case were also still somewhat unclear as to how the program actually worked;

5. the Applicant's counsel contacted the Ministry the same day as the court sentence was imposed, in order to ask about the suspension, and was told the Applicant would receive a letter confirming the details of the sentence;

6. the Ministry's letter was dated August 23, 2010; it was sent to the Applicant by mail which meant that it could reasonably be expected to have been delivered within five (5) days or by the 28th of August but highly unlikely by the 25th;

7. as the Applicant had not been asked to surrender his licence, he had kept on driving until he was stopped for a random check on the 25th of August;

   The vehicle was then impounded because the Ministry records showed the police officer on the scene that the Applicant's licence was suspended on August 18th, despite the fact the Applicant's counsel said he had called the Ministry that day and not been given that information;

8. none of the facts submitted by the Applicant's counsel were disputed.

On the ground of extreme hardship, there was no evidence to conclude that the Applicant was suffering any hardship other than he was unable to carry out all the work to which he would have been assigned. It was acknowledged that one out-of-town job had been postponed and that the Applicant's employer was patiently supporting him during this period and not dismissing him.

On the basis of the limited evidence submitted on the hardship ground of the appeal, it is my conclusion that this part of the appeal fails.

However, on the ground of due diligence, there are a number of compelling facts such as (i) that the Applicant observed each of the requirements imposed on him; (ii) his counsel contacted the Ministry to inquire about the status of the licence immediately after the court's sentence was imposed and advised that a letter would be sent to inform the Applicant how the sentence was to be implemented; (iii) however, the Ministry's letter was only sent out on the 23rd while the vehicle was impounded on the 25th. Therefore the Applicant could not yet have known about the suspension.

It could be argued the Applicant could have called the Ministry every day to check what his status was and then possibly have learned of the suspension on the 24th, at least.

But then there is the length of time it took for the actual trial to occur (literally 15 months after the original 90 days suspension was completed) and that no clear information was given to the Applicant at the conclusion of the trial and sentencing. Nor was he asked to surrender his licence.

Therefore it is the Tribunal's belief that the Applicant, and counsel on his behalf, carried out fair and reasonable due diligence to determine whether or not the licence was suspended.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: October 4, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6225-MVIA-DUDI-Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: SIMON DANN, Member

APPEARANCES: THE APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 17, 2010 Toronto

REASONS FOR DECISION

A hearing was held on September 17, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 90 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 90 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: 2010 Kia FLX (the “vehicle”)
Date of Appeal: September 2, 2010

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 as provided in section 50.2(3)(c) of the Act.

As there were no preliminary matters in dispute between the parties, the hearing proceeded.

ISSUE

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

The Applicant’s entire evidence centred on the fact that she provided the individual (the “driver”) who was driving the vehicle at the time of its impoundment with transportation to and from the correctional centre where he was completing a detention sentence on weekends. The Applicant testified that at the date she understood was the completion of the sentence, the driver told her that he had “done his time” and then had his licence reinstated. She testified that she had taken the driver’s word for it.

Evidence for the Registrar

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, R.S.C. 1985, c. C-46 (the “*Criminal Code*”) outlined in point 4 below.

3. Copy of the Order made by the Registrar 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 various offences, including Driving while Disqualified under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until April 28, 2014.

Additionally, the Agent for the Registrar reviewed the ways in which a member of the public can access the Internet, and for a small fee can check the status of an individual's driver's licence to see whether it is valid or not.

The Applicant confirmed that she had not been aware of this fact.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> “Owner” means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

Where an owner’s vehicle has been previously impounded within a period of two years or less to the impoundment under appeal, the Applicant is precluded from filing an appeal under subsection 50.2(3)(d), as provided by subsection 50.2(4), which states:

> (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.

The owner may then only appeal the Registrar’s order on any of the three remaining 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; …

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the *Shorter Oxford English Dictionary*, 3rd ed., provides the definition of “due diligence” as follows:

> **Due: A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling *to* by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).
>
> **Diligence:** 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation…

Also, “due diligence” in *Black’s Law Dictionary* (sixth edition) at page 457 is as follows:

> **Due diligence:** Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS

According to the Applicant's testimony and the evidence she provided, it was clearly established that the due diligence exercised by the Applicant was limited to taking, in good faith, the verbal information provided to her by the driver.

From the Tribunal's perspective and in reference to the interpretation of "due diligence" as has been defined through precedent and other sources, this was not found to be sufficient. The Applicant also confirmed that her action did not include checking with the Ministry of Transportation, through which she could have inquired about the status of the driver's licence.

While the information available through the Ministry of Transportation is simple, it nonetheless would have provided the Applicant with the basic information needed to ascertain the validity of the driver's licence.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under subsection 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 90 days.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Member

RELEASED: September 24, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6224 MVIA-EXHP – Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: JANE WEARY
Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL MCKNIGHT,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: September 14, 2010 Toronto

REASONS FOR DECISION

An electronic hearing was held on September 14, 2010 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 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 Mercury Sable SGL (the "vehicle")
Date of Appeal:	August 23, 2010

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

There were no preliminary matters in dispute between the parties.

ISSUE

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 testified that the impoundment of her vehicle has resulted in her being unable to provide her children with extra-curricular activities when the school day is over. Further, the impoundment has imposed difficulties in her accessing a proper grocery store to purchase food for her family. While there are convenience stores nearby, the closest grocery store to her residence is in the town some 30 kilometres from her residence.

As the sole provider in her home with two children under the age of five, the Applicant stated she required the vehicle for transportation to her employment in the town. In cross examination however, it became apparent that she has missed only three work shifts since the impoundment one month ago as she has been able to get a ride to and from work with a co-worker. She advised that her employment supervisor is aware of the inconvenience caused by the impoundment and is somewhat sympathetic to her situation.

The Applicant testified that her mother-in-law generally baby-sits her children and resides close enough to the Applicant that she is able to walk to her home to do so. Her husband uses their family vehicle to go to work.

A second vehicle, a 1990 Chevy Malibu, registered to the Applicant remains on her property and has been recently plated (August/10). The Applicant advised that it is not in working condition, and thought there might be a problem with a belt. She did not give evidence of any efforts undertaken by her to repair the problem. She had paid for new plates because her parents offered to make the repairs in the future.

The Applicant advised that neither she nor her children had in fact missed any medical appointments since the impoundment and that her residence did receive 911 emergency services should any be needed in the two weeks remaining of the impoundment order.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving dangerously under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver remained under suspension until March 24, 2011.

The Registrar's representative argued that the impoundment had not caused the Applicant "exceptional hardship" as defined in the Act and Regulations. He termed the effect more one of inconvenience, pointing out that the Applicant's children were taken to school by bus and babysat by family nearby; the Applicant had missed but three shifts in the month which had passed since the impoundment occurred as she had arranged for alternative transport to work; and no health and/or safety concerns had been raised.

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.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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.

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 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 issue to be considered in this appeal is whether or not the impoundment results in exceptional hardship to the Applicant as she alleges. A general dictionary definition of hardship as seen above, involves a severity of suffering which is greater than abnormal difficulty or unusual inconvenience. Beyond the general definition however, section 22 of the Regulation is very specific in delineating what is required to meet this criteria for appealing the impoundment and the Tribunal is not persuaded that this Applicant has succeeded in meeting it.

The facts establish that the Applicant's family are cared for and are properly schooled notwithstanding the impoundment. They have not missed any medial appointments and there are emergency services available should any future medical need arise. Further, there are grandparents, residing within walking distance, who have a vehicle which the Applicant did not contend was unavailable to her family for grocery or other needs.

There was also the evidence of an alternate vehicle, being the Chevrolet Malibu. This is in the Applicant's possession and is plated for operation, yet no reasons were put forth by the Applicant indicating efforts she has made to determine what exact repairs are required to make use of the vehicle, nor why such repairs had not yet been attempted.

The facts also demonstrated that the Applicant has been able to maintain her employment by arranging for transportation with an understanding co-worker. She concedes her

supervisor is aware of the impoundment and is also understanding of its impact. She has missed three shifts since August 14th, the day of the impoundment.

The Tribunal concludes that the evidence indicates that there is no threat to the health or safety of any person resulting from the impoundment. Nor does the evidence establish that there are no potential alternatives available to the Applicant to meet her transportation needs. The Tribunal finds that, while the impoundment has caused inconvenience, such is not "immediate, significant and lasting". As a consequence it concludes that the ground of exceptional hardship relied upon by the Applicant in this appeal has not been met.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Jane Weary, Vice-Chair

RELEASED: September 15, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6220-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: DAVID B. CARYLL, Member

APPEARANCES: APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 7, 2010 Toronto

REASONS FOR DECISION

A hearing was held on September 7, 2010, at Toronto, Ontario, in the presence of the Applicant and Russell McKnight, Agent for the Registrar of Motor Vehicles (the "Registrar"), to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the Act.

BACKGROUND

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: 2003 Pontiac Grand Am (the "vehicle")
Date of Appeal: August 23, 2010

The Applicant 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 the Tribunal on September 7, 2010 and, as there were no preliminary matters, the hearing proceeded.

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

BACKGROUND FACTS

The following facts are not in dispute.

On Tuesday, July 27, 2010, the Applicant gave her vehicle to an acquaintance (the "driver") to do some maintenance. Later the same day, the police had an encounter with the vehicle. While trying to identify who was operating the vehicle, it drove off even though the police had ordered the driver to stop.

Subsequently, the driver was identified, by the police, as the individual the Applicant had given the vehicle to. The police also discovered the driver's licence was suspended for a conviction under the *Criminal Code* of Canada.

The police impounded the vehicle, from the Applicant's residence, on Sunday, August 9, 2010.

EVIDENCE CONCERNING DUE DILIGENCE

The Applicant testified that the loss of her vehicle was causing her exceptional hardship. She said she needs the vehicle to go to work. The Applicant also testified that the family had two other vehicles. These, and on one occasion a taxi, had prevented her from missing any work.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act,

confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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

There are two issues the Tribunal wishes to comment on before dealing with the issue of exceptional hardship.

First, there was evidence presented concerning matters related to a number of *Summons to Defendant,* issued by the police, and evidence related to the Applicant's formal Complaint to the police. It is beyond the scope of the Tribunal to comment on such matters.

Second, the Applicant appeared to not understand the law as it relates to vehicle impoundments. It is a fact that the driver had a suspended licence. While the Applicant gave her vehicle to the driver in good faith, section 55.1 of the Act puts the responsibility on the Applicant to make sure that her vehicle is not driven by a disqualified driver, subject to certain exceptions; exceptional hardship being but one.

The issue to be decided, is should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

In this case, the central issue for the Tribunal is to determine whether no alternative to the impounded motor vehicle is available.

The Applicant testified that, during the impoundment period, her source of transportation to to work was the use of one of the families other two vehicles, and the use of a taxi.

There was no other evidence offered that related to exceptional hardship.

The Tribunal cannot consider, in arriving at its decision, the fact that the loss of the vehicle will cause inconvenience, and financial or economic loss to the Applicant, as described under subsection 22(2)(a) and (b) of the Regulation.

The Tribunal finds that the Applicant has not met the onus under subsection 22(3)(a) of the Regulation, namely, to demonstrate that no alternative to the impounded motor vehicle is available.

The Tribunal's jurisdiction is set out in and limited by the Act. The Applicant has failed to satisfy the statutory requirements in order for this appeal to be successful.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

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David B. Caryll, Member

RELEASED: September 14, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6217-MVIA-STLN-EXHP-STOLEN-EXCEPTIONAL HARDSHIP

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID B. CARYLL,
Presiding member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: September 7, 2010 *Teleconference*

DECISION

A hearing was held on September 7, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "HTA" or the "Act").

THE TRIBUNAL RULED TO ALLOW THE APPEAL of 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 is to be released from the impound facility, and the costs associated with the impoundment paid by the Registrar.

This decision contains the written reasons referred to in the preliminary decision released on September 8, 2010.

INTRODUCTION

This is an appeal under section 50.2 of 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:	2008 Dodge Grand Caravan (the "vehicle")
Date of Appeal:	August 19, 2010

The Applicant appeals on the basis that the vehicle was stolen at the time in respect of which the order was made and the loss of the vehicle will result in exceptional hardship, as provided in section 50.2(3)(a) and (d), respectively, of the Act.

This matter came before the Tribunal on September 7, 2010 and, as there were no preliminary matters, the hearing proceeded.

ISSUES

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

BACKGROUND FACTS

The following facts are not in dispute.

On Thursday, August 5, 2010, at approximately 3:20 a.m., the vehicle was stopped by the police. The police discovered the driver (the "driver") was never licenced, and was under suspension for an offence under the *Criminal Code*. The police impounded the vehicle.

EVIDENCE CONCERNING THEFT

The Applicant testified that she married the driver in 2000, and they had subsequently separated in 2007. In July of 2010, she allowed him to stay at her house because he was starving and unemployed. The conditions she attached to this arrangement were that he could not drink.

On Saturday, July 31, 2010, the Applicant took their daughter – who is living with her – camping. On Wednesday, August 4, 2010, her son phoned to say that the driver was drinking again and had taken the vehicle. She told her son to call the police and have charges laid.

After her son's call, the Applicant phoned the driver and told him to return the vehicle to her home. She said he refused, but agreed to return it to her parents' house. She then phoned her parents and asked them to obtain the vehicle's keys from the driver.

Subsequent to these phone calls, and between 1:10 p.m., and 6:45 p.m., August 4, 2010, the Applicant sent the driver the following six text messages:

1. "Leave the debit cards with my parents and the keys to the van I do not want you to be driving it."
2. "Where are you?"
3. "Return the van or I have to report it stolen."
4. Chris where are. I am worried.
5. Would you return the van. I asked for the keys five hours ago."
6. Would you tell me what time you are returning the van."

She testified that she gave a printed copy of her text messages to the police. She also said that her Blackberry indicated that the driver had received the messages.

The Applicant testified that her parents told her that the driver showed up at their house, but did not leave the vehicle's keys, and drove off.

Some nine hours after the last message the driver was stopped by the police and the vehicle impounded.

The Applicant found out, later, that the police responded to her son's call. They came and took a statement, but would not lay charges. She testified that she talked to Constable J who said he would not charge the driver with theft as she and the driver were still legally married. The Registrar confirmed that no charges laid.

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.

Regulation 574 R.R.O. 1990 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a) and (d).

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code (Canada)* R.S.C. 1985, c. C-46 provides guidance.

Section 1 of the *Code* states:

> "steal" means to commit theft…

Section 332(1) of the *Code* states:

> 332. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
>
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
> (b) to pledge or deposit it as security;
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
>
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
>
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
>
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle permanently. The Court held that the term "stolen" could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, 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

Issue of Stolen Vehicle

The issue to be considered is whether the motor vehicle, which is subject to the order, was stolen at the time in respect of which the order was made.

The Applicant's evidence was that once she heard from her son that the driver was driving the vehicle, she took action to have the driver return the vehicle. During a phone call he agreed to return the vehicle to her parents' home.

This testimony, although hearsay, is consistent with the first text message that said, "leave the debit cards with my parents and the keys to the van I do not want you to be driving it"

She then phoned her parents and asked her father to obtain the vehicle's keys from the driver when he arrived.

She testified that her parents told her that when the driver arrived, he refused to leave the keys. The driver left their home and drove off. This evidence is also consistent with the tone and content of the text messages.

The other significant evidence is the series of text messages the Applicant sent the driver. These clearly indicated that the Applicant wanted the vehicle returned, and, if not, she would "have to report it stolen".

When viewing all of the relevant evidence the Tribunal finds, on a balance of probabilities, that the driver knew that the Applicant had revoked any permission, or implied permission, for him to be driving her car.

The Tribunal also finds, that on a balance of probabilities the driver knew he was to leave the vehicle, and its keys, at the parents' home. The Tribunal also accepts the testimony that he arrived at the parent's home, and then drove off in the vehicle.

The significance of the Tribunal's finding is that once the driver had left the parents' home, with the vehicle, as the court said in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745:

> In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently

or temporarily.

The Tribunal finds that the driver intended to deprive the Applicant, without her consent, of her vehicle, and therefore, the motor vehicle was stolen at the time in respect of which the order was made.

Issue of Exceptional Hardship

As the Applicant has successfully appealed under subsection 50.2(3)(a) – the vehicle was stolen - the Tribunal will not deal with 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 Act, the Tribunal allows the appeal of the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle. The vehicle is to be released from the impound facility, and the costs associated with the impoundment paid by the Registrar.

LICENCE APPEAL TRIBUNAL

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David B. Caryll, Presiding Member

RELEASED: September 17, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6213 – MVIA – EXHP – DUDI – Exceptional Hardship and Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID B. CARYLL
Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Representative for the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: August 31, 2010 Teleconference

REASONS FOR DECISION

A teleconference hearing was held on August 31, 2010, at Toronto, Ontario, in the presence of the Applicant and Victoria Bedrossian, representative for the Registrar, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	1997 Mercury, Sable – New York plates (the "vehicle")
Date of Appeal:	August 24, 2010

The Applicant appeals on the basis that he 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 the Tribunal on August 31, 2010 and, as there were no preliminary matters, the hearing proceeded.

ISSUE

The bases for the Applicant's appeal are:

1. 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?

2. Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

BACKGROUND FACTS

The following facts are not in dispute.

The Applicant, a resident of New York State, USA, lent his vehicle to his brother for the purpose of travelling to a location in Ontario. The brother posses a Florida State drivers licence.

On Sunday, August 8, 2010, the vehicle was stopped by the police on highway 401. The police found that the brother was barred, for life, from driving in Canada because he was convicted for certain offences under the *Criminal Code*. The police impounded the vehicle.

EVIDENCE CONCERNING DUE DILIGENCE

The Applicant testified that he thought that his brother had a valid licence. The two of them had gone to Canada as recently as early August 2010. The Applicant was driving on that occasion. At the border both Canadian and USA customs had asked to see identification. They both showed their licences, New York and Florida, respectively. As Customs' did not indicate any problems, after consulting their computer systems, the Applicant said he assumed his brother's licence was valid.

He further testified that although his brother works in both countries, he was unaware of his brother's convictions in Canada. He admitted that they had never discussed this subject. He also testified, that he only thought his brother's Florida licence was valid because he had seen him driving with it.

The Applicant's testimony also included some hearsay evidence about his brother's encounter with the police. Also, on the *Notice to Registrar* it indicated that the police seized his brother's licence. Apparently, the police drove his brother to the boarder and returned his licence so he would have identification to facilitate his return to the USA.

EVIDENCE CONCERNING EXCEPTIONAL HARDSHIP

The Applicant testified that the primary use for his car is for work. Although, he owns a truck that he is now using during the impoundment period.

The essence of his appeal, is that he lends the vehicle to his daughter, from time to time, to drive back and forth to school. The daughter lives in residence, and during the impoundment period, her mother uses her car to pick up the daughter.

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.

The owner may appeal the Registrar's order as set out in subsection 50.2(3):

> (3) [Two of the] grounds on which an owner may appeal under subsection (1) and [two of the] grounds on which the Tribunal may set aside the order to impound are,
>
> (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 section 50.2(3)© alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, Black's Law Dictionary (sixth edition) at page 457 defines due diligence 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.

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

Due Diligence:

Before dealing with the issue of due diligence, the Tribunal wishes to comment on the brother's encounter with the police. Any questions concerning conversations the brother had with the police are well beyond the scope of this Tribunal. Questions of this nature should be directed to the police themselves.

The first issue to be considered in this appeal is whether the Applicant:

> "… exercised due diligence in attempting to determine that the licence of the driver at the time the vehicle was impounded, in respect of which the order was made, was not then under suspension."

Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence, and the onus of proof is on the Applicant to establish that due diligence was exercised.

Black's Law Dictionary defines due diligence as:

> "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 …".

In this case, for the Applicant to rely on a defence of due diligence, he must show:

1. that he took all reasonable steps to prevent an individual without a valid licence from driving his car, and

2. that at the time of the impoundment of his vehicle, he had an honest and reasonable belief that his car was being driven by someone with a valid licence.

The Tribunal finds that the Applicant took no prudent steps to ensure that the driver had a valid licence. Basing his belief on the fact that his brother appeared to have had a valid Florida licence does not meet the standard for due diligence. It is unknown what information the customs' data bases show. It would have been prudent to inquire if the systems dealt with traffic matters. As he knew his brother came to Canada, from time to time, at the very least, the Applicant should have asked whether his brother was permitted to drive in Ontario.

The onus was on the Applicant to prove on a balance of probabilities that he exercised due diligence.

The Tribunal finds that the Applicant failed to meet this test, as required by subsection 50.2(3)(c) of the Act.

For future reference, one possibility of exercising due diligence would be to contact the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

Exceptional Hardship:

The second issue to be considered in this appeal is should the Tribunal:

> "… set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship [to the Applicant]?"

In reviewing the evidence, the Applicant has access to a second vehicle. In the case of his daughter's need to return home from school, from time to time, her mother drives her in the absence of the Applicant's car.

After considering all of the evidence, the Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation, namely, "that no alternative to the impounded motor vehicle is available", and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under subsection 22 (2) of the Regulation.

Although the Tribunal is sympathetic to the position of the Applicant, it has no alternative but to adhere to the law and apply it accordingly.

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, c. H8 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

David B. Caryll, Presiding Member

RELEASED: September 7, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6201-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THAT ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DAVID B. CARYLL, Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 31, 2010 *by teleconference*

REASONS FOR DECISION

An electronic hearing was held on August 31, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar) pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1985 Pontiac PBR (the "vehicle")
Date of Appeal: August 13, 2010

The Applicant 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.

As there were no preliminary matters, the hearing proceeded.

ISSUE

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 following facts are not in dispute.

On Thursday, July 22, 2010, at approximately 11:00 a.m., the police stopped the Applicant while he was driving along the highway. The police found that the Applicant's driver's licence was under suspension for a conviction under the *Criminal Code* of Canada, R.S.C. 1985, c. C-46. Thereupon, the police impounded the vehicle.

Evidence for the Applicant

The Applicant testified that he is on a fixed disability income of some $875.00 per month. After a monthly loan payment, he is left with about $575.00 for all other living expenses.

The essence of his appeal is that he may be unable to afford to recover his vehicle from the impoundment facility, once the impoundment period is completed.

The Applicant testified that he lives approximately 12 kms from the nearest town. During the period from April 21, 2010 to July 22, 2010, while his licence was suspended, the Applicant was driven to town twice a week by his neighbours so that he could shop for supplies. He stated that he never drove during this period except on the single occasion which led to the impoundment.

He testified that he takes care of his elderly mother who, on occasion, has to visit a doctor. Again, his neighbours and girlfriend assist him in this regard.

The Applicant testified that there is no regular bus service available to him, and that taking a taxi was too expensive. He confirmed that there are 911 emergency medical services available where he lives.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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

There is no doubt that the Applicant will suffer some economic loss related to the recovery of his vehicle from the impoundment facility.

However, under the legislation, the central issue for the Tribunal to determine is whether:

> …no alternative to the impounded motor vehicle is available.

The Applicant testified that his regular source of transportation to town, during the pre-impoundment period, was from friends and his girlfriend. He had always been able to shop or attend other appointments, even though his licence was suspended. And, he testified that this has not changed during the impoundment period.

The Tribunal finds that the Applicant has an alternative to the impounded vehicle to do his shopping and to take his mother to her appointments. The Applicant and his mother have access to 911emergency medical services if needed.

Under subsection 22(1), there was no evidence presented to show that the impoundment of the vehicle would result in a threat to the health or safety of any person ordinarily transported by the motor vehicle.

In arriving at its decision, the Tribunal cannot consider the fact that the loss of the Applicant's vehicle will cause him inconvenience, financial or economic loss as described under subsection 22 (2)(a) and (b) of the Regulation.

The Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation, namely, to demonstrate that no alternative to the impounded motor vehicle is available.

Therefore, the Applicant has failed to satisfy the statutory requirements for this appeal to be successful.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impoundment facility for 45 days.

LICENCE APPEAL TRIBUNAL

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David B. Caryll, Member

RELEASED: September 10, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6192-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN, Presiding Member

APPEARANCES: APPLICANT, unrepresented

VICTORIA BEDROSSIAN, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: August 24, 2010 Toronto

REASONS FOR DECISION

A hearing was held on August 24, 2010, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 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:	CHRYSLER, 300, 2006 (the “vehicle”)
Date of Appeal:	August 6, 2010

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 August 24, 2010, and proceeded as an oral hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

A summary of the Applicant’s evidence is as follows:

The Applicant summarized her evidence by testifying that she was in the hospital at the time the vehicle was taken by the driver and she submitted a supporting letter from her neurologist. She also has a one month old daughter with a heart condition requiring the child to see doctors in two separate locations.

The Applicant’s medical condition requires her to have blood checks twice a week at a lab and, in addition, her mother relies on her for transportation to her place of work. In each instance, the Applicant stated she needs her vehicle to travel to doctor’s appointments and to meet her mother’s transportation needs.

Evidence for the Registrar

A summary of the Registrar’s evidence is as 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's licence of the driver was then under suspension until October 27, 2010.

The Applicant did not dispute any of the evidence submitted by the Registrar's Agent and in response to questions submitted by the Agent to the Applicant, it was learned that the Applicant had:

- access to 9-1-1 service;
- missed medical appointments but had been able to reschedule them;
- used taxi service but not transit as taxis were more convenient;
- had not looked into renting a vehicle.

The Applicant also confirmed that she and her family had essentially been able to get by the impoundment period, which had so far passed with help from other family members but that it was a difficult time. She did not indicate that there had been any direct and or significant threat to anyone's well-being as a result of the vehicle impoundment.

In summary, the Registrar's Agent submitted that the Applicant was able to manage through the impoundment period without incurring any threat to her health or well-being and to the well-being of anyone else dependent upon access to the vehicle. Therefore, the Registrar's Agent asked that the order to impound be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
>
> (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
>
> (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
>
> (a) inconvenience to any person;
> (b) financial or economic loss to any person;
> (c) loss of employment or employment opportunity to any person; or
> (d) loss of education or training or of an educational or training opportunity to any person.
>
> (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

(a) no alternative to the impounded motor vehicle is available;
(b) the loss will be immediate, significant and lasting;
(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of exceptional hardship under subsection 50.2 (3)(d). Section 22 of Regulation 574, is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

The Applicant in this case has argued that the impoundment has caused hardship as described in subsection 22(2) and, in order for the appeal to be considered under subsection 22(2), the Applicant must demonstrate that all of subsection 22(3) has been met.

Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

While the Applicant's evidence and testimony confirmed the family had been able to get through the impound period already passed, albeit with some stated difficulties, there was no evidence to indicate the remainder of the impound period would be any different.

It was also clear the Applicant has access to emergency services (i.e., 911 service) and taxis, despite the cost. In summary, there was no compelling evidence to indicate a condition of hardship upon the family, in accordance with the hardship criteria detailed in subsections 22 (2) and (3).

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Simon Dann, Presiding Member

RELEASED: September 8, 2010

This decision, may also be available on Quicklaw.

Decisions under Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

Fiscal Year 2010 - 2011, October - December

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

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<http://www.ontario.ca/lat/english/Documents/Decisions/2009/hta/mvia/oct/5694.mvia.exhp.pdf>

- 6280-MVIA-Consent Order <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/oct/6280-MVI.PDF>
- 6278-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/oct/6278-mvia-EXHP-exceptional%20hardship.pdf>
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- 6256-MVIA-DUDI-Due Diligence <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/oct/6256-mvia-DUDI-due%20diligence.pdf>
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- 6248-MVIA-Wellburn Transport Limited-DUDI-Due Diligence <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/oct/6248-mvia-Wellburn-DUDI-due%20diligence.pdf>
- 6241-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/oct/6241-mvia-EXHP-exceptional%20hardship.pdf>
- 6325-MVIA-DUDI-Consent Order <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/nov/6325.MVIA.Dudi.consent%20order.pdf>
- 6324-MVIA-NUSP-EXHP-Not Under Suspension and Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/nov/6324.mvia.nusp.exhp.pdf>
- 6318-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/nov/6318.mvia.exhp.pdf>
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- 6310-STLN-EXHP-Stolen & Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/nov/6310.mvia.stln.exph.reasons.pdf>*
- 6307-MVIA-STLN-EXHP-Stolen and Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/nov/6307.mvia.stln.exhp.pdf>*
- 6299-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/nov/6299.MVIA.exhp.pdf>*
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- 6328-MVIA-Motion-Extension of Time *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/dec/6328-MVIA.motion.time.pdf>*
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- 6339-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/dec/6339.MVIA.exhp.pdf>*
- *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-October-December.aspx?ControlMode=Edit&DisplayMode=Design>* 6343-MVIA-Due Diligence & Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/dec/6343-MVIA.pdf>*
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- 6366-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/dec/6366.mvia.exhp.pdf>*
- 1641602 ONTARIO LTD. DBA DOLLAR RENT A CAR-DUDI-Due Diligence *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/dec/6369.mvia.dudi.pdf>*

- 6385-EXHP-Exceptional Hardshi
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Ontario

HIGHWAY TRAFFIC ACT
R.S.O. 1990, c. H.8

6280-MVIA-Consent Order

IN THE MATTER of the ORDER TO IMPOUND #0500939
to impound a motor vehicle owned by the Applicant
made pursuant to section 55.1 of the *Highway Traffic Act*
- Effective on: September 22, 2010

AND IN THE MATTER of a requirement for a hearing respecting the said Order to Impound pursuant to section 50.2 of the *Highway Traffic Act*

THE APPLICANT

- Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Applicant, and the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Agent for the Registrar of Motor Vehicles, as to the disposition of these proceedings, which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the Order to Impound (#0500939) a motor vehicle is set aside and 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: October 5, 2010

This decision may also be available on Quicklaw.

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On September 22nd, 2010, the motor vehicle described in Order to Impound # 0500939 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8 as amended.

2. The Applicant is the owner of said vehicle.

3. The Applicant filed an appeal of the Order to Impound, in accordance with the grounds permitted under clause 50.2(3)(a) of the *Highway Traffic Act*, stating that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.

4. Having investigated this matter, the Registrar is satisfied that the vehicle was stolen at the time of the impoundment order.

5. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or Consent Orders.

JOINT SUBMISSION

Accordingly, the parties consent to an Order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the Order to Impound.

Applicant

_____
(Signature of Applicant)

_____
(Date)

Authorized Delegate for Registrar of Motor Vehicles

_____
(Signature of Respondent)

_____
(Date)

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6278-MVIA-EXHP- Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: THE APPLICANT

RUSSELL McKNIGHT, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: October 15, 2010 Toronto

REASONS FOR DECISION

An electronic hearing was held on October 15, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act.

BACKGROUND

This is an appeal under section 50.2 of the Act.

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2005 Pontiac MON (the "vehicle")
Date of Appeal: September 29, 2010

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.

The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

The Applicant's Notice of Appeal filed with this Tribunal (Exhibit #1) identifies the grounds of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order to impound the vehicle will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and considered the documents tendered by the Registrar.

Evidence for the Applicant

The Applicant testified that she lives with her husband, the suspended driver, in a rural area approximately fifteen miles away from the nearest small municipality and sixty miles from the nearest major centre. On the day of the impoundment, while the Applicant was in bed, the Applicant's husband took the vehicle to drive the household garbage to its pick-up point, approximately two miles from their home.

The Applicant testified that her husband is retired and both he and she are in receipt of pensions. The Applicant uses her vehicle both for personal errands and to supplement the family income by driving seniors to appointments and, working with a not-for-profit organization, driving patients to hospital. The frequency of this part time employment varies but the Applicant estimated that her income from this source totals approximately $250.00 per month. On cross-examination, she testified that the not-for-profit organization was aware of her current situation and that she would be able to continue the work after her vehicle was returned.

Since the impoundment, the Applicant has not been able to continue her part time driving and has lost that income. She also stated that on two occasions, she has had to hire a driver at the cost of approximately $35.00 per day in order to get groceries and reach

medical appointments, one of which is scheduled on a regular weekly basis. On other occasions, she has had the assistance of a neighbour and of friends to drive her. She has had to reschedule two appointments in order to accommodate the schedule of those able to drive her but has missed none. She lives in an area served by 911.

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*, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar 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 pursuant to which the driver's licence of the driver was then under a lifetime suspension.

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.

Regulation 574, R.R.O. 1990, 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)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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 issue to be considered in this appeal is whether the loss of the Applicant's vehicle will result in exceptional hardship. Section 22 of Regulation 574 is very specific. It provides the Tribunal with the criteria the Applicant must meet in order to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant uses the impounded vehicle both for personal errands and to supplement the family pension income by driving seniors to appointments and patients to hospital. Since the impoundment, the Applicant has received assistance from a neighbour and from friends to drive her to pick up groceries and to medical appointments. She has twice hired a driver at the cost of $35.00 per day. While she has had reschedule two appointments, she has missed none and she lives in an area served by 911.

Due to the impoundment, the Applicant has not been able to continue her part time driving work and has lost income of approximately $250.00 per month. However, she testified that she will be able to continue this work once her vehicle is returned to her. There is no evidence to indicate that the financial impact of the impoundment is either lasting or significant. The Tribunal notes that the cost of the impoundment itself cannot be considered in determining whether or not exceptional hardship will result from the impoundment.

The evidence indicates that the Applicant has available alternatives to the use of the impounded vehicle and therefore does not establish 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Mary Ann Spencer, Member

RELEASED: October 15, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6264-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID CARYLL,
Presiding member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: October 7, 2010 Toronto

REASONS FOR DECISION

A hearing was held on October 7, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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.

INTRODUCTION

This is an appeal under section 50.2 of 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 Chevrolet Venture (the “vehicle”)
Date of Appeal: September 15, 2010

The Applicant 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 the Tribunal on October 7, 2010 and, as there were no preliminary matters, the hearing proceeded.

ISSUE

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

BACKGROUND FACTS

The following facts are not in dispute.
On Friday, September 10, 2010, the Applicant parked her vehicle on a friend’s driveway to make additional space, on her driveway, for weekend visitors. Around 4:15 a.m., on Saturday, September 11, 2010, the police stopped the vehicle, at the junction of highway 410 and Westeny Road, Ajax, and discovered the friend’s licence was under suspension for an offence under the *Criminal Code*. The police impounded the vehicle.”

EVIDENCE CONCERNING EXCEPTIONAL HARDSHIP

The Applicant testified that she is a self employed professional. Her sources of income flow from two organizations where she works four and two days a week, respectively, plus a number of private homecare clients. Her vehicle is used to transport the supplies and equipment needed to conduct her practice.

She testified that without her vehicle she has lost a number of days of work at the organization that provides four days per week. She said she might loose this work as the organization needs someone with her skills. She has been able to reschedule her private homecare clients.

The organization that gives her two days of work provides the needed supplies and equipment. She uses public transportation to go to this organization.

She said that available car rentals and taxis are too expensive for her to use. She did not fully investigate these options.

The Applicant has a second vehicle that is not road worthy because it requires major repairs.

The Applicant further testified that she has not missed any medical appointments, and she has access to 911 Emergency Medical Services.

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.

Regulation 574 R.R.O. 1990 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 English Dictionary*, 3rd ed. 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, 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

There is no doubt that the Applicant is clearly inconvenienced by having her vehicle impounded, and will have some associated financial or economic loss related to her work, the rental of a replacement vehicle, or the use of a taxi.

The Tribunal cannot consider, in arriving at its decision, the fact that the loss of her car will cause the Applicant inconvenience, financial or economic loss as described under subsection 22 (2)(a) and (b) of the Regulation..

Therefore, the central issue for the Tribunal to determine is whether;

"… no alternative to the impounded motor vehicle is available."

The Applicant acknowledged that she has access to 911 Emergency Medical Services, taxis, car rental, and public transportation.

The Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation, namely, “to demonstrate that no alternative to the impounded motor vehicle is available”.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____
David Caryll, Presiding member

RELEASED: October 14, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6263-MVIA-EXHP- Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: AGENT, representing the Applicant

SONIA DE SANTIS, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: October 5, 2010 Toronto

REASONS FOR DECISION

An electronic hearing was held on October 5, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act.

BACKGROUND

This is an appeal under section 50.2 of the Act.

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: 2009 Cadillac ESC (the "vehicle")
Date of Appeal: September 16, 2010

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.

The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

The Applicant's Notice of Appeal filed with this Tribunal (Exhibit #1) identifies the grounds of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order to impound the vehicle will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

The Agent for the Applicant testified that the vehicle is a corporate vehicle, owned by the company established by the Agent for the Applicant. The Agent for the Applicant is the president of that company. The vehicle is used primarily by the Agent for the Applicant's wife, who is also employed by the company, to drive the Applicant. It is also used by the couple for personal transportation.

The Agent for the Applicant is the suspended driver in this case. On the day of the impoundment, he and his wife were visiting relatives. His wife, however, did not feel well and because of her advanced pregnancy, the Applicant made the decision to drive the vehicle.

The Agent for the Applicant and his wife live in a rural area approximately fifteen kilometres from the nearest municipality which is not served by public transportation. In the Notice of Appeal, the Agent for Applicant indicated that the loss of the vehicle was of significant concern as his wife was expected to deliver their first child imminently and transportation to the hospital would be needed.

The Agent for the Applicant advised the Tribunal that the baby has now been born and both his wife and the baby are in good health. He testified that he had chosen to rent a vehicle for a period of approximately two weeks surrounding his wife's due date to ensure transportation was readily available. He also testified that his mother lives approximately three kilometres from his home and that she has been able to provide assistance using her

vehicle. However, he stated that his mother's vehicle, while roadworthy, is old and he does not believe it could withstand significant long distance travel. In addition, he testified that his wife's mother has also been visiting and that he has rented a second vehicle for her. He stated that these rentals have been a "huge expense" and that "money has run out". The rentals end approximately three weeks before the impoundment period ends. The Agent for the Applicant indicated he has been at home due to the birth of the baby but intends to return to work approximately three weeks before the impoundment ends.

The Agent for the Applicant indicated that without the use of the impounded vehicle not only was personal transportation a "huge problem" but the business could be damaged. Normally, the Agent for the Applicant's wife would use the impounded vehicle to drive the Agent for the Applicant to sales appointments. The Agent for the Applicant's mother also drove the impounded vehicle. Before the impoundment, in preparation for the wife's impending maternity leave, an advertisement was placed to hire a replacement driver. He also indicated they intended to buy another vehicle. However, as a result of the impoundment, the advertisement has been withdrawn since now they require a driver with a vehicle, a greater expense which they cannot afford given the costs associated with the new baby and the unexpected cost of the impoundment. Plans to purchase an additional vehicle have also been cancelled.

On cross-examination, the Agent for the Applicant acknowledged that there are ten vehicles and/or trailers registered to the Applicant that are currently in use. He testified, however, that these are all needed for business delivery and installation work and would not normally be available to him and his wife although they have used them on rare occasions. He also stated that he cannot use the vehicle he rented for sales appointments which are throughout the province because it has kilometre limits and would be too expensive to drive. He testified that he was trying to 'grow the business' and that it was 'picking up': in fact he intends to hire two more employees. He also indicated, however, that the business was threatened if he could not continue to generate new customers and sales.

Further on cross-examination, the Agent for the Applicant confirmed that no medical appointments have been missed as a result of the loss of the vehicle for personal use. Arrangements have been made for transportation of the baby to a first check up appointment scheduled to take place in a municipality some distance from their home. The area in which the Agent for the Applicant and his family reside is served by 911.

<u>Evidence for the Registrar</u>

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*, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar 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 pursuant to which the driver's licence of the driver was then under a lifetime suspension.

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.

Regulation 574, R.R.O. 1990, 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)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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 issue to be considered in this appeal is whether the loss of the Applicant's vehicle will result in exceptional hardship. Section 22 of Regulation 574 is very specific. It provides the Tribunal with the criteria the Applicant must meet in order to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant in this case is an incorporated business and the impounded vehicle is used primarily by the Agent for the Applicant, the president of the business, and his wife, who is currently on maternity leave from the business. The vehicle is used by the Agent for the Applicant, driven by his wife, for customer visits and sales appointments, and by the couple for personal transportation

The Agent for the Applicant testified that there are ten operational vehicles/trailers registered to the business. While he stated that business was 'picking up' and he was in the process of hiring two more employees, he also indicated that he was 'growing the business' and needed to be able to make sales appointments. He stated none of the vehicles registered to the Applicant could be used for this purpose. However, he also testified that he and his wife do use those vehicles although on rare occasions.

Following the impoundment, the Agent for the Applicant rented a vehicle for a period of two weeks to ensure transportation was available as his wife was imminently expecting a baby. He also rented a second vehicle for his wife's mother's use when she arrived after the baby's birth. Further assistance is available from the Agent for the Applicant's mother who lives nearby, has an operational vehicle, and is also available to drive other vehicles. No medical appointments have been missed by the Agent for the Applicant's family and they live in an area with 911 emergency services.

In this case, the Applicant has alternatives available to the impounded vehicle. Two vehicles have been rented on a short term basis to replace the personal use aspect of the impounded vehicle. The Applicant indicated that it would be expensive to use a rental for business purposes because of the distances that need to be driven. He also testified that plans to hire a driver have been cancelled because of the expense of hiring one with the use of a vehicle. While some sales appointments may in fact have been deferred because of the Agent for the Applicant taking time off due to the birth of his first child, and further may be deferred if the Applicant chooses not to continue to rent a vehicle and use it for business purposes, there is no indication that the financial impact on the Applicant would be either lasting or significant. In fact, the Agent for the Applicant testified that the business has been 'picking up' and there are plans to hire two more employees.

The Tribunal notes that given the Agent for the Applicant's driver's licence is under a lifetime suspension, the costs to the Applicant associated with replacement of the Agent for the Applicant's wife during her maternity leave are not solely due to the impoundment of the vehicle. The Tribunal further notes that the costs to the Applicant of the impoundment itself

cannot be considered in determining whether the impoundment will result in exceptional hardship.

The evidence indicates that the Applicant has available alternatives to the use of the impounded vehicle and therefore does not establish 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Mary Ann Spencer, Member

RELEASED: October 7, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6261-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THAT ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 4, 2010 Toronto

REASONS FOR DECISION

A hearing was held on October 4, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar) pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. The owner has appealed that order. The owner, motor vehicle and date of appeal are as follows:

Owner: (the “Applicant”)
Motor Vehicle: 2005, Jeep Liberty (the “vehicle”)
Date of Appeal: September 15, 2010

The Applicant 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.

As there were no preliminary matters, the hearing proceeded.

ISSUE

The Applicant withdrew her allegation that the vehicle was stolen.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship to the Applicant?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

She solemnly affirmed before giving her evidence. She said that she loaned her car to her married son to take it in for service. The suspended driver is a friend of her son .They stopped at the gymnasium and the friend asked for the keys to the vehicle. When the son went outside after about 30 minutes he saw the vehicle being towed. The police called and said that her son was not in any trouble but her car had been impounded as it was being driven by a suspended driver. She is upset because the suspended driver was not charged and she is suffering for his action.

On cross examination the Applicant conceded the following:

[a]She has not missed any work days as a result of the impoundment.
[b]She takes the bus to work and obtains rides with friends.
[c]She does not have any medical problems.
[d]The suspended driver said that he would pay the impoundment fee.
[e]There is “911’ service in her area.

Evidence for the Registrar

A summary of the Registrar’s evidence 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, R.S.C. 1985, c. C-46 (the "*Criminal Code*")in point 4 below;

3. Copy of the Order by the Registrar 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* pursuant to which the driver's licence of the driver was then under suspension until July 20, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years. The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> “Owner” means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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 only issue to be considered in this appeal is whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship. The Tribunal has carefully considered the evidence of the Applicant. It is clear that she has not suffered exceptional hardship as she has been able to take the bus to work. She also has help from friends and colleagues to drive her to work. She has not missed any work days as a result of the impoundment save for one day when she came to the Tribunal to file her appeal. She has no medical condition which requires her to attend a doctor and in the event of a medical emergency, there is "911" service in her area.

The Tribunal finds, therefore, that she has alternatives to the impounded vehicle. The Tribunal heard no evidence that the Applicant's financial condition is more strained as a result of the impoundment. The Tribunal, therefore, finds that although she may have suffered through the actions of her son's friend, she has not established exceptional hardship, as defined in 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impoundment facility for 45 days.

LICENCE APPEAL TRIBUNAL

Terrance Sweeney, Vice-Chair

RELEASED: October 7, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6256-MVIA- Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN
Presiding member

APPEARANCES: The Applicant, unrepresented

RUSSELL McKNIGHT, Agent, representative for the Registrar of Motor Vehicles

DATE OF HEARING: September 30, 2010 Teleconference

REASONS FOR DECISION

A teleconference hearing was held on September 30, 2010, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 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 90 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1990, Honda Accord (the "vehicle")
Date of Appeal:	September 10, 2010

The Applicant 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 as provided in sections 50.24 s.4 of the Act.

This matter came before this Tribunal on September 30, 2010 and proceeded as an in-person hearing. There were no preliminary matters in dispute between the parties.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant testified that he had met the person ("DR") who was driving the vehicle at the time it was impounded about four (4) years earlier. DR was working as a mechanic at a local service shop and as he saw DR driving vehicles at that time, it never occurred to him to ask him whether he was licensed as a driver. Sometime in 2009, DR began working on his own and the Applicant followed DR for continuing service on his vehicle.

The Applicant said he then asked DR if he was a licenced driver and accepted DR's "yes" reply. The Applicant said DR never told him about not being licensed or suspended but he also acknowledged he did not ask for, nor did he ever see, a licence document with DR's photo on it. He said he simply "took (DR's) word for it".

The Applicant then presented DR as a witness who testified he had never advised the Applicant that he did not have a licence or that he had been suspended.

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;

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 various offences dangerous driving under the *Criminal Code* of Canada and being an unlicensed driver with suspension until May 17, 2011.

Additionally, the Agent for the Registrar, reviewed the ways in which a member of the public can go on the internet and for a small fee check the status of an individual's driver licence, whether it was valid or not.

The Applicant confirmed that he had not been aware of this and that he had not seen the option on the Ministry website.

The Registrar's Agent also asked the Applicant if he had asked DR if he had a valid driver's licence after DR went on his own. The Applicant said he had asked because he thought DR was younger than he was and "wanted to check". But he had not asked to see the actual licence document.

The Registrar's Agent stated that asking for the licence document would have been the bare minimum which he should have done. He also asked the Applicant if he was aware he could pursue DR to recover the impound costs and the Applicant said he knew that and had discussed it with DR.

In conclusion, the Registrar's Agent asked for the Order to Impound to be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 574 R.R.O. 1990 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.

Where an owner's vehicle has been previously impounded within a period of two years or less to the impoundment under appeal, the owner may appeal the Registrar's order on only one specific ground set out in subsection 50.2(3)(c):

> (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,
>
> > (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;

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 defined as follows:

> **Due diligence:** Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS

According to the Applicant's testimony and the evidence he provided, it was clearly established that the due diligence exercised by the Applicant was limited to taking in good faith, the verbal information provided to him by the driver. The Applicant's witness, the driver of the vehicle at the time it was impounded, confirmed he had never disclosed his unlicensed status nor that he was suspended from driving, or in effect, unable to apply for a licence until the expiry of the suspension period in 2011.

While the Applicant's trust in DR's word can be understood in consideration to the interpretation of "due diligence" as has been defined through precedent and other sources, his efforts are not sufficient.

The Tribunal also considers that the Applicant did not ask to see a valid driver's licence document, which the Registrar's Agent called the "bare minimum", nor did he check with the Ministry of Transportation. The Tribunal also considers that when DR went on his own, the responsibility for checking the status of DR's driver's licence passed from DR's employer to the Applicant.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____
Simon Dann, presiding Member

RELEASED: October 5, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6253-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: JANE WEARY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 28 and 29, 2010 *by teleconference*

REASONS FOR DECISION

An electronic hearing was held on September 28 and 29, 2010 to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1995 Chevrolet Pickup GM4 ("the vehicle")
Date of Appeal: September 9, 2010

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

There were no preliminary matters in dispute between the parties.

ISSUE

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 Registrar.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant testified that the impoundment of her vehicle has resulted in her being unable to travel from her home in a small northern Ontario town to a small southern Ontario town where her ill father is residing. She stated that she generally makes the trip from Sudbury where the father of two of her children meets her and the children at the bus station in the vehicle which remains in his possession in southern Ontario. She is unable to drive the vehicle herself. She is met in this fashion every two weeks and, together, the four travel the lengthy drive down to the small southern Ontario town. Four other children remain in the small northern Ontario town where they attend school by bus. The Applicant last travelled to the small southern Ontario town on the weekend of August 27th and has not returned to the small northern Ontario town and her other children since. Her evidence was that she needed the impounded vehicle to do so as the cost of public transport between the two small Ontario towns for herself and the two children was prohibitive.

The Applicant stated that she had often observed the suspended driver operating a motor vehicle and he had advised her that he was not a suspended driver. She advised that he was a friend of her and her children's father.

The Applicant is unemployed and thus does not rely upon the vehicle for her income needs. The Applicant conceded she owns a second vehicle, being a 1998 Chevrolet van, which is plated but is currently in need of mechanical repairs. She gave no evidence as to what attempts, if any, she had made to have the van serviced. The Applicant advised that neither she nor her children had in fact missed any medical appointments since the impoundment and that her residence did receive 911 emergency services should any be needed in the two weeks remaining of the impoundment order.

Evidence for the Registrar

A summary of the Registrar evidence follows.

PC Feijo gave sworn testimony that he was one of the officers on patrol on the day that the Applicant's vehicle was stopped and the suspended driver identified as operating the vehicle. A record search undertaken at the time revealed the driver had an extensive record and was under a driving suspension. The driver was arrested and vehicle impounded for 45 days ending October 13, 2010.

The documents tendered by the Registrar and admitted into the record 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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") 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 an extensive record of driving convictions under the *Criminal Code* since 1984 pursuant to which the driver's licence of the driver remained under suspension until June 30, 2013.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in

exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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

While the Applicant based her appeal on grounds the impoundment order imposes exceptional hardship, she also tendered evidence that she had made efforts to determine the driver was in fact licensed at the time of his using her vehicle. To the extent this evidence attempts to satisfy s. 50.2(30 (c) of the Act, I find it fails. She chose to rely on the word of an individual with an extensive criminal driving record spanning over twenty years. In this case, while characterizing her relationship as being one of friendship, the Applicant conceded the driver has since made no offer to assist her in the economic pressures his dishonest and criminal actions had caused her and her family, including paying for her to return to her children in the small northern Ontario town or paying for her to regain possession of the vehicle from the impoundment. Her trust has been ill founded.

As to the issue of whether or not the impoundment results in exceptional hardship for the Applicant as she has alleged in her Appeal Notice, I am also persuaded it does not. A general dictionary definition of hardship as seen above, involves a severity of suffering which is greater than abnormal difficulty or unusual inconvenience. Beyond the general definition however, section 22 of the Regulation is very specific in delineating what is required to meet this criteria for appealing the impoundment and the Tribunal is not persuaded that this Applicant has succeeded in meeting it.

The facts establish that the Applicant's family has not been negatively impacted by the impoundment. They have not missed any medical appointments and there are emergency services available should any future medical need arise. The Applicant did not contend that there were negative implications to either her children or her family's medical needs.

The impact appeared to be that her transport to visit her father some 20 hours distance from her home was compromised. This is unfortunate due to his current ill-health, but does not meet the threshold required of "exceptional hardship" as there is no allegation the

effects would be “immediate, significant and lasting” given that she has spent the last month with her father, and the vehicle will be eligible for release in two weeks, the amount of time she generally takes between visits to him.

Further, there was also the evidence of an alternate vehicle, being the Chevrolet van. This is in the Applicant’s possession and is plated for operation; yet no reasons were put forth by the Applicant indicating efforts she has made to determine what exact repairs are required to make use of the vehicle, nor why such repairs had not yet been attempted. As a consequence s. 22(4) of the Regulation has not been satisfactorily complied with.

Further the Applicant testified that the father of her children (who travels in the vehicle to Sudbury regularly to pick her up and bring her to the small southern Ontario town) pays for the transport costs. There was, however, no evidence of her having made efforts to have him provide her and the children with any alternate transport, despite his having possession of her vehicle and his friendship with the individual who borrowed the vehicle despite being a suspended driver leading to her loss of the use of her vehicle.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____
Jane Weary, Vice-Chair

RELEASED: October 12, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6249-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 1, 2010 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on October 1, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

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 GMC Sierra (the "vehicle")
Date of Appeal: September 14, 2010

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.

The Registrar 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 Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

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 Registrar.

Evidence for the Applicant

The Applicant was affirmed before giving testimony.

The Applicant is employed as a nurse at a hospital within her community. She is the mother of three adult daughters who all live in different communities. The Applicant's siblings and parents live a significant distance from the Applicant's home.

The Applicant's former fiancé, the suspended driver at the time the vehicle was impounded, is currently employed full-time. After their relationship broke down about two months ago, the suspended driver has been living with his stepdaughter and walks to and from work each day. He is not providing any financial assistance to the Applicant towards the maintenance and upkeep of their home. The suspended driver was not living with the Applicant on the day the vehicle was impounded.

On the day that the vehicle was impounded, the suspended driver finished work and walked to the hospital where the Applicant was working to request the keys to the impounded vehicle. He wanted to load pallets of wood into the vehicle, which were at his workplace, to be used for the home's fireplace. (The Applicant's home is heated only by a wood stove.)

Although she was fully aware of his driver's licence suspension and had driven the suspended driver to and from work for 10 months prior to their breakup, the Applicant "with hesitation" assumed the two minute drive would be harmless and allowed him to use the vehicle to return to work to pick up the pallets of wood.

After loading the pallets onto the truck, the suspended driver was on his way back to the hospital to return the vehicle to the Applicant. According to the Applicant, the police advised her they had received a call informing them that the suspended driver had care and

control of a vehicle. The suspended driver was returning to the hospital when the police stopped him and determined he was a disqualified driver. He was arrested and the vehicle was impounded.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with More than 80 Mgs of Alcohol in Blood under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until March 30, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22. (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
> (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
>
> (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
>
> (a) inconvenience to any person;
> (b) financial or economic loss to any person;
> (c) loss of employment or employment opportunity to any person; or
> (d) loss of education or training or of an educational or training opportunity to any person.
>
> (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
>
> (a) no alternative to the impounded motor vehicle is available;
> (b) the loss will be immediate, significant and lasting;
> (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
>
> (d) the impact of the loss,
>
> (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of "exceptional hardship" under subsection 50.2 (3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria that the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment.

The Applicant in this case has argued that the impoundment will result in hardship as described in subsection 22(2). In order for her appeal to be considered under subsection 22(2), the Applicant must have demonstrated that all (emphasis added) of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

Earlier this year, the day before the suspended driver was charged with a *Criminal Code* conviction, he transferred the ownership of two vehicles into the Applicant's name, one of which is the impounded vehicle. The Applicant also has a snowmobile and an ATV, which is used to cut and collect wood, registered in her name.

The Applicant testified that she is not using the second vehicle due to a "broken windshield and a blown transmission", but did renew the licence plate sticker. She is trying to save about $800.00, the approximate cost to repair the second vehicle.

Only one of three daughters is aware of the Applicant's situation. The Applicant's daughter lent the Applicant her vehicle for a few weeks prior to the daughter returning to work full-time. This daughter also provides assistance to the Applicant on weekends by taking the Applicant grocery shopping and assisting with any errands.

Since a significant amount of the Applicant's hours worked are from "call-ins", the Applicant can get a ride to work with a colleague if the Applicant is given sufficient notice from the hospital to request a ride from her co-worker.
"Call-ins" are usually placed by the hospital's staffing department between 5:00 a.m. and 5:30 a.m. Since the vehicle's impoundment, the Applicant testified that although her employer is not aware of her situation, the staffing department has been accommodating and has given her adequate advanced notice. The Applicant advised the Tribunal that she has also been "taking taxis to work".

The Applicant has missed one-half day of work since she was not able to get to work on time due to her vehicle's impoundment. She has not had or missed any medical appointments and has not needed any medication. She lives in an area where there is no public transit available to her; however, her community is 911 accessible.

The Applicant may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the 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 Applicant is sincerely remorseful and takes "full responsibility" for allowing the suspended driver to drive the impounded vehicle. Unfortunately, there are consequences to these actions. The suspended driver lost the right and privilege of having care and control of a vehicle when his driver's licence was suspended earlier this year. This ban is unconditional.

The Tribunal finds that the Applicant has been "inconvenienced" with not having her vehicle. There have been alternatives available to her. Since there are alternatives to the impounded motor vehicle, the Tribunal cannot grant the appeal.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 574, the Tribunal finds that the Applicant has not established exceptional hardship as set out in section 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Nives Montano, Member

RELEASED: October 8, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6248-MVIA-Wellburn Transport Limited-DUDI-Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DONALD BENNINGER, Presiding member

APPEARANCES: CHARLES PICKEL, Agent, representing the Applicant

RUSSELL MCKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: September 29, 2010 *by teleconference*

REASONS FOR DECISION

A hearing was held on September 29, 2010, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles ("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 Act.

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the “Applicant”
Motor Vehicle:	1995, Freightliner (the “vehicle”)
Date of Appeal:	August 31, 2010

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

As there were no preliminary matters in dispute between the parties, the hearing proceeded.

ISSUE

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

The Applicant testified he was the owner of the motor vehicle at the time in respect of which the order was made. He stated that he was not the driver at that time but he had hired the driver two years ago. When the driver was hired, he presented the Applicant with a copy of his driver’s licence and a driver’s extract dated September 2007. The Applicant testified that there were no concerns at that point. The Applicant stated that during the past year business was slow so the driver of the subject vehicle left his employment and drove trucks for another business. He also stated that during this employment, the driver was stopped in Michigan and charged with Driving While Impaired. The Applicant stated his business picked up, so he re-hired the driver of the subject vehicle not knowing his licence was suspended. The Applicant took a new copy of the driver’s licence and thought all was in order.

The Applicant testified that he did not make any attempt to verify that the driver's licence was not then suspended; nor did he attempt to obtain a new driver's abstract. He stated that the driver of the subject vehicle had advised him of the Driving While Impaired charge in Michigan and requested time off to attend court in Michigan. He also stated that the driver had explained what happened in court and the outcome was $980.00 in court costs and over $500.00 to the State of Michigan for a Driver Responsibility Fee. The Applicant was advised by the driver that he could not drive trucks in the United States but he was allowed to drive his personal vehicle and did so to and from court. The Applicant testified that he found this unusual but did not follow up with any police services or the Ministry of Transportation ("MTO") in Canada to ensure that the licence of his driver was not suspended.

In his closing remarks, the Applicant stated that he thought the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension but he will have to check more diligently in the future.

The driver of the vehicle at the time in respect of which the order was made, testified that he was the driver on August 18, 2010 when he was stopped by the police for speeding but he was not aware his licence was suspended in Canada. He stated that a lawyer at court in Michigan told him he thought the decision of the court pertaining to not driving trucks applied only in the United States. The driver of the subject vehicle testified he never received any notice from the MTO regarding the suspension of his licence but during cross-examination, the Agent for the Registrar advised him that every suspended driver in Ontario is advised by letter and he would have received one.

In conclusion, the driver stated he never contacted MTO or any police services in Ontario to obtain clarification regarding the status of his driver's licence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner. 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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 3 below;

2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

3. 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 in U.S.A.

pursuant to which the driver's licence of the driver was then under suspension until April 29, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

> **Due: A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling *to* by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).
>
> **Diligence:** 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

> **Due diligence:** Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS

According to the Applicant's evidence and the testimony of the driver of the motor vehicle at the time it was detained, there was little, if any effort, to determine if the licence of the driver was valid or suspended. The Applicant advised the Tribunal that he had made a copy of the driver's licence of his driver when he returned to work with him, but he made no further inquiries of the police or MTO regarding the status of this licence. The Applicant in his closing statement realized he needed to investigate much further to prove due diligence.

From the Tribunal's perspective and in reference to the interpretation of "due diligence" as has been defined through precedents and other sources, the Applicant's action of taking a copy of the driver's licence does not meet the necessary requirement to establish "due diligence" . While the Applicant was aware of the driver's abstract being available through MTO, he chose not to obtain one when he re-hired his driver. The Applicant failed to

demonstrate due diligence by his action of only accepting his driver's version of the validity of his licence. The Applicant has the right to recover costs from the suspended driver and may pursue compensation from him, as is stated in Section 55.1(21) of the Highway Traffic Act. After considering all the evidence, the Tribunal finds the Applicant has not met the onus required by Subsection 50.2(3)(c) of the Act. Therefore the Applicant's appeal is dismissed.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____

Donald Benninger,
Presiding Member

RELEASED: October 5, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6241-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 1, 2010 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on October 1, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2001 GMC Sonoma (the "vehicle")
Date of Appeal: September 15, 2010

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.

The Registrar 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 Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

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 Registrar.

Evidence for the Applicant

A summary of the Applicant's submissions and affirmed testimony follow.

The Applicant is employed full-time. As a hobby, the Applicant and his late partner restored classic cars in their spare time. The suspended driver occasionally worked with them by painting the vehicles.

The Applicant's late partner passed away suddenly in June 2009. One month later, the Applicant was required to move from his residence. He moved into a rental property where there was limited parking. The Applicant owns two vehicles, his personal vehicle and the deceased's vehicle.

The suspended driver, sympathetic to the Applicant's situation, offered to store the second vehicle, at no cost, at his residence until the Applicant decided what to do with this vehicle. The Applicant delivered the vehicle to the suspended driver's home and provided him with a spare set of keys in the event that he needed to move the vehicle or run a quick errand to the store. Apparently, the suspended driver was also storing two other vehicles owned by other individuals. The Applicant provided three testimonials, all outlining the circumstances surrounding the storage of the impounded vehicle.

The Applicant was unaware that the stored vehicle had been impounded. He received a copy of the Order to Impound by mail, ten days after the vehicle's impoundment. In the interim, the suspended driver has moved residences and does not respond to text messages sent by the Applicant. The Applicant has also sent text messages to the suspended driver's girlfriend, which also go unanswered.

The Applicant has gone to the suspended driver's place of employment and was informed that he no longer works there. The Applicant has "no idea" what the circumstances are surrounding the stored vehicle's impoundment.

The Agent for the Registrar advised the Applicant and the Tribunal that according to the suspended driver's driving record, a 90-day Administrative Driver's Licence Suspension was posted on the day the vehicle was impounded. It is, therefore, safe to assume that the suspended driver was driving impaired. The suspended driver has never been licensed and is suspended from driving a motor vehicle for life.

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 the 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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar 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 is under suspension for life.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8), final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22. (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
> (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
>
> (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
>
> (a) inconvenience to any person;
> (b) financial or economic loss to any person;
> (c) loss of employment or employment opportunity to any person; or
> (d) loss of education or training or of an educational or training opportunity to any person.
>
> (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
>
> (a) no alternative to the impounded motor vehicle is available;
> (b) the loss will be immediate, significant and lasting;

(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of "exceptional hardship" under subsection 50.2 (3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment.

The Applicant, in this case, has argued that the impoundment will result in hardship as described in subsection 22(2). In order for his appeal to be considered under subsection 22(2), the Applicant must have demonstrated that all (emphasis added) of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

Testimony was heard that the Applicant owns two vehicles: one vehicle which has been in storage for the past year and is now impounded; and a second vehicle which the Applicant is currently driving. This appeal is based on the loss of a secondary vehicle which was not being used.

The Applicant advised the Tribunal that he wanted the police to lay a charge of "stolen" against the suspended driver, but was advised that since he provided a set of keys to the suspended driver, this action authorized the Applicant's permission for the suspended driver to have care and control of the impounded vehicle.

The suspended driver abused the Applicant's trust. The evidence before the Tribunal, however, is that the Applicant did not take sufficient measures to ensure that the suspended driver had a valid driver's licence.

Under the Ontario Vehicle Impoundment Program, which came into effect February 1999, all vehicle owners have a responsibility to protect the public, and to ensure that suspended drivers do not drive their vehicles. This program applies to all vehicle owners, regardless of whether the vehicle is loaned to or borrowed from a friend or family member, used for business or employment purposes, or is rented or leased. A vehicle's owner must verify the validity of the driver's licence of the person who will have care and control of their vehicle. This can be accomplished by contacting the Ministry of Transportation of Ontario ("MTO") with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca. For any other questions, Service Ontario can be reached at 1-800-267-8097.

The untimely passing of the deceased has caused a significant financial strain on the Applicant. He has had to absorb the funeral costs and unpaid bills of the deceased. Since there is an alternative to the impounded vehicle, the Tribunal cannot consider the Applicant's financial difficulties. The financial difficulties are not due to the costs associated with the vehicle's impoundment, but have been compounded to the outstanding debt the Applicant is currently trying to pay which pre-existed the vehicle's impoundment.

The Applicant may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the Act:

> The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 574, the Tribunal finds that the Applicant has not established exceptional hardship as set out in section 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Nives Montano, Member

RELEASED: October 8, 2010

This decision may also be available on Quicklaw.

Ontario

HIGHWAY TRAFFIC ACT
R.S.O. 1990, c. H.8

6325-MVIA-DUDI-Consent Order

IN THE MATTER of the ORDER TO IMPOUND #0501112
to impound a motor vehicle owned by the Applicant
made pursuant to section 55.1 of the *Highway Traffic Act*
- Effective on: November 1, 2010

AND IN THE MATTER of a requirement for a hearing respecting the said Order to Impound pursuant to section 50.2 of the *Highway Traffic Act*

THE APPLICANT

- Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Applicant, and the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Counsel for the Applicant and the Agent for the Registrar of Motor Vehicles, as to the disposition of these proceedings, which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the Order to Impound (#0501112) a motor vehicle is set aside and 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: November 10, 2010

This decision may also be available on Quicklaw.

Schedule "A"

Between:

THE APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On November 1st, 2010, the motor vehicle described in Order to Impound #0501112 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8, as amended.

2. The Applicant, <name deleted>, is the owner of said vehicle.

3. The Applicant filed an appeal of the Order to Impound, in accordance with the grounds permitted under clause 50.2(3)(c) of the *Highway Traffic Act*, stating 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.

4. Having investigated this matter and receiving the appropriate information from the applicant, the Registrar is satisfied 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.

5. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or Consent Orders.

JOINT SUBMISSION

Accordingly, the parties consent to an Order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act*, that the Tribunal set aside the Order to Impound.

The Applicant

_____
(Signature of Applicant)

_____
(Date)

Authorized Delegate for Registrar of Motor Vehicles

_____
(Signature of Respondent)

_____
(Date)

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

6324-MVIA-NUSP-EXHP-Not Under Suspension and Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: November 22, 2010 Toronto

REASONS FOR DECISION

A hearing was held on November 22, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1998 Pontiac Grand Am (the "vehicle")
Date of Appeal: November 3, 2010

There were no preliminary matters in dispute between the parties and the hearing proceeded.

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The stepdaughter of the Applicant was sworn and testified. She is the half-sister of the alleged driver of the vehicle whose licence is under suspension. Sunday, October 24, 2010, was a rainy night. Her half-brother asked her to drive him over to a friend's apartment to pick something up. She did so and remained at the friend's apartment talking to the friend's mother. At one point, she gave the keys to her half-brother and asked him to go down to the vehicle and roll up the window. About an hour later, she looked out the window and saw the police car and the vehicle in question hooked up to a tow truck. She went down to talk to the police.

The Applicant did not plead "exceptional hardship" but the Tribunal allowed this witness to make submissions on this point. She is the mother of a four year old child. Her mother looks after the child and needs the vehicle to get around with the child. Her mother has had surgery on her knees and cannot get around on her own.

On cross-examination, the witness admitted the following:

- her mother does not work outside the home.

- the Applicant has used her uncle's van to get to work while his vehicle has been impounded.

- there are taxi services available in her town.

- there is "911" service in her town.

- her child is in good health.

- she takes the bus to work.

The alleged driver of the vehicle solemnly swore and testified that he did not drive the vehicle. He admitted to being in the driver's seat with the ignition on when the police officers approached him.

Under cross-examination, he admitted that he knew his licence was suspended and that he did not tell the police officer this when he handed the police officer his licence.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded vehicle 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 (the "*Criminal Code*") outlined in point 4 below.

3. Copy of the Order by the Registrar 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 Driving with More than 80 Mgs of Alcohol in Blood under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until August 10, 2011.

Police Constable Steven Fox was sworn and testified that he is an eight year veteran of the police force. On the night in question, he was in uniform. He was with a fellow officer in a marked squad car. They were parked near a 15-storey apartment building when they observed the subject vehicle go north, turn right and proceed past them. They turned around to the rear of the building and saw the vehicle backing into a parking spot. He did not lose sight of the vehicle.

The window of the vehicle was rolled down which made him suspicious of drugs as it was a rainy night. He approached the vehicle. The suspended driver was the only person in the vehicle. He asked for his driver's licence, which the person gave him. He checked the licence and determined that the driver had had his licence suspended in August 2010, for "Over 80". The driver said that he had a three month licence which was obviously a lie. The driver also lied again when he said that his mother was applying for the three month licence. The officer then charged the driver with the *Criminal Code* offence of Driving While Disqualified. The officer waited with the driver until the tow truck arrived.

About this time, the half-sister came up to the officer and stated that she had been driving the vehicle and that therefore, he could not charge her half-brother with the offence. When he asked her where she had been, she lied and said that she had been at McDonald's. She was not able to tell him what she had had to eat. She was nervous and started to cry. She said that she knew that her half-brother had been driving the vehicle.

P.C. Fox filled out a "contact card" in which she admitted that she had lied and she retracted her earlier statement.

The Applicant cross-examined the officer. He suggested that because it was raining, it was impossible for the officer to know if there was one person or two in the vehicle. The officer was firm in his testimony that he saw the driver driving the vehicle.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8), final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(b) and (d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the vehicle at the time in respect of which the order was made was not then under suspension?

Section 41 of the Act identifies the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d) and (e), and 41(7) and 42(1) and 42(5) as follows:

> 41. (1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,
>
> (a) under section 220, 221 or 236 of the *Criminal Code* of Canada committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (b) under section 249, 252, 253 or 255 of the *Criminal Code* of Canada committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (c) under subsection 254 (5) of the *Criminal Code* of Canada committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
>
> (e) referred to in a predecessor to this sub-section,
>
> is thereupon suspended ...
>
> 42. (1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* of Canada or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,
>
> (a) upon the first conviction, one year; and
>
> (b) upon a subsequent conviction, two years,
>
> in addition to any other period for which the licence is suspended and consecutively there to.
>
> (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
>
> (a) an order directing that the accused be discharged is made under section 730 of the *Criminal Code* of Canada or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
>
> (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* of Canada, including a confirmation or variation of the disposition.

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 22 of Regulation 574, R.R.O. 1990, provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Tribunal rules, based on all of the evidence, that the suspended driver more likely than not was the driver of the vehicle.

The Tribunal was forced to rule on the issue of credibility as the evidence for the Applicant, in many respects, contradicted that of the police officer.

The Tribunal prefers the evidence of the police officer over that of the sister and driver for these reasons:

(a) each of the sister and driver lied at the first encounter with the police.

(b) the evidence in-chief of the sister was to the effect that after she gave her half-brother the keys to the vehicle, she had no idea what he was doing with the vehicle for about an hour.

(c) the evidence of the driver was self-serving and not credible.

The police officer, on the other hand, gave his evidence calmly and believably. He never lost sight of the vehicle and when he approached the vehicle, only the driver was in it, in the driver's seat, with the ignition on. Moreover, he felt that there was sufficient evidence to charge the driver with another criminal offence.

In respect to "exceptional hardship", the Applicant did not initially appeal on this basis nor did he testify. The evidence of his stepdaughter established that he and his family have alternatives to the impounded vehicle and no exceptional hardship to the Applicant or his family will result from the impoundment order.

Accordingly, this appeal is hereby denied.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant’s vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Terrance Sweeney, Vice-Chair

RELEASED: November 30, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6318-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: November 19, 2010 Toronto

REASONS FOR DECISION

A hearing was held on November 19, 2010, at Toronto, Ontario, in person, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	2007, GMC Envoy (the "vehicle")
Date of Appeal:	November 2, 2010

The Applicant confirmed that her licence was not under suspension, but agreed that the licence of the driver at the time of the impoundment was. Thus, the Applicant's appeal on the grounds that the driver's licence was not suspended at the time of impoundment was withdrawn.

As for the due diligence grounds for appeal it was agreed that it would be withdrawn as well, as the Applicant did not understand the concept. Nonetheless in the interest of fairness and clarification, the Tribunal feels the details should be set out in reasons for decision.

All documents were entered into evidence as exhibits with the consent of both parties.

ISSUE

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, as set out in the request for hearing (Exhibit # 1).

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal was entered as Exhibit #2. In a typewritten note the Applicant explains the reasons that the suspended driver was driving her vehicle. Being in her first trimester of pregnancy the Applicant was feeling ill and asked her friend to drive. The Applicant has lost time off work and continues to have difficulty in getting to work. The Applicant states that she has been required to move.

During the hearing, the Applicant reiterated the explanation given in her notice of appeal. The Applicant is adamant that she was very sick and has had difficulty to get to work without the vehicle.

As for the other vehicles listed, they belong to her father and she is not allowed to drive them.

In cross-examination, the Applicant confirmed that she did purchase a vehicle in July which she sent to storage in Ottawa in August. The Applicant attested that she works three jobs and is not financially able to get to Ottawa to bring the car from storage.

According to the Applicant she has had to quit her part-time jobs as her working hours are awkward and she cannot get to the work. The Applicant confirmed that she was not able to work because of her pregnancy, not just because she did not have a vehicle. In response to specific questions from the Registrar's Agent the Applicant admitted that she has in fact asked for sick leave, but is not sure it will be granted nor the details.

The Applicant testified that she believed that the suspended driver only had one drink and allowed him to drive because she was sick. The suspended driver will not be paying for the cost of impoundment, as he does not have a job, and, because he is a friend, the Applicant will not sue him.

The Applicant also confirmed that she lives with her parents, but believes that they will throw her out if she is unable to pay her rent. Under further questioning the Applicant admitted that her parents want her to leave because of the disgrace she has brought upon her family by becoming pregnant.

The Applicant attested that after the hearing she will be going to the hospital to terminate the pregnancy as it is an ectopic pregnancy.

The Applicant testified that she feels strongly she is unable to carry both leases and is in the process of clearing up the situation.

Evidence for the Registrar

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 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 Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until July 7, 2011.

The Registrar called no evidence.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

In her summary statement, the Applicant stated that other than the vehicle in storage, the other vehicles registered to her address belong to her parents. The Applicant contends that she appealed because she is pregnant and cannot travel by bus. She emphasized that after the hearing, she is going to the hospital to have the pregnancy terminated.

The Registrar's Agent noted that the Applicant appealed on due diligence and exceptional hardship. The suspended driver has been suspended since 2003. The Applicant has never made any attempt to ask to see his licence. In fact on the night in question she allowed a drinking driver to drive her vehicle.

As for exceptional hardship, the Registrar's Agent pointed out that the Applicant has alternate modes of transportation, she has opted to use public transportation rather than go to Ottawa to retrieve the vehicle in storage.

With respect to health and safety there is 911 available.

According to the Registrar's Agent the fact that the Applicant has to move out of her home has nothing to do with hardship caused by the impoundment.

In rebuttal, the Applicant referred to the suggestion that she could have used the vehicle in storage, and questioned the right that anyone has to force her to make decisions she does not feel are financially viable. The Applicant feels that she should not be punished for allowing a person who had only one drink to drive. She also feels that it is unreasonable to ask someone to prove they have a driver's licence.

The onus is on the Applicant to establish due diligence and exceptional hardship, as grounds of appeal, as provided in section 50.2(3)(c) and (d) of the Act, respectively.

The Tribunal will first address the matter of due diligence. Section 50.2(3)(c) is defined in section 55.1 of the Act as follows:

> (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…

There is no doubt that the Applicant is the owner of the vehicle and that she allowed a suspended driver to drive her vehicle.

The Applicant affirmed that she was unaware that her friend's licence was under suspension, but also pointed out that she never questioned whether the suspended driver has a valid driver's licence.

Thus, given the evidence, the Tribunal concludes that the Applicant does not meet the standard of section 50.2(3)(c) of the Act.

With respect to exceptional hardship, as per section 50.2(3)(d) of the Act, the Tribunal reviewed the factors required to meet the onus for consideration of financial loss. In assessing financial loss, the Tribunal is restricted by section 22(2) of the Regulation.

The constraint imposed by section 22(2) is lifted by section 22(3), which states that the Tribunal may consider the criteria set out in section 22(2), if the owner demonstrates that no alternative to the impounded motor vehicle is available.

There are albeit inconvenient, alternate modes of transportation available to the Applicant. Therefore, the criterion for consideration under section 22(3)(a) has not been met.

The Tribunal further reviewed section 22(3)(b), which allows the Tribunal to consider losses that are immediate, significant and lasting.

The Tribunal sympathizes with the Applicant; nonetheless the impending loss of her home has nothing to do with the impoundment and therefore cannot be considered.

With respect to the loss of work, again it seems the loss was partly due to the pregnancy and not necessarily the impoundment. Further there is no documented income and expense statements regarding any actual financial losses, which might have been incurred by the Applicant, other than the impoundment fees.

As any losses that the Applicant may have sustained have not been proven to be significant or lasting, the Tribunal cannot find that there is exceptional hardship as defined under the Regulation.

The Regulation also provides that the Tribunal cannot consider economic loss unless the owner demonstrates that:

> (d) the impact of the loss,
>
> (i) will be upon a person other than the person whose driving while his or her driver's 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).

The Applicant was not the suspended driver, but after assessing the evidence presented, the Tribunal finds that although the Applicant has been inconvenienced by the loss of the vehicle, she has not established exceptional hardship, as defined in 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 Act, 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: November 24, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6311-MVIA EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Presiding member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: November 12, 2010 Toronto

REASONS FOR DECISION

A hearing was held on November 12, 2010, by teleconference at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 amended (the "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

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 Volk CTS (the "vehicle")
Date of Appeal:	October 25, 2010

There were no preliminary matters in dispute between the parties.

ISSUE

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, as set out in the request for hearing (Exhibit 1).

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

The Applicant in this case is the suspended driver. He indicated that he was appealing the impoundment not only on the basis of exceptional hardship but also on the basis that his licence suspension under the *Criminal Code of Canada* had expired in 2008 and that his current suspension was in fact an administrative suspension by the Ministry of Transportation under the *Highway Traffic Act* and that his vehicle therefore should not have been impounded. The Applicant quoted from his Prohibition Order in support of his position and provided a copy of the Notice of Suspension of Driver's Licence he had received from the Ministry of Transportation.

In terms of exceptional hardship, the Applicant advised that he lives with his girlfriend and that she is the normal driver of his vehicle. The vehicle was used by the girlfriend to drive the Applicant to his full time job; to drive herself to her part-time job and for household errands such as groceries. Since the impoundment, the Applicant's girlfriend has been able to borrow a vehicle from a family member on occasion. However, the Applicant has had to make arrangements to work at home. He works on an hourly basis and in the first week following the impoundment, before arrangements were settled, he missed some days

of work. The Applicant's girlfriend has missed no work since she has either used the borrowed vehicle or has been able to get rides from co-workers. For errands, taxis have been used in addition to the borrowed vehicle.

On cross-examination, the Applicant stated that while the municipality in which he lives has a public transportation system, he was unaware of how the area where he lives is served by that system and had made no inquiries in that regard.

Both the Applicant and his girlfriend are in good health although the Applicant stated he is suffering from stress as a result of the impoundment. However, no medical appointments have been scheduled. The Applicant and his girlfriend live in an area served by 911 emergency services.

Evidence for the Registrar

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 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 leaving the scene of an accident under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 28, 2010.

The representative of the Registrar read for the record Section 41 (1) of the *Highway Traffic Act.*

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,

- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.
.

APPLICATION OF LAW TO FACTS

The Applicant in this case argued that his licence was not in fact suspended under the *Criminal Code of Canada.* The Tribunal notes that the Notice of Suspension of Driver's Licence issued by the Ministry of Transportation and provided by the Applicant with his Notice of Appeal, states "Your driver's licence is suspended under sections 41 and 43 of the Highway Traffic Act for a period of 3 years, effective Nov. 28, 2007. Reason: Failing to remain at the scene of an accident, *Criminal Code of Canada".*

The Tribunal member asked the Applicant if he agreed his licence was suspended under section 41 of the *Highway Traffic Act.* The Applicant stated that he did agree. In fact, the Applicant was convicted of an offence under Section 252 (1) of the *Criminal Code of Canada* and section 41.1 (b) of the *Highway Traffic Act* provides the authority to the Ministry of Transportation for the licence suspension.

> 1. Subject to subsections 41.1(1), (2) and (3), the driver's licence of a person who is convicted offence, …
>
> (b) under section 249, 249.1, 249.2, 249.3, 249.4 or 252 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized now vehicle;…
>
> Is therefore suspended,

In this case, because it was the Applicant's second conviction under the *Criminal Code of Canada,* the licence was suspended for a total of three years.

Sections 55.1 (2) and (3) provide the authority for the suspension.

> (2) Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or he driver's licence is under suspension under section 41, 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,
>
> (a) notify the Registrar of the fact or cause the Registrar to be notified; and
> (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

There is therefore no doubt that the impoundment of the vehicle was carried out properly in accordance with the provisions of the Act.

As to the issue of exceptional hardship, Section 22 of Regulation 574 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant testified that since the impoundment, he and his live-in girlfriend have had the occasional use of a vehicle loaned by a member of the girlfriend's family. The Applicant initially lost some hours of work due to transportation difficulties but has been able to make arrangements to work at home. The girlfriend has not missed any work. They live in a municipality served by public transit but have not made any inquiries as to the specific availability of transit near their home. On occasion, they have used taxis for household errands.

The evidence indicates that the Applicant has alternatives available to the use of the impounded vehicle and therefore does not establish exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

The Tribunal further notes that even if there were no alternatives available to the use of the vehicle, that the Tribunal could not consider the impact of its loss on the Applicant himself since he was the suspended driver in this case.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

Mary Ann Spencer, Presiding Member

RELEASED: November 15, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6310- STLN-EXHP-Stolen & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: ELIZABETH SPROULE
Presiding member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Representative for the Registrar of Motor Vehicles

DATE OF HEARING: November 9, 2010 Toronto

REASONS FOR DECISION

A hearing was held on November 9, 2010, at Toronto, Ontario, in person, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	2010, SUZI GVT (the "vehicle")
Date of Appeal:	October 22, 2010

This matter came before this Tribunal on November 9, 2010, and proceeded as an oral hearing, in person.

ISSUES

As set out in the Applicant's request for hearing (Exhibit #1), the owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and that the loss of the vehicle will result in exceptional hardship, all as provided in section(s) 50.2(3)(a) and (d) of the Act.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant testified that the he left the impounded vehicle in the driveway of his home while he went to his cottage with his spouse. He took the primary keys to the vehicle with him. The Applicant's son, who is 22, resides with his parents and while they were absent on October 16, 2010, had a number of friends over for a night of drinking and card playing. An individual who was in attendance at this event left at one point, when and to where the Applicant's son apparently did not know. However, at around 1:30 a.m. on October 17, 2010, the Applicant's son noticed that the Applicant's new car was not in the driveway and called the police to report it stolen. When the police found the car it was in the possession of the son's friend. The Applicant's son was not co-operative with the police after this point.

The Applicant testified that his son does not have permission to drive the impounded vehicle. In response to a question by the Tribunal as to what vehicle his son does drive the Applicant testified that his son does not drive as he does not have a licence. The explanation given for this was that his licence has been suspended for two years for unpaid fines. When asked to elaborate the Applicant explained that his son had been found to be 'stunt driving' and had been penalized with significant fines and the seizure of his car.

The spare 'remote' to the impounded vehicle, which was used by the driver, was kept in the drawer of a piece of furniture in the front the Applicant's house. He testified that it was not

in an obvious place, but rather at the back of the drawer amongst papers and the driver would have been required to search for it. The Applicant does not know the driver, did not give him consent to take his car, and has attempted to have him charged with stealing it. The Police have declined to do so to date.

The impounded vehicle is the vehicle that the Applicant uses for business purposes. He has had to rent a vehicle to replace it.

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 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 impaired driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until September 2, 2011.

There were no witnesses for the Registrar.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The meaning of "stolen" is not provided in *The Highway Traffic Act.*

The Shorter Oxford English Dictionary, 3rd ed., provides the definition of "stolen" as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* of Canada (the "Code") R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

> "steal" means to commit theft…

Section 332(1) of the Code states:

> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
> (b) to pledge or deposit it as security;
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle permanently. The Court held that the term "stolen" could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> "In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily."

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of

any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

As to the first issue the Tribunal finds that the Applicant's vehicle was stolen at the time it was impounded. The Tribunal accepts the Applicant's evidence that he did not give consent to his son, nor the driver, to drive the impounded vehicle, or have care and control of the vehicle. It makes sense to the Tribunal that the Applicant did not give consent to his son, either actual or implied, in view of the fact that the Applicant's son does not have a valid driver's licence.

Accepting that the son did not have consent to drive the car the Tribunal concludes that he had no authority to give consent to the driver, although there is no evidence before the Tribunal that he tried to give consent. In fact, the evidence is the opposite. The son called the police and reported the car stolen when he noticed it missing. His subsequent lack of co-operation with the police is not evidence of consent, in the Tribunal's opinion, and in any event as indicated above, he did not have any authority to provide consent.

It was suggested that the Applicant was not careful enough in keeping the spare remote where it could not be found and therefore should be held responsible. In the Tribunal's opinion an Applicant should not be held responsible for the unforeseeable as in this circumstance: a person unknown to the Applicant, with a suspended licence, searched and found the vehicle remote in the furniture of his house, and took his vehicle without right and by stealth. The issue is simply did the driver have the car by 'colour of right' and the answer to that is no.

As to the second issue, the Applicant has an alternative vehicle so there are no grounds for exceptional hardship.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

_____
Elizabeth Sproule, Presiding Member

RELEASED: November 15, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6307-MVIA-STLN-EXHP-Stolen and Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: November 10, 2010 Toronto

REASONS FOR DECISION

A hearing was held on November 10, 2010, at the Tribunal's Chambers, Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act"). On November 12, 2010, the Tribunal made the following Order, with Reasons to follow:

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act.

BACKGROUND

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: 2006 Mitsubishi CLE (the "vehicle")
Date of Appeal: October 22, 2010

There were no preliminary matters in dispute between the parties so the hearing proceeded.

ISSUES

As set out in the Applicant's Notice of Appeal (Exhibit #2), the owner appeals on the basis that the vehicle was stolen at the time it was being driven and that the loss of the vehicle will result in exceptional hardship, all as provided in sections 50.2(3)(a) and (d) of the Act.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the vehicle was stolen at the time the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant testified that she and the driver of the vehicle at the time of the impoundment are spouses. They have two children, one in high school and one in junior school. At the present time, the children reside with the Applicant's spouse and the Applicant predominantly resides with her parents. She works from 6:00 p.m. to 2:00 a.m. some distance from her home and she sleeps at her spouse's residence after work to be there for the children during the day. Her son takes the school bus to high school and her daughter walks to school.

The Applicant was aware that her spouse was suspended from driving. She stated that she is helping him find work by driving him around to job interviews during the day when she is not at work. Notwithstanding that she does not give him permission to use the vehicle, he sometimes takes it without her consent. She detailed one incident when she received a telephone call from friends some distance from her home telling her that they had seen her spouse driving the vehicle in the area. She contacted her spouse and told him in no uncertain terms that he did not have her permission to use the vehicle and that he should return it to her friend who would drive it back to her. She threatened to call the police if he did not comply. Her spouse drove the car back by himself.

On the morning of October 19, 2010, the Applicant was asleep at her spouse's house having finished work at 2:00 a.m. the night before. She received a phone call from her spouse at around 7:30 a.m. telling her that he had been stopped by the police and that the vehicle had been impounded. In the past, when her spouse had been stopped by the police, she would receive a telephone call from the police telling her where the vehicle was

so that she could make arrangements to come and pick it up. She did not understand why the vehicle was impounded on this occasion and why she had not received a call to come and pick it up. The reason for the impoundment was not explained to her until very recently when she finally had a discussion with the officer who had stopped the car.

The Applicant admitted that she had not asked the police to lay charges against her spouse. Her spouse is out of work. He is facing charges of driving while suspended arising out of the incident on October 19, 2010. The Applicant stated that she would not consider adding to his troubles by seeking to lay charges.

When discussing her current circumstances, the Applicant stated that about one week before the incident in question she had been prescribed medication for depression. As a result of the impoundment, the Applicant's condition worsened and she is now taking three types of medication. She is on sick leave from work. She does not know when she will return to work but hopes it will be before the expiry of the impoundment period in early December. She is currently awaiting payment of sick benefits.

The Applicant stated that when she needs to travel she has been assisted by family members and friends. Her doctor's office is close to her parents' house and shopping is nearby. In her current financial situation, she sometimes has access to food banks in her neighbourhood but has been able to do so despite the loss of the vehicle. While taxis are available in the area she would not be able to utilize them because of the cost. The same reasoning applies to rental cars. The area is covered by 911 emergency services such that, although she and her children are generally healthy, emergency services are available if necessary.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar under seal were admitted into the record:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 (the "*Criminal Code*") outlined in point 4 below.

3. Copy of the Order by the Registrar 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 Impaired Driving under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until April 28, 2011.

The Registrar called one witness, Constable John Ivey. Constable Ivey was not summonsed until the morning of the hearing so he was unable to travel and attend in person. The Tribunal heard his evidence via teleconference. He stated that on the morning of October 19, 2010, he was conducting speed enforcement. At approximately 6:10 a.m., he observed the vehicle travelling at high speed. He used his speed measuring device and got a reading indicating that the vehicle was travelling at 30 km/h over the speed limit. He stopped the vehicle. The driver did not have a licence and produced a health card instead as proof of identity. On checking the driver's record, he noted that the driver's licence had been suspended from 2001 due to unpaid provincial fines. In April 2010, the driver was given a one year prohibition from driving after being convicted of Impaired Driving. At this point, Constable Ivey impounded the vehicle.

Constable Ivey spoke to the Applicant on November 7, 2010. She had called him several times to try to determine why she could not come and pick up the vehicle. He explained to her that on previous occasions when she had picked up the vehicle, the driver, her spouse, had been subject to a provincial suspension of his licence. There is no impoundment program where the suspension is provincial. He explained that the driver's conviction for Impaired Driving under the *Criminal Code* triggered the provisions of the impoundment program. He stated that the Applicant was unaware of the impoundment rules. Constable Ivey confirmed that the Applicant has never asked him to lay charges for taking the vehicle without permission.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The meaning of "stolen" is not provided in the Act.

The Shorter Oxford English Dictionary, 3rd ed., provides the definition of "stolen" as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* provides guidance.

Section 1 of the *Criminal Code* states:

> "steal" means to commit theft…

Section 322(1) of the *Criminal Code* states:

> 322.(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
>
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> (b) to pledge or deposit it as security;

> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
>
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
>
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
>
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
>
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle permanently. The Court held that the term "stolen" could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> In our opinion a vehicle is "stolen" in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 22 of Regulation 574, R.R.O. 1990, provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The argument that a suspended driver has stolen the vehicle is one that is easy to assert. The Tribunal must use a great deal of circumspection in considering this argument. One of the indicia that a vehicle has been stolen, of course, is the laying of charges. Another is the lack of a relationship between the owner and the driver to support an inference that the owner has lent the vehicle to the driver. It does not flow from these indicia that one family member cannot steal a vehicle from another. To complicate the analysis, in a close family relationship, the laying of charges may result in such bad feelings that the owner does not want to contemplate such action. The Tribunal must consider the totality of the facts to determine if, in fact, the vehicle was stolen or if the argument is being used opportunistically. There may be instances when specific permission for use was not given but the overall facts support a conclusion that use of the vehicle by the suspended driver is acquiesced in by the owner.

The Tribunal is satisfied that, at the time the vehicle was stopped by Constable Ivey, the Applicant had not specifically consented to her spouse driving it. Nor was she aware that he was driving it.

In addition to her assertion that she was ignorant of his use of the vehicle, the Tribunal notes that the time when the vehicle was stopped was approximately 6:10 a.m. The Applicant had finished work at 2:00 a.m. that morning and had gone to sleep on her arrival at her spouse's house. It remains for the Tribunal to consider if the Applicant in some manner acquiesced in her spouse's use of the vehicle.

There is evidence that the Applicant's spouse had used the car on other occasions since his licence had been suspended for unpaid fines in 2001. The fact of that use does not automatically establish that he was driving with her permission on those occasions. The Tribunal notes that his record over that nine year period does disclose several occasions when he was convicted of driving while suspended. From the Applicant's evidence, on at least some of those occasions she went and picked up the car and drove it home. Several occasions over a nine year period does not establish a routine use of the vehicle with the Applicant's permission or acquiescence. It is equally consistent with a willful spouse refusing to honour the Applicant's wishes that he not use her vehicle.

In addition to those occasions, there is the Applicant's evidence that when she was aware that he was driving the car some distance from home she did not tell him to drive it home. She told him to let her friend drive it back. Her request was ignored on that day. The Applicant also described how she drove the suspended driver around to look for work. If she was acquiescent in his use of the car, she would have simply permitted him the use of it and return it at his convenience.

The final consideration for the Tribunal is the time and use of the vehicle. The vehicle was stopped at 6:10 a.m. The Applicant was asleep and it was well before the time when her children had to be in school. It is a reasonable inference that the Applicant's spouse was joyriding while she slept, in the belief that she would never be aware of his activity. The Tribunal concludes that the Applicant's spouse was using the vehicle without either the Applicant's permission or her acquiescence.

The Applicant's spouse had taken her vehicle without her permission. The Tribunal also finds that he had no reasonable grounds to believe that he had her permission or that the Applicant had acquiesced in his use of the vehicle. To use the language of the *Criminal Code*, he had no "colour of right" in the vehicle. The indicia of fraud are present in the Applicant's spouse's action. He took the car surreptitiously while she was asleep. There appeared to be no reason for his use of the vehicle. The Tribunal finds that he took the vehicle fraudulently with the intent to deprive the Applicant of the use of the vehicle. In short, he stole it.

Having determined that the Applicant's spouse stole the vehicle, the Applicant's appeal succeeds. Had the only issue before the Tribunal been exceptional hardship, the Tribunal would have found that there is no evidence that the Applicant will suffer exceptional hardship. That is not to say that she will not suffer inconvenience, but on the evidence there are alternative means of transport available to her and ready access to all necessary services, including emergency services.

Since she is currently on medical leave from work, she does not need the vehicle for that purpose. Food stores, food banks and doctors are all within easy reach and, when she needs to travel out of her area, she has access to friends and relatives.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude, Vice-Chair

RELEASED: November 18, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6299-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: AGENT FOR THE APPLICANT

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: November 4, 2010 *by teleconference*

REASONS FOR DECISION

A teleconference was held on November 4, 2010, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (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

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, Chevrolet GM4 (the "vehicle")
Date of Appeal:	October 18, 2010

PRELIMINARY MATTERS

This matter came before this Tribunal on November 4, 2010 and proceeded as a teleconference.

The Registrar 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 Registrar were entered into evidence as exhibits with the consent of both parties.

The Agent is the Applicant's wife. During today's hearing, the Agent provided the Tribunal with verbal testimony. The Representative for the Registrar had finished with her questions and while the Agent was clarifying a question posed by the Tribunal, the Agent could no longer hear anyone and the line was disconnected approximately 40 minutes into the hearing. It was later determined, upon further investigations by the Tribunal's staff, that the technical difficulties were not specifically isolated to this hearing, but to other hearings as well. The Tribunal extends its apologies for this interruption.

Since the Agent does not have a telephone, the Tribunal directed its staff to try to contact the Agent through a phone number she provided for her son. The Tribunal's staff left a voicemail message at his home and on his cell phone. In the interim, the conference bridge was immediately reopened and both the Presiding Member and the Representative for the Registrar remained on the bridge for 20 minutes waiting for the Agent. The Agent for the Applicant did not rejoin the teleconference.

The Tribunal's staff received a call from the Agent's son approximately one hour after the hearing adjourned to provide it with the Applicant's phone number.

The teleconference did not resume, both the Agent and the Representative for the Registrar concluded their evidence and their submissions. The dropped call by the Agent has no impact on this decision. The information that the Agent gave just before the call ended was background but does not in the end affect the outcome. All submissions and testimony have been taken into consideration.

ISSUES

As set out in the Applicant's request for a hearing (Exhibit #1), the owner appeals on the basis that loss of the vehicle will result in exceptional hardship, all as provided in section(s) 50.2(3)(d) of the Act.

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

Evidence for the Applicant

The Applicant was affirmed before giving testimony.

As aforementioned, the Agent is the Applicant's spouse. The Applicant has been hospitalized since August 2010 and is awaiting placement in a nursing home.

Both the Agent and the Applicant are seniors. They are the parents of two adult sons, one of which is the suspended driver at the time the vehicle was impounded. The suspended driver is in a common-law relationship and is a father of three children and is expecting a fourth child. Due to financial difficulties, the suspended driver has moved back home while his common-law spouse and children moved back home with her mother. According to the Agent, the suspended driver is on social assistance and is currently incarcerated.

During the afternoon on the day the vehicle was impounded, the suspended driver, his spouse and children visited with the Agent at her home for a short while. The Agent was also entertaining a visit from a friend as well. During the suspended driver's stay, he consumed about six beers within three hours.

Sometime between 4 p.m. and 5 p.m., the suspended driver called the hospital to inquire about the Applicant. The hospital misinformed the suspended driver by advising him that the Applicant was placed in 'palliative' care instead of 'medical' care. The suspended driver became enraged. According to the Agent, the suspended driver "cannot accept his father's illness". He verbally threatened the Agent and her friend with physical assault and death threats.

While the Agent was in the bathroom, the suspended driver took her keys out of her purse, left the home, and drove away with the Applicant's vehicle. The Agent suspected he drove to the hospital to check on the Applicant. When the Agent called the hospital, the hospital staff informed her that the suspended driver was acting like a "raging lion". The Agent authorized the hospital staff to call the police. The suspended driver immediately left the hospital and returned to the Agent's home. The Agent retrieved her keys and hid them from the suspended driver on the fridge.
Still enraged, the suspended driver removed some guns from the Applicant's gun cabinet. He placed them on the table and, once again, uttered death threats and physical assault on the Agent and her friend.

The suspended driver searched the home for the vehicle's keys and found them on the fridge. He once again took the Applicant's vehicle. The Agent believes the suspended driver was still under the influence of alcohol.

The Agent's friend, who was visiting with her during this whole ordeal, called his wife to warn her of what happened. She immediately called police. The police located the

suspended driver who was allegedly charged with impaired driving, driving while disqualified, uttering death threats to two people, and possession of weapons.

He is currently in jail without bail.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit 3):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 , R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below.

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Ability Impaired under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until March 5, 2013.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

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.

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The *Shorter Oxford English Dictionary*, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section.

First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to

public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the foregoing grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria that the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Agent of the Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Agent testified she "knows all of his convictions" and is aware of the suspended driver's suspensions. He has been in and out of jail about 10-15 times since he was 17 years old. There is no dispute over the documents provided to her representing the Registrar's submissions.

The Agent and her friend currently have restraining orders issued against the suspended driver.

As mentioned above, the Agent is a senior citizen on a fixed income of less than $1,000 per month. This past month, she stopped receiving the Applicant's old age security cheque

because it is being redirected to the hospital for his maintenance and well-being while he is waiting for an opening at a nursing home.

The Agent is having difficulty paying her rent and has disconnected her phone service. She has applied for and is waiting for availability into a seniors' residence.

The Agent has testified that her other son will be purchasing a bus pass for her for the month of November so she can visit the Applicant in hospital daily. The convenience of a bus stop is across the street from her home. The Agent's son has also helped the Agent with the purchase of her groceries.

The Agent's friend and his wife have also provided assistance during the vehicle's impoundment. They have transported her, on occasion, to the hospital, to her medical appointments and have helped in and around her home.

The Agent advised the Tribunal that she also has a serious medical back issue, but she has been able to attend her doctor's appointments with the help of her friends and has not missed any appointments to date.

Her community is 911 accessible in the event of an emergency and a hospital is close by.

Although it may be futile, the Tribunal would like to inform the Applicant and Agent that they 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 is quite sympathetic to the regrettable situation of the Applicant's family; unfortunately it cannot consider the Applicant's or Agent's financial difficulties since (1) the Applicant can no longer drive a vehicle, (2) the Agent has had alternatives to the impounded vehicle available to her to get to hospital, doctor's appointments and groceries purchased for her by her friends and/or family, and (3) the financial difficulties pre-existed the vehicle's impoundment.

After considering the above requirements, the Tribunal finds that the Agent has had alternatives to the Applicant's impounded vehicle and the Tribunal cannot grant the appeal. Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 574, the Tribunal finds that the Applicant has not established exceptional hardship as set out in section 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 Act, 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: November 12, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6297-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN, Presiding Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representative for the Registrar of Motor Vehicles

DATE OF HEARING: November 3, 2010 Teleconference

REASONS FOR DECISION

A teleconference hearing was held on November 3, 2010, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 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 Pontiac SFS (the "vehicle")
Date of Appeal: October 18, 2010

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 August 24, 2010, and proceeded as an oral hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

A summary of the Applicant's evidence is as follows:

The Applicant submitted a written statement with her Notice of Appeal and essentially summarized her evidence by testifying that she had not realized the driver's licence had been suspended and that she needed her vehicle to get to work, drive her son to extra-curricular activities as well as be able to do regular errands.

The Applicant said it is a 40 minute drive to her place of employment in another community and there is no connecting transit service. She also explained that none of her colleagues work nearby her home.

The Applicant confirmed she had rented a vehicle on one occasion but could not afford to do this again; nor is she able to afford the impound fees. She did say that she had been able to borrow a friend's car but it was unlikely to be available again as her friend needed the vehicle to get to her work location.

She said she receives no support from her ex-husband and has no family within the community. She added that if she is unable to get to work she would not be able to pay her rent and could lose her job.

Evidence for the Registrar

A summary of the Registrar's evidence is as 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's licence of the driver was then under suspension until January 13, 2011.

The Applicant did not dispute any of the evidence submitted by the Registrar's Agent and in response to questions submitted by the Agent to the Applicant, it was learned that she had:

- access to 9-1-1 service;
- had not missed medical appointments and was in good health;
- had initially rented a vehicle and also borrowed a friend's vehicle.

The Applicant said her son had not missed any school days and was able to get to school on his own. She had so far missed six (6) work shifts and been able to switch some others. It was also possible that she could pick up additional shifts to make up lost shifts after the impound period.

The Applicant said she had only known the individual who was driving her vehicle at the time it was impounded for a short time but that she had occasionally loaned him the vehicle. She acknowledged she had not asked to see his driver's licence or whether it was valid. It was also learned that she had loaned the driver her vehicle the day of the impoundment and he had come to pick her up at "the bar" before being stopped by the police – she was in the vehicle at that time.

She did not indicate that there had been any direct and or significant threat to anyone's well-being as a result of the vehicle impoundment.

In summary, the Registrar's Agent submitted that the Applicant would be able to manage through the impoundment period without incurring any threat to her health or well-being and to the well-being of anyone else dependent on access to the vehicle. In addition, any economic loss incurred through missed shifts, could potentially be recouped with additional shifts after the impound period.

Therefore, the Registrar's Agent asked that the order to impound be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed. 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, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

> 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
>
> (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

(b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

(a) inconvenience to any person;
(b) financial or economic loss to any person;
(c) loss of employment or employment opportunity to any person; or
(d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

(a) no alternative to the impounded motor vehicle is available;
(b) the loss will be immediate, significant and lasting;
(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of exceptional hardship under subsection 50.2 (3)(d). Section 22 of Regulation 574, which is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

The Applicant in this case has argued that the impoundment has caused hardship as described in subsection 22(2) and, in order for the appeal to be considered under subsection 22(2), the Applicant must demonstrate that all of subsection 22(3) has been met.

Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection

22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Applicant's evidence and testimony confirmed that she and her son had been able to get through the initial impound period. It was also confirmed the Applicant has access to emergency services (i.e., 911 service) and rental vehicles, despite the cost.

Although she has experienced some stated difficulties and while it is not unreasonable to consider these may continue to be experienced through the balance of the impound period, the Applicant did not provide any compelling and detailed evidence to show how the impoundment would impose exceptional and lasting conditions of hardship, in accordance with the hardship criteria detailed in subsections 22 (2) and (3). The Applicant also did not provide any evidence to show there was absolutely no alternative transportation available.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____

Simon Dann, Presiding Member

RELEASED: November 12, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6296-MVIA-EXHP- Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent representing the Registrar of Motor Vehicles

DATE OF HEARING: November 4, 2010 Toronto

REASONS FOR DECISION

An electronic hearing was held on November 4, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act.

BACKGROUND

This is an appeal under section 50.2 of the Act.

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: 2003 STRN S13 (the "vehicle")
Date of Appeal: October 15, 2010

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.

The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

The Applicant's Notice of Appeal filed with this Tribunal (Exhibit #1) identifies the grounds of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order to impound the vehicle will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Registrar.

Evidence for the Applicant

The Applicant testified that the impounded vehicle is the sole family vehicle and is normally used by the Applicant and/or his wife to drive to and from work; to drive his two children to school and extra-curricular activities and for household errands. The family lives in a very small town with few facilities: the children's school; the family doctor and major grocery stores are all located in a municipality approximately twenty kilometres from the Applicant's home. There is no public transportation in the municipality where the Applicant and his family live.

The suspended driver in this case is the Applicant's wife. The Applicant testified that she knowingly drove the vehicle while her licence was suspended on the belief that "nothing would happen". The Applicant emphasized to the Tribunal that since the impoundment, his wife has shown significant remorse.

Until the impoundment of the vehicle, the Applicant was working six days a week. His wife was working a full time job and also working shifts in a restaurant. Since the loss of the vehicle, the Applicant and his wife have been able to make car pooling arrangements to get to work for which they pay approximately $30.00 and $60.00 respectively per week. However, the Applicant also testified that he has experienced some difficulty on occasion in finding transportation home: he has had to take taxis, at the cost of approximately $35.00 on two occasions and has had to hitchhike on occasion. He testified that he had to give up his Saturday shift and income of approximately $120.00 because of the unavailability of transportation. Similarly, he testified that his wife had given up her second job

approximately three weeks after the impoundment because of the difficulty in making transportation arrangements for varying shifts. The Applicant further noted that his wife was intending to see if she would be able to pick up part time work in restaurants closer to home that she could walk to.

The Applicant's children have been able to get to school by taking the school bus. They are able to walk to the bus stop. However, the children have not been able to attend their extra-curricular activities. The Applicant testified that some of the lessons he has paid for would be rescheduled but that some could not be.

The Applicant testified that he has been able to borrow a vehicle on rare occasions from a friend and from family and has used those occasions for priority errands such as grocery shopping. However, he stated that since both his friend and family member work full time that it was not always convenient.

The Applicant also noted that he is currently in the process of interviewing for a better job in a municipality approximately two and half hours drive from his home and is concerned about how he would attend any further interviews scheduled. On cross-examination, he indicated that he would likely get a few days notice and that he would in fact make arrangements to attend the interview given its priority.

The Applicant testified that he and his family are generally in good health. The Applicant's daughter has needed to see the doctor on one occasion and the Applicant was able to borrow a vehicle in order to take her. A follow-up appointment has yet to be rescheduled pending the Applicant's ability to make transportation arrangements. There is 911 emergency service in the municipality in which the Applicant lives.

The Applicant testified that he and his wife have weekly net income of approximately $1000. Fixed costs total approximately $300 a week. The balance is used for groceries and other household expenses. The Applicant declared bankruptcy approximately two and a half years ago and has been making payments. As a result of the bankruptcy, he is unable to obtain either credit cards or a line of credit. He testified that he had investigated the possibility of renting a vehicle and the least expensive he could find would cost approximately $270.00 per week. The Applicant stated he could not afford this. The Applicant also expressed significant concern about his ability to pay for the impoundment costs given his current financial circumstances. He stated that he "could last forty five days if he had to" but did not know how he would pay for the impoundment costs.

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*, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with a blood alcohol level in excess of .08 ccc pursuant to which the driver's licence of the driver was suspended until September 23, 2011.

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.

Regulation 574, R.R.O. 1990, 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)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the *Shorter Oxford English Dictionary*, 3rd ed., 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, 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 issue to be considered in this appeal is whether the loss of the Applicant's vehicle will result in exceptional hardship. Section 22 of Regulation 574 is very specific. It provides the Tribunal with the criteria the Applicant must meet in order to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant testified that both he and his wife, the suspended driver in this case, have given up some work because of the loss of the Applicant's vehicle. However, they have been able to make arrangements for car pooling to their primary jobs although the Applicant himself has experienced some challenges in getting home. The Applicant's children have been able to get to school by taking the school bus but have missed some extra-curricular activities. The Applicant also testified that he has, on occasion, been able to borrow a vehicle from either a friend or a family member in order to do major grocery shopping or to take his daughter to a doctor's appointment. No medical appointments have been missed.

The Applicant testified that he could not afford to rent a vehicle at the approximate cost of $270.00 per week. However, the Tribunal notes that the Applicant has chosen to give up income of approximately $120.00 weekly; his wife quit her second job three weeks after the impoundment and gave up that income; and between them, the Applicant and his wife are paying approximately $90.00 per week in car pooling costs. On occasion, the Applicant has paid $35.00 for a taxi in order to get home from work. Given these figures, it does not appear that the cost of renting a vehicle would be greater than the costs the Applicant has incurred by choosing not to rent one.

While the Applicant has given up the income from his sixth working day because of transportation difficulties, he testified that his employer is aware of his circumstances, and while his employer is not happy, the Applicant is not under threat of job loss. The Applicant's wife intends to replace her second job with one closer to home. Therefore, there is no indication that the loss to the Applicant will be either significant or lasting.

The Tribunal further notes that the costs to the Applicant of the impoundment itself cannot be considered in determining whether the impoundment will result in exceptional hardship. The evidence indicates there are alternatives available to the impounded vehicle and therefore does not establish 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Mary Ann Spencer, Member

RELEASED: November 8, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6295-MVIA-DUDI-EXHP-Due Diligence and Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: November 5, 2010 *by teleconference*

REASONS FOR DECISION

A hearing was held on November 5, 2010, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1998 Chevrolet Malibu (the "vehicle")

Date of Appeal: October 19, 2010

The Registrar submitted a set of original certified documents, copies of which had previously been filed with the Tribunal.

The Applicant advised the Tribunal that there was a discrepancy with the location where the incident occurred. The original handwritten Notice to Registrar completed by the police at the time the vehicle was impounded listed the name of the street the suspended driver parked the Applicant's vehicle. When the Notice to Registrar was perfected, the street name had changed. It referred to a street which ran parallel to it. A copy of the original handwritten Notice to Registrar has been attached to Exhibit #3. The Agent for the Registrar could only advise the Applicant and the Tribunal that the police must have been satisfied to have viewed the suspended driver to have care and control of the vehicle, for the vehicle to have been impounded, but could not address the error in the perfected Notice to Registrar.

The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits.

ISSUES

As set out in the Applicant's Notice of Appeal (Exhibit #2), 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 that the loss of the vehicle will result in exceptional hardship, all as provided in sections 50.2(3)(c) and (d) of the Act.

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

Evidence for the Applicant

The Applicant was affirmed before giving testimony.

The Applicant has been a registered practical nurse at a hospital within her community for the past 15 years. She is also a single mother of two daughters aged 19 and 23, who live on their own.

The suspended driver at the time the vehicle was impounded is the Applicant's boyfriend. The Applicant has known him for the past four years but they have been living together for the past year. He is currently on a waiting list for financial approval for a disability pension.

In an effort to make money, he finds and refurbishes old bikes and sells them. The suspended driver's parents have helped him financially in the past but given this specific circumstance, they are of the view that he should assume the responsibility of his actions and, in this case, they will not assist him financially. No evidence was heard whether they have a vehicle to assist the Applicant during the interim.

On the morning the vehicle was impounded, the Applicant's youngest daughter called to advise that she was in distress. Since the Applicant was in a deep sleep due to changes in her medication, the suspended driver removed the keys to the Applicant's vehicle from her purse and took her vehicle to attend to the Applicant's daughter.

Although the Applicant does not know for certain, she assumes that the suspended driver observed a police officer following him and panicked. In an effort to evade police, he parked the car quickly and began walking. The distance from where the vehicle was stationed to where the Applicant's daughter lived was four kilometres.

The Applicant did not provide further details regarding this situation, but the vehicle was ultimately impounded. The suspended driver, who was quite remorseful, called the Applicant to advise of the vehicle's impoundment.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 to impound the vehicle.

4. Copy of the Ministry of Transportation records indicating that the driver at the time of the impoundment had been convicted of the offence of Dangerous Driving under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until December 17, 2010.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

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).

ISSUE 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?

The Shorter Oxford English Dictionary, 3rd ed., 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 defined 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.

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 22 of Regulation 574, R.R.O. 1990, provides the criteria to be considered and those not to be considered in determining the appeal under this section.

First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,

- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the foregoing grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

Appeal - Due Diligence

The first issue to be considered in this appeal is whether the Applicant exercised due diligence, in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed, which is required under this section of the Act.

The suspended driver has a history of licence suspensions. He was in a motor vehicle accident in October 2008, which left the Applicant without a vehicle due to the significant damage it had incurred. She became aware of the fact that he was a suspended driver following the accident. Shortly after he purchased a replacement vehicle for the Applicant and it was delivered to her, he advised her that he "paid all his fines from the accident and got his licence back". In January 2009, the suspended driver informed the Applicant that he "had a valid driver's licence". In the Applicant's Reasons for Appeal attached to Exhibit #2, the Applicant wrote "he has always told me that he did have a full and legal licence".

The Applicant testified that she was "never shown a driver's licence" nor did she ask to see one. The Applicant kept the keys to her vehicle in her purse. No measures were taken to verify the validity of her boyfriend's driver's licence or to secure access to her vehicle. She trusted him and took his word for it.

Due diligence requires that the Applicant take further steps to verify the validity of the driver's licence. This can be accomplished by contacting the Ministry of Transportation of Ontario ("MTO") with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

Appeal – Exceptional Hardship

The second issue to be considered in this appeal is whether the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the ground of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria that the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Applicant has been on a medical leave from her employer since May 2010. She is scheduled to return to work as early as January 2011. She is currently collecting unemployment insurance benefits and is also financially supporting her youngest daughter for groceries and laundry.

The Applicant's oldest daughter has her own vehicle, attends college and is independent.

The Applicant has many medical appointments for a condition that she has been dealing with for the past 20 years. Because of her condition, she cannot take public transit or be around a large group of people.

She is unable to rent a vehicle, since she does not have a credit card, or take taxis due to her limited income. Her daughter was able to drive her to two medical appointments as well as to purchase groceries since the vehicle's impoundment. The Applicant has not looked into synchronizing her medical appointments with her daughter's school schedule. No evidence was heard whether the Applicant could borrow her daughter's vehicle for a short time while her daughter is attending class. On one occasion the Applicant walked 1½ hours to a medical appointment.

Due to the sensitive nature of her medical condition, the Applicant does not wish to ask her co-workers for assistance since it may require her to divulge her reasons.

The Applicant has missed a number of medical appointments because she was not able to get to them. Her doctors "are not happy" since her recovery may be delayed. Due to the number of missed medical appointments, her doctors have imposed a $50 surcharge for future missed appointments. Her employer is also aware that she has not been attending her medical appointments.

The suspended driver has agreed to help pay for the impoundment costs and has currently saved $800, which is being held by his parents. The Applicant may pursue compensation from the suspended driver should he change his mind, as is stated in section 55.1(21) of the 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 Applicant decided to forego her medical appointments rather than use a small portion of the money the suspended driver had saved to attend to her medical appointments by taxi.

After considering the above requirements, the Tribunal finds that the Applicant has alternatives to the impounded vehicle and cannot grant the appeal. The Tribunal hopes that the financial impact will be absorbed by the suspended driver, but the impact will not ultimately be significant and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 574, the Tribunal finds that the Applicant has not established exceptional hardship as set out in section 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Nives Montano, Member

RELEASED: November 9, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6291-MVIA-STOLEN-DUE DILIGENCE-EXCEPTIONAL HARDSHIP

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 29, 2010 *in person*

REASONS FOR DECISION

A hearing was held on October 29, 2010, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (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

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: Hyundai Accent (the "vehicle")
Date of Appeal: October 12, 2010

The owner appeals on the basis that the motor vehicle was (1) stolen at the time it was being driven; (2) the vehicle owner's due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended; and (3) the loss of the vehicle will result in exceptional hardship, as provided in sections 50.2(3)(a), (c) and (d) of the Act.

There were no preliminary matters in dispute between the parties.

The Registrar 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 Registrar were entered into evidence as exhibits with the consent of both Parties.

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the 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 Registrar.

<u>Evidence for the Applicant</u>

The Applicant was affirmed before giving testimony.

She is a registered nurse who works full-time at a hospital within her community. Due to her area of expertise, she must be available for seven to nine "on-call emergency shifts" per month.

The Applicant is also a single mother of a teenage son.

She is the only child to her parents. Her father resides about 80 kilometres away and the Applicant is estranged from her mother.

The suspended driver at the time the vehicle was impounded, was the Applicant's boyfriend for the past 1 ½ years. She met the suspended driver through a mutual friend shortly after her divorce. The suspended driver is employed as a general contractor/construction worker by this mutual friend who also owns a construction company. Due to the nature of this industry, continuous employment is not guaranteed.

During the early hours of the morning prior to the vehicle's impoundment, the Applicant and the suspended driver had been watching movies. The Applicant had fallen asleep on the couch and was not aware the suspended driver had taken her vehicle to allegedly purchase cigarettes. According to the Applicant, a police vehicle was following the suspended driver on his return home. The suspended driver sped up and quickly turned the corner of her street and drove into someone's driveway, turned off the ignition and remained in the vehicle. The police approached the vehicle and asked the suspended driver whether he resided at the home he was stationed in front of. The suspended driver informed police that he did not and pulled into a random driveway because he "*didn't want to go to jail*". The police escorted the suspended driver down the street to the Applicant's home to advise her of what had just transpired and to inform her of her vehicle's impoundment.

The suspended driver no longer resides with the Applicant and their relationship dissolved after her vehicle's impoundment.

Evidence for the Registrar

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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with More than 80 Mgs of Alcohol in Blood under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until August 24, 2012.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a),(c) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act.*

The *Shorter Oxford English Dictionary*, 3rd ed., provides the definition of "stolen" as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* of Canada (the "Code") R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

> "steal" means to commit theft…

Section 332(1) of the Code states:

> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
> (b) to pledge or deposit it as security;
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle

permanently. The Court held that the term “stolen” could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> “In our opinion a vehicle is ‘stolen’ in this context when it is taken without the owner’s consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.”

With respect to an appeal under 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 English Dictionary*, 3rd ed., 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, provides for criteria to be considered and

criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

22. (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

(a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

(b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

(a) inconvenience to any person;

(b) financial or economic loss to any person;

(c) loss of employment or employment opportunity to any person; or

(d) loss of education or training or of an educational or training opportunity to any person.

(3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

(a) no alternative to the impounded motor vehicle is available;

(b) the loss will be immediate, significant and lasting;

(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and

(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

APPEAL – STOLEN

The first issue to be considered in this appeal is whether the motor vehicle was stolen at the time in respect of which the order was made.

The burden of proof is on the Applicant to establish whether the impounded vehicle was, in fact, stolen.

When the police officer informed the Applicant that her vehicle had been impounded, he handed her the Notice of the Registrar and suggested that she and the suspended driver 'talk amongst themselves' on how they wanted to proceed. In hind sight, the Applicant believes the police officer may have been implying she decide to lay a charge of theft against the suspended driver.

The Agent for the Registrar of Motor Vehicles asked the Applicant if she would have charged the suspended driver with theft on or shortly after her vehicle was impounded. She replied "*I don't think so", "not at that time".* The Applicant believes the suspended driver may have been aware that if she did press charges against him of theft, her vehicle would have been released from impoundment. Instead, to avert any such thoughts, the suspended driver ensured her he would help her pay the costs of her vehicle's impoundment by finding additional work. He also managed to "*secure a loaner for 2-3 days*' to appease her.

Since the suspended driver was apprehended on his return home, a short distance from the Applicant's residence, the evidence is clear that the suspended driver wrongfully took the Applicant's vehicle without her consent.

The Tribunal found no proof that the driver's intent was to deprive the Applicant of her vehicle either permanently or temporarily.

Therefore, the Tribunal is of the view that the impounded vehicle was not, in fact, stolen from the Applicant within the meaning of subsection 50.2(3)(a) of the Act.

APPEAL - DUE DILIGENCE

The second issue to be considered in this appeal is whether the Applicant exercised due diligence, in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed, which is required under this section of the Act.

Although the Applicant went to court with the suspended driver last year regarding an

impaired driving charge, she was unclear on what the charges entailed. She was not aware that he was charged with a Criminal Code offence and although the court requested that he surrender his driver's licence, she did not realize that his driver's licence had been suspended for one year. She also did not know, until receiving the Ministry of Transportation's submissions that the suspended driver's licence had been "cancelled, unlicenced and unrenewable". After the court requested the surrender of his driver's licence, which he did not have, the Applicant told the suspended driver he was not permitted to drive her vehicle.

The Applicant advised the Tribunal that the keys to the vehicle were hanging on a key rack at the front door. There was an "understanding" between the Applicant and the suspended driver that he was not to have care and control of her vehicle. To the best of her knowledge, this was the first time he took her vehicle since last year.

The Applicant took no measures to secure the access of her vehicle by hiding and/or keeping her vehicle's keys out of sight.

The Applicant trusted the suspended driver as she had no reason not to. The suspended driver had been driving his employer's work truck. He had use of it for business and pleasure. After the vehicle was impounded, the Applicant spoke to the suspended driver's employer who confirmed that he was aware the suspended driver was a disqualified driver, but continued to allow him to use his vehicle.

It is unfortunate that the suspended driver misused and abused the Applicant's trust.

Due diligence requires that the Applicant, take further steps to verify the validity of the driver's licence. This can be accomplished by contacting the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

APPEAL – EXCEPTIONAL HARDSHIP

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria that the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the

impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Applicant testified she has rented her neighbours' second vehicle until the end of the month. She is paying them for the use of their vehicle.

The Applicant's son has been able to ride his bike to school. In the event of bad weather, there are mothers within the Applicant's complex that would be able to take him to school.

During her regular shifts, the Applicant could take public transit since the hospital is about 5 kilometres from her home. When she is required to work an on-call emergency shift, she must be in a position to get to the hospital within 20 minutes of the hospital calling her into work. Taxis are not a reliable form of transportation especially during the early morning hours. She would be competing for transportation with patrons leaving bar establishments.

Although her employer is aware of her situation, should she fail to arrive at work within a certain timeframe, she may be suspended without pay.

During this impoundment period, the Applicant has only missed two days of work: (1) on the day the vehicle was impounded; and (2) to attend today's hearing.

There are no health issues; therefore there is no threat to health and safety. The Applicant's community is 911 accessible in the event of an emergency.

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 the Applicant to be a very sensitive and compassionate person. She opened her heart to help someone get their life back in order. Unfortunately, the person she let into her life was not the person she thought he was.

After considering the above requirements, the Tribunal finds that the Applicant has an alternative to the impounded vehicle and cannot grant the appeal. There will be a financial impact once the vehicle is released from impoundment, but will not ultimately be significant and lasting.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 574, the Tribunal finds that the Applicant has not established exceptional hardship as set out in section 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 Act, the Tribunal confirm the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____
Nives Montano, Member

RELEASED: November 2, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6288 -MVIA-EXHP-DUDI-Exceptional Hardship and Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: ELIZABETH SPROULE, Presiding member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: October 29, 2010 *by teleconference*

REASONS FOR DECISION

A hearing was held on October 29, 2010, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (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

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:	2006 Acura RSX (the "vehicle")
Date of Appeal:	October 12, 2010

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.

PRELIMINARY MATTERS

This matter came before this Tribunal on October 29, 2010 and proceeded as an electronic hearing.

ISSUES

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

1) 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?

2) 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 Registrar.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant testified that the driver of the car at the time of the impoundment was her son. He had borrowed the car while she was away and had driven it for a few days before the impoundment. The Applicant knew of the suspension of her son's licence in 2009; however, when she learned that the driver had borrowed her car, she was not overly concerned because, given the time of year, it made sense to her that he would have his licence back at that time. In addition, the driver had previously told the Applicant that his licence was being reinstated and she had seen his licence in his wallet. The Applicant stated that she believed that normally when a licence is suspended the actual document would physically be taken from the suspended driver and therefore she felt she did not have reason to question the driver further. When asked in what circumstance the Applicant was shown the licence she testified that the Applicant had come over for an occasion and had shown it to her. She also testified she had seen it on another occasion in the past.

The Applicant did not contact the Ministry of Transportation to confirm the status of the driver's licence as she was not aware that she could do that.

The Applicant testified that the loss of the vehicle has caused a lot of inconvenience and expense. She travels for work, frequently to the U.S., and requires a vehicle. The means of transportation available to her to get to and from the airport are particularly costly. Other means of transportation available include acquaintances, taxis, limos, shuttles and rental cars. The Applicant is the registered owner of another vehicle, a 2011 model. Since the impoundment of the vehicle, this second vehicle has become the primary vehicle for both the Applicant and her spouse. Having to share this vehicle has resulted in economic loss to the Applicant in forgone income as well as additional expenses. Either the Applicant or her spouse will have to rent a car to meet their needs in the future.

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, R.S.C. 1985, c. C-46 (the "*Criminal Code*") 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 having a blood/alcohol content in excess of .08 under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until October 26, 2010.

5. Copies of Ministry of Transportation records indicating one vehicle, in addition to the impounded vehicle is currently registered in the name of the Applicant.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) 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 English Dictionary*, 3rd ed. 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, 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

As to the first issue filed, the evidence established that the Applicant knew that the driver's licence had been suspended for a year, but did not know exactly when the licence would be reinstated. She had noted that the driver had a licence in his wallet sometime prior to borrowing the car, on more than one occasion, and assumed this meant he had a valid driver's licence.

Based on these facts the Tribunal does not find that the Applicant exercised due diligence in attempting to determine that the driver's licence was not under suspension at the time he had possession of the car. The Applicant took no active steps to seek clarification of when the suspension would expire; she simply trusted the driver when he said his licence had been reinstated. Although the Applicant testified she saw a licence in the driver's wallet, she indicated she had seen it before, and gave no evidence of actually examining it. More is expected of an owner of a vehicle to ensure that a suspended driver is not given access to a motor vehicle.

Pursuant to s. 22(1) of Regulation 574, in determining whether an impoundment will result in exceptional hardship the Tribunal must consider whether there is an alternative to the impounded vehicle and if not, whether the impoundment will result in a threat to the health or safety of any individual normally transported by that vehicle.

The evidence of the Applicant establishes that there are a number of alternatives to the impounded vehicle for the transportation of the Applicant. She in fact has another car. The Tribunal accepts that this car must now be shared to meet the driving needs of both the Applicant and her spouse but her evidence was that other options were available such as taxis, limos, public transit and rental cars. The Tribunal understands that there may be costs associated with some of the alternative means of transportation but there was no evidence that those costs were prohibitive. The Tribunal finds that the impoundment will not result in exceptional hardship.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Elizabeth Sproule, Presiding Member

RELEASED: November 4, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

6328-MVIA-Motion-Extension of Time

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

TO IMPOUND A VEHICLE

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: THE APPLICANT, Self-represented

RUSSELL MCKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF MOTION: December 1, 2010 Toronto

ORDER

This motion arises in the course of an appeal by the Applicant to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Registrar of Motor Vehicles (the "Registrar") under the *Highway Traffic Act,* R.S.O.1990, c. H.8 (the "Act") impounding the Applicant's Motor Vehicle. The Applicant seeks an extension of the time within which to file her appeal.

The Applicant placed her van in storage. It was stolen from the storage facility sometime in August, 2010. The Applicant contacted the impound facility which told her that she could claim the van in 90 days if she paid impound costs of $1,200. She was also told that she would not have to pay the impound costs if she produced paper work from the police. She then focused on obtaining the paper work from the police. She did receive the Order to Impound from the

Ministry of Transport, which included a reference to her right to appeal the Order. However, she continued to pursue the police paperwork and did not appeal the Order until after the appeal period had passed. It was clear from her statement that she was prepared to pursue whatever means were open to her to reclaim her van without paying the impound cost.

Under section 50.2 of the Act, an owner of a motor vehicle that is subject to an order to impound may appeal the order to the Tribunal.

Part IV of Ontario Regulation 574 of the Act provides that the owner must file a notice of appeal within 15 days of the issuance of the order to impound. Subsection (20) (7) of the regulation provides that "the Board", which includes the Tribunal, may:

> Extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

The Tribunal is satisfied that the Applicant/Owner was acting in good faith and attempting to pursue lawful avenues to have her van released without paying the impound costs. In reaching this decision, the Tribunal is mindful of the fact that the Applicant is a victim of theft and was acting on what she thought was knowledgeable advice from the impound facility.

The Ministry of Transport advises that the original impoundment was only for 45 days. After 45 days, the place of impoundment may charge additional fees for the release of the van. Over 110 days have now passed since the van was impounded. Further impound costs have been accumulating. Even if the Applicant is successful at the appeal, she will still have to pay all impound costs that have accrued since the release date of September 26, 2010.

The Applicant advised that she wished to recover her personal possessions from the van but she was told that while she had the right under the Act to do that during the first 45 days of impoundment, she would now have to approach the impound factility directly to negotiate access to her van with them.

It was decided at the hearing of this matter that the Applicant would be granted this motion of extension of time. But in view of the fact that it may not be economical for the Applicant to pursue the appeal, the Applicant is to be given until December 15, 2010 to decide whether she wishes to pursue her appeal or whether she wishes to withdraw the appeal, thereby abandoning the matter. If the Applicant does nothing, then she will be considered to have withdrawn her appeal effective December 15, 2010.

Accordingly, the Tribunal orders that this Motion be granted and that the Applicant be given until December 15, 2010 to notify the Registrar and the Tribunal, in writing, that she wishes to pursue her appeal. If the Applicant does

not so notify the Tribunal and the Registrar, then she will be considered to have withdrawn her appeal and this matter will be considered at an end.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice Chair

RELEASED: December 2, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6330-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DONALD BENNINGER
Presiding member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS, AGENT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: NOVEMBER 26, 2010 Toronto

REASONS FOR DECISION

A hearing was held on November 26, 2010, at Toronto, Ontario, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

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: 2006 Honda, pick-up
Date of Appeal: November 7, 2010

There were no preliminary matters in dispute between the parties.

The hearing proceeded.

ISSUE

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, as set out in the request for hearing (Exhibit 1).

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

The Applicant testified that on the evening of November 6, 2010, he went out with his friends after work to rebuild a snow machine and have a few drinks. He stated he left his truck loaded with his tools at home but took the key for his truck with him. When he returned home around 6 a.m. on November 7, 2010 he found his truck and tools missing and his girl friend crying. She told him she took the other set of keys for his truck out of his night table drawer and took the truck for a drive. She was pulled over by the police who found her licence under suspension and the truck was impounded for 45 days. The Applicant testified he is a construction worker who does cement finishing and must be able to move himself and his tools from one job site to another. He stated when he works during the week he works 10 hours a day at about $31.00 an hour and when he does private jobs on the week-end he can make $1,000.00.

The Applicant testified that there are no family members living near him but his girl friend's father does take her to her teaching work every day and drives her to pick up groceries. He picked up the Applicant's tools at the impound facility for him. He stated the girl friend's Father cannot drive the Applicant to work because he drives his daughter in another direction and could not be available to move from one job site to another. The Applicant testified that since the impoundment one of his co-workers has taken him to a job site for three or four days as he was driving past the Applicant's home for that job, but this is not the case most days. He stated he has only worked that three or four days since the impoundment. He stated he has delayed his week-end work and the customers are not happy with him.

The Applicant testified he has no money to rent a vehicle because his girl friend and he have purchased their home together and they have heavy mortgage payments. In addition he stated he has high vehicle payments and his rental house is not rented at the moment. The Applicant stated during cross-examination that he has looked into renting a truck but it is very expensive. He agreed he could rent a truck for the weekend jobs as they pay better but he needs a truck seven days a week. He stated he has not considered a smaller vehicle as he has a lot of tools.

During cross-examination the Applicant testified he is in good health and has not required any doctor's appointments but he had a dentist appointment which he attended. He stated there is 911service in his area.

Evidence for the Registrar

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 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 impaired driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until September 9, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3) (d) of the HTA. Section 22 of Regulation 574 R.R.O.1990 as amended by Ontario Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if, in fact, exceptional hardship will result from the impoundment.

In order for the Applicant's claim to be considered under Section 22(2) (a), and (b) and (c) and (d) of the Regulation, the Applicant must have demonstrated that all of Section 22(3) has been met. Furthermore Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered regarding an alternative vehicle.

In this case the Applicant testified he did consider the rental of another truck but found it too expensive. He did not consider renting a more economical vehicle but did testify that his girlfriend's father placed all his tools out of his truck in his car when he picked them up at the impound facility.

He stated he could make excellent money for doing private jobs on the weekend. But he chose not to rent a truck as he believed he would not be able to afford it given his financial commitments pre-existing the impoundment. If he had rented an economical vehicle for these weekend jobs he would have some remaining funds to apply to a rental of a vehicle for the other days when work was available at a distant location. Also he would be satisfying his local weekend employers and protecting his business reputation for the future. Although the evidence presented demonstrates the Applicant has considerable debt there were alternatives such as the rental of another vehicle at lower cost than a truck or rent a truck and pay the price.

The Tribunal finds as a fact on the basis of the testimony of the Applicant that he has alternatives to his impounded vehicle.

After considering all of the evidence, the Tribunal finds that the Applicant has not met the onus under subsection 22(3)(a) of the Regulation and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under subsection22(2) of the Regulation.

The Applicant has the right to recover costs from the suspended driver and may pursue compensation from her, as is stated in Section 55.1(21) of the Highway Traffic Act.
After considering all the evidence, the Tribunal finds the Applicant has not met the onus required by Subsection 50.2(3) (d) of the Act. Therefore the Applicant's claim is dismissed.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Donald Benninger, Presiding Member

RELEASED: December 1, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6336 MVIA-NUSP-EXHP-Not Under Suspension, & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER
Presiding member

APPEARANCES: SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: December 1, 2010 Toronto

ORDER

A hearing was commenced on December 1, 2010 at Toronto, Ontario, in person to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "HTA" or the "Act"). The Applicant did not attend.

The appeal in this matter was perfected on November 12, 2010. The Tribunal member noted that the Tribunal had received a copy of correspondence dated November 16, 2010 from the office of the Registrar of Motor Vehicles to the Applicant advising that the Registrar had determined the Applicant's driver's licence was not suspended and had ordered the vehicle released from impoundment effective November 17, 2010. A copy of the letter ordering the vehicle release was also forwarded to the Tribunal. Ms De Santis confirmed that the vehicle had been released.

Because the vehicle is no longer impounded, there is no longer a basis for an appeal and no jurisdiction for the Tribunal to hold a hearing. The Tribunal therefore orders this matter before the Tribunal to be concluded.

LICENCE APPEAL TRIBUNAL

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Mary Ann Spencer, Presiding Member

RELEASED: December 3, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6339-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: December 2, 2010 Toronto

REASONS FOR DECISION

A hearing was held on December 2, 2010, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

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:	Sierra Pickup Truck (the "vehicle")
Date of Appeal:	November 15, 2010

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

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, as set out in the request for hearing (Exhibit 1).

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.

Evidence for the Applicant

The owner of the vehicle solemnly affirmed that on November 7, 2010 she and her husband had a fight. She knew that his licence was under suspension. She did not know, however, that her husband had left the house, and took her keys to the vehicle and her credit cards. He was arrested that night and charged with driving "over 80" and her vehicle was impounded.

She and her husband are in the painting and remodelling business. She needs the vehicle to get to job sites. There is another vehicle in the family but it needs new back brakes and a pump and she is afraid to take the risk of driving it.

On cross-examination she admitted the following:

- She drove the alternate vehicle at least three times while the vehicle was impounded.

- She has an estimate of about $900.00 to fix the alternate vehicle but does not have the money now to fix it.

- She has three children who are all healthy.

- Her eldest child takes the bus to his school and she walks one child to school while the baby is looked after by a family member.

- She and her husband have obtained rides to work with a friend during the impoundment period.

- There is bus and taxi service in her city. She does not like taking the bus.

- Her city has "911" service.

Evidence for the Registrar

The Registrar did not call any witnesses. 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 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 driving with more than 80 mgs alcohol in blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until October 12, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

Issue: Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.
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APPLICATION OF LAW TO FACTS

The Tribunal rules, based on all of the evidence, that the Applicant does have an alternative vehicle to the impounded one available to her. The Applicant admitted that she drove the alternative vehicle on at least three occasions after November 7, 2010. Moreover, the Applicant adduced no evidence that she and her husband missed any days of work because of the impoundment. Indeed, their friend seems to have driven them whenever they needed help.

The Applicant has failed to establish, on a balance of probabilities, that no alternative vehicle is available to her. The Tribunal, therefore, need not consider the "health and safety" aspects of paragraphs 22(1)(a) and (b) of Ontario Regulation 632/98 amending Regulation 574 of R.R.O.1990.

In these circumstances, no exceptional hardship to the Applicant or her family will result from the impoundment order.

Accordingly, this appeal is denied.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: December 12, 2010.

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6343/MVIA - Due Diligence & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

SONIA DE SANTIS, Agent for the Registrar of Motor Vehicles

DATE OF HEARING: DECEMBER 6, 2010 Toronto

REASONS FOR DECISION

A hearing was held on December 6, 2010, at Toronto, Ontario, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

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 Pontiac Grand Prix (the "vehicle")
Date of Appeal:	November 18, 2010

ISSUES

As set out in the Applicant's request for hearing (Exhibit #1), 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 that the loss of the vehicle will result in exceptional hardship, all as provided in section(s) 50.2(3)(a) (b) (c) and (d) of the Act.

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.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant solemnly affirmed and testified that he operates, as a sole proprietor, a business of leasing used vehicles. The driver asked to lease the vehicle from him in April 2010. Prior to agreeing to lease the vehicle, the Applicant telephoned the local licensing office and was told verbally that the driver had a valid driver's licence. He also checked with a person at the driver's insurance company who told him that the driver was in good standing with the insurance company. This was confirmed in writing a few days later.

The Applicant then entered into a lease contract dated April 14, 2010 with the driver for the vehicle.

He has about a dozen used automobiles on his lot for lease and about 50 or 60 automobiles currently on lease. He only learned that the driver's licence was under

suspension when he received a copy of the impoundment order sometime after November 2, 2010. He subsequently has learned that the driver's licence was suspended on September 21, 2010 for impaired driving. The insurance company did not inform him of this, nor did it tell him that it had cancelled the driver as a customer. The driver is 3 months in arrears on his lease payments and all attempts to contact him have failed.

He said that he would like to get the vehicle back and is concerned as to the amount he is expected to pay for something that was not his fault. He is also concerned that if the vehicle is sold at auction and a shortfall results the impoundment company will pursue him for this amount of money.

He is going to sue the driver in Small Claims Court but is not optimistic that he will recover all that is owed to him.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 impaired driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until September 21, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) (b) (c) and (d).

Issue — 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?

The Shorter Oxford Dictionary, 3rd ed. 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 defined 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.

Issue — Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

On the first issue of due diligence, the evidence establishes that the Applicant made reasonable efforts, in April 2010, to confirm that the driver had a valid driver's licence. The Applicant did not enter into the lease of the vehicle on April 14, 2010 until he determined this fact.

The problem, of course, is that the driver irresponsibly drove the vehicle on September 21, 2010 while impaired. He continued to drive the vehicle while his licence was suspended until he was stopped by the police on November 2, 2010. The vehicle was then impounded.

The Tribunal accepts the evidence of the Applicant that he had no knowledge that the driver's licence had been suspended until after November 2, 2010 when he received notice of the impoundment of the vehicle. Moreover, the Respondent did not suggest anyway that the Applicant reasonably could have discovered this fact.

The Tribunal finds that the Applicant has satisfied the onus on him that he took all reasonable steps to determine that the driver's licence was not under suspension in April 2010 and objectively had no way of knowing when the driver's licence was suspended.

In these circumstances, it would be unfair to burden the Applicant with paying the impoundment fees and the impoundment order will be set aside.

The Applicant has succeeded on the first issue. Accordingly, it is unnecessary for the Tribunal to consider the question of "exceptional hardship".

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant’s motor vehicle.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Presiding Member

RELEASED: December 14, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6347-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: December 10, 2010 *by teleconference*

REASONS FOR DECISION

A hearing was held on December 10, 2010, in Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant

Motor Vehicle: 1997 Buick Century (the "vehicle")
Date of Appeal: November 22, 2010

The Registrar submitted a set of original certified documents, which had previously been filed with the Tribunal. The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits with the consent of both parties.

ISSUE

As set out in the Applicant's Notice of Appeal (Exhibit #2), 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.

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

Evidence for the Applicant

The Applicant was affirmed before giving testimony.

The Applicant is a single father who resides in a rural community in eastern Ontario. He is also the suspended driver at the time the vehicle was impounded.

Approximately six months ago, the Applicant registered a sole proprietorship for automobile cleaning and detailing. This business is located about 16 kilometres from his home. The Applicant's 20-year old son, who lives with his mother, works with the Applicant. He resides about 12 kilometres from the business, but in the opposite direction of the Applicant.

The nature of the business involves the Applicant or an employee picking up a vehicle from a dealership, which requires cleaning and detailing. Once the services have been rendered, the vehicle is returned to the dealership. The services of the business are not limited to vehicle dealerships but also to the general public.

The Applicant testified that due to his driver's licence suspension, his son is the primary driver of the impounded vehicle.

On the morning that the vehicle was impounded, the Applicant's son "had to go somewhere". The Applicant had an emergency and knowing it would be a "mistake, took a chance" and drove the vehicle, which has now been impounded.

The Applicant advised the Tribunal that while he was on his way to a dealership location, he stopped at a coffee shop wherein the arresting officer pulled in after the Applicant. The Applicant was arrested and charged with driving while disqualified.

Evidence for the Registrar

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit #3):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 (the "*Criminal Code*") outlined in point 4 below.

3. Copy of the Order by the Registrar 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 Driving with More than 80 Mgs of Alcohol in Blood under the *Criminal Code* pursuant to which the driver's licence of the driver was then under suspension until December 3, 2010.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship [subsection 50.2(3)(d)].

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 22 of Regulation 574, R.R.O. 1990, provides the criteria to be considered and those not to be considered in determining the appeal under this section.

First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the ground of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the ground of "exceptional hardship" under subsection 50.2 (3)(d). Section 22 of Regulation 574 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if, in fact, "exceptional hardship" will result from the impoundment.

The Applicant in this case has argued that the impoundment will result in hardship as described in subsection 22(2). In order for his appeal to be considered under subsection 22(2), the Applicant must have demonstrated that all of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Applicant was convicted of a *Criminal Code* offence and was suspended until December 3, 2010. The Applicant advised the Tribunal that he is fully aware of his licence suspension. As aforementioned, the primary driver of the vehicle is the Applicant's son. Before the vehicle was impounded, the Applicant's son would pick up and drop off the Applicant each day to and from work. Since the vehicle's impoundment, they have each taken a taxi to and from work each day, at the Applicant's expense, at a cost of approximately $50 per day.

Although the Applicant's son lives close to town and public transit is accessible to him, he chooses not to utilize its service. The Applicant's son's mother does not have a driver's licence and does not drive. The Applicant cannot rent a vehicle for his son since his son is under the age of 25. Since the Applicant does not have public transit available to him, he occasionally pays his business neighbour a nominal amount to be driven home.

There is a 32 year old second vehicle registered in the Applicant's name. As a condition of his residential lease, all vehicles parked on the property must have valid licence plate stickers. This second vehicle is not only in pieces, its floor boards have deteriorated and the interior has been removed from the vehicle. It has not been roadworthy since July 2009.

By his own admission, the Applicant is aware that this is a "quieter time of the year" and business has declined. He is currently working on two to three vehicles per week and is losing approximately $1,000 per week. Since there are alternatives to the impounded vehicle, the Tribunal cannot consider the Applicant's financial difficulties. The business is still operating after 30 days of the vehicle being impounded. The financial difficulties are not solely due to the vehicle's impoundment but due to the declining business climate, which pre-existed the loss of the vehicle.

The Applicant is in good health and has not had or missed any medical appointments. Neither he nor his son has missed any days of work. In the event of an emergency 911 services are accessible by the Applicant.

The Applicant's licence is under suspension due to a conviction of an offence under the *Criminal Code*. The Applicant was the driver of the impounded vehicle, and by his own admission, he wrongfully had care and control of the vehicle knowing that he was a disqualified driver. Therefore, as a disqualified driver he should not be driving under any circumstances. The return of a vehicle to a suspended driver would jeopardize the safety of everyone. The Tribunal must abide by and uphold the law.

Accordingly, after considering the criteria set out in subsections 22(3) and (4) of the Regulation, the Tribunal finds that the Applicant has not established exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

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Nives Montano, Member

RELEASED: December 20, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6351-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: December 13, 2010 Toronto

REASONS FOR DECISION

A hearing was held on December 13, 2010, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	1998, CHEV MAL (the "vehicle")
Date of Appeal:	November 22, 2010

As for the due diligence grounds for appeal it was agreed that it would be withdrawn, as the Applicant admitted that she did not verify whether the suspended driver had a valid driver's licence.

All documents were entered into evidence as exhibits with the consent of both parties.

ISSUE

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, as set out in the request for hearing (Exhibit # 2).

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal was entered as Exhibit #2. In a typewritten note the Applicant explains the reasons that the suspended driver was driving her vehicle. Being a career oriented woman, the Applicant states that she needs the vehicle in order to serve the two restaurants for whom she works, as well as to pick up her siblings from school.

During the hearing, the Applicant reiterated the explanation given in her notice of appeal. The Applicant testified that she was intoxicated and allowed a friend to drive the vehicle. The Applicant thought she was doing the right thing and feels that she has been unjustly saddled with a huge expense.

In cross-examination, the Applicant confirmed she has been getting to work by walking and by getting rides. According to the Applicant the car is not just necessary for her to get to and from work, but most importantly to ran errands for the restaurants, such as delivery catering orders and picking up supplies at the LCBO. In the last three weeks the Applicant has been driving the owners' car. The Applicant is paid for using her own vehicle and considers it a "hassle" to drive the owners' car.

According to the Applicant she has not been able to pick up her siblings since her vehicle was impounded.

With respect to renting a car, the Applicant felt it would not be worth her while to do so.

The Applicant called a friend as a witness. The witness testified that the Applicant was not aware of her friend's situation. The witness also testified that the Applicant is a responsible person who has learned from this experience.

In cross-examination the witness affirmed that it would not be feasible to rent a car as the delivery times are specific morning or evening events. For the last three weeks an extra person had to be brought in.

Evidence for the Registrar

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 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 Fail to Provide Breath Sample or Blood Sample under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until December 17, 2010.

The Registrar called no evidence.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d)).

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and

- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

In her summary statement, the Applicant stated she had absolutely no idea about her friend's situation, but now that she is suffering she has learned her lesson.

The Registrar's Agent noted that the Applicant appealed on exceptional hardship. The legislation requires consideration of whether there is an alternative vehicle available. Evidence from the Applicant and the owner of the business, confirms that the Applicant has been able to use one of their vehicles. The Applicant has been able to get around either with the owner's car or the help of her friends.

As for expenses, she has not lost job hours or income, and impoundment fees cannot be considered. The Applicant is able to sue the suspended driver for costs.

The Registrar's Agent pointed out that there are no health and safety issues.

In rebuttal, the Applicant emphasized that the fact she has to be dependent on her friends constitutes exceptional hardship.

The onus is on the Applicant to establish exceptional hardship, as grounds of appeal, as provided in section 50.2(3)(c) and (d) of the Act, respectively.

With respect to exceptional hardship, as per section 50.2(3)(d) of the Act, the Tribunal reviewed the factors required to meet the onus for consideration of financial loss. In assessing financial loss, the Tribunal is restricted by section 22(2) of the Regulation.

The constraint imposed by section 22(2) is lifted by section 22(3), which states that the Tribunal may consider the criteria set out in section 22(2), if the owner demonstrates that no alternative to the impounded motor vehicle is available.

There are, albeit inconvenient, alternate modes of transportation available to the Applicant. Therefore, the criterion for consideration under section 22(3)(a) has not been met.

The Tribunal further reviewed section 22(3)(b), which allows the Tribunal to consider losses that are immediate, significant and lasting.

The Tribunal sympathizes with the Applicant but there is no documented income and expense statements regarding any actual financial losses, which might have been incurred by the Applicant, other than the impoundment fees.

As any losses that the Applicant may have sustained have not been proven to be significant or lasting, the Tribunal cannot find that there is exceptional hardship as defined under the Regulation.

The Regulation also provides that the Tribunal cannot consider economic loss unless the owner demonstrates that:

> (d) the impact of the loss,
>
> (i) will be upon a person other than the person whose driving while his or her driver's 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).

The Applicant was not the suspended driver, but after assessing the evidence presented, the Tribunal finds that although the Applicant has been inconvenienced by the loss of the vehicle, she has not established exceptional hardship, as defined in section 22 of the Regulation.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Antoine Aouad, M.D.,
Presiding Member

RELEASED: December 17, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6364-MVIA -EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: December 21, 24, 2010 Toronto

REASONS FOR DECISION

A hearing was held on December 21and 24, 2010, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	1990, Ford COF (the "vehicle")
Date of Appeal:	November 30, 2010

All documents were entered into evidence as exhibits with the consent of both parties.

The hearing commenced on December 21, as scheduled and was subsequently adjourned to December 24, 2010 at 9:30 AM.

ISSUE

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, as set out in the request for hearing (Exhibit # 2).

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 submitted an Offense Inquiry document indicating that a charge laid "14 11 10" was withdrawn.

During the hearing, on December 21, 2010, the Applicant testified that the impoundment of the truck has cost a great deal not only to her but also to the people normally transported by the vehicle. Further the alleged suspended driver at the time of impoundment "has been cleared of all charges", and the matter was dropped.

In cross-examination, the Applicant confirmed the identity of the suspended driver but asserted that the vehicle was being driven by another individual when stopped by the police.

The Applicant testified that she had court documents indicating that the individual was cleared by the court but the truck remains impounded.

At this point the Ministry requested an adjournment in order to review the documents.

At the hearing on December 21, 2010, the Applicant testified that the person named as being disqualified had in fact never been disqualified. The disqualified individual is someone with the same name who has a record.

The Applicant asserted that whether he is disqualified or not is irrelevant, the point is that she needs her vehicle in order to continue working as she and the others are losing money.

In cross-examination the Applicant confirmed that she runs her daughter's roofing business which works year round. The Applicant's daughter does not drive as she is pregnant. The workers are not able to drive themselves. Both the Applicant and her husband have cars, but neither the ladder nor the tools can go in the car. Further the Applicant's husband needs his vehicle to get to work.

According to the Applicant, neither herself nor her daughter can afford to rent a vehicle. The Applicant admitted that she gets around. She was not able to confirm the number of missed work days, explaining instead that she usually goes around getting work. When pressed, the Applicant admitted that she usually solicits works via the telephone but has not done so because of the loss of the vehicle. Without the truck there is no point in lining up jobs as she cannot get to the job sites.

Under further questioning the Applicant confirmed that she had no jobs lined up for November 14, 2010.

The Applicant has not missed any medical appointments since the vehicle was impounded, and 911service is available in the area.

Evidence for the Registrar

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 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 driving while disqualified or prohibited under

the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 20, 2010.

The Registrar called no evidence.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

In closing the Applicant affirmed she needs her vehicle and that she does not have the money to pay the fees.

The Respondent's Agent quoted the section applicable for the determination of hardship, and maintained that the Applicant does not meet that criterion.

According to the Respondent's Agent the Applicant does have other vehicles which can be used and is getting around.

There are no health or safety issues as there is 911 service in the area.

Regarding financial loss, the Respondent's Agent pointed out that there were no jobs lined up on November 14. Further the Applicant has not provided an amount which can be verified.

In rebuttal, the Applicant reiterated that she cannot use the cars; that it makes no sense to line up jobs if she cannot get the job done; and that it does not matter whether or not the suspended driver was driving the truck.

Although the Applicant alleged both mistaken identity and the fact that the suspended driver was not driving the truck at the time of impoundment, as she has not appealed under mistaken identity, the Tribunal has no jurisdiction to deal with these matters.

The onus is on the Applicant to establish exceptional hardship, as grounds of appeal, as provided in section 50.2(3) (d) of the Act.

In assessing financial loss, the Tribunal is restricted by section 22(2) of Regulation 574 R.R.O. 1990, which provides:

> 22(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.

The constraint imposed on the Tribunal by section 22(2) 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 impounded motor vehicle is available;

At issue is whether the Applicant has alternative modes of transportation.

Evidence before this Tribunal indicates that other means of transportation are available to the Applicant. Therefore, the criterion for consideration under section 22(3)(a) is not met.

The Tribunal further reviewed section 22(3)(b) which allows the Tribunal to consider losses provided that:

> (b) the loss will be immediate, significant and lasting;

The Applicant has not provided documented proof of loos of income. According to the evidence there were no jobs lined up on November the 14th. It seems that the Applicant opted not to solicit work on the grounds that she could not get to the job; nonetheless there is no reason that jobs could not be scheduled after the termination of the impoundment.

As any losses the Applicant may have sustained have not been proven to be significant or lasting, the Tribunal cannot find that there is exceptional hardship as defined under the above-noted Regulation.

Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

(d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's 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).

The Applicant was not the driver of the vehicle at the time of impoundment. Although the Tribunal sympathizes with the Applicant, given that there is no evidence of any losses arising from the impoundment, that are sustained, immediate, significant and lasting, the Tribunal cannot find that there is exceptional hardship as defined under the Regulation.

After assessing the evidence presented, the Tribunal finds that although the Applicant may have been inconvenienced by the loss of the vehicle, she has not established exceptional hardship, as defined in 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 Act, 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

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Antoine Aouad, M.D., Presiding Member

RELEASED: December 30, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6366-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: D. GREGORY FLUDE, VICE-CHAIR
Presiding member

APPEARANCES: APPLICANT, unrepresented

RUSSEL McKNIGHT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: December 20, 2010 By Teleconference

REASONS FOR DECISION

A hearing was held on December 20, 2010, by teleconference] Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

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:	2003 Pontiac GFS (the "vehicle")
Date of Appeal:	December 1, 2010

There were no preliminary matters in dispute between the parties so the hearing proceeded.

ISSUE

The Applicant 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, as set out in the request for hearing (Exhibit 1).

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 of the Applicant. The Applicant admitted that he was the owner of the vehicle. He also admitted that on the day the vehicle was impounded, November 16, 2010, he was the driver and that his licence was under suspension for the offence of driving while impaired. In the face of these admissions, the Registrar elected to call no evidence and the Tribunal proceeded to consider the Applicant's evidence of exceptional hardship.

Evidence for the Applicant

The Applicant testified that he is currently unemployed and receiving assistance from Ontario Works. He lives in a large urban area, his monthly income is approximately $900.00 per month. He is a single parent raising a young son. Around the time the vehicle was impounded, the Applicant's son required dental work that was not covered by Ontario Works costing $990.00. The Applicant faced the choice of postponing the surgery and using the funds to recover his car or proceeding with the surgery. He chose the surgery and the procedure was performed in early December. As a result he is unable to afford the impound fees.

As stated above, the Applicant lives in a large urban area. Bus service and taxi service is available to him as is "911" emergency service. In addition, he has recently moved in with his parents. His parents have a car and can provide transportation from time to time, if necessary. In fact, it was one of his parents that drove his son for the dental procedure in a nearby town. The primary beneficiary of the use of the car is the Applicant's son. On the morning the Applicant was stopped by the police he was driving his son to school. Since the impoundment, the Applicant's son has been getting a ride to school but he can walk in good weather.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

It is clear from a review of the facts that the order to impound the vehicle was correctly made. The Applicant was under a *Criminal Code* suspension for driving while impaired when he was stopped. It is also clear that the cost of the impoundment will create a severe economic impact on the Applicant given his currently reduced circumstances. Notwithstanding the economic impact, the Applicant's appeal must fail. There is a range of alternative means of transportation available to the Applicant and his son. Firstly, transportation is available from the Applicant's parents. Secondly, living as he does in a large urban area, public transportation and taxis are widely available. Finally, in the event of a medical emergency, emergency medical services are available by dialing 911. Having made this determination, it is unnecessary for the Tribunal to consider any of the other factors set out in section 22 of Regulation 574.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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D. Gregory Flude, Vice Chair

RELEASED: December 22, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1641602 ONTARIO LTD. DBA DOLLAR RENT A CAR-DUDI-Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: D. GREGORY FLUDE, VICE-CHAIR
Presiding member

APPEARANCES: BIRHAN DESTA, Agent, representing the Applicant

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: December 20, 2010 Toronto

REASONS FOR DECISION

A hearing was held on December 20, 2010, in person at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

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:	1641602 Ontario Ltd. dba Dollar Rent a Car (the "Applicant")
Motor Vehicle:	2010 Toyota Corolla (the "vehicle")
Date of Appeal:	December 2, 2010

There were no preliminary matters in dispute between the parties. The hearing proceeded.

ISSUE

As set out in the request for hearing (Exhibit 1), the owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS

Evidence for the Applicant

A summary of Mr. Desta's evidence on behalf of the Applicant follows.

The Applicant is in the business of leasing cars. The standard lease is for two weeks and is renewable by the lessee on inspection of the vehicle by the Applicant to determine that no damage has occurred. On each initial lease, the Applicant asks for a driver's licence but not at the renewal. The Applicant has an electronic reader in its office that can determine if a licence is genuine or fake. The reader does not provide information about suspensions of drivers' licences, simply whether they are fakes or not.

On August 6, 2010, the Applicant leased the vehicle. There were to be two drivers. The Applicant ran the licences through the reader and determined that both licences were genuine. Unbeknownst to the Applicant, the second driver had had her licence suspended for driving over the legal limit two days earlier. The first time the Applicant became aware of the suspension was when the vehicle was impounded.

In cross-examination Mr. Desta was asked if he was aware that MTO had a program permitting interested persons to check for licence suspensions, either on the Internet or by telephone. Mr. Desta stated that he was not. He further stated that he was unaware of any communication from MTO advising of the program, either to his branch or to head office.

He did describe a system of information exchange between branches and head office where branches are advised of individuals who are using false documents to try to rent cars. He was of the view that if information was sent to head office it would have been forwarded to him.

Evidence for the Registrar

The documents tendered by the Registrar under seal and admitted into the record were as follows:

1. 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;

2. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle is registered in the name of the Applicant as registered plate owner,

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 driving with a blood alcohol in excess of .08 mgs under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until August 4, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the mobot vehicle at the time in respect of which the order was made was not then under suspension (subsection 50.2(3)(c)).

ISSUE

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?

The Shorter Oxford Dictionary, 3rd ed. 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.

The owner bears the onus of proof on the balance of probabilities to prove that due diligence was exercised.

APPLICATION OF LAW TO FACTS

In submissions, the Agent for the MTO acknowledged that there is a lag between the courts registering a conviction and that information finding its way onto MTO records. Had this matter arisen shortly after the original lease date, during the currency of the first or second lease period, it is highly likely that no search available to the Applicant would have

disclosed the fact that the driver had a Criminal Code conviction and resulting suspension. That is not the case here. The Vehicle was impounded on November 25, 2010, approximately three and a half months after it was initially leased. The evidence of Mr. Desta was that there is a visual damage inspection of the vehicle every two weeks but after the first rental there is no further licence check. The Tribunal is of the opinion that this course of action ignores the realities of the modern world where a driver's status may change rapidly. Having driving privileges in August is no guarantee that those privileges still exist in November. At the very least, the Applicant should have asked to see each permitted drivers' licence at each renewal. It is a fact that, after the first rental, the Applicant did not exercise any diligence on each renewal, let alone due diligence.

The Tribunal notes the MTO program for clarifying the status of licences before permitting drivers to take vehicles. This program came as a surprise to Mr. Desta. MTO provided little evidence regarding the program. The Tribunal does not know its date of inception or the extent to which it was advertised. Clearly, now that the Applicant is aware of the program, any failure to use it in the future would strongly negate a defence of due diligence, but the Tribunal cannot conclude that a failure to use the program in this instance constitutes lack of due diligence.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

D. Gregory Flude, Vice Chair

RELEASED: December 23, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6385-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: D. GREGORY FLUDE, VICE-CHAIR
Presiding member

APPEARANCES: APPLICANT, unrepresented

RUSSEL McKNIGHT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: December 30, 2010 By Teleconference

REASONS FOR DECISION

A hearing was held on December 30, 2010, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1994 Buick RGS (the "vehicle")
Date of Appeal:	December 13, 2010

There were no preliminary matters in dispute between the parties so the hearing proceeded.

ISSUE

The Applicant 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, as set out in the request for hearing (Exhibit 1).

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 evidence on behalf of the Registrar and from the Applicant.

Evidence for the Registrar

Mr. McKnight testified on behalf of the Registrar and introduced a number of certified documents that were entered as exhibits without objection on the part of the Applicant. The exhibits, numbered 3 through 6 establish that the Applicant is the owner of the impounded vehicle (Ex. 5); that on the day in question the vehicle was being driven by the owner's brother (Ex.3); and that at the time the vehicle was stopped by the police the Applicant's brother was under a licence suspension for the *Criminal Code* conviction of driving with a blood alcohol level in excess of .80 (Ex. 4). Based on this information, the Registrar issued an Order to Impound the vehicle (Ex. 6). The Registrar provided two further vehicle records indicating that the Applicant had a second car registered in her name and that the Applicant's brother had a vehicle registered in his name (Ex. 7 & 8). In cross-examination, Mr. McKnight stated that the purpose for which exhibits 7 and 8 were produced was to show evidence of alternative transportation available to the Applicant.

Evidence for the Applicant

The Applicant testified that she is currently unemployed and has been so since October, 2010. She lives in a large urban area and has bus and taxi service available to her. She suffers from claustrophobia, back pain, and other pain resulting from injuries sustained in a multi-vehicle accident a number of years ago. Accordingly she cannot use the bus. She did admit that, if absolutely necessary, she would pay for a taxi despite her reduced income due to her unemployment.

The Applicant is looking for work. It was her evidence that she needs the vehicle to attend interviews. She cannot use the second vehicle because her husband needs that vehicle to get to and from work. He works 4:00 p.m. to midnight and must leave the house by 3:15 p.m. Because it is not possible to dictate to potential employers when interviews will occur, she needs the vehicle to attend interviews at a time when the second car is not available to her. So far the Applicant has not missed an interview since the impoundment and has none scheduled until after the return date of the vehicle.

The Applicant's mother is currently undergoing chemotherapy and radiation for cancer. The Applicant sees her mother every two days and talks to her on the telephone every day. She state that her mother has "chemo brain," a condition which the Applicant described as making her mother very demanding. The Applicant's mother may call up and demand that the Applicant come over and make dinner or come and keep her company. The Applicant testified that she needs the vehicle to be able to respond to her mother's needs. She cannot use the second car because her husband uses it to go to work. If she felt the situation was serious enough, the Applicant would take a taxi to see her mother.

When questioned about the two other vehicles, the Applicant admitted that she has use of the second family car up until about 3:00 p.m. each day. Her mother has a car but the Applicant does not have access to it because her mother will not let her drive it. She also has no access to her brother's car. She stated that her brother's car is in such a state of disrepair that it cannot be driven and has little or no value. It is currently out of province with a third party who may be able to affect some repairs.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.
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APPLICATION OF LAW TO FACTS

It is clear from a review of the facts that the order to impound the vehicle was correctly made. The Applicant's brother was under a *Criminal Code* suspension for driving above the legal limit when he was stopped. The Registrar submits that the Applicant has failed to establish that there is no alternative to the impounded vehicle. The Applicant submits that there is no alternative transportation available because her claustrophobia and pain rule out taking the bus and taxis are too expensive. The Tribunal accepts the Registrar's position.

Living as she does in a large urban area, it is clear that there is a range of alternative means of transportation available to the Applicant. Firstly, transportation is available from the Applicant's second car. Secondly, living as she does in a large urban area, public transportation and taxis are widely available. Finally, the Registrar invited the Tribunal to take adjudicative notice of the fact that in the event of a medical emergency, emergency medical services are available by dialing 911. The Tribunal does so. The Applicant conceded that these services were available to her and her mother in her submissions.

The major reasons cited by the Applicant for use of the car were to attend interviews and visit her mother. The Tribunal is not convinced that interview appointments cannot be scheduled within the period during which she has a car available to her each day. No argument was advanced that it was impossible to make arrangements with her husband to take him to work and pick him up after his shift to extend the availability of access to the family car as necessary during the period of impoundment. The Tribunal concludes that the impoundment creates inconvenience for the Applicant but such inconvenience falls far short of exceptional hardship.

Having made this determination, it is unnecessary for the Tribunal to consider any of the other factors set out in section 22 of Regulation 574.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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D. Gregory Flude, Vice-Chair

RELEASED: December 30, 2010

This decision may also be available on Quicklaw.

LAT <http://www.ontario.ca/lat/Pages/default.aspx> > English
<http://www.ontario.ca/lat/english/Pages/default.aspx> > Decisions 10-11 MVIA January-March

Decisions under Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

Fiscal Year 2010 - 2011, January - March

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

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<http://www.ontario.ca/lat/english/Documents/Decisions/2009/hta/mvia/jan/5849.mvia.consent.order.pdf>

- 6328-MVIA-STLN-EXHP-Stolen & Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jan/6328-mvia-stln-exhp.pdf>
- 6386-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jan/6386.mvia.exhp.reasons.pdf>
- 6393-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jan/6393-mvia-exhp.pdf>
- 6396-MVIA-STLN-EXHP-Stolen-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jan/6396%20-%20mvia%20stln%20exhp.pdf>
- 6398-MVIA-STLN-Stolen <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jan/6398.mvia.stln.reasons.pdf>
- 6401-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/jan/6401%20MVIA.pdf>
- 6404-MVIA-DUDI-EXHP-Due Diligence & Exceptional Hardship <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6411-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6419-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6423-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6427-MVIA-STLN-Stolen <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6430-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6431-MVIA-DUDI-EXHP-Due Diligence & Exceptional Hardship Quinte Drywall <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6452-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>
- 6456-MVIA-EXHP-Exceptional Hardship <http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>

- 6460-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>*
- 6462-MVIA-DUDI-EXHP-Due Diligence & Exceptional Hardship *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>*
- 6467-MVIA-STLN-Stolen-Exceptional Hardship *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>*
- 6469-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>*
- 6491-MVIA-EXHP-Consent Order *<http://www.ontario.ca/lat/english/Pages/Decisions-10-11-MVIA-January-March.aspx?ControlMode=Edit&DisplayMode=Design>*
- 6471-MVIA-NUSP-EXHP-Not Under Suspension & Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6471.mvia.nusp.exhp.pdf>*
- 6480-MVIA-DUDI-EXHP-Due Diligence & Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6480-MVIA.pdf>*
- 6482-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6482-MVIA-EXHP.pdf>*
- 6483-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6483.mvia.exhp.pdf>*
- 6485-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6485-MVIA.pdf>*
- 6486-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6486.MVIA.EXHP.DUDI.pdf>*
- 6487-MVIA-NUSP-DUDI-EXHP-Not Under Suspension, Due Diligence & Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6487.mvia.nusp.dudi.exhp.pdf>*
- 6492-MVIA-DUDI-EXHP-Due Diligence-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6492.MVIA.dudi.exhp.pdf>*
- 6496-MVIA-EXHP-STLN-Exceptional Hardship and Stolen *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6496.MVIA.EXHP.STLN.pdf>*
- 6500-MVIA-DUDI-EXHP-Due Diligence & Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6500.MVIA.DUDI.EXHP.pdf>*
- 6506-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6506.mvia.exhp.reasons.pdf>*
- 6516-MVIA-DUDI-EXHP-Due Diligence and Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6516.mvia.dudi.exhp.pdf>*
- 6519-MVIA-EXHP-Exceptional Hardship *<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6519.mvia.exhp.pdf>*

- 6520-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6520.m
  via.exhp.decision.pdf>
- 6521-MVIA-STLN-EXHP-Stolen & Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6521.M
  VIA.STLN.EXHP.pdf>
- 6529-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6529.m
  via.exhp.pdf>
- 6533-MVIA-DUDI-Due Diligence
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6533.m
  via_due_diligence.pdf>
- 6538-MVIA-EXHP-Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6538.M
  VIA.EXHP.pdf>
- 6542-MVIA-DUDI-NUSP-EXHP- Due Diligence, Not Under Suspension, & Exceptional Hardship
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/mvia/mar/6542.M
  VIA.DUDI.NUSP.EXHP.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6328-STLN-EXHP-Stolen & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: December 31, 2010 Toronto

REASONS FOR DECISION

A hearing was held on December 31, 2010, at Toronto, Ontario, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	1989 CHEV G/V (the "vehicle")
Date of Appeal:	November 9, 2010

This matter came before this Tribunal on December 31, 2010 and proceeded as a teleconference hearing.

The Applicant was granted an extension to file the appeal by order of the Tribunal released December 02, 2010.

All documents were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties, and the hearing proceeded.

ISSUES

As set out in the Applicant's request for hearing (Exhibit #1), the owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and that the loss of the vehicle will result in exceptional hardship, all as provided in section(s) 50.2(3)(a) and (d) of the Act.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal was entered as Exhibit # 1. In a letter to the Tribunal the Applicant writes that the vehicle was

taken from storage without her permission; therefore it is the Applicant's position that the vehicle was stolen.

During the hearing the Applicant stated that although she is the victim of crime she feels like a criminal. She proceeded to request that even if the Tribunal does not order the return of the van, she would like an exemption from paying the impoundment fees that are now over $3,000.00, which she cannot afford.

The Applicant testified as to the circumstances that led to the impoundment, emphasizing the fact that she laid charges but has no idea what the police had done.

In cross-examination, the Applicant explained that the van was in storage because the insurance company required an appraisal.

According to the Applicant the suspended driver is an employee of her son, who had the keys and permission to sleep in the van.

The Applicant testified that she contacted the Whitby OPP, because she had no idea she had to contact the Toronto police. She reported the vehicle stolen after she found out that the vehicle was impounded, because she originally believed the police had laid charges.

In response the Registrar's Agent comments regarding the fact the no charges appear to have been laid, the Applicant was adamant that she had pressed charges and that her son has the paperwork she was given at the time which consists of the officer's name and badge number.

According to the Applicant, the officer at 42 Division told her that he would contact the OPP officer in Whitby to advise him that charges were being laid.

The Applicant failed to pick up the vehicle after 45 days as she thought it was 90 days. When she realized it was 45 days, she had no money to pick up the van and laid charges.

Since the impoundment, the Applicant had borrowed her daughter's car and been able to get back and forth to work.

With respect to health and safety, the Applicant confirmed she is in good health, has not missed medical appointments, and has 911 service in the area.

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 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 for life.

The Registrar 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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The meaning of "stolen" is not provided in *The Highway Traffic Act.*

The Shorter Oxford English Dictionary, 3rd ed., provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* of Canada (the "Code") R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

"steal" means to commit theft…

Section 332(1) of the Code states:

322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
(a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
(b) to pledge or deposit it as security;
(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle permanently. The Court held that the term "stolen" could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> "In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily."

Issue — Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,

- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Applicant feels that she should not have to pay the fees as she had nothing to do with the impoundment as the vehicle was stolen.

In her summary statement, the Registrar's Agent maintains that the vehicle was properly impounded, as the suspended driver is barred from driving for life.

The Registrar's Agent noted that the Applicant has been able to use another vehicle, and that there are no health and safety concerns. The Applicant had been getting to and from work and had lost no wages.

With respect to the vehicle being stolen, the suspended driver had access to the vehicle and was allowed to sleep in the vehicle. The police have confirmed that no charges have been laid and the Registrar is satisfied that the vehicle was not stolen.

In rebuttal the Applicant maintained that she is willing to lose the van, but does not understand why she has to pay for the 45 days fees as she believes she laid charges against the driver.

With respect to the Applicant's appeal under section 50.2(3)(a) that the vehicle was stolen., the gist of the Applicant's testimony is that the vehicle was taken without permission, therefore stolen. Nonetheless the Applicant did not appear to have laid charges until after she realized the cost of the impoundment. Further, although the Tribunal believes the Applicant attended at the various police stations, there is no evidence that charges were in fact laid.

After assessing the evidence presented with respect to section 50.2(3)(a), the Tribunal finds that the Applicant's vehicle had not been stolen at the time of impoundment.

The onus is on the Applicant to establish exceptional hardship, as grounds of appeal, as provided in section 50.2(3) (d) of the Act.

In assessing financial loss, the Tribunal is restricted by section 22(2) of Regulation 574 R.R.O. 1990, which provides:

> 22. (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.

The constraint imposed on the Tribunal by section 22(2) 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 impounded motor vehicle is available;

At issue is whether the Applicant has alternate modes of transportation.

Evidence before this Tribunal is that the Applicant has been able to borrow her daughter's car. Therefore, the criterion for consideration under section 22(3)(a) is not met.

The Tribunal further reviewed section 22(3)(b) which allows the Tribunal to consider losses that are:

> (b) …immediate, significant and lasting;

There is no evidence of losses sustained by the Applicant. The Tribunal cannot find that there is exceptional hardship as defined under the above-noted Regulation.

Subsection 22(3)(d)(i)(ii), of Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

> d) the impact of the loss,
>
> i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...
>
> ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant was not the driver of the vehicle at the time of impoundment. Although she is the affected party, given that there is no evidence that any losses sustained are long and lasting, the Tribunal cannot find that there is exceptional hardship as defined under the Regulation.

After assessing the evidence presented, the Tribunal finds that although the Applicant may have been inconvenienced by the loss of the vehicle, she has not established exceptional hardship, as defined in 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 Act, 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

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ANTOINE AOUAD, M.D.,
Presiding member

RELEASED: January 5, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6386-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: December 31, 2010 *by teleconference*

REASONS FOR DECISION

A hearing was held on December 31, 2010, at Toronto, Ontario, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "HTA" or the "Act").

The Tribunal released its Decision on January 5, 2011, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the Order of the Registrar of Motor Vehicles for the following reasons.

BACKGROUND

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	1999 GMC SIERRA (the "vehicle")
Date of Appeal:	December 13, 2010

All documents were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties, and the hearing proceeded.

During the hearing the Applicant withdrew the appeal on the basis the vehicle had been stolen.

The hearing proceeded.

ISSUE

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, as set out in the request for hearing (Exhibit 1).

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal was entered as Exhibit # 1. In a handwritten note the Applicant pleaded for the return of the motor vehicle as she and her son live in the country and the vehicle is the only source of transportation for both. The truck is required to transport logs which are used for the heating of the Applicant's home. The Applicant went on to explain that neither her nor her son are working and, at the moment, have not received either employment insurance or welfare.

During the hearing, the Applicant explained the circumstances that led to her son being behind the wheel.

Regarding the hardship the Applicant reiterated the statements in her letter to the Tribunal emphasizing both hers and her son's mental state as well as their financial situation.

According to the Applicant, she was a self-employed artist for thirty three years until she was involved in a car accident and had her income "reduced to nothing". After being on welfare for a while, the Applicant got a job in the spring of 2010; her son was actually working at the time as well. Then, the house began to fall apart, the plumbing and the furnace broke, the ceiling fell down and the Applicant ended up with pneumonia twice. As far as the plumbing is concerned, the Applicant still owes the plumber nine hundred dollars.

The Applicant testified that she was let go from her job without having worked enough weeks to collect employment insurance. She is in the process of applying for welfare again but was told that she could not apply until she was formally advised on her ineligibility for employment insurance.

The Applicant attested to the fact that the vehicle is needed to transport the wood cut down by her son required for heating. Further, the Applicant also affirmed that there are other vehicles registered to her, but they are only used for parts.

In cross-examination, the Applicant testified that her friends have been very generous for Christmas and have provided and delivered basic necessities such as food and wood.

The Applicant explained that she received a letter of employment insurance denial just before Christmas and has not had an opportunity to contact welfare. As for her son, he is also still waiting to receive benefits. Basically the family has been living on handouts from friends.

According to the Applicant the family is living day to day and has not prepared for picking up the vehicle.

The Applicant testified that although she has not been clinically diagnosed, she slipped into a depression due to life circumstances and "was not able to create". Thus, her livelihood as an artist was affected. Contributing to her loss of income was also the fact that due to the economic depression, her art lost marketability. The Applicant hopes that by staying active she will be able to lift herself out of the depression and get back to being an artist. The Applicant's mother has helped but cannot do much. The Applicant's son has also been able to borrow money to help them through.

The Applicant has missed a medical appointment to have stitches removed, and has not been to rebook, as her friends work during the day and are not available to take her.

911 service is available in the area.

Evidence for the Registrar

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 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 Driving with More than 80 mgs Alcohol in Blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until August 17, 2011.

The Registrar called no evidence.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Applicant acknowledged that it was a mistake for her son to take the car, but he was emotionally distraught. The Applicant feels responsible for him being suspended.

The Respondent's Agent correctly pointed out that the Applicant's financial situation is pre-existing and not a result of the impoundment.

The Respondent's Agent argues that although the vehicles registered to the Applicant are in non-working order, the Applicant has had her needs met by her family and friends. As for the future, the Applicant is preparing to apply to welfare and has not proven that her loss is significant. The Respondent's Agent argues that there are no health or safety issues as there is 911 service in the area.

In rebuttal, the Applicant reiterated the remarks during testimony in chief, expounding on the fact that she has no idea where to get the money to pay for the impoundment.

The onus is on the Applicant to establish exceptional hardship, as grounds of appeal, as provided in section 50.2(3) (d) of the Act.

The Tribunal referred to section 22(1) of the Regulation which deals with the threat to the health and safety of any person ordinarily transported by the motor vehicle. It is the view of this Tribunal that this section is not meant to apply only to emergency services and whether 911 service is available in the area. The Tribunal notes the use of the vehicle and the season of the year.

The Tribunal found the Applicant forthcoming, honest and credible. During the hearing she alluded several times to her mental state, with respect to her situation, as well as related to her concerns for her son. It is generally recognized that emotional health affects physical health. The Tribunal notes the significant risk on all the facts of this case that additional stress put upon the Applicant would adversely affect her health. Undoubtedly, additional stress suffered by the Applicant due to the continued loss of her vehicle would not only hinder the Applicant's recovery, but also result in a more severe debilitation. Thus, the Tribunal finds the Applicant's unique situation falls within section 22(1) of the Regulation.

Having found that there is a threat to the health and safety of a person ordinarily transported by the vehicle, the Tribunal is no longer required to consider any of the other factors under section 22 of the Regulation.

After assessing the evidence presented, the Tribunal finds that the Applicant has established exceptional hardship, as defined in 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 Act, the Tribunal **sets aside** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

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Antoine Aouad, M.D.
Presiding Member

RELEASED: January 12, 2011

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6393-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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., Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: January 11, 2011 Toronto

REASONS FOR DECISION

A hearing was held on January 11, 2011, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result, the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2001 Infiniti QX4 (the "vehicle")
Date of Appeal: December 16, 2010

All documents were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties, and the hearing proceeded.

ISSUE

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, and as set out in the Notice of Appeal (Exhibit #2).

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal was entered as Exhibit #2. In a letter dated December 16, 2010, addressed to the Honourable Kathleen Wynne, Minister of Transportation, the Applicant details the circumstances under which the vehicle was impounded. The Applicant asserts that he is the victim of a crime, who is being deprived of his rights. He requests that the vehicle be released as it is an essential "tool" for the family.

During the hearing, the Applicant testified that he was notified by the police that he is the victim of a crime, and cannot understand why he and his family must be punished.

The Applicant attested to how the vehicle came to be impounded. He left the car with a mechanic who drove it, without consent, while impaired. The Applicant also testified that he cannot claim the loss through the insurance company.

In cross-examination, the Applicant confirmed that his wife is the primary user of the vehicle, and also stated that she had rented a car on two occasions for a few days. According to the Applicant, no one, other than the Applicant's wife, has missed any school or work since the impoundment. The children have been driven to school by an older brother, but one of the Applicant's sons, who attends university and works at a local mall, has encountered difficulties with having to take public transportation. The Applicant testified that his wife actually works for him, and under questioning, admitted that she is able to drive in to work with him, but it is inconvenient.

The Applicant confirmed that there are several vehicles available for family use, including a recently purchased vehicle.

Neither the Applicant nor his family have missed any medical appointments since the vehicle was impounded, and 911 services are available in the area.

Evidence for the Registrar

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 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 (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar 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 Driving with More than 80 Mgs of Alcohol in Blood under the *Criminal Code* pursuant to which the driver's licence of the driver is under suspension for life.

The Registrar 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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 22 of Regulation 574, R.R.O. 1990, provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and

safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

In his closing statement, the Applicant expressed his feelings regarding the fact that someone in a position of trust had abused their power and victimized the family. This incident has caused emotional and financial stress to the family.

The Registrar's Agent advised the Applicant that he has the right to recover his losses from the suspended driver.

The Registrar's Agent quoted the section applicable for the determination of hardship, and maintained that the Applicant does not meet that criterion.

According to the Registrar's Agent, the vehicle was properly impounded and the Applicant has other vehicles as well as public transportation available to him.

There are no health or safety issues as there are 911 services available in the area.

Regarding the financial loss, the Registrar's Agent argues that the loss is not lasting or significant as the Applicant's wife works for him.

In rebuttal, the Applicant stressed his view that the government is unfairly punishing the victim of a crime and making money on the impoundment fees.

It is unfortunate that the Applicant chose to appeal under section 50.2(3)(d) of the Act, exceptional hardship, rather than one of the other defences available to him under section 50.2 of the Act.

The onus is on the Applicant to establish exceptional hardship, as the ground of appeal, as provided in section 50.2(3)(d) of the Act.

In assessing financial loss, the Tribunal is restricted by section 22(2) of Regulation 574, R.R.O. 1990, which provides:

> 22 (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.

The constraint imposed on the Tribunal by section 22(2) 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 impounded motor vehicle is available;

At issue is whether the Applicant has alternative modes of transportation. The evidence before this Tribunal indicates that other means of transportation are available to the Applicant. Therefore, the criterion for consideration under section 22(3)(a) is not met.

The Tribunal further reviewed section 22(3)(b) which allows the Tribunal to consider losses provided that:

> (b) the loss will be immediate, significant and lasting;

The Applicant has suffered no loss of income. The Applicant's wife has missed time off work but will be able to make it up, as she works for the Applicant.

As any losses that the Applicant may have sustained have not been proven to be significant or lasting, the Tribunal cannot find that there is exceptional hardship as defined under the above-noted Regulation.

Regulation 574, R.R.O. 1990, provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

> (d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's 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).

The Applicant was not the driver of the vehicle at the time of the impoundment; rather, he is the affected party. Nonetheless, although the Tribunal sympathizes with the Applicant, given that there is no evidence of any losses arising from the impoundment, that are sustained, immediate, significant and lasting, and given that the Applicant has alternatives the Tribunal cannot find that there is exceptional hardship as defined under the Regulation.

After assessing the evidence presented, the Tribunal finds that although the Applicant may be inconvenienced by the loss of the vehicle, he has not established exceptional hardship, as defined in 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 Act, the Tribunal confirms the Order of the Registrar 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., Member

RELEASED: January 20, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6396-MVIA-STLN-EXHP-Stolen-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID B. CARYLL,
Presiding member

APPEARANCES: THE APPLICANT,
Represented by a family member of the owner of the Applicant

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: January 11, 2011 Toronto

DECISION

A hearing was held on January 11, 2011, at Toronto, Ontario, in the presence of the Agent for the Applicant, and Sonia De Santis, Representative for the Registrar, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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.

INTRODUCTION

This is an appeal under section 50.2 of the Act.

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 Honda, UEX (the “vehicle”)
Date of Appeal: December 17, 2010

The Applicant appeals on the basis: that the vehicle was stolen at the time of the impoundment order; and, that the loss of the vehicle will result in exceptional hardship, as provided in sections 50.2(3)(a)(d) of the Act.

This matter came before the Tribunal on January 11, 2011, and, as there were no preliminary matters, the hearing proceeded.

ISSUES

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis:

1. That the vehicle was stolen at the time of the impoundment order; or

2. That the impoundment order will result in exceptional hardship for the Applicant?

BACKGROUND FACTS

The following facts are not in dispute.

On the evening of Friday, December 4, 2010, a family member of the owner of the Applicant (the “Driver”) used the vehicle, driven by a friend, to attend a social function. The friend became intoxicated at the function, so the Driver took control of the vehicle for the drive home.

At 2:06 a.m., Saturday, December 5, 2010, the police stopped the vehicle and discovered that the Driver’s licence was under suspension for an offence under the *Criminal Code*. The police impounded the vehicle.

EVIDENCE CONCERNING THE GROUNDS FOR THE APPEAL

1. That the Vehicle was stolen

The Driver testified that it was normal to seek permission from the Agent or their father to use the vehicle. The understanding that a friend, with a valid licence, can drive. On this occasion the Driver took the vehicle without seeking permission. The friend drove the vehicle to the social function.

The Agent, also an employee of the Applicant, and the Driver both said that not seeking permission meant the vehicle was stolen. The Driver said that in taking the vehicle in this

way was not meant to deprive anyone of the vehicle. The Driver was never charged with theft of the vehicle.

On Sunday, December 6, 2010 the police contacted the father and told him the vehicle was impounded. The father did not report the vehicle stolen at this, or any other, time.

2. That the Impoundment Creates Exceptional Hardship

The Agent testified that the vehicle was owned by his father's automobile dealership and driven using one of its two dealer plates (the" plate"). The Agent said that the main concern is that not only did the police impound the vehicle but the plate as well. The plate is used to allow potential customers to test drive vehicles. The plates are also used as the family's personal plates.

The Agent said the loss of the plate is negatively impacting the business. It reduces the number of customers who can test drive a vehicle at one time. The Agent said the business did not have to close, or operate on reduced hours, because of the loss of the plate. It was also admitted that this was a slow time of the year for the business.

The Agent testified that the loss of the plate is causing personal hardship. There is inconvenience and additional cost the Agent must bear in going to a second job at night. Buses and taxis take too much time or are too expensive. The Agent further testified that their mother, who has her own car, is unable to help as she needs her car for work. The Agent subsequently testified that their mother missed a physiotherapy appointment when he borrowed her car.

The Driver is a student attending an out of town university. Without the impounded plate the Agent is unable to drive the Driver to attend classes. The Driver has to resort to the bus. The Driver has missed one quiz, and had trouble getting to class on time.

The Agent testified that the family was healthy, no one missed any essential medical appointments, and the family had access to 911 Emergency Health Services.

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.

O. Reg. 574, R.R.O. 1990, as amended by O. Reg. 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 subsections 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in the Act.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code (Canada)* R.S.C. 1985, c. C-46 provides guidance.

Section 1 of the *Code* states:

> “steal” means to commit theft…

Section 332(1) of the *Code* states:

> 332. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
>
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
> (b) to pledge or deposit it as security;
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
>
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
>
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
>
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of “stolen” only to an intention to take the vehicle permanently. The Court held that the term “stolen” could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> In our opinion a vehicle is ‘stolen’ in this context when it is taken without the owner’s consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in

exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

> **Exceptional:** Of the nature of or forming an exception; unusual.
>
> **Hardship:** 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

> (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

> (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of O. Reg. 574, R.R.O. 1990, as amended by O. Reg. 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 CONCERNING THE GROUNDS FOR THE APPEAL

1. That the Vehicle was Stolen

The Driver describes a family practice whereby it is normal to ask for permission to use the vehicle. On the occasion in question the Driver took the vehicle without seeking prior permission. The question: is it theft or did the Driver borrow the vehicle?

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that:

> … a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.

Under cross examination the Driver said he had no intent to deprive the Applicant of the vehicle.

There was no evidence offered to show that the Driver knew, or should have reasonably know, that the Driver was not to take the vehicle. The only testimony, which the Tribunal finds self serving, was the allegation that as the vehicle was taken without seeking prior permission, it was therefore stolen. There was no testimony to show how this act deprived the Applicant or the family of the use of the vehicle. This is further supported by the fact that the vehicle was not reported stolen at any time. If the father felt that the vehicle was stolen he had the perfect opportunity, when the police called, to deal with it.

The Tribunal finds as fact that the Driver's failure to notify the father may have been discourteous, but was not theft. The Tribunal finds on a balance of probability that the vehicle was borrowed and not stolen.

The Tribunal finds that the Applicant has not met the burden of proof to establish that the vehicle was stolen, and, therefore, the appeal on these grounds has failed.

2. That the Impoundment Creates Exceptional Hardship

To establish a case for exceptional hardship the Applicant must first establish, as required by the legislation, that there was:

> "… no alternative to the impounded motor vehicle is available."

The main thrust of the Applicant's argument has to do with the inconvenience caused to the Agent, Driver, and their father. The dealer plates also functioned as private plates. The Agent used a plate to go to work, as did the father to get to work and for other family uses, such as allowing the Driver to go out socially or be driven to university.

Both witnesses testified that: they have access to taxis, public transportation; to their mother's car, to the remaining plate that is not impounded, and to their father's employee assistance.

There was testimony that the family members were in good health, no urgent medical appointments missed, and the family had access to 911 Emergency Health Services.

Any threats to private or public health and safety may be considered only if there is no alternative to the impounded vehicle.

The Tribunal finds as a matter of fact that the persons affected by the impoundment have alternate sources of transportation.

The Tribunal cannot consider, in arriving at its decision, the fact that the loss of the car will cause the Applicant inconvenience, financial or economic loss as described under subsection 22 (2)(a) and (b) of the Regulation.

The Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation, namely, *"to demonstrate that no alternative to the impounded motor vehicle is available".*

Therefore, the appeal on the grounds of exceptional hardship has failed.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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David B. Caryll, Presiding Member

RELEASED: January 17, 2011

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6398-MVIA-STLN-Stolen

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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., Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: January 11, 2011 Toronto

DECISION RELEASED: January 12, 2011

REASONS FOR DECISION

A hearing was held on January 11, 2011, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

The Tribunal released its Decision on January 12, 2011, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2005 Chrysler 300 (the "vehicle")
Date of Appeal: December 17, 2010

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3)(a) of the Act.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties.

ISSUE

The Applicant's Notice of Appeal filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of the appeal states that the vehicle was taken without permission, by her son, while she was at work.

During the hearing, the Applicant reiterated the comments in her letter to the Tribunal. The Applicant testified that the family has been in a state of depression since the death of another son. The vehicle, which was taken without permission, is needed for the transportation of both the Applicant and her daughter. The loss of the vehicle is causing difficulties for the family.

Under cross-examination, the Applicant admitted that in October of last year her son took another car without permission and had an accident. The Applicant is aware that her son is a suspended driver and does not allow him to drive. Nonetheless, according to the Applicant, when her husband is away, her son does not obey her or his sister. The Applicant has bailed her son out of jail on previous occasions, but this time she has left him in jail in order for him to learn his lesson.

In response to the Registrar's Agent's question regarding the laying of charges against the suspended driver, the Applicant appeared confused as to the process. It appears the Applicant might have been under the impression that charges would be laid by a third party. When told that she would have to do it herself, she replied: "I am a mom", suggesting that she would not be laying charges against her son.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada (the "*Criminal Code*") outlined in point 4 below;

3. Copy of the Order by the Registrar to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail or Refuse to Provide Breath or Blood Sample under the *Criminal Code* pursuant to which the driver's licence of the driver is suspended for life.

The Registrar 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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(a).

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The meaning of "stolen" is not provided in the Act.

The Shorter Oxford English Dictionary, 3rd ed., provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* provides guidance.

Section 1 of the *Criminal Code* states:

"steal" means to commit theft…

Section 322(1) of the *Criminal Code* states:

> 322.(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
>
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> (b) to pledge or deposit it as security;
>
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
>
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
>
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
>
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
>
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle permanently. The Court held that the term "stolen" could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> In our opinion a vehicle is "stolen" in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.

The owner bears the onus of proof on the balance of probabilities that the vehicle was stolen at the time of impoundment.

APPLICATION OF LAW TO FACTS

The Applicant had no closing statement.

The Registrar's Agent pointed out that the vehicle had been taken in the past and is likely to be taken in the future, as the Applicant has not taken precautionary measures, such as putting the keys in a place the son cannot get them.

The Registrar's Agent maintained that it also appears that the Applicant believes she is punishing her son by leaving him in jail, but has no intention of charging him.
The onus is on the Applicant to establish the merits of her grounds for appeal.

The Tribunal will address the "stolen vehicle" issue. The gist of the Applicant's evidence is that the vehicle was taken without her knowledge or consent and was therefore stolen. In order to determine whether the vehicle was stolen at the time of impoundment, the Tribunal must consider the meaning of the word "stolen". As the Act offers no definition, the Tribunal looked to Black's Law Dictionary, 6th ed., for reference as to what is commonly accepted by the judiciary as constituting theft.

According to Black's Law Dictionary, 6th ed., "stolen" is defined as follows:

> Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The definition is clear that the property must be taken "without …permission".

Further, in the Tribunal's Decision of *6307-MVIA-STLN-EXHP-Stolen and Exceptional Hardship*, released November 2010, Vice-Chair Flude ruled as follows:

> The argument that a suspended driver has stolen the vehicle is one that is easy to assert. The Tribunal must use a great deal of circumspection in considering this argument. One of the indicia that a vehicle has been stolen, of course, is the laying of charges. Another is the lack of a relationship between the owner and the driver to support an inference that the owner has lent the vehicle to the driver. It does not flow from these indicia that one family member cannot steal a vehicle from another. To complicate the analysis, in a close family relationship, the laying of charges may result in such bad feelings that the owner does not want to contemplate such action. The Tribunal must consider the totality of the facts to determine if, in fact, the vehicle was stolen or if the argument is being used opportunistically. There may be instances when specific permission for use was not given but the overall facts support a conclusion that use of the vehicle by the suspended driver is acquiesced in by the owner.

The question that needs to be asked is whether the defence that the vehicle was stolen is being used opportunistically. The Tribunal found the Applicant's evidence both credible and plausible. The Tribunal accepts the Applicant's explanation that she is unable to control her son's behaviour.

Thus, the Tribunal accepts the Applicant's testimony that the vehicle was taken without consent. There is no doubt that the Applicant has been deprived of the use of her vehicle, and the Registrar called no evidence to the contrary.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

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Antoine Aouad, M.D., Member

RELEASED: January 20, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6401/MVIA -EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER
Presiding member

APPEARANCES: APPLICANT, unrepresented

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: January 13, 2011 *Teleconference*

REASONS FOR DECISION

A hearing was held on January 13, 2011, by teleconference at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar") made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the "Applicant"
Motor Vehicle:	2001 Pontiac Montana (the "vehicle")
Date of Appeal:	December 20, 2010

At the outset of the hearing, the Applicant noted that the vehicle had been taken without her permission. The Tribunal member asked the Applicant if she wished to add to the grounds of her appeal. Following discussion, the Applicant indicated she wished to proceed solely on the grounds indicated in her Notice of Appeal filed with the Tribunal.

ISSUE

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, as set out in the request for hearing (Exhibit 1).

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

The Applicant testified that she is a single mother living on disability pension. She indicated that she has medical conditions which include a breathing problem which limits her ability to walk for any distance. She attends medical appointments regularly for monitoring of these conditions.

The hospital facility which the Applicant regularly attends for tests is located in a larger municipality and is approximately twenty kilometres from the Applicant's home. Since the impoundment of her vehicle, she has rescheduled three medical appointments because of transportation difficulties. While there is a bus service available Mondays to Fridays where the Applicant lives, her breathing difficulty prevents her from walking the distance required to catch the bus.

One of the Applicant's two children attends school within walking distance of the Applicant's home. The older of the Applicant's two children attends school but is currently on the work

segment of his co-op program. He is able to use the weekday bus to get to work. Neither of the Applicant's children have missed school but the younger of the Applicant's children has not been able to attend extra curricular activities. The Applicant also noted that she had to use a taxi on one occasion to take her younger child to a clinic when the child became ill. The Applicant stated she would not normally use taxis because she cannot afford them. The area where the Applicant lives is served by 911 emergency service.

The Applicant testified that she acquired her vehicle in late spring of 2010. She was unaware that her roommate, the suspended driver, did not have a valid licence. She stated he had never driven the car before he took her keys from her purse while she was sleeping. The suspended driver was not paying the Applicant rent and had failed to pay his share of the bills. After the impoundment incident, the Applicant asked him to leave her home. The Applicant expressed significant concern about the magnitude of the impoundment fees.

The Applicant normally used her vehicle not only for medical appointments but also for errands such as grocery shopping. She stated that living on a fixed income she relies on using a food bank which is located in the major municipality, some distance from her home and grocery shops only at the end of the month when her disability cheque arrives. She has had occasional rides from a neighbour to assist her since the vehicle was impounded. She stated that she accepted these when offered but did not like to ask for assistance.

On cross-examination, the Applicant testified that before she acquired the vehicle, she received a transportation allowance as part of her disability pension. She stated that she had not approached her caseworker about her current situation.

Evidence for the Registrar

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 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 impaired driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under a lifetime suspension.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

ISSUE

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 22 of Regulation 574 R.R.O. 1990 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of

any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

As to the issue of exceptional hardship, Section 22 of Regulation 574 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant testified that since the impoundment, she has relied on the offer of occasional rides from a neighbor for transportation for errands, although she indicated that she does not like to ask for their assistance. While the area in which the Applicant lives is served by weekday bus service, the Applicant's medical conditions prevent her from walking to the bus stop. As a result, the Applicant noted that she had rescheduled three regular medical appointments since the impoundment. She has used a taxi on one occasion when her daughter needed to attend at a medical clinic but stated that she cannot afford taxis because she lives on a fixed disability pension. Neither of the Applicant's children have missed school: the younger child can walk to school and the older is able to use the bus service. The younger child has, however, missed extra-curricular activities.

Before acquiring her vehicle in the late spring of 2010, the Applicant received a transportation allowance as part of her disability payment which paid for a bus pick-up service for her and her dependents. She testified that she has not made inquiries as to its availability during the impoundment period.

The Applicant expressed her concern about her inability to pay the impoundment fees. The Tribunal cannot consider the costs of the impoundment itself in determining whether the impoundment will result in exceptional hardship. For the information of the Applicant, she may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the HTA.

> The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order.

The evidence indicates that the Applicant has alternatives available to the use of the impounded vehicle and therefore does not establish 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 Act, 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

Mary Ann Spencer, Presiding Member

RELEASED: January 14, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6471-MVIA-NUSP-EXHP-Not Under Suspension and Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: February 24, 2011 *by teleconference*

REASONS FOR DECISION

A hearing was held on February 24, 2011, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

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 Ford FCS (the "vehicle")

Date of Appeal: February 4, 2011

As a preliminary matter, it was agreed by the parties to add the ground of exceptional hardship to the Applicant's grounds for appeal.

ISSUES

As set out in the Applicant's Notice of Appeal (Exhibit #2), the owner appeals on the basis that the driver's licence was not under suspension as provided in section 50.2(3)(b) of the Act. At the outset of the hearing, the further issue, that the loss of the vehicle will result in exceptional hardship, as provided in section 50.2(3)(d) of the Act, was identified.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's husband is the suspended driver in this case. He took the vehicle without the Applicant's knowledge while she was away from the family home, was stopped by the police and the vehicle was impounded. The Applicant stated that she knew there was "some trouble" with her husband's licence but she did not know the details.

The Applicant testified that she has not been able to work since the impoundment of her vehicle. She is registered with an employment agency and accepts temporary assignments when offered. She stated that her normal routine before the impoundment was to drive her husband to work, return home and drive her children to school, and then use the vehicle to drive to work. She then picked her children up from school on her way home. Her husband used public transportation to return home. The Applicant also used her vehicle for household errands such as grocery shopping.

The Applicant lives in an area served by public transportation. On cross-examination, she clarified that the jobs she is offered are in various locations, all of which are accessible by public transportation although for some, the public transportation stop is a distance from the place of employment. The Applicant stated that she could walk the distance in nicer weather, but that in winter it was "too hard".
She further indicated that using public transportation made her return home too late for her to pick up her children from school. The Applicant then stated that she could take taxis for

all or part of the journey to work in these further locations but that taxis are expensive and her net pay would be low.

After confirming with the Applicant that the vehicle was acquired approximately two months before the impoundment and that the Applicant has worked for the employment agency for approximately five months, the Registrar's Agent asked the Applicant how she had reached her employment before she owned the vehicle. The Applicant was not specific in her response. Finally, the Registrar's Agent asked the Applicant if she had been able to get groceries during the impoundment period. The Applicant stated that she had used public transportation but it was difficult.

The Applicant testified that her children suffer from asthma and as a result are unable to walk to school in cold weather. They missed five days of school immediately following the impoundment. The Applicant indicated initially that this was due to the loss of the vehicle. On cross-examination, however, she clarified that the children missed school due to illness. Subsequently, the children have attended school either being driven by neighbours, being taken by the Applicant in a taxi, or by walking.

The Applicant further testified that she needed a vehicle in case her children became ill and she needed to seek emergency medical assistance. The Applicant lives in an area served by 911 emergency services.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar (Exhibit #3) 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 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 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 Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until March 12, 2013.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(b) and (d).

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Section 41 of the Act identifies the types of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d) and (e), and 41(7) and 42(1) and 42(5) as follows:

> 41. (1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,
>
> (a) under section 220, 221 or 236 of the *Criminal Code* of Canada committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (b) under section 249, 252, 253 or 255 of the *Criminal Code* of Canada committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (c) under subsection 254 (5) of the *Criminal Code* of Canada committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
>
> (e) referred to in a predecessor to this sub-section,
>
> is thereupon suspended ...
>
> 42. (1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* of Canada or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,
>
> (a) upon the first conviction, one year; and
>
> (b) upon a subsequent conviction, two years,
>
> in addition to any other period for which the licence is suspended and consecutively there to.
>
> (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
>
> (a) an order directing that the accused be discharged is made under section 730 of the *Criminal Code* of Canada or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
>
> (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* of Canada, including a confirmation or variation of the disposition.

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

As to the issue of whether the driver's licence of the driver of the vehicle at the time it was impounded was suspended, the suspended driver in this case is the Applicant's husband. The Applicant initially testified that she knew there "was some trouble" with her husband's licence. The documents submitted by the Registrar clearly indicate that the Applicant's husband's driver's licence was suspended due to an offence under the *Criminal Code* of Canada at the time of the impoundment. The Applicant's attention was drawn to these documents and she agreed that her husband's licence was in fact suspended when he

drove her vehicle. The Applicant's appeal therefore fails on the ground set out in section 50.2(3)(b) of the Act.

As to the issue of exceptional hardship, Section 10 of O. Reg. 631/98 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant initially indicated that as a result of the impoundment, she was unable to work and her children had missed school. On cross-examination, however, the Applicant testified that it would be possible for her to use public transportation or taxis to reach her work but that it would be time consuming and inconvenient. She stated that walking the final portion of the trip was "too hard" in the winter months and that using taxis would be expensive. The Applicant also clarified that her children initially missed school because they were ill, and have since attended because neighbours have assisted, taxis have been used or they have walked. The Applicant lives in an area served by 911.

The evidence indicates that the Applicant has alternatives available to the use of the impounded vehicle but that she has chosen not to use them to reach her work. Alternatives have been used for the Applicant's children to reach school and for household errands. The evidence, therefore, does not establish 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 Act, 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

_____
Mary Ann Spencer, Member

RELEASED: March 4, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6480-DUDI-EXHP-Due Diligence & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: ELIZABETH SPROULE
Presiding member

APPEARANCES: DOUGLAS BROWN, Agent for the Applicant

RUSSELL McKNIGHT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 2, 2011 By teleconference

REASONS FOR DECISION

A hearing was held on March 2, 2011, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	2001, Pontiac (the "vehicle")
Date of Appeal:	February 10, 2011

This matter came before this Tribunal on March 2, 2011 and proceeded as an oral hearing.

ISSUE

As set out in the Applicant's request for hearing (Exhibit #1), 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 that the loss of the vehicle will result in exceptional hardship, all as provided in section(s) 50.2(3) (c) and (d) of the Act.

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

The Applicant, her son and a friend of his who was in attendance the night of the impoundment testified. A summary of their evidence follows.

The Applicant was in the habit of loaning her car to her adult son so that he could get to his place of work in another community. He has a valid licence. Both the Applicant and her son stated that they 'share' the car. Neither gave evidence that there were any restrictions or qualifications placed on the son's use of the vehicle.

On the night of the impoundment the Applicant's son went with a friend, (the 'driver'), to meet up with some other friends at a restaurant. Both the son and the driver had a few beers together. The group then left the restaurant and walked to another establishment. At this second location the Applicant's son lost track of the driver until the end of the evening.

One of the individuals in the group who had been in attendance at the second establishment left at the end of the evening in a cab. Shortly after leaving he noted that there were a number of police cruisers about so he called the Applicant's son, who had not left the establishment yet, and offered to come back in the cab and pick him and the driver up and give them a place to stay for the night. The Applicant's son indicated that the driver did not want to do this. Through the phone this individual heard the driver tell the Applicant's son that he was 'fine' to drive.

The Applicant's son testified that he was drunk when he left the second establishment. He did not ask the driver if he had a valid licence. He did not have concerns at the time as the driver said he was 'fine' to drive. They were pulled over by police shortly thereafter and the driver immediately jumped in the back seat and tried to indicate that the Applicant's son was driving.

Up until June of 2010, the Applicant had been employed during the school year as a school bus driver. In September of 2010 the Applicant was not given a 'run': this was the first time in approximately 17 years that she had not been employed as a driver. When the Applicant's son obtained a job and required a car, the Applicant made the decision to provide him with her car and stay at home until he got a car. In effect, this has resulted in her remaining unemployed up until the date of these proceedings, approximately 8 months.

The Applicant and her spouse are facing financial problems. They are dependent on one income, which is not sufficient to pay their bills. The Applicant's spouse has health issues and is only able to work 3 or 4 hours in a day. They have been very supportive of their son over the years and have helped him financially and this has had a financial impact as well. The Applicant now needs to get a job but cannot look for one without a car, as there are few opportunities in the community in which she is currently living. The Applicant does not have sufficient funds to pay what is required to get the car back.

The Applicant's spouse does have a vehicle, a van, which accommodates two passengers in the front. The back is full of tools as it is used for the spouse's employment. Since the impoundment, the Applicant has not been able to transport her grandchildren to her house for a visit, although they have been brought to see her by their mother.

The loss of the vehicle has not impacted the Applicant's son's employment. He has however, had to move and now lives with a friend in the community where he is employed. This makes it difficult for him to see his children who live with their mother in another community.

In cross-examination the Applicant's son was asked if he knew the driver well. He responded that he knew he was an electrician and that he lived about 10 minutes away.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of 'Blood/Alcohol Content in Excess of .08' under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until December 7, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

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).

Issue 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?

The Shorter Oxford Dictionary, 3rd ed. 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 defined 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.

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

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.

APPLICATION OF LAW TO FACTS

The purpose of Section 55 of the Act is to prevent suspended drivers from having access to motor vehicles and thereby reduce the number of people injured or killed by those who should not be behind the wheel of a car. To accomplish this, the Act places an onus on owners of vehicles to exercise due diligence to ensure only individuals with a valid driver's licence drive their vehicle.

The Applicant's Agent has argued that because the Applicant initially gave her vehicle to a licensed driver her responsibility ended. The law however goes farther than that. The due diligence required relates to the licence of the driver at the time the car is impounded. Therefore, when an owner of a vehicle chooses to place the care and control of a vehicle into the hands of another individual, that individual steps into the shoes of the owner and must exercise the same due diligence as that expected of the owner. Hence, it is important for an owner to ensure that any individual given the care and control of a vehicle understands, and is able and willing, to carry out the due diligence expected.

It is clear from the evidence that the Applicant and her son saw themselves as 'sharing' the car and that when in his possession; the son had complete care and control of the vehicle. Based on the testimony of the Applicant's son, the facts are that he simply got drunk and permitted an individual, with whom he had spent at least a portion of the evening drinking to get behind the wheel of a car he was responsible for without any form of inquiry as to whether he had a valid driver's licence. From his responses in cross-examination it appears that the Applicant's son did not even know this individual very well. Clearly, there was no due diligence. Fortunately the police intervened before a tragedy occurred.

As to the second issue of exceptional hardship, Section 10 of Regulation 631/98 set out above, provides the criteria as to what is and what is not to be considered by the Tribunal in determining whether there is exceptional hardship. The first consideration is whether there is an alternative to the impounded vehicle and in this instance the Tribunal concludes that there is an alternative vehicle available to the Applicant. The Tribunal understands that this vehicle is used by the Applicant's spouse for his employment but the evidence before the Tribunal is that the Applicant's spouse is only able to work 3 to 4 hours a day. It was not made clear to the Tribunal why the Applicant could not use this alternative vehicle to pursue employment opportunities during the many hours of the day that it was not in use.

The Tribunal may consider economic loss or loss of employment opportunity resulting from the impoundment, if the loss will be immediate, significant and lasting. The facts before the Tribunal are that the Applicant has by choice forgone employment for many months prior to the impoundment in order to promote her son's employment opportunities. The Applicant indicated that she is now looking to get a job at a Wal-Mart ; however, there was no evidence that any particular job is available to her. Therefore the Tribunal does not have any evidence to conclude that the impoundment will result in an economic loss or a loss of employment opportunity that will be <u>immediate</u>, significant and lasting.

It would appear to the Tribunal that the main concern of the Applicant is the cost of the impoundment. As pointed out by the Representative of the Registrar, the cost of the impoundment, or other losses incurred as a result of the impoundment order, can be recovered from the driver pursuant to s.55.1 (21) of the HTA.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____
Elizabeth Sproule, Presiding Member

RELEASED: March 7, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6482-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: ELIZABETH SPROULE

APPEARANCES: APPLICANT, self-represented

RUSSEL MCKNIGHT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 2, 2011 By teleconference

REASONS FOR DECISION

A hearing was held on March 2, 2011 by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	The Applicant
Motor Vehicle:	Chevrolet Uplander (the "vehicle")
Date of Appeal:	February 10, 2011.

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.

At the outset of the proceeding the Applicant advised that she had not received the Respondent's submissions. The Respondent confirmed that the documents had been sent by courier but had not been delivered as the Applicant was not home at the time. The Applicant indicated she had not been able to go and pick them up. A brief recess was called to allow the Tribunal to email the Applicant a copy of the documents that the Registrar intended to rely upon. These included documents numbered 1 to 4, and 7, in the Respondent's submissions. The Applicant confirmed she received the documents and did not take issue with their contents. The Registrar's Representative advised the Tribunal that documents 5,6,8, and 9 were not relevant and had been included in error and therefore they were disregarded by the Tribunal.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's car was impounded while being driven by her son, who resides with her. The Applicant was aware that her son's licence had been suspended and that he had

driven while suspended in the past. The Applicant testified that she had not been aware that her son had taken her car as he did so late in the night while she was asleep.

The Applicant works in a community approximately 20 kms away from her home. Her son works at the same location. They have been making arrangements to get to work with co-workers at a cost of approximately five dollars each per trip. The Applicant's son has been assisting with these costs. Recently the arrangements made did not work out as planned and the Applicant was 25 minutes late for a work related function, this created a lot of stress for the Applicant. The Applicant was concerned that there may be repercussions as a result of this but had not been advised by her employer on this issue as of these proceedings.

The Applicant is diabetic and has other health issues, including chronic back problems. She has an appointment every three months with her physician and has to have blood work done prior to those appointments. In addition, she has a monthly appointment with a chiropractor. She also sees a foot specialist.

The Applicant's appointments with her physician and her chiropractor take place at a clinic in the community where she lives. Although there is a transportation service to the clinic which the Applicant can access from her home, it will not go to her place of work to pick her up. There is no public transit or taxi service in the Applicant's community, but there is 911 emergency service. There are no rental cars. The Applicant has borrowed a friend's car to meet some of her needs.

Since her car was impounded the Applicant testified that she has missed one of her scheduled quarterly appointment with her physician and one chiropractic appointment. Written confirmation of the missed appointments was provided in the form of a letter from the Applicant's doctor. The doctor indicated that the Applicant's missing appointments was "concerning" to her.

The Applicant's chiropractor is only at the clinic one day a week , as a result it was four weeks before the Applicant was able to make a new appointment. She was able to attend this appointment. The Applicant has not missed any appointments with her foot specialist, as she was able to hire someone from work to drive her.

The Applicant's grandson, who is in high school, has recently come to live with the Applicant. His school is far away and he needs to be driven to a pick up point for transportation to his school. Currently, arrangements have been made with another student's family to drive the Applicant's grandson; however, the Applicant feels this is an imposition upon them.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of 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 2 below;

2. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 27, 2013..

3. 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.

4. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

5. Copy of Notice to the Registrar indicating the details of another instance when a vehicle was detained while being driven by the same individual referred to in point 2 above.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3) (d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or

- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

Section 10 of Regulation 631/98, set out above, provides the criteria to be considered and not consider it determining whether exceptional hardship will result from an order to impound. The Tribunal is first to consider whether there is an available alternative to the impounded vehicle.

The evidence before the Tribunal is that the Applicant has had to make arrangements with fellow workers for transportation to work. The Tribunal accepts that this has not been easy and at times it has been frustrating, however, it has and is an alternative means of transportation. The Applicant has also been able to borrow a vehicle on occasion, she has been able to arrange the assistance of neighbors to meet the transportation needs of her grandson, and has access to a transportation service to the clinic she attends.

The Applicant's health issues require her to attend a limited number of medical appointments. The evidence before the Tribunal is that the Applicant has been able to attend her foot specialist, she missed one chiropractor's appointment but was able to attend a subsequent appointment, and she missed one appointment with her physician. There is a transportation service available to the Applicant to go to the clinic, where her doctors practice from her home. It is not available from her work place 20 kms away.

It was not clear to the Tribunal why the Applicant could not make arrangements to attend the clinic to see her physician directly from her home using the transportation service available. The number of appointments the Applicant would have during the impoundment period is very limited. The Applicant provided no evidence that her employment situation would not accommodate this, economically or otherwise. Her evidence before the Tribunal indicated that she normally attends these medical appointments during the work day, which suggests to the Tribunal that some accommodation must already be in place.

The Tribunal is not satisfied that the Applicant is without alternative means of transportation to the impounded vehicle given the various arrangements she has been able to enter into and the transportation service available to her for her medical appointments, which she has not made use of. The Tribunal has no doubt that the loss of her vehicle has been

extremely inconvenient to the Applicant and has been a source of stress and frustration. However given the alternative means of transportation available, the Tribunal does not find there is ‘exceptional hardship’.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____

Elizabeth Sproule, Presiding Member

RELEASED: March 7, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6483-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 4, 2011 *by teleconference*

REASONS FOR DECISION

A hearing was held on March 4, 2011, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant

Motor Vehicle: 1995 Chev Bzr (the "vehicle")
Date of Appeal: February 11, 2011

ISSUES

As set out in the Applicant's Notice of Appeal (Exhibit #2), 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.

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant is a single mother with three young children who lives in a small municipality without public transportation and with only one taxi. She is currently participating in the Ontario Works program, working four days a week, but has been accepted into a community college program in a larger municipality approximately a sixty kilometre commute from her home and has received a student loan to assist her. Her program begins in the summer term.

The Applicant had acquired the impounded vehicle only the day before its impoundment, previously having leased a vehicle. She purchased the vehicle with a loan from a family member in order to reduce her costs and to provide her with transportation to school. She testified that she was not confident driving in snowy conditions and therefore allowed her ex-boyfriend to drive the vehicle. She stated that while she knew his licence had been suspended, she believed it had been reinstated but she confirmed that she did not ask.

Since losing her vehicle, the Applicant has been able to continue with her work although a few days were missed due to weather conditions. Her children have been able to attend school. The Applicant has received rides to her work and the children who attend school have been driven by neighbours. Her youngest child's babysitter lives across the street from the Applicant. The Applicant testified that she and the children are in good health, have missed no medical appointments and live in an area with 911 emergency services.

The Applicant testified that she was coping without the vehicle at this time. Her main concern was that she could not pay the impoundment fees, would lose her vehicle and therefore would not be able to begin school, something she has worked hard to accomplish. There is no public transportation to the school from her municipality other than the sole taxi which at forty dollars a trip would be prohibitively expensive.

The program in which she intends to enrol also has a job placement component for which she would also need her vehicle. She testified that even before the impoundment she had investigated the possibility of car pooling to school but because she is attending in a summer term, she could find no one. She also indicated she had investigated moving to the larger municipality but that housing was more costly there and she did not wish to disrupt her childrens' schooling.

On cross-examination, the Applicant stated that the suspended driver, her ex-boyfriend, already owes her child support and she believes that he would not be able to assist her with the impoundment fees. She also stated that she borrowed the money from a family member, who is living on a disability pension, to purchase the vehicle and she would not be able to borrow more money.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar (Exhibit #3) 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 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 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 Driving While Disqualified under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until April 13, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the ground of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

As to the issue of exceptional hardship, section 10 of O. Reg. 631/98 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment order. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant testified that she has managed to cope without her vehicle. While she lives in a small municipality without public transportation and with only one taxi available, she has been able to get rides to work and neighbours have driven her children to school. The only missed days have been due to weather conditions. The Applicant and her family are in good health, no medical appointments have been missed, and the Applicant lives in an area with 911 emergency services.

The Applicant testified that her primary concern is with paying the fees to release her vehicle from impoundment. She has just been accepted into a community college program in a large municipality and stated that she needs a vehicle in order to commute to her classes. She believes that she will lose her vehicle because she cannot afford to pay the impoundment fees, and therefore will have to forfeit her opportunity to attend school.

The Tribunal cannot consider the impoundment fees in determining whether exceptional hardship will result from the loss of the vehicle. The loss the Tribunal must consider is the forty five day period of the impoundment. In this case, the evidence indicates that the Applicant has alternatives available to the use of the impounded vehicle. The evidence, therefore, does not establish exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

For the Applicant's information, she may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the 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.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____
Mary Ann Spencer, Member

RELEASED: March 9, 2011

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6485-MVIA-EXHP-EXCEPTIONAL HARDSHIP

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID B. CARYLL,
Presiding member

APPEARANCES: THE APPLICANT,
Represented by the owner of the Applicant (the "owner")

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: March 7, 2011 *Teleconference*

DECISION

A hearing was held on March 7, 2011, in the presence of the Owner of the Applicant, and Sonia De Santis, Representative for the Registrar, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "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, for the reasons found below.

INTRODUCTION

This is an appeal under section 50.2 of the Act.

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1994 Jeep, W/Y (the "vehicle")
Date of Appeal:	February 14, 2011

The Applicant appeals on the basis: that the loss of the vehicle will result in exceptional hardship, as provided in sections 50.2(3)(d) of the Act.

This matter came before the Tribunal on March 7, 2011, and, as there were no preliminary matters, the hearing proceeded.

ISSUES

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis:

1. That the impoundment order will result in exceptional hardship for the Applicant?

BACKGROUND FACTS

The following facts are not in dispute.

Early on Thursday, February 3, 2011 the vehicle was being operated by an employee of the Applicant. When he became tired, after working a long shift, the owner gave his employee a rest break, taking over the operation of the vehicle.

At 6:20 a.m., the same day, the police stopped the vehicle and discovered that the owner's licence was under suspension for an offence under the *Criminal Code*. The police impounded the vehicle.

EVIDENCE CONCERNING THE GROUNDS FOR THE APPEAL

That the Impoundment Creates Exceptional Hardship

The owner was candid in his testimony. He acknowledged that he should not have been driving, and knew the potential consequences.

He testified that the only reason he drove the vehicle was in an attempt to protect his client base. And, in so doing, his vehicle was impounded by the police.

He said that the loss of the vehicle has resulted in some poor customer service. On one occasion, although he rented another vehicle, customer service times were still unsatisfactory.

The Applicant owns another vehicle that was put into service during this period. The owner testified that this second vehicle has mechanical problems which, again, adversely effected customer service.

The owner testified that he had to absorb about $1,600 in costs to keep the second vehicle on the road.

As far as the potential loss of business is concerned, the owner candidly said he will only know the impact of the impoundment next fall when he attempts to resign his current clients.

Under questioning from the Registrar, the Applicant testified that, in addition to his partner, his employees drive him to any required appointments. His partner shops for groceries. He further testified that he is in good health, has no ongoing medical appointments, and, has access to 911 Emergency Medical Services.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3) (d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS CONCERNING THE GROUNDS FOR THE APPEAL

That the Impoundment Creates Exceptional Hardship

The owner is asking the Tribunal to release his vehicle because the impoundment is resulting in exceptional hardship. The main thrust of his argument has to do with the potential economic consequences resulting from the vehicle's impoundment. In particular, the potential loss of customers next winter due to poor customer service this winter.

Although the owner's business concerns are legitimate, the legislation is very specific in what criteria the Tribunal may, or may not, consider for allowing a successful appeal. The thrust of the legislation is shown in Section 10 of O. Reg. 631/98:

> In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] **shall not** … 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.

There are some exceptions to these factors that the Tribunal may consider in arriving at a decision. However, the only one relevant to this case is that the Applicant must first establish that there was:

> "… no alternative to the impounded motor vehicle is available."

Testimony shows that the owner has a second road worthy vehicle available to him. He also said that his partner and employees were available to drive him to appointments.

There was testimony that the owner is in good health, no urgent medical appointments missed, and has access to 911 Emergency Health Services.

The Tribunal finds as a matter of fact that the owner has alternate sources of transportation.

Therefore, the Tribunal finds that the Applicant has not met the onus under Section 10 of O. Reg. 631/98 namely, *"to demonstrate that no alternative to the impounded motor vehicle is available".*

Therefore, the appeal on the grounds of exceptional hardship has failed.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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David B. Caryll, Presiding Member

RELEASED: March 10, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6486-MVIA-EXHP-DUDI-Exceptional Hardship & Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: GENEVIÈVE BLAIS, Presiding Member

APPEARANCES: APPLICANT, Unrepresented

RUSSELL MCKNIGHT, Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 08, 2011 Ottawa

REASONS FOR DECISION

A hearing was held on March 08, 2011, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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 Act.

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1997 Toyota 4RU (the "vehicle")
Date of Appeal:	February 15, 2011

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on March 08, 2011 and proceeded as an oral hearing.

There were no preliminary matters in dispute between the parties.

ISSUE

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows. She gave brief testimony about each issue.

The Applicant was self-represented. For five years she has lived with her common law husband, the suspended driver, and they have a three year old child. Together they manage a family business and the Applicant describes herself as being self employed.

In support of the first ground of appeal, due diligence, she testified that at the time the vehicle was impounded on January 26, 2011, she did not see her husband driving her vehicle. She was ill and in bed and her husband was caring for their child. She was awakened late in the evening when the police entered her home to investigate the matter.

The Applicant stated that she knew that her husband's licence had been suspended as a result of a conviction in 2010. However, she believed that the suspension period had expired and that his licence had been reinstated. She further testified that, to her knowledge, her husband had not been driving during the suspension period.

The agent for the Registrar questioned the Applicant about her husband's activities on the evening of the occurrence. She was unable to provide any information as to his activities or the circumstances around the occurrence. She candidly stated that she "does not ask him a lot of questions". She has never asked to see his licence. She described the whole matter of his licence suspension as a "touchy issue". She leaves the keys for her vehicle on the microwave and sees no reason to secure them. She has assumed he is a responsible person and stated "if he did drive, he had a valid licence".

On the second ground of her appeal, exceptional hardship, the Applicant stated she requires the vehicle as transportation for the family business, to drive her son to daycare and to attend her daily medical appointments. As she resides outside of the city limits, approximately 34 kilometres from the center of the city, she has no access to public transportation.

On cross examination, the Applicant stated that since her husband's licence suspension in 2010, she has assumed all the driving and additional responsibilities for the management of the business. She has found all of this responsibility and work overwhelming and since the date of the vehicle impoundment the burden has increased.

In further evidence, the Applicant stated that, for the first few weeks after the vehicle impoundment, she relied on family and friends for transportation. She confirmed that there is a second vehicle in the home, registered in husband's name. It is a large commercial type of vehicle. She acknowledged that she has now insured this vehicle and is currently using it for her daily transportation needs. She emphasized that the loss of use of her vehicle has been very stressful as she lacks the confidence to drive her husband's vehicle and feels unsafe. She argued that "it is unfair that I be punished for something I did not do".

Since the date of the vehicle impoundment, the Applicant has been able to attend all medical appointments. She stated that there has been no loss in revenue to the family business. She is concerned as to the amount she will have to pay for the impoundment fees, but has not discussed financial assistance for the fees with her husband.

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 the 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 November 1, 2011.

The Agent for the Registrar called no witnesses. He relied on the documentation filed as Exhibits 2, 3, 4, and 5. The Applicant at no time questioned the accuracy of the documentation.

The Agent for the Registrar submitted that the Applicant did not demonstrate due diligence in attempting to determine whether her husband had a valid driver's licence. She did not ever see or attempt to see the driver's licence and made assumptions about the date of reinstatement. The keys for her vehicle are exposed and readily available to her husband to use.

As for the Applicant's contention that she suffered exceptional hardship, the Agent for the Registrar emphasized that there are alternatives to the impounded vehicle available to the Applicant, so that the ground of exceptional hardship could not succeed. Initially the Applicant sought the help of friends and family for transportation and over the past several weeks, she has the full use of a second family vehicle.

In addition, the Agent for the Registrar also submitted that there was no threat to the health or safety of any person ordinarily transported by the motor vehicle. Also, the financial loss that the Applicant testified to was not immediate, significant and lasting, for the family business has not been negatively affected.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

> (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) 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 English Dictionary, 3rd ed. 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 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the driver at the time the vehicle was impounded was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed, as required under this section of the Act.

The evidence is clear that the Applicant knew her husband's licence was suspended, assumed that it had been reinstated, but took no steps whatsoever to either determine the status of the driver's licence or to protect her keys from improper use.

The Applicant assumed that her husband was responsible and would only drive if his licence was reinstated and valid. At no point did she request actual proof of the licence. Her belief of his version of the events and the validity of his licence, founded on the lack of inquiries or proof and based on assumptions, cannot be considered to be honest and reasonable, on the facts of this case.

Having regard to all those factors, the Tribunal considers that the Applicant falls short of having taken all reasonable steps that a prudent person should have taken in these circumstances to determine that the driver's licence of her husband was not then under

suspension. As a result, the Tribunal does not consider that the Applicant has satisfied her onus of proving on a balance of probabilities that she exercised due diligence.
On that ground, the Applicant's appeal fails.

The second issue to be considered in this appeal is whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The evidence of the Applicant was that there are alternatives to the impounded vehicle available to her, a matter that this Tribunal must consider, according to Section 10 of O. Reg. 631/98 referred to earlier. For a few weeks she was assisted by family and friends. She now has the full use of a second, registered and fit commercial vehicle owned by her husband. The use of this vehicle has allowed the daily management of the family business and the Applicant's attendance to all her medical appointments. Although the Applicant is insecure in driving this vehicle, this fact is not a matter that this Tribunal can consider, in accordance with section 10(2)(a) of Regulation 631/98, referred to earlier.

The Applicant's evidence indicated no financial loss to her self-employment in the family business. Evidence was heard that the Applicant may experience financial difficulties in order to pay the large impound fee. The Applicant was unable to tell the Tribunal whether or not her husband, who is responsible for the occurrence, will assist in these costs.

The Applicant's primary concerns relate to the costs of the impoundment and her level of security in driving an alternate vehicle. The Tribunal cannot consider these factors in determining exceptional hardship.

Overall, the evidence presented by the Applicant was not sufficient to prove that she is indeed suffering any immediate, significant and lasting impact because of the impoundment. The evidence shows that the Applicant has alternatives to the impounded vehicle.

The Tribunal has sympathy for the Applicant. However, having regard to all the above factors, and applying to them the applicable legislation, the Tribunal finds that the Applicant has not satisfied her onus to prove on a balance of probabilities that she suffered exceptional hardship as a result of the impoundment of her vehicle.

Therefore, on the ground of exceptional hardship, the Applicant's appeal also fails.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

Geneviève Blais, Presiding Member

RELEASED: March 11, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6487-MVIA-NUSP-DUDI-EXHP-Not Under Suspension, Due Diligence and Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: DAVID B. CARYLL, Member

APPEARANCES: THE APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 7, 2011 *by teleconference*

DECISION

A hearing was held on March 7, 2011, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 1997 Saturn SL1 (the "vehicle")
Date of Appeal: February 15, 2011

The Applicant appeals on the basis: that the driver's licence was not under suspension; that the vehicle owner exercised due diligence; and, that the loss of the vehicle will result in exceptional hardship, as provided in sections 50.2(3)(b), (c) and (d) of the Act.

ISSUES

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that:

1. The driver's licence of the Applicant, at the time the impoundment order was made, was not then under suspension;

2. The Applicant exercised due diligence in attempting to determine that the driver's licence of the Applicant, at the time the impoundment order was made, was not then under suspension;

3. The impoundment order will result in exceptional hardship to the Applicant.

FACTS

The following facts are not in dispute.

On Tuesday, February 1, 2011, the Applicant was driving her vehicle on a public road in the Province of Ontario.

At 9:40 a.m., the same day, the police stopped the vehicle and discovered that the Applicant's licence was under suspension for an offence under the *Criminal Code* of Canada. The police impounded the vehicle.

The Ministry of Transportation of Ontario ("MTO") records show that the Applicant's licence, effective January 7, 2011, is suspended until January 7, 2012.

The Applicant's Evidence

1. That the driver's licence was not under suspension; and that the vehicle owner exercised due diligence

On Friday, January 7, 2011, the Applicant pled guilty to a charge of "Dangerous Driving" flowing from an incident on May 10, 2010. Evidence was entered to show that the Applicant's licence is suspended until January 7, 2012.

The Applicant testified that she believed that because she pled guilty, to escape jail time, she would be able to drive. She proffered as evidence a page from a court document that says in part:

> …YOU SHALL NOT OPERATE A MOTOR VEHICLE FOR 12 MONTHS FROM TODAYS DATE [January 7, 2011], EXCEPT FOR TRAVELLING DIRECTLY TO, WHILE EMPLOYED AT AND TRAVELLING DIRECTLY HOME FROM WORK, OR EXCEPT FOR NECESSARY SHOPPING FOR GROCERIES, PERSONAL NEEDS, FOR MEDICAL ATTENDANCES, OR COMPLETING COMMUNITY SERVICE HOURS.

After her court date, the Applicant went to the office of the MTO and paid MTO the $150 licence reinstatement fee. Her new licence was then mailed to her.

She testified that her lawyer told her to show the court document to the police officer if she was stopped. Under cross-examination, she was asked why she did not include the entire document in her application to the Tribunal. She stated that she did not think it was important.

She also stated that when she was stopped on February 1, 2011, the police officer ignored the court document and impounded her vehicle.

The Applicant testified that about a week after her conviction, she received a letter from the MTO informing her that her licence was suspended. She said she thought that this was an "error on behalf of the … court", and ignored it. She also stated the fact that when her new licence arrived in the mail, it reinforced this belief.

2. <u>That the impoundment will result in exceptional hardship</u>

The Applicant testified that she does not have another personal vehicle. However, she has access to public transportation and taxis. She stated that because she is on an Ontario Disability Supplement, she finds these alternatives too expensive.

She obtains her groceries by walking to a corner store. On occasion she obtains help from her boyfriend, when he is in town, and her daughter.

She testified that her family doctor is in another nearby city. However, there is a medical clinic near where she lives. The Applicant has some medical issues, but, no appointments of an urgent nature have been missed. She has access to 911 emergency health services.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(b), (c) and (d).

ISSUE #1 Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Section 41 of the Act identifies the types of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d) and (e), and 41(7) and 42(1) and 42(5) as follows:

> 41. (1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

(a) under section 220, 221 or 236 of the *Criminal Code* of Canada committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
(b) under section 249, 252, 253 or 255 of the *Criminal Code* of Canada committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*

(c) under subsection 254 (5) of the *Criminal Code* of Canada committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*

(d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or

(e) referred to in a predecessor to this sub-section,

is thereupon suspended ...

42. (1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* of Canada or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

(a) upon the first conviction, one year; and

(b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

(4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,

(a) an order directing that the accused be discharged is made under section 730 of the *Criminal Code* of Canada or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or

(b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* of Canada, including a confirmation or variation of the disposition.

ISSUE #2 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?

The Shorter Oxford English Dictionary, 3rd ed., 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 defined 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.

ISSUE #3 Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,

- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

1. That the driver's licence was not under suspension; and that the vehicle owner exercised due diligence

The main thrust of the Applicant's case rests on the document from the court that, she argues, gave her permission to use her car in certain limited circumstances. If this is true, she further argues, then, it also means she exercised due diligence.

The Applicant had in her possession, before the impoundment, two documents. One was the court document, and, the second was a notice informing her that her licence was suspended.

In dealing with the issue of due diligence, Black's Law Dictionary (sixth edition) at page 457 states:

> **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 had an opportunity to contact her lawyer, the police or the MTO to establish whether her licence was suspended or not. To assume, on its face value, that the notice from the MTO was an administrative error is not, in the Tribunal's view, exercising due diligence.

The Tribunal finds that the Applicant has not established that she exercised due diligence.

The Tribunal is troubled by the inclusion of only part of the document that the Applicant received from the court. The page submitted makes reference to other parts of the document not shown. To be of any value, the Tribunal would need to see the entire document and what other content it contains which may be pertinent to the case before this Tribunal. Therefore, the Tribunal has attached little value to this evidence when compared to the evidence offered by the Registrar.

The Tribunal finds that the Applicant has not established that her licence was not under suspension.

2. That the impoundment will result in exceptional hardship

To establish a case for exceptional hardship, the Applicant must first prove, as required by the legislation, that:

> …no alternative to the impounded motor vehicle is available.

The Applicant testified that she has access to taxis and public transportation. She said that there is some help from her boyfriend and daughter. Also, she can obtain groceries by walking to a corner store.

There was testimony that although she has some medical issues, no urgent medical appointments have been missed, and that she has access to 911 emergency health services.

The Act states that any threats to private or public health and safety may be considered only if there is no alternative to the impounded vehicle.

The Tribunal finds as a matter of fact that the Applicant, who is affected by the impoundment, has alternate sources of transportation.

The Tribunal cannot consider, in arriving at its decision, the fact that the loss of the vehicle will cause the Applicant inconvenience, and financial or economic loss, as described under Section 10 of O. Reg. 631/98.

The Tribunal finds that the Applicant has not met the onus under the Regulation, namely, "to demonstrate that no alternative to the impounded motor vehicle is available".

Therefore, the appeal on the ground of exceptional hardship must also fail.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

_____

David B. Caryll, Member

RELEASED: March 18, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6492/MVIA-DUDI-EXHP-Due Diligence-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: JANE WEARY, Vice-Chair

APPEARANCES: ANTHONY S. KASSAM, Agent, representing the Applicant

RUSSELL MCKNIGHT, Agent, representing the Registrar, Motor Vehicles

DATE OF HEARING: March 01, 2011 Toronto

REASONS FOR DECISION

A hearing was held on March 01, 2011 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

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: 2006 Chevrolet Silverado (the "vehicle")
Date of Appeal: February 17, 2011

There were no preliminary matters in dispute between the parties.

ISSUE

The owner appeals on the basis that:

(1) He exercised due diligence in attempting to determine the driver's licence of the driver of the motor vehicle was not then under suspension, as provided in paragraph 50.2(3)(c) of the Act; and

(2) The loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) (d) of the Act.

Should the Tribunal set aside the Registrar's order to impound the vehicle on either basis?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

The Applicant operates a snow removal business in the Durham region. For the past six years his primary business activity has been under contract to the local school boards whereby he is responsible for winter snow removal for ten school properties. These contracts have come to him by way of tender. He is currently in the second year of a two year term. The contracts provide him payment on a fee for service basis, resulting in the bulk of his winter income. In the event that he is not able to meet his contract commitments, renewal of his contract would be at risk. Further, in the event the school boards are required to contract out the work to a competitor, the Applicant would be charged back the resulting school board costs.

He also holds a number of smaller contracts with local businesses for similar work services.

Last winter was a difficult season in the snow removal industry given the low snow fall. This year has been better, although the Applicant is still attempting to catch up on his losses from 2009/10. The Applicant described his family situation, including the personal debt load, as well as his revenue and expenses in his snow plough business. For the last twenty-one years, the Applicant uses vehicle equipment, in large part leased to him, to deliver landscape services in the summer months. In the winter, his sole income is that provided from snow clearing.

Each schoolyard takes a minimum time of one hour to properly clear and salt, resulting in ten hours of work for one driver. Given that the Applicant is required to have the properties cleared of snow by 7:30 a.m. on any morning of snowfall, he finds that two drivers and two trucks are required in the event of significant snow accumulation.

In December of this year he hired G. who had worked for him as a general labourer in previous summers. G. had called him to advise that he now owned his own truck and plough and needed the work. The Applicant reviewed G.'s vehicle, driver's license, ownership and insurance, finding everything appeared to be in order. He had no reason to doubt Greer and hired him.

In mid-January, while ploughing a schoolyard, the Applicant hit a snow-covered skid which caused significant damage to the radiator and transmission of his 2008 Chevy truck. The cost to repair the vehicle has been assessed at over $4,000.00. The Applicant determined not to proceed by way of insurance as his deductible is $1,000.00 and he fears his premiums will rise across the board. He determined repair was not required given that he had a 2006 Silverado truck outfitted with a plough as well as G.'s truck.

On Sunday, February 13th of this year he arranged to pick-up G. and proceed to salt the schoolyard properties prior to resumption of classes the following day. G. advised his own truck was in need of some mechanical repair and was not then available. This suited the Applicant who is required to pay G. a greater fee in the event he uses his truck. Prior to completing the salting job, the Applicant was needed at home and instructed G. to complete the task using the Applicant's 2006 Silverado.

He was shocked when the police later telephoned to advise him the vehicle had been impounded as G. was a suspended driver.

Some time later G. provided him with an unsolicited letter (Exhibit 5) in which he acknowledged having misled the Applicant as to the validity of his truck and licence.

The Applicant submits that the loss of his 2006 Silverado and plough causes exceptional hardship to his family given their reliance on it for their winter income. Given the significance of the school board contract to him, its loss would be devastating.

He has no alternative vehicle which is capable of meeting his contract obligations of snow removal since repair of the 2008 Chevy is beyond his current means and may not be completed in time for the next snowfall. Despite his significant contacts in the area after 21 years of business, efforts undertaken by him to subcontract out the work and/or hire alternate drivers with ploughing capability have not been successful. This is a consequence of the high level of snow accumulation this year and the fact that the season is ending.

The Applicant stated he is suffering from stress as a result of the impoundment.

In cross examination, the Applicant acknowledged that, even were the impoundment of the 2006 Silverado lifted by the Tribunal, he would still be limited to only the one vehicle for meeting his snow removal commitments. He testified that, although two is optimum, one would be better than none at all. He expressed the hope that one vehicle would be sufficient to allow him to complete the season's needs given it is now March 1 and, although winter storms might well still occur, they could be light in nature and short lived enough for him to maintain adequate service.

Evidence for the Registrar

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 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 at the time of impoundment G. had a history of driving while under suspension and in December 2010 had been convicted of impaired driving pursuant to which his driver's licence was suspended until December, 2012.

Although at the time of issuing the impoundment the Registrar's search of Ministry databases had revealed a number of alternate vehicles plated to the Applicant, the Representative acknowledged the Applicant's evidence that none of the other plated vehicles were in fact sufficient for the snow plough task save for the damaged 2008 Chevy.

In submissions, it was the Registrar's position that, if repaired, this truck was in fact an alternate vehicle available to the Applicant within the meaning of the Regulation as set out below. The Applicant had clearly made no serious effort to have this repair performed notwithstanding the fact that he had been without any adequate plough for over two weeks to date. Moreover, the Applicant had acknowledged he was able to complete light salting of properties as required under the contracts with other vehicles in his possession. Should light accumulations be all that remain for this season, then such alternate vehicles are sufficient.

The Registrar further submitted that the evidence presented by the Applicant with regard to financial impact represented pre-existing financial commitments (leases/mortgages) and were thus not attributable to the impoundment.

Finally, it was the Registrar's position that the due diligence required of an owner to ascertain a driver was legally licensed, was more than merely viewing a licence proffered by the individual. In fact, where operating a business, due diligence would require some ascertainment of the validity of documentation. Had the Applicant done this in December when he hired G., he would have immediately learnt of G.'s licence suspension.

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.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the owner exercised due diligence in ascertaining whether the driver's licence was in good standing (paragraph 50.2(3)(c); another of which is whether the order will result in exceptional hardship (subsection 50.2(3)(d)).

Due Diligence Issue:

In Black's Law Dictionary (sixth edition), "due diligence" is defined at page 457 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.

In the event the Tribunal determines that the owner did indeed exercise due diligence in attempting to determine that the driver, at the time of the impoundment, was not then under suspension, it may set aside the registrar's impoundment order.

Exceptional Hardship Issue:

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

Despite the Applicant's evidence that G. had worked for him previously and proven himself a reliable employee, and, despite the fact that he had asked for and been shown G.'s licence at the time of hiring, the Tribunal agrees with the Registrar that, once the Applicant was considering hiring him for driving duties, it was only prudent to verify the employees alleged qualifications in that regard. These "relative facts" of employment duties requiring

special licence (i.e. driving a truck) trigger additional expectations on the employer. At a minimum, verification that the licence, and – for that matter – insurance, were in good standing was required in order for the employer to assert he met a standard of due diligence in this regard. However, the evidence from the Applicant was that he was satisfied to rely simply on G.'s own assertion that his documents were valid.

Given this, the Tribunal concludes from the evidence that the Applicant did not exercise due diligence.

As to the issue of exceptional hardship, Section 10 of O. Reg. 631/98 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The evidence indicates that the Applicant does not in fact have any viable alternative to the impounded vehicle. While there is the damaged Chevy truck, it is not in working order; to put it into working order will require significant funds which the Applicant is hard pressed to provide given his inability to earn income while his truck remains impounded. Further, the evidence is not available upon which a determination can be made that repair would be immediate (if affordable), without which the concept of a valid alternative, again, proves to be without basis. The alternatives provided by the cars for salting and shovelling are admitted. These services are not the extent of those to which the Applicant is obligated however under his snow removal contracts. They too are not therefore, realistic alternatives for his purpose and needs.

In reviewing whether there is an impact to health or safety caused by the impoundment, the evidence has established to the satisfaction of the Tribunal that there is such an associated risk. The Applicant testified that, despite his efforts to find assistance, there was no one available in the community for him to hire to carry out the snow removal he is unable to provide. Consequently, the schools themselves are at risk should serious snow fall in the next few weeks for which they are unable to contract alternative snow removal.

The Tribunal does not agree that the financial loss resulting from the impoundment has not been established because the Applicant's evidence was limited to pre-existing economic debt. In fact, the Tribunal finds that this evidence demonstrates the precarious situation of the Applicant's financial circumstances and thus the immediate significant and lasting impact upon him were the impoundment allowed to remain in force.

Finally, this evidence establishes clear financial loss and loss of employment to the Applicant, being an individual other than the suspended driver, ordinarily transported by the vehicle, which is significant, immediate and lasting given that the Applicant risks losing any realistic opportunity for future repeat contracts should he prove unable to service his current contractual obligations.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

_____

Jane Weary, Vice-Chair

RELEASED: March 04, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6496-MVIA-EXHP-STLN-Exceptional Hardship and Stolen

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: DAVID B. CARYLL, Member

APPEARANCES: APPLICANT, Self-Represented

RUSSELL MCKNIGHT, Agent, representing the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: March 16, 2011 *Teleconference*

DECISION

A hearing was held on March 16, 2011, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the Act. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: Applicant and the driver

Motor Vehicle: 1995 Chev GM4 Pickup Truck (the "vehicle")
Date of Appeal: February 22, 2011

The Applicant appeals on the basis that the motor vehicle was stolen at the time it was being driven, and that the loss of the vehicle will result in exceptional hardship, as provided in sections 50.2(3)(a) and (d) of the Act.

ISSUES

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that:

1. The motor vehicle was stolen at the time in respect of which the order was made.

2. The impoundment order will result in exceptional hardship to the Applicant.

BACKGROUND FACTS

The following facts are not in dispute.

On Thursday, February 10, 2011, the Applicant's friend (the "driver") was driving their vehicle on a public road in the Province of Ontario.

At 6:03 p.m., the same day, the police stopped the vehicle and discovered that the driver's licence was under suspension for an offence under the *Criminal Code* of Canada. The police impounded the vehicle.

The Ministry of Transportation of Ontario ("MTO") documents show that the Applicant's licence, as of February 18, 2011, is suspended until June 2, 2014.

Further MTO documents show the Applicant and driver as joint owners of the vehicle.

EVIDENCE CONCERNING THE GROUNDS FOR THE APPEAL

<u>That the motor vehicle was stolen at the time in respect of which the order was made</u>

The Applicant testified that on January 6, 2011 she purchased the vehicle from a private individual. She signed both the vehicle ownership document and the used car package (the "documents"), placing them in the vehicle's glove compartment.

Some maintenance was required to make the vehicle road worthy. It was parked at her residence while the driver had the required work performed. She also testified that she gave him a key to the vehicle.

She testified that on January 11, 2011, she first learned that the driver, without her permission, signed the documents and had the vehicle registered, by the MTO, in both their names. The driver himself told her as he bragged to her about his exploits at the MTO.

On February 10, 2011, she ended their three year relationship.

The Applicant testified that she was at work on the day the driver moved out taking his belongings, her new 50 inch television and the vehicle.

She phoned the police to report the vehicle stolen. She was told they couldn't charge the driver with theft because the vehicle was registered in both of their names.

The Applicant said she went to the MTO who was unhelpful. When she asked to see the documents related to the registration she was told it would cost her six dollars and take two months to obtain. She did not complete the request.

She said she was also told that in registering a vehicle only her signature was required, not her physical presence.

Under cross-examination the Applicant testified that, she knew about the driver's ten driving convictions, including his current suspended licence.

She admitted that in the period leading up to the impoundment, and beyond, except for the visit to the MTO, she took no action to deal with the alleged registration fraud, or, the theft of her 50 inch TV.

This is underscored by the fact that she was asked, under cross-examination, at least twice what she had done to "fix" these problems. The Applicant had no answer.

She also admitted that at the time of the vehicle's purchase she owed $466 in unpaid fines. It was suggested, under cross-examination, that it was convenient for her to have the driver register the vehicle and thus to avoid having to pay these fines. She denied this.

<u>That the impoundment order will result in exceptional hardship</u>

The Applicant testified that the only reason she appealed under the exceptional hardship ground, was because she thought her difficulty in affording the impoundment fees, if she lost the appeal, were covered under this ground.

She testified that she has access to public transport and transportation by her mother. She said she is in good health and has access to 911 Emergency Medical Services.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

Issue — Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The meaning of "stolen" is not provided in *The Highway Traffic Act.*

The *Shorter Oxford English Dictionary*, 3rd ed., provides the definition of "stolen" as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* of Canada (the "Code") R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

> "steal" means to commit theft…

Section 332(1) of the Code states:

> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
> (b) to pledge or deposit it as security;
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle permanently. The Court held that the term "stolen" could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> "In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily."

Issue — Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The *Shorter Oxford English Dictionary*, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training,.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

<u>The motor vehicle was stolen at the time in respect of which the order was made</u>

The main thrust of the Applicant's case rests on her contention that the driver had fraudulently registered himself as joint owner of the vehicle.

The relevant evidence can be summarized as follows. The vehicle was purchased on January 6, 2011. The Applicant discovered that the driver had registered them both as co-owners on January 11, 2011. The vehicle was impounded on February 10, 2011.

And, as shown in cross-examination, in the two months before this hearing, the Applicant has not made any serious effort to deal with the issues surrounding the vehicle or the theft of her 50 inch TV.

The Applicant's evidence is largely unsubstantiated or hearsay. On the other hand, the Tribunal has accepted the Registrar's documentary evidence as factual. Therefore, the Tribunal has attached little weight to the Applicant's evidence relative to the documentary evidence offered by the Registrar.

To be successful in her appeal, the Applicant must establish on a balance of probabilities that the driver had fraudulently registered himself as one of the owners of the vehicle. This she has failed to do.

The Tribunal finds that the Applicant has not established that the vehicle was stolen at the time of the impoundment, and therefore her appeal fails.

That the impoundment order will result in exceptional hardship

To establish a case for exceptional hardship, the Applicant must first prove, as required by the legislation, that:

> …no alternative to the impounded motor vehicle is available.

The Applicant testified that she has access to public transportation, and help from her mother.

She also testified that she is good health and that she has access to 911 emergency health services.

The Tribunal finds as a matter of fact that the Applicant, who is affected by the impoundment, has alternate sources of transportation.

The Tribunal cannot consider, in arriving at its decision, the fact that the loss of the vehicle will cause the Applicant inconvenience, and financial or economic loss, as described under Section 10 of O. Reg. 631/98.

The Tribunal finds that the Applicant has not met the onus under the Regulation, namely, "to demonstrate that no alternative to the impounded motor vehicle is available".

Therefore, the appeal on the ground of exceptional hardship must also fail.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

David B. Caryll, Member

RELEASED: March 22, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6500 MVIA-DUDI-EXHP-Due Diligence & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MARY ANN SPENCER
Presiding Member

APPEARANCES: AGENT, Representing the Applicant

RUSSELL MCKNIGHT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 15, 2011 *Teleconference*

REASONS FOR DECISION

A hearing was held on March 15, 2011, at Toronto, Ontario, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

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:	2003 CADI C/T (the "vehicle")
Date of Appeal:	February 23, 2011

This matter came before this Tribunal on March 15, 2011 and proceeded as an electronic hearing.

ISSUES

As set out in the Applicant's request for hearing (Exhibit #1), 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 that the loss of the vehicle will result in exceptional hardship, all as provided in sections 50.2(3) (c) and (d) of the Act.

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant lives with his wife and one of his sons. The suspended driver in this case is another son of the Applicant who occasionally lives with the family. Both the Applicant and his wife receive Old Age Security as their only source of income. The son who lives with them permanently is in receipt of an income replacement allowance as he cannot work as the result of an accident.

The Applicant's Agent, the son who permanently lives with the Applicant, testified that the vehicle is needed for transportation to medical appointments. He and both of his parents are in poor health and see a number of doctors on a regular basis. He estimated that over the last two week period, a total of between fifteen and twenty medical appointments have

been scheduled for the three of them. He testified that only one appointment has been missed because he has been able to arrange rides from friends for himself and his parents. On one occasion, he took his mother to an appointment on public transportation but it was difficult because it involved changing buses and was time consuming. He further stated that using taxis, at an estimated cost of $30 to $40 per trip, would be prohibitively expensive for the family.

On cross-examination, the Representative of the Registrar of Motor Vehicles asked the Applicant's Agent about the status of a second vehicle registered in the Applicant's name and currently plated. The Applicant's Agent stated that the vehicle has some fluid leaking and has not been driven for at least two months. He testified that no investigation had been made as to the nature of the problem or the cost of repair.

The Applicant's Agent testified that no one in the family was aware that his brother, the suspended driver, did not have a valid licence. He further testified that his brother, who is in jail as a result of the incident leading to the impoundment, asked to borrow money for a lawyer last summer. At that time, the Applicant's Agent became aware that there were problems with his brother's driving record. However, he stated that his brother told him his licence was taken for only two months and he had no reason to disbelieve this.

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 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 Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until February 19, 2015.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

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).

Issue — 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?

The Shorter Oxford Dictionary, 3rd ed. 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 defined 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.

Issue — Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The first issue to be considered is whether the Applicant exercised due diligence in attempting to determine that the driver at the time the vehicle was impounded in respect of which the order was made was not then under suspension. Section 50.2(3)(c) of the Act requires the owner of the vehicle to exercise due diligence. The onus of proof is on the Applicant to establish due diligence was performed.

The son who acted as the Applicant's Agent testified the family became aware that the suspended driver had issues with his licence when he asked to borrow money to pay for a lawyer last summer. At that time, the suspended driver told his family that his licence was suspended for two months. In fact, it was suspended until February, 2015. No evidence was presented to indicate that any members of the family asked the suspended driver for any further details. Notwithstanding the fact that the family knew the suspended driver was in need of legal assistance related to his driving record, the evidence indicates they accepted his statement at face value and made no efforts then or later to determine the status of his licence.

The Tribunal therefore finds that the evidence is insufficient to indicate that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

The second issue to be considered in this appeal is whether the loss of the Applicant's vehicle will result in exceptional hardship. Section 10 of O. Reg. 631/98 is very specific. It provides the Tribunal with the criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle.

The Applicant, his wife and the son who permanently lives with them all suffer from various medical conditions and regularly attend doctors' appointments. None them currently work and therefore the loss of the vehicle has had no impact on employment. The son who acted as the Applicant's Agent testified that he and his parents have approximately fifteen to twenty appointments in a two week period but that only one appointment had been missed because rides had been arranged with friends or, in one instance, public transportation had been used.

The Applicant also owns a second plated vehicle. While the Applicant's Agent testified that the vehicle has not been driven for approximately two months because it has been leaking fluid, he also stated that he does not know what the problem is or how much it would cost to have it addressed, indicating that this further alternative to the impounded vehicle has not been fully investigated.

In this case, the evidence indicates that the Applicant has alternatives available to the use of the impounded vehicle. The evidence therefore, does not establish 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 Act, 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

_____
Mary Ann Spencer, Presiding Member

RELEASED: March 16, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6506-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: JANE WEARY, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

RUSSELL McKNIGHT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 22, 2011 *teleconference*

REASONS FOR DECISION

A hearing was held on March 22., 2011, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "HTA" or the "Act").

The Tribunal released its Decision on March 22, 2011, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	2001 Pontiac Mon (the "vehicle")
Date of Appeal:	February 28, 2011

ISSUE

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, as set out in the request for hearing (Exhibit 1).

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

The Applicant testified that she had no reason to believe the driver of her vehicle at the time of impoundment was unlicensed. She had known him for close to ten years as her girlfriend's boyfriend and a hard worker. She had no information he had a criminal record, or that he had a suspended licence. On the afternoon of the impoundment, he had offered to get some medication from a near-by pharmacy as her two year old child was spiking a high fever and vomiting and she did not want to leave the child at her residence.

The Applicant has not worked since the birth of her youngest child, having sought the protection of a shelter soon after delivery due to an abusive domestic relationship with the child's father. She is a single mother caring for both the infant and a fourteen year old son who resides with her. The latter has a number of medical needs requiring her to transport him to various health intervention locations in London, Kitchener, Cambridge and Hamilton. She relies on her vehicle for this purpose. Public transport is not a realistic alternative. It is not always available when needed, is expensive and inappropriate as a means of transport given her son's situation – which includes anxiety and mis-behaviour in public.

When asked by the agent of the Registrar whether she had sought assistance from social services for taxi money to attend appointments, the Applicant advised she had been told by these agencies when she first applied to them two years previously that additional funds for private vehicles were not provided. She had therefore believed there were no additional funds which she might access while her own car was impounded.

Since the impoundment of her car, two medical appointments have been missed to date. A main concern is that on-going bi-weekly appointments in Cambridge were not scheduled over the last month due to holidays, however these are re-commencing on March 24. These are extremely important given the son's needs. The Applicant testified that her son has exhibited clear signs of concern due to the missed appointments to date. These signs are of significance given the need for consistency and regularity in her son's treatments.

The Applicant further testified that the infant's father has been coming to her home since the impoundment, which has been a cause of further stress and worry. He is hostile and their history has included violence. While she had the vehicle they would meet for the father's visitation rights with the infant at a local, public location. This is no longer possible.

Although she advised the driver that this hearing was scheduled and also that she was unable to pay the significant funds required by the impoundment facility to release the vehicle, he has not offered to assist her and actually refused her request for help.

She has a friend who did drive her to the courthouse for a procedure on May 14th, but this friend was not available to drive her and the fourteen year old to the missed medical appointment in London. The friend is a single mother of three with numerous obligations and can not be relied upon to assist her in transportation needs. Her only family is a father who does not own a vehicle and has no ability to assist her in paying for alternate transport as he, too, survives on a disability pension.

She has been advised that the impoundment period terminated March 20th and the vehicle is available for pick-up at a cost to her of $800.00, a sum she does not have. Every day it remains at the facility the cost rises by $35.00. She has been to a pawnshop which has advised she can raise enough funds to pay for a week further.

Evidence for the Registrar

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 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 driving while impaired under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension for life.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8), final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

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APPLICATION OF LAW TO FACTS

The onus is on the Applicant to provide convincing evidence that her particular situation meets the legislative exception to an impoundment provided by “exceptional hardship”. Here the Tribunal is persuaded by what it concludes to be credible and convincing testimony of the Applicant, that she has no realistic alternative means of transportation. It accepts her position that friends and family are not readily available to support her in this need and disagrees with the Registrar’s suggestion that these other individuals are obligated to assist her in this regard.

On the same reasoning, while the legislation might provide her with a remedy against the suspended driver for damages, taking such action and achieving prompt and successful results is, quite realistically, not a valid alternative either.

The Tribunal accepts the serious medical implications the loss of this vehicle has had on her fourteen year old son and, by implication, the rest of her domestic life. He has missed two medical appointments which would have been pivotal in assisting him (and, by extension, herself) in his complex and multiple physical and mental disabilities. As a consequence he has reverted in some manner to a situation which makes family life more uncertain, stressful and difficult, and which negatively impacts on his medical and behavioral prognosis.

Moreover, there is undisputed evidence of the risk to the Applicant and her domestic safety in having her abuser attend at her home while her vehicle is not available. The Tribunal therefore finds that the impoundment has resulted in a threat to the health and/or safety of individuals who ordinarily rely on the impounded vehicle for transport as set out in the Regulation above.

These findings of exceptional hardship are sufficient to conclude that the impoundment order should be set aside under subsection 50.2(3).

The Tribunal is further persuaded by the evidence that the facts establish an economic loss to the Applicant – in the significant sum of monies she is required to pay the impoundment facility for the return of her vehicle. Her undisputed evidence was that she was required to pawn personal possessions simply to find the funds to pay for charges due for keeping the vehicle a number of days beyond the impoundment period. There is no question that this loss, given her inability to pay it, will impact on her being able to secure the release of the car in time for already established medical needs of the son. As a consequence of the findings earlier made by the Tribunal regarding the effect of missed medical appointments on family members transported by the vehicle, there is no doubt that the impact will be immediate, lasting and significant.

Having demonstrated the existence of the factors required by section 10 of the Regulation, the Tribunal is also of the position that the Applicant's financial loss is a factor which may also be considered in these circumstances.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: March 23, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6516-MVIA-DUDI-EXHP-Due Diligence and Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: SIMON DANN, Member

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 16, 2011 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on March 16, 2011, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2007 CADI HF6 (the "vehicle")
Date of Appeal: March 1, 2011

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 that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUES

As set out in the Applicant's Notice of Appeal (Exhibit #2), 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 that the loss of the vehicle will result in exceptional hardship, all as provided in sections 50.2(3)(c) and (d) of the Act.

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 Registrar.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant was self-represented and gave evidence on his own behalf.

The Applicant testified that he had just met the driver (a woman) at the time of the impoundment, and did not know that she had a suspended licence.

The Applicant stated he had met the woman for the first time that evening at a local restaurant. He testified that over the course of the evening, he consumed four beers and was reluctant to drive, considering he was impaired. He said that the woman he was with had only had two beers and told him she was okay to drive. The Applicant testified that he considered her offer as meaning that she had a valid driver's licence and so he did not ask her to produce it.

The Applicant's testimony from there was that as the woman was driving, she hit an ice patch and had an accident, making the vehicle undriveable. There were no personal injuries and the woman ran from the vehicle as soon as it came to a stop. She was later arrested nearby, and the Applicant confirmed that he only learned she in fact had a lifetime suspension from the police at the scene.

Regarding hardship as the second ground of his appeal, the Applicant said that he used a taxi the first day to get to work and has since then been using a rental vehicle at the cost of $25.00 per day. He testified that this was a financial hardship for him. He did not have any additional evidence to provide.

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 to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver is under a lifetime suspension.

Regarding due diligence, the Registrar's Agent submitted that the Applicant had been satisfied by the offer to drive, and thereby assumed the woman he had met had a valid driver's licence. At a minimum, the Applicant should have asked the woman to produce her driver's licence.

The Registrar's Agent submitted that while he appreciated how renting a vehicle has taken a toll on the Applicant, there is no material evidence that any other losses had been experienced. In addition, the Applicant confirmed that he had been able to access alternative transportation.

In summary, the Registrar's Agent asked the Tribunal to confirm the impoundment as the Applicant had:

(1) not checked, in any form, whether the woman he met, and allowed to drive his vehicle, had a valid driver's licence; and

(2) not experienced any losses or threats to the health, safety or well-being to anyone dependent upon the vehicle, and he had also been able to use alternate transportation.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

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).

ISSUE #1 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?

The Shorter Oxford English Dictionary, 3rd ed., 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.

ISSUE #2 Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

Regarding the ground of due diligence, the evidence established that the Applicant had not checked with the driver to find out whether she had a valid driver's licence. The Applicant's own evidence confirms that the ground of due diligence is not proven.

On the question of exceptional hardship, the Applicant testified that he was able to use a taxi and rent a vehicle as an alternate form of transportation. He had not missed any work or testified to any other impacts.

Overall, the evidence presented by the Applicant's concerns simply related to the costs of the impoundment and obtaining alternate transportation. Since the Tribunal cannot consider the costs of the impoundment, or inconvenience, in determining if exceptional hardship will result from the impoundment, the ground of exceptional hardship is not found proven either.

It was noted to the Applicant that he could pursue compensation from the suspended driver, as is stated in subsection 55.1(21) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

Simon Dann, Member

RELEASED: March 22, 2011

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6519-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: JANE WEARY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

SONIA De SANTIS, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 22, 2011 *by teleconference*

REASONS FOR DECISION

A hearing was held on March 22, 2011, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result, the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

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: 2006 Pontiac Pue (the "vehicle")

Date of Appeal: March 2, 2011

There were no preliminary matters in dispute between the parties.

ISSUE

As set out in the Applicant's Notice of Appeal (Exhibit #1), 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.

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 Registrar.

Evidence for the Applicant

The Applicant in this case is the girlfriend of the suspended driver. At the time of the impoundment, they shared the same address although the Applicant advised that this is no longer the case. She testified that she knew the driver was in trouble with his driver's licence but believed he had not yet gone to Court for the *Criminal Code* impaired charges of last August, and therefore, she believed that he remained eligible to drive. He had informed her that this was indeed the situation. She had not taken any steps to further investigate and takes responsibility for this omission.

On the date of the impoundment, they were driving to work together as was their habit, given that they work close to one another. She was not driving at the time, as she suffered from sciatica. Her boyfriend, therefore, was operating the vehicle.

It is a leased vehicle for which she is solely responsible. She entered into the lease in August of 2010, following the suspension and impoundment of a Toyota. The lease will not terminate for four years. Her monthly payments are $280.00.

The Applicant stated that she is the single mother of two teenage sons. The loss of the vehicle has resulted in severe hardship for her family who are dependent on the car for after school activities. In order to access her full-time employment, she has been required to rent an alternate vehicle, which is costing the family funds that are needed elsewhere. The result is added stress and economic hardship.

In cross-examination, the Applicant acknowledged that her sons are 16 and 19 years old and they have been able to walk to school or take a bus. On occasion a friend has driven them for after-school activities involving football and tutoring. There are no health issues in the family, whereby anyone has missed any appointments due to the impoundment. There are 911 services available in the community where she lives.

She further admitted that the suspended driver was assisting with the additional vehicle rental payments on an ad-hoc basis, given the temporary nature of his employment. She believes that attempting to get money from him through the small claims court to pay for the impoundment charges would cost more than anything she might receive as a result.

The Applicant stated that she has no friends or family who are willing to assist her in providing transportation while the vehicle remains under the impoundment order. She feels like a victim.

Evidence for the Registrar

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 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 to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had driving convictions going back to 1995, the most recent of which was for Driving with More than 80 Mgs of Alcohol in Blood under the *Criminal Code* of Canada, in August 2010, pursuant to which the driver's licence of the driver is under suspension until October 26, 2011.

The Agent for the Registrar read for the record section 41(1) of the Act.

The Registrar's Agent submitted Exhibit #2, which included document #3 noted above, being the certified record of the plate information for the Applicant's impounded vehicle, which illustrates the lease was entered into on June 18, 2010 – some two months prior to the impoundment of the Toyota.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
>
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
>
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
>
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the ground of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Applicant has the onus of establishing exceptional hardship as such is defined under the legislation. Only if she is able to meet this burden is the Tribunal able to order the impoundment be lifted. The evidence in this case, as provided by the Applicant, falls short of persuading the Tribunal that this is the case.
The Applicant is clearly inconvenienced by the impoundment. She also faces a serious economic challenge in finding funds to pay the impoundment costs. While the Tribunal has

some sympathy for the Applicant, given her evidence that she was misled by the driver into believing that his driving the vehicle was legitimate, this sympathy is muted to a significant degree by the following observations. First: the fact is that the driver's suspension was effective six months ago; nonetheless, it would appear he has been driving the Applicant's vehicle. Secondly: the Applicant's testimony cannot be considered entirely credible given her willingness to mislead the Tribunal as to the date of her entering into the lease for the impounded vehicle. Were it really after the Toyota's impoundment, as she testified, this would support her position that she had entered into the lease as a result of losing faith in her boyfriend's responsible driving. In fact, this was not the case as the facts demonstrate that the Applicant entered into the lease two months prior to the August impoundment of the Toyota.

More importantly, however, the Tribunal has no jurisdiction to order the lifting of the impoundment based on the Applicant's financial difficulties in the situation, as here, where there is an alternative vehicle available.

Where the claim of exceptional hardship is made by an applicant, section 10 of O. Reg. 631/98 provides the Tribunal with the very specific criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle. Here, the evidence is clear that the Applicant has a rental car for which the driver is assisting her in making her payments. There is, therefore, an alternate vehicle which she is using and which is available to her for her employment and domestic needs.

The evidence indicates that the Applicant has alternatives available to the use of the impounded vehicle and therefore does not establish 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: March 25, 2011

This decision may also be available on Quicklaw.

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

Ontario

6520-MVIA-EXHP-EXCEPTIONAL HARDSHIP

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: DAVID B. CARYLL, Presiding member

APPEARANCES: APPLICANT, Self-represented (the "Applicant")

Russell McKnight, Agent, representing the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: March 22, 2011 Toronto

DECISION

A hearing was held on March 22, 2011, at Toronto, Ontario, in the presence of the Applicant, and Russell McKnight, Agent for the Registrar, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 (the "HTA" or the "Act").

The Act provides, under section 50.2, the vehicle's owner right of appeal to the Tribunal. And, in subsection 50.2(2) the Act specifically names the parties to an appeal as the owner and the Registrar. As the Applicant is not the owner of the vehicle, the Tribunal dismisses this appeal.

LICENCE APPEAL TRIBUNAL

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David B. Caryll, Presiding Member

RELEASED: March 23, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6521/MVIA-STLN-EXHP-Stolen & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: SIMON DANN
Presiding member

APPEARANCES: APPLICANT, Unrepresented

RUSSELL McKNIGHT
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 16, 2011 *Teleconference*

REASONS FOR DECISION

A hearing was held on March 16, 2011, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	2005, Ford SPE (the "vehicle")
Date of Appeal:	February 26, 2011

This matter came before this Tribunal on March 16, 2011 and proceeded as a teleconference hearing.

There were no preliminary matters in dispute between the parties.

ISSUES

As set out in the Applicant's request for hearing (Exhibit #1), the owner appeals on the basis that the vehicle was stolen and the loss of the vehicle will result in exceptional hardship, as provided in section(s) 50.2(3) (a) and (d) of the Act.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the vehicle was stolen and that the order will result in exceptional hardship?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

On the ground of 'stolen', the Applicant's evidence was that the vehicle was taken without her permission and that she had not even known it was gone until the police contacted her to inform her of the impoundment.

She said the driver was her ex-brother-in-law and he had been staying with her temporarily, until he could find a permanent place to live.

She confirmed she had known he had a suspended license and had never given her permission for him to use the vehicle. She said the keys had not been locked away and may even have been in her coat pocket that night. She had not pressed charges and expressed her belief the driver intended to return the vehicle as the police stopped him in her neighbourhood where it looked as if "he was going home".

Regarding the ground of exceptional hardship, the Applicant said she needed her vehicle for work as well as to be able to carry out all her regular errands. Her son is also dependent on her for transportation to a local college for a masonry construction course. She said if he missed three classes he would be dropped from the course.

The Applicant said the loss of use of the vehicle was causing her daily hardship and inconvenience, as well as additional costs for alternative transportation methods. She did not mention anything about having missed medical appointments, lack of 911 emergency services or lost income and confirmed that so far, her son not missed any classes in his course. She also said that she could not afford the impoundment fee.

On questioning by the Respondent's Agent, the Applicant confirmed the driver had been staying with her for about a month but that she had never given him permission to use the vehicle nor had they discussed the possibility. For alternate transportation, she confirmed she had been able to get rides and use transit while her son had also been able to get rides. She confirmed she was worried about the 'what if' rides became unavailable for her and her son.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 under the *Criminal Code* of Canada pursuant to which the driver's license of the driver was then under suspension.

The Registrar's Agent reviewed the evidence provided by the Applicant for the appeal ground of stolen and said there was no evidence to confirm the vehicle was stolen at the time of impoundment. He pointed to the Applicant's testimony that while the vehicle had been taken, without permission there did not appear to have been any intention to deprive her of the vehicle as she said he was stopped in her neighborhood.

The Registrar's Agent also referred to the Applicant's testimony that the keys had been accessible, despite her being aware the driver's license was suspended. She also did not press charges.

The Registrar's Agent said the Applicant's appeal on the ground of exceptional hardship should not succeed as the Applicant has been able to use transportation alternatives. She also has not lost employment and there has been no loss of any education or threats to anyone's health or safety due to the impoundment.

The Applicant did not provide any evidence to confirm she had experienced, or would experience financial or economic loss. Therefore the appeal on the grounds of exceptional hardship had not been met and the order to impound should be confirmed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8), final and binding.

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3) (a) and (d).

Issue (1) Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the vehicle was stolen?

With respect to an appeal under section 50.2(3)(d) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in the the *Highway Traffic Act*. However, the *Shorter Oxford English Dictionary*, 3rd ed. defines "stolen" as follows:

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code* of Canada (the "Code") R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

> "steal" means to commit theft.

Section 332(1) of the Code states:

> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent, (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> (b) to pledge or deposit it as security;
>
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
>
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
>
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
>
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
>
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Ontario (Registrar of Motor Vehicles)* [2002] O.J. No. 745 that the Tribunal should not limit the meaning of 'stolen' only to an intention to take the vehicle permanently. The Court held that the term 'stolen' could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily.

Issue (2) Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

In summary and regarding the issue of 'stolen', the Applicant testified that while she was aware the driver had a suspended license, she had never discussed the subject of not taking the vehicle with him and her vehicle keys had been accessible. She also said she believed he intended to return the vehicle as he was stopped in her neighborhood looking "like he was going home". The Applicant had not pressed charges.

Based on the submitted evidence, the Tribunal recognizes that while the vehicle may have been taken without permission, the Applicant stated her belief it would be returned. There was also no evidence that it was taken against her will. Overall, the Applicant has failed to meet the criteria needed to confirm the vehicle was stolen at the time of impoundment.

Regarding (secondly) the issue of exceptional hardship, the Applicant testified she was able to get rides, use public transportation and generally make do with alternate transportation means. She confirmed she had not missed any days of work and had also been able to get groceries as needed, despite the inconvenience.

She acknowledged her son had been able to have rides to his educational program and had not missed any classes. There were no health issues or medical appointments missed and therefore this was not an issue for hardship consideration.

As to financial impacts, the Applicant did not provide any detail evidence to show there had been any significant or lasting impacts leading to hardship or loss as defined by the regulations. Therefore, the appeal on the grounds of exceptional hardship, due to the impoundment, is not found proven.

It was noted to the Applicant that she could pursue compensation from the suspended driver, as is stated in subsection 55.1(21) of the HTA.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Simon Dann, Presiding Member

RELEASED: March 18, 2011

This decision may also be available on Quicklaw at.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6529-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8, 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: JANE WEARY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

RUSSELL McKNIGHT, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 23, 2011 *by teleconference*

REASONS FOR DECISION

A hearing was held on March 23, 2011, at Toronto, Ontario, by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar of Motor Vehicles (the "Registrar") pursuant to section 55.1(3) of the Act. As a result, the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

The Registrar made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner: the Applicant
Motor Vehicle: 2007 Dodge Caravan (the "vehicle")

Date of Appeal: March 4, 2011

There were no preliminary matters in dispute between the parties.

ISSUE

As set out in the Applicant's Notice of Appeal (Exhibit #1), 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.

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 Registrar.

Evidence for the Applicant

The Applicant in this case is the father of the suspended driver. They share the same address and the Applicant was aware of his daughter's licence suspension. He testified that his daughter and his granddaughter were driving to the store with the Applicant's wife (the driver's mother) at the time of the impoundment when the Applicant's wife took ill with leg cramping and a migraine. Their cell phone was not with them, and so, they did not phone to ask the father (the Applicant) to come and drive them home. Instead, although only a few blocks away from home, the daughter drove the vehicle and was stopped by the police for not having plates. It was the day before her suspension was to be lifted. The Applicant knew the vehicle was not plated when his wife, daughter and granddaughter left with the vehicle. He arranged for the plates the very next day.

The Applicant was very honest and forthright in his evidence. He advised that he has another vehicle, which he uses to get to work as necessary, and which is available for the family needs. He explained that he is a part-time retiree. His wife is disabled with arthritis, and her medical needs are expensive. They have just completed some extensive and expensive home renovations. His pension and part-time salary are the family's primary income. He noted that his daughter had a number of problems leading to her Impaired Driving conviction under the *Criminal Code*, and subsequent licence suspension last year. She is improving and has moved back home with her own daughter this year. Since the impoundment, the family has missed no medical appointments.

Evidence for the Registrar

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 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 to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had driving convictions including Impaired Driving under the *Criminal Code* of Canada in February 2010, pursuant to which the driver's licence of the driver was under suspension until February 24, 2011.

The Agent for the Registrar read for the record section 41(1) of the Act.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

(a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

(b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(d).

ISSUE Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed., 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.

Section 10 of O. Reg. 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that:

- there is no alternative to the vehicle available,

- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle, and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the ground of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The Applicant has the onus of establishing exceptional hardship as defined under the legislation. The evidence in this case fails to persuade the Tribunal that there is exceptional hardship.

Where the claim of exceptional hardship is made by an applicant, section 10 of O. Reg. 631/98, provides the Tribunal with the very specific criteria the Applicant must meet to determine if exceptional hardship will result from the impoundment. The Tribunal must first consider whether the Applicant has an alternative to the motor vehicle. The Applicant has acknowledged the use of an alternate vehicle for the family needs. This is sufficient to oust any authority this Tribunal has to overturn the impoundment Order as issued under the clear terms of the legislation.

The evidence indicates that the Applicant has alternatives available to the use of the impounded vehicle, and therefore 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 Act, the Tribunal confirms the Order of the Registrar to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

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Jane Weary, Vice-Chair

RELEASED: March 28, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6533-DUDI-Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 (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: MARCH 24, 2011 *Teleconference*

REASONS FOR DECISION

A hearing was held on March 24, 2011, at Toronto, Ontario, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	1999 Ford Taurus SCS (the "vehicle")
Date of Appeal:	March 8, 2011

The Registrar submitted a set of certified documents which were received by the Tribunal by facsimile.

The documents tendered by the Applicant and the Registrar were entered into evidence as exhibits.

ISSUE

As set out in the request for hearing (Exhibit 1), the owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant was affirmed before giving testimony. She is a single mother of 2 young children. She is employed full-time at a child care centre and also attends college to further her education. The Applicant is also in a driver's education course to obtain her G2 licence.

The Applicant purchased the impounded vehicle in December 2010 and it was registered with the Ministry of Transportation in February 2011.

The Applicant's brother, the suspended driver at the time the vehicle was impounded, was visiting with the Applicant after not having seen each other for approximately 5 months. When the Applicant last saw the suspended driver, he was driving a vehicle which he said he had purchased. He also advised the Applicant that his driver's licence had been reinstated. In reality, the Applicant, after having spoken with the suspended driver's

girlfriend, was informed the vehicle had been stolen and the suspended driver was also disqualified. He had been incarcerated for a period of time.

On the afternoon the vehicle was impounded, the Applicant needed to run some errands and cash her pay cheque. She asked the suspended driver if he was a qualified driver and if he would drive her vehicle while she, her children and a friend ran some errands. He allegedly advised her that he was licensed and agreed to drive her vehicle. She did not ask to see his driver's licence.

While the suspended driver had care and control of the Applicant's vehicle, he was gaining speed and was ultimately pulled over by police. When stopped by police, the suspended driver turned to the Applicant and confessed that he had lied; that he could not be stopped by police since he was not a qualified driver. The suspended driver was arrested. The Applicant called one of her neighbours who was kind enough to pick up the Applicant, her children and her friend before the vehicle was impounded.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 Dangerous Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until October 21, 2011.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

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).

ISSUE 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?

The Shorter Oxford English Dictionary, 3rd ed., 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 defined as follows:

> **Due diligence:** Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS

The issue to be considered in this appeal is whether the Applicant exercised due diligence, in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made, was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and that the onus of proof is on the Applicant to establish that due diligence was performed, as required under this section of the Act.

The Applicant did not request the suspended driver to produce his driver's licence nor did she take any measures to ensure that the suspended driver had a valid driver's licence. She "trusted him" and took his word for it albeit was aware of his past driving offences.

Due diligence requires that the Applicant take further steps to verify the validity of the driver's licence. This can be accomplished by contacting the Ministry of Transportation of Ontario ("MTO") (seven days a week, 24 hours a day) with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

The Tribunal wishes to point out that the Applicant has the right to seek compensation from the suspended driver, as stated in subsection 55.1(21) of the HTA:

> "The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

It is unfortunate that this situation has occurred to a sensible and intelligent person, but the fact remains that there is no evidence before the Tribunal that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

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Nives Montano, Presiding Member

RELEASED: March 30, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6538-MVIA-EXHP-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 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: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: APPLICANT, Unrepresented

SONIA DE SANTIS
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 29, 2011 *Teleconference*

REASONS FOR DECISION

A hearing was held on March 29, 2011 by teleconference, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar") made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	2005 Chev M/L (the "vehicle")
Date of Appeal:	March 10, 2011

There were no preliminary matters in dispute between the parties so the hearing proceeded.

ISSUE

The Applicant 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, as set out in the request for hearing (Exhibit 1).

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 of the Applicant and received documentary evidence from the Registrar.

Evidence for the Registrar

The Registrar introduced certified documentary evidence indicating that the Applicant was the owner of the vehicle and that, at the time the vehicle was stopped, he was the driver and his licence was suspended pursuant to the provisions of the *Criminal Code* for impaired driving. There was also evidence that there was another vehicle with valid licence plates registered in the Applicant's name.

Evidence for the Applicant

The Applicant admitted that he was the owner of the vehicle. He also admitted that on the day the vehicle was impounded, February 27, 2011, he was the driver and that his licence was under suspension for the offence of driving while impaired. The Applicant lives in a large urban area. Bus service and taxi service is available to him as is "911" emergency service. He can walk to the grocery store about 20 minutes walk away although that is difficult because he has pain in one foot. He has used taxis from time to time to attend work and to attend important medical appointments. He has missed approximately eight

medical appointments that he deemed were not important enough to justify the expense of a taxi.

The Applicant finds himself in dire financial straits. He is a millwright by trade. Currently he is laid off and on unemployment insurance. He is called back to work from time to time but is barely scraping by financially. Recently, his schizophrenic son has come to stay with him. Indeed, at the time he was stopped he was returning from a visit to his pastor where he was seeking spiritual help to guide him in handling his son. He stated that this was the only time he had driven the vehicle since his suspension. He drove on this occasion simply because he was in need of the pastor's help, suffering from pain in his foot and unable to afford a taxi.

The Applicant has not missed any work as a result of the impoundment. Since the impoundment he has missed two days of work, once because a taxi refused to come because of inclement weather and on the second occasion because of health problems. His son's treatment is currently based in another city. The next appointment for his son is on April 27, 2011, after the end of the impoundment period, but an earlier appointment could be arranged. The scheduled appointment is a preliminary step to the transfer of the son's treatment to a location close to the Applicant's home. The Applicant is seeking more extensive treatment for his son and a transfer is necessary.

The Applicant stated that his son's schizophrenia had placed a great emotional burden on his family. It ultimately led to the breakdown of his marriage. The Applicant was able to point, with some pride, to the fact that two of his children had university degrees and his troubled son had finished college before his illness had manifested itself. As part of the family break-up, his wife had moved in with one of her sons and had taken the second car. It was not available to the Applicant.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3), one of which is that the order will result in exceptional hardship (subsection 50.2(3)(d).

Issue Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of Regulation 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,
- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

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APPLICATION OF LAW TO FACTS

It is clear from a review of the facts that the order to impound the vehicle was correctly made. The Applicant was admittedly under a *Criminal Code* suspension for driving while impaired when he was stopped. The Tribunal accepts that the Applicant's use of the vehicle was for a good purpose, seeking spiritual guidance to better care for his son. The legislation, however, has no provisions for considering the intent of the driver at the time of the incident. It is sufficient that the Applicant was the driver.

It is also clear that the cost of the impoundment will create a severe economic impact on the Applicant given his currently reduced circumstances. Notwithstanding the economic impact, the Applicant's appeal must fail. There is a range of alternative means of transportation available to the Applicant and his son. Living as he does in a large urban area, public transportation and taxis are widely available. Finally, in the event of a medical emergency, emergency medical services are available by dialing 911.

It is also clear from the legislation that the relief is not available for economic or financial hardship unless the burden of such hardship falls on a person other than the suspended driver whose actions led to the impoundment. In this case, the Applicant owner was also the driver at the time of the impoundment. This Tribunal has no discretion to consider the economic impact of the impoundment on the Applicant. The Applicant's son's next medical appointment is after the end of the impoundment period so there will be little or no impact on him.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, 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

D. Gregory Flude, Vice-Chair

RELEASED: March 30, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6542-MVIA-DUDI-NUSP-EXHP- Due Diligence, Not Under Suspension, & Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8 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: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: APPLICANT, Unrepresented

RUSSELL McKNIGHT,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 29, 2011 Toronto

REASONS FOR DECISION

A hearing was held on March 29, 2011 at the Tribunal's Chambers, 1 St. Clair Ave. West, 12th Floor, Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, c. H.8 amended (the "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

The Registrar of Motor Vehicles (the "Registrar") made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	1999 Pont Mon (the "vehicle")
Date of Appeal:	March 11, 2011

There was no material dispute over the underlying facts. The dispute focussed on the identity of the driver at the time of the impoundment and whether the Applicant would suffer exceptional hardship. No evidence was tendered concerning due diligence and, accordingly the Tribunal will not consider that aspect of the appeal notwithstanding it was initially advanced as a ground of appeal.

According to the best evidence available to the Tribunal, on March 2, 2011 the police attended the Applicant's home some time after 8:00 p.m. The vehicle was in the driveway and the Applicant's husband was inside the house. There had been an earlier report of the vehicle being driven on a 400 series highway and crossing the lanes. The police concluded that the Applicant's husband had been the driver, demanded a breath sample, arrested the Applicant's husband and impounded the vehicle. Apparently there was no other adult in the house at the time.

There were no preliminary matters in dispute between the parties so the hearing proceeded.

ISSUES

As set out in the Applicant's request for hearing (Exhibit #1), the owner appeals on the basis that the driver's licence was not under suspension, that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and that the loss of the vehicle will result in exceptional hardship, all as provided in sections 50.2(3)(a) (b) (c) and (d) of the Act. The due diligence defence being incompatible with the defence that the driver's licence was not under suspension at the time of the impoundment, two issues were left for the consideration of the Tribunal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The basis of the Applicant's case, and the major focus of the Applicant's evidence, was the fact the person the police say was driving the vehicle, and whose licence was under suspension, was not, in fact, the driver. She called her brother-in-law as a witness as well as giving evidence herself.

The Applicant's brother-in-law testified that he had driven the Applicant's husband to work on the morning of Tuesday March 1, 2011. He had kept the vehicle on Tuesday and Wednesday but the Applicant needed it. He planned to return it to the Applicant on Wednesday evening.

On Wednesday, March 2, 2011 he finished work at 7:00 p.m. some distance from the Applicant's home. He was met by another brother who, at the time had been looking after the Applicant's infant son. After work, some time was spent transferring the baby to the vehicle, taking tools from the vehicle and putting them in the other car and chatting. The witness estimated that he left his work premises around 7:30 p.m. to drive to the Applicant's home.

From his work location to the Applicant's home he would have to use the 400 series highway in question. He testified that the baby was crying on parts of the drive and he turned around briefly to see if he could calm the child. He feels this action may have caused him to drift into other lanes on the highway.

The witness estimated that he reached the Applicant's home around 8:00 p.m. Only his brother, the Applicant's husband, was home. He delivered the baby and the keys to the vehicle to the Applicant's husband and left some time after 8:00 p.m. He left the Applicant's home in his own car and arrived home around 9:00 p.m. Some time later he was advised by the Applicant what had transpired.

The Applicant testified that she arrived home after 10:00 p.m. on the night in question. She was greeted by the police who informed her that her husband had been arrested and that her vehicle was being impounded. The vehicle was then towed. Inside the house she found the baby in the care of friends. Her husband was released the next day around 5:30 a.m.

The Applicant stated that she lives on one side of a large conurbation and works on the opposite side. Her doctor is on the same side as her work and she needs to take the baby to appointments. She has been driven to work by a co-worker and has had the assistance of friends and family to attend medical appointments. Public transport is available but the journey would take about three hours and she does not want to expose the baby to the journey or the elements. She also has two other children and needs to be home when they

come home from school around 3:30 each afternoon. In her view use of the vehicle is an absolute necessity and she will suffer exceptional hardship if it is not available to her.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle 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 impaired driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until July 2, 2012.

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.

Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

> (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
>
> (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
> (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
> (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
> (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3) (b) and (d). In considering subsection (d), the Tribunal is cognizant of the definitions of the words exceptional and hardship. The Shorter Oxford English Dictionary, 3rd ed. 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.

Section 10 of Regulation 631/98 provides the criteria to be considered and those not to be considered in determining the appeal under this section. First, the Tribunal must consider whether no alternative exists for the impounded vehicle and if there is no alternative, then whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle or a threat to public health and safety or to the environment or property of a community in whose service the vehicle is ordinarily used.

Second, the section provides that the Tribunal may not, except in certain circumstances, consider certain factors:

- inconvenience to any person, financial or economic loss to any person,
- loss of employment or employment opportunity to any person, or
- loss of education or training.

These factors may be considered if the owner demonstrates that

- there is no alternative to the vehicle available,

- the loss will be immediate, significant and lasting,
- the impact will be on a person ordinarily transported by the vehicle and
- the impact of the loss will be on someone other than the suspended driver and will not be the result of a loss by the suspended driver of the type described above.

All elements of the grounds of appeal must be proven on the balance of probabilities by the owner of the vehicle.

APPLICATION OF LAW TO FACTS

The first issue before the Tribunal concerns the application of subsection (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. Central to this determination is the identity of the driver of the motor vehicle at the specific time. The evidence with respect to the driver of the vehicle comes from two sources. The first source is the Notice to Registrar prepared from information provided by the police. A certified copy of Notice to Registrar was relied on by the Registrar. Certification establishes that the Notice to Registrar is a true copy of a document in the Registrar's possession and the Tribunal is satisfied that the Registrar received this Notice, and in reliance on it, issued an order to impound the vehicle. Based on the information in the Notice to Registrar, the order to impound was correctly made.

Certification does not prove factual allegations in the Notice to Registrar that are in dispute between the parties. Generally, those factual allegations remain hearsay. In the normal course, this Tribunal can consider hearsay evidence and consider what weight to assign. It is worthy of note that the Notice to Registrar is a business record and contains information entered by a person who was under a duty to enter that information at the time. Thus, it falls under the business records exception to the hearsay rule. Such documents are considered to be inherently reliable and are accepted for the truth of their contents. Against the documentary evidence, the Tribunal has the evidence of the Applicant's brother-in-law which was first-hand and factual.

The Applicant's brother-in-law had first hand knowledge of the events that were not available to the police or the person preparing the Notice to Registrar. The police arrived after the fact and made certain assumptions. Faced with the fact that the Applicant's husband was the sole adult in the house at the time of their attendance, those assumptions were not unreasonable. The assumptions, however, must yield in light of further evidence that is equally consistent with the facts. The witness gave a completely consistent explanation of the facts. His evidence was believable. It was not peppered with self-serving but improbable detail. When he was uncertain of the precise time something occurred, he stated that was the case. He left his place of work around 7:30 p.m. after talking with his brother, transferring the baby and tools. He arrived at the Applicant's home around 8:00 p.m. He left the Applicant's home some time after 8:00 p.m. and arrived home at 9:00 p.m. He did not recall wandering over lanes but conceded he was distracted by the baby. The Notice to Registrar identifies 8:00 p.m. as the time of the incident. The Tribunal concludes that the evidence is overwhelming that the Applicant's brother-in-law was the

driver at the time in respect of which the order was made. There was no evidence that his licence was then under suspension.

Having made the finding with respect to the driver of the vehicle, it is not necessary to consider the question of undue hardship. Suffice it to say that the evidence advanced by the Applicant in support of this position fell far short of undue hardship. There were many alternatives available to her, alternatives of which she had been able to avail herself in the period between March 2, 2011 and today's hearing.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

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D. GREGORY FLUDE, Vice-Chair

RELEASED: March 30, 2011

This decision may also be available on Quicklaw.

<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvis/6005.cvis.6183361.Canada.Inc.pdf> **Decisions under the Highway Traffic Act**

Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - (CVIS)

Fiscal Year 2010 - 2011

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

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<http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvis/6005.cvis.6183361.Canada.Inc.pdf>

- 6183361 CANADA INC. O/A J & J LINEHAUL
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/cvis/6005.cvis.6183361.Canada.Inc.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6183361 CANADA INC. O/A J & J LINEHAUL

APPEAL FROM AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 82.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8

TO IMPOUND AND SUSPEND A COMMERCIAL MOTOR VEHICLE

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: JASWINDER SINGH, Agent, representing 6183361 Canada Inc. o/a J & J Linehaul (the "Applicant")

PATRICK MOORE, Counsel, representing the Registrar of Motor Vehicles (the "Registrar")

DATE OF HEARING: May 20, 2010 Kingston

REASONS FOR DECISION AND ORDER

The Applicant appeals pursuant to the provisions of section 50.3 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act") from the impoundment and suspension of the vehicle portion of the permit of its vehicle, a 1997 Semi-Trailer.

EVIDENCE

The evidence of the Registrar consisted of documentation and the testimony of inspection officers Rejean Laframboise and Ellen Claire Delage.

The evidence of the Applicant consisted of documentation and the testimony of Jaswinder Singh, President of the Applicant.

The following is a summary of the relevant evidence.

Officer Laframboise has been employed with the Ministry of Transportation since 2003, and he obtained his Critical Inspection Certificate in 2004. Officer Laframboise was stationed on the exit ramp on March 19, 2010, where he observed the push rod movement on the Applicant's vehicle as it went past him. He directed the driver to come into the inspection station. He then carried out a Level 1 Commercial Vehicle Safety Alliance (CVSA) inspection of both the tractor and the trailer. Based on the documentation provided by the driver and his observations, he determined that the trailer required brakes. He noted that the braking system for the trailer was an "S Cam", clamp type 30, regular, with round ports. Pursuant to Ontario Regulation 512/97, the maximum allowable push rod travel for this type of brake is two inches.

Officer Laframboise carried out a test of the brakes by blocking the wheels, having the driver release the brakes, ensuring the air pressure in the vehicle indicated between 90 and 100 p.s.i., and then having the driver turn off the engine. With the brakes released, he then marked the push rods at the face of the chamber using chalk, and after confirming the pressure on the truck gauge was between 90 and 100 p.s.i., he instructed the driver to apply the brakes and hold them on. He then measured the distance from the face of the chamber to the chalk marks. Officer Laframboise measured the push rod travel for both the truck and the trailer. The results were that the brakes on the trailer appeared to be out of adjustment. The measurements of push rod travel for the rear axle were 2 1/4 inches on the left and 2 3/8 inches on the right, and for the front axle, 2 1/4 inches on the left and 2 3/8 inches on the right. Officer Laframboise concluded that 100 percent of the brakes were out of adjustment by 1/4 of an inch or more. A critical defect occurs when 50 percent of the brakes are out of adjustment by 1/4 of an inch or more.

After telling the driver to remain, Officer Laframboise had Officer Delage verify his findings. Officer Delage testified that the same procedure was followed to verify the measurements with the exception that a certified air gauge was attached to the air lines to ensure the air pressure was at the appropriate level during the measuring of the push rod travel, rather than relying on the gauge on the dash of the tractor. Officer Delage and Officer Laframboise both went under the vehicle at the same time, and Officer Delage, the verifying officer, erased the previous chalk marks and made new chalk marks on the push rods at the face of the chamber. The officers then checked the air gauge and confirmed that the pressure was at 95 p.s.i. The driver was then instructed to fully apply the brakes, which he did. The verifying officer took measurements from the face of the chamber to the chalk marks. There was one measurement, that of the rear right push rod, which was 1/8 of an inch less than Officer Laframboise's original measurement. The conclusions, however, were the same in that the push rod travel for all the brakes were still 1/4 of an inch or more beyond the two inches allowed. Therefore, the trailer was found to have a critical defect.

After completing the inspection, Officer Laframboise advised the driver that the trailer would be impounded, and he proceeded to complete a Notice to Registrar of Critical Defect. The driver was also advised that the brakes would have to be adjusted before the trailer could be towed away as trailers that require brakes, which included the subject trailer, could not travel if the brakes are out of adjustment.

Later in the afternoon on March 19, 2010, a mechanic attended at the inspection station and adjusted the brakes on the trailer.

Mr. Jaswinder Singh is the President of the Applicant. Mr. Singh provided a copy of the annual inspection certificate and the bill of the inspecting mechanic, completed on February 4, 2010, indicating that the vehicle had no defects at that time.

Mr. Singh also produced a bill of the mechanic who adjusted the brakes on the trailer on March 19, 2010, at the inspection station. Mr. Singh pointed out that the bill does not indicate that there was a "defect". It does, however, indicate that a "brake adjustment" was carried out.

Lastly, Mr. Singh produced a copy of a mechanic's invoice, dated May 5, 2010, indicating that a safety check had been carried out on the trailer. This was required to facilitate the trailer's release.

Mr. Singh pointed out that the verifying officer's measurements differed from Officer Laframboise, which in his opinion, indicated that a mistake had been made and that other mistakes could have been made. He offered no evidence to support this suggestion, and did not offer evidence that any measurements were taken by the attending mechanic to contradict the officers' findings.

Mr. Singh also questioned why the Applicant had to be put through the expense of having to send a mechanic to do the brake adjustments, since the trailer was going to be impounded anyway, and the individual who was sent to tow it probably could have done the adjustments.

LAW

Section 50.3 of the Act defines this Tribunal's jurisdiction to hear and determine impoundment appeals. Section 50.3 of the Act states:

> 50.3(1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.
>
> **Parties**
>
> (2) The owner and the Registrar are the parties to an appeal under this section.

Grounds for appeal

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are,

(a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made; or

(b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1.

Powers of Tribunal

(5) The Tribunal may confirm or set aside the order to impound and suspend.

Ontario Regulation 512/97, Part II, Section 7, sets out the method of measurement of push rod travel for air brakes and what amounts to critical defects:

Air Brakes

7. (1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.

(2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of sections 82.1 and 84 of the Act if one or more of the following defects is present on more than 50 per cent of the wheel brakes of the vehicle:

1. A drum or rotor is cracked, broken or missing.
2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam shaft, or cam shaft support bracket is broken or missing.
3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
4. The push rod travel out of the service brake chamber is ¼ inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

Column 2 of Schedule 1 states that the maximum allowable travel for clamp type 30 regular stroke brakes is two inches.

DECISION

There are two possible grounds upon which the Tribunal can set aside an Order to Impound:

1) The commercial motor vehicle or trailer was stolen at the time the order was made; or

2) There were no critical defects at the time of the inspection.

There has been no suggestion that the vehicle was stolen and there is no evidence that Officer Laframboise and Officer Delage carried out their measurements incorrectly. There was a small discrepancy with one of the measurements but the conclusions were consistent, that 100 percent of the brakes on the trailer were out of adjustment at the time of inspection, and this exceeded the requirement for a critical defect, which occurs when more than 50 percent are out of adjustment. The Tribunal is satisfied that Officer Laframboise and Officer Delage followed the regulatory protocol in conducting the inspection and accepts their finding that the trailer in question had a critical defect at the time of the inspection.

The invoices submitted by the Applicant do not contradict any of the evidence of the Registrar. They show that on February 4, 2010, the trailer had no defects. The evidence that on March 19, 2010, the day of the impoundment, the mechanic sent by the Applicant adjusted the brakes before the vehicle was impounded supports a finding that the brakes needed adjusting. The May 5, 2010, invoice is evidence that after the impoundment, the vehicle passed a safety check. There is no evidence that the vehicle was defect free on March 19, 2010, which is the relevant time.

ORDER

On all of the evidence, and pursuant to section 50.3(5) of the Act, this Tribunal confirms the Registrar's Order, effective March 19, 2010, to impound the Applicant's trailer and to suspend the plate portion of its permit.

LICENCE APPEAL TRIBUNAL

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Elizabeth L. Sproule, Vice-Chair

RELEASED: June 7, 2010

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

Decisions under the Highway Traffic Act

Section 95(1) - Motor Vehicle Inspection Licence - (GARAGE)

Fiscal Year 2010 - 2011

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

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- Ramanathan Thangarajah And Unity-A-Automotive Inc.-Pre-Hearing
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/garage/may/5843-gar.ThangarajahUnity.pre.pdf>
- S.B. Auto Services Ltd. And Shiqer Bajrami
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/garage/oct/6174-GAR-S.B.Auto%20Services%20Ltd.pdf>
- Ramanathan Thangarajah And Unity-A-Automotive Inc.
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/garage/oct/5843-GAR-Thangarajah-Unity%20A%20Auto-Motion.pdf>
- Hamilton Auto Services Ltd
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/hta/garage/mar/6348GAR.Hamilton%20Auto%20Services.pdf>

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

Ontario

PRE-HEARING

RAMANATHAN THANGARAJAH AND UNITY-A-AUTOMOTIVE INC.-Pre-hearing

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 REVOKE A MOTOR VEHICLE INSPECTION STATION LICENCE AND TO REVOKE A MOTOR VEHICLE INSPECTION STATION MECHANIC'S REGISTRATION

TRIBUNAL: SIMON DANN, Member

APPEARANCES: SYMON ZUCKER, Counsel, representing the Applicants

PATRICK S. MOORE, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF PRE-HEARING: May 4, 2010 Toronto

ORDER

On May 4, 2010, a pre-hearing was held by this Tribunal, in the presence of Symon Zucker, Counsel, appearing for Ramanathan Thangarajah and Unity-A-Automotive Inc., (the "Applicants"), and Patrick S. Moore, Counsel appearing on behalf of the Director of Vehicle Inspection Standards (the "Director").

At the outset of the prehearing, Mr. Zucker advised the Tribunal that he had two issues to discuss and these were:

1. that he was new on the file and required additional time to prepare as he had only recently received eight (8) volumes of materials from the Ministry's office and that he had additional disclosure requests to make.

2. that he wished to request a motion hearing regarding what he termed to be an "abuse of process" on the Ministry's part; the purpose of the motion hearing being to "quash the allegations" raised from the 2007 Notice of Proposal and removed from the current Notice of Proposal.

Mr. Zucker further noted that he had only received the volumes of material on or about April 20, 2010, despite requesting disclosure on or about February 25, 2010. Mr. Moore acknowledged the April 20th date.

Mr. Zucker added that the request for disclosure was to provide him with a list of witnesses which the Ministry intended to call as well as a "general idea" of what their testimony was expected to address. Mr. Moore indicated he would comply with the request over the next ten (10) or so days.

After some discussion and in an effort to narrow the issues for the motion hearing, Mr. Zucker agreed he would be submitting arguments to exclude items 3, 4, 6, 7(a) to 7(t) inclusive, set out in the Notice of Proposal dated December 17, 2009.

Mr. Zucker noted his position as being that these items were (i) dealt with in 2007 and they were not going to be brought up again, and (ii) that to revive them now and include them in the current Notice of Proposal was an abuse of process.

In summary, there was no resolution of the issues between the Parties and there was agreement on a motion hearing, which required the scheduling of new dates for the hearing. It was agreed the motion hearing could occur on the originally scheduled hearing date.

The Parties also agreed the Tribunal may schedule the same Chair to preside over both the motion hearing and the hearing.

Therefore, the Tribunal makes the following Order:

1. The Parties to the hearing are the Applicants and the Director.

2. The hearing of the Applicants' motion for an order to "quash the [noted] allegations" from the Notice of Proposal dated December 17, 2010 will take place on June 1, 2010 commencing at 9:30 a.m. at the Tribunal's hearing rooms, 1 St. Clair Ave. West, Toronto. The Applicants will comply with the filing requirements set out in Rule 11.2 of the Tribunal's Rules of Practice.

3. 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.

4. The Parties were further reminded of the Tribunal's disclosure rules and time limits, and that they shall fully comply with the requirements of disclosure of all

documents or things, as set out under Rules 6 and 11 of the Tribunal's Rules of Practice.

5. In the absence of a settlement being reached by the Parties prior to the hearing, originally scheduled for June 1, 2, 3 and 4, 2010 has, upon agreement by the Parties, been rescheduled and will now commence at 9:30 a.m. on Monday, August 16, 2010 and continue on August 17, 18 and 19, as may be required, at the Tribunal's hearing rooms, 1 St. Clair Ave. West, Toronto.

6. Subject to the outcome of the Motion hearing, the parties agree that the books of documents provided by the Respondent for the purpose of the pre-hearing contains relevant documents which can be reviewed by the panel conducting the hearing in this matter prior to the commencement of the hearing.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Member

RELEASED: May 13th 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

S.B. AUTO SERVICES LTD. AND SHIQER BAJRAMI

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS UNDER THE *HIGHWAY TRAFFIC ACT,* R.S.O. 1990, CHAPTER H.8 as amended

TO REFUSE REGISTRATIONS

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: SHIQER BAJRAMI, Applicant, on his own behalf, and as Agent for the Applicant, S.B. AUTO SERVICES LTD.

DOUGLAS LEE, Counsel for the Respondent, Director of Vehicle Inspection Standards

DATE OF HEARING: OCTOBER 12, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

By a Notice of Proposal dated June 23, 2010, and pursuant to clauses 91(3)(a), (b) and (c) and 92(4)(a) and (b) of the *Highway Traffic Act* ("the *Act"),* the Director of Vehicle Inspection Standards ("the Director") proposed to refuse to issue a Motor Vehicle Inspection Station ("MVIS") licence to S.B. Auto Services Ltd. and to register Shiqer Bajrami as a Motor Vehicle Inspection Station Mechanic ("MVIM") on the following grounds:

1. Shiqer Bajrami, the proposed mechanic, has previously been the holder of the MVIS licence as a sole proprietor operating under the business name S.B. Motors. He has also previously been the director of a corporation called S.B. Motors Ltd.

that held an MVIS licence. He was the president of Xeni Motors Ltd. Xeni Motors Ltd.'s application for an MVIS licence was refused on November 10, 2009. An appeal by Xeni Motors Ltd. to the Licence Appeal Tribunal was dismissed on February 19, 2010.

2. I am of the opinion that S.B. Auto Services Ltd. is the same enterprise as Xeni Motors Ltd. While Valbone Bajrami is listed as the director of S.B. Auto Services Ltd., I am of the opinion that Shiqer Bajrami has the controlling role in this corporation. Therefore, I refuse to issue an MVIS licence to the applicant on the same grounds that I refused a licence to Xeni Motors Ltd.

3. I also refuse to register Shiqer Bajrami as an inspection mechanic on the same grounds that I refused him on November 10, 2009.

4. I do not issue MVIS licences to applicants who do not have a qualified mechanic. Shiqer Bajrami is the only proposed mechanic of the applicant. I have concluded that he does not meet the requirements of section 93 [sic] of the *Act*. Therefore, in addition to the reasons stated earlier, I refuse to issue the corporation a licence in absence of an eligible mechanic.

The Director called one witness, filed two books of documents and two other documents, all of which were marked as exhibits.[1] Mr. Bajrami testified for the Applicants. He filed no documents.

FACTS PROVEN

There was no serious dispute about virtually all of the facts. Accordingly, the Tribunal finds that the following have been proved:

1. This is the fourth time since 2003 that Mr. Bajrami has appeared before the Tribunal.

   (a) In May 2003, Mr. Bajrami, o/a S.B. Auto Centre, appealed the Director's decision under the MVDA to refuse him registration as a motor vehicle dealer. The Tribunal denied his appeal.

   (b) In May 2005, Mr. Bajrami appeared before the Tribunal on behalf of his company, S.B.Motors Limited, and successfully appealed the Director's refusal to grant it a MVIS licence subject to a condition that the corporation not be convicted of "curbsiding".

   (c) In February of this year, Mr. Bajrami and a new company he had formed, Xeni Motors Ltd., appealed to the Tribunal from a Notice of Proposal of the

[1] Exhibits 3, 4, 5 and 6

Director refusing them registration as a MVIM and as MVIS, respectively. The Tribunal denied the appeal.

2. On March 25, 2010, Valbone Bajrami ("Mrs. Bajrami"), the wife of Mr. Bajrami, incorporated S.B. Auto Services Ltd. under the laws of Ontario. She is the sole director.

3. Mrs. Bajrami is not a mechanic and has had no previous experience in operating a MVIS.

4. Mr. Bajrami has over $109,000 of outstanding unsatisfied judgments against him. Mrs. Bajrami is jointly responsible with Mr. Bajrami for $31,000 of such judgments.

5. Mr. Bajrami has not paid $6,875.00 in fines levied against him for industry-related offences.

6. None of Xeni Motors Ltd., Mr. Bajrami or S. B. Motors Ltd. is currently compliant with the *Retail Sales Tax Act*. Each of them has an outstanding balance with the Ministry of Revenue of Ontario.

7. S.B.Motors Ltd. has not filed Corporations Tax returns.

THE CASE FOR THE DIRECTOR

Mr. Michel Morrissette was sworn and testified. He is a transportation enforcement officer employed by the Ministry of Transportation (the “Ministry”). He was tasked to investigate the Applicants on receipt of the applications for registration.

He met with Mrs. Bajrami and Mr. Bajrami twice in May 2010. He formed the firm opinion that Mrs. Bajrami was a "puppet" of Mr. Bajrami. She attempted to play up her role as a director of the corporation as much as possible but it was Mr. Bajrami who answered all the questions and did most of the talking. Mr. Bajrami pressed him to approve the application and said that Mr. Morrissette had the ability to approve the application.

Mr. Bajrami cross-examined Mr. Morrissette and suggested to him that he "was told" not to approve the application. Mr. Morrissette categorically denied this suggestion. He said that he was compelled to do his job in accordance with the Ministry's practices, policies and procedures.

Mr. Bajrami then suggested to Mr. Morrissette that the Ministry was trying "to damage him" and "get revenge" against him. Mr. Morrissette denied any such claim.

THE CASE FOR THE APPLICANTS

Mr. Bajrami was sworn and testified. In his opinion the matter was simple. He had not engaged in "curbsiding" since 2005 so he and S.B. Auto Services Ltd. should be registered. He accused Mr. Morrissette of lying and said that Mr. Morrissette had told him that he was “told" to deny the application.

He then made a number of unsubstantiated allegations that the Ministry was out to damage him and "get revenge".

Counsel for the Director, in cross-examination, put to Mr. Bajrami a recent letter from the Attorney General's office[2] which said that all of the outstanding judgments against him and Mrs. Bajrami remain unpaid. He said that "was wrong" and offered to bring evidence "from his lawyer" that some of them had been paid. When Counsel confronted him with evidence of non-compliance with the *Retail Sales Tax Act* and the unpaid fines, he professed no knowledge and insisted that he had entered into an arrangement with the Minister of Revenue of Ontario to pay the Retail Sales Tax.

THE LAW

The Highway Traffic Act

> 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.
>
> (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;
>
> 92. (4) Subject to section 95, the Director may refuse to register a motor vehicle inspection mechanic where, in his or her opinion,
>
> (a) the past conduct of the mechanic affords reasonable grounds for belief that the mechanic will not act as a motor vehicle inspection mechanic in accordance with the law and with honesty and integrity; or

[2] Exhibit 3, Tab 16, p. 114

> (b) the mechanic is not competent to act as a motor vehicle inspection mechanic.

The Director must prove his case on a balance of probabilities.

APPLICATION OF THE LAW TO THE FACTS

The Tribunal accepts the testimony of Mr. Morrissette. Where it differs from that of Mr. Bajrami, the Tribunal prefers the evidence of Mr. Morrissette.

It follows, therefore, that theTribunal finds that Mrs. Bajrami is a mere puppet of Mr. Bajrami in S.B. Auto Services Ltd. Mr. Bajrami is the directing mind of that corporation.

It is naive of Mr. Bajrami that he could think that he could come back to the Tribunal with a new company with Mrs. Bajrami as the sole director and, on similar facts, seek to obtain licencing when a mere seven months ago this Tribunal denied him such licencing.

He obviously has no idea of what the people of Ontario expect from licensed MVISs and MVIMs. It is not enough to refrain from "curbsiding". A licensee must respect the laws of Ontario. Yet, Mr. Bajrami continued to deny responsibility for his debts, fines, and Retail Sales Tax failures in the face of clear evidence thereof.

It is particularly troubling to the Tribunal that he has breached the statutory trust imposed on him by the *Retail Sales Tax Act* (Ontario) as it then was.

Vice-Chair Flude in his judgment in Xeni Motors[3] referred to this as follows:

> Not only is it a breach of law, but misappropriation of trust funds indicates a lack of integrity and honesty.

There is no basis upon which this Tribunal could grant licensing to the Applicants which, in addition to the other factors included herein, have wasted economic resources in a futile appeal.

Mr. Bajrami is ungovernable. His past behaviour affords reasonable grounds for belief that he will not act as a MVIM in accordance with the law and with honesty and integrity. He is the directing mind of S.B. Auto Services Ltd. so it follows that his past behaviour is such that the proposed MVIS will not be operated in accordance with law and with integrity and honesty.

The Director has proved his case and is entitled to the Order he seeks.

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[3] Exhibit 3, Tab 10, para. 33

DECISION AND ORDER

The Tribunal hereby orders the Director to carry out his Proposal and refuse to register S.B. Auto Services Ltd. as a Motor Vehicle Inspection Station and Mr. Shiqer Bajrami as a Motor Vehicle Inspection Mechanic.

LICENCE APPEAL TRIBUNAL

_____
Terrance Sweeney, Vice-Chair

RELEASED: October 22, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

RAMANATHAN THANGARAJAH AND UNITY-A-AUTOMOTIVE INC.

AN APPEAL OF A DECISION OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS UNDER THE *HIGHWAY TRAFFIC ACT,* R.S.O. 1990, c. H.8

TO REVOKE REGISTRATIONS

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: SYMON ZUCKER, Counsel, representing the Applicants

JOHN PETROSONIAK and DOUGLAS LEE, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF HEARING: July 26, 2010
September 21, 2010 Toronto

ORDER

This motion arises in the course of an appeal by the Applicants, Mr. Ramanathan Thangarajah and Unity-A-Automotive Inc. ("Unity-A"), to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Director of Vehicle Inspection Standards (the "Director") under the *Highway Traffic Act,* R.S.O.1990, c. H.8 (the "Act") proposing to revoke the Type 2 and Type 6 Motor Vehicle Inspection Station Licences of Unity-A and the registration of Mr. Thangarajah as a motor vehicle inspection station mechanic. The motion is brought by the Applicants who move to strike certain allegations in the Director's Notice of Proposal. The Applicants also seek a declaration that the Director's conduct evidences an abuse of process.

FACTS

This motion relates to a previous Notice of Proposal issued by the Director to revoke the licence of Unity-A and the agreement whereby that Notice of Proposal was rescinded.

The Applicants assert that there was an agreement relating to certain of the allegations in that earlier Notice of Proposal that precludes them from being raised again in the current proceedings. The Director denies that the agreement reached would preclude him from resurrecting these allegations. The Tribunal had the pleasure of hearing from the three counsel involved in the disputed events and found all three to be highly credible. The Tribunal also thanks the counsel appearing on this motion for their assistance.

On May 22, 2007, the Director issued a Notice of Proposal proposing to revoke the licence of the Applicant Unity-A. The Director brought concurrent charges under the Act and under the *Provincial Offences Act,* R.S.O. 1990, c. P.33 (the "POA"). There was a "global resolution" between the parties that addressed both the POA charges and the revocation proposal which was being appealed to the Tribunal. Unity-A agreed to plead guilty to certain of the POA charges and to pay certain fines. The Director agreed to withdraw the balance of the charges. Further, the Director agreed to rescind the Notice of Proposal after the Unity-A had withdrawn its appeal to this Tribunal.

Mr. Michael Fraleigh was the counsel retained by the Applicants to act on the earlier appeal to the Tribunal. Settlement discussions between him and Mr. Patrick Moore, counsel for the Director, began sometime in the summer or fall of 2007. Mr. Fraleigh testified that Mr. Patrick Moore advised him that the Director was prepared to withdraw the Notice of Proposal if Unity A would plead guilty to certain of the POA charges. In mid to late October 2007, the discussions became more specific and included a discussion of what would happen subsequently, if the Director's offer was accepted. Mr. Fraleigh's original position was that the Notice of Proposal was to be withdrawn and, in his words, "not see the light of day again". Mr. Moore did not agree to this but Mr. Fraleigh's clear recollection is that Mr. Moore did agree that the allegations in the Notice of Proposal could form part of the history or "narrative" if there was a subsequent Notice of Proposal but would not form the basis of any subsequent Notice of Proposal. He would have expected to see words such as "It has previously been alleged . . . ." in a subsequent Notice of Proposal. He testified that he had seen similar wording in other proceedings. If he had understood that the allegations of the earlier Notice of Proposal would re-appear as grounds in a subsequent revocation proceeding, he would have recommended to his client that it proceed with the hearing in 2007.

In a letter dated November 21, 2007, Mr. Moore wrote:

> Further to our discussions, the Director will rescind his proposal of May 22, 2007 to revoke the licence of Unity-A-Automotive Inc. upon being notified that the company has withdrawn its application to the Licence Appeal Tribunal. This will occur after outstanding provincial offences charges are resolved in court tomorrow in the manner agreed to with Mr. Patterson.

Mr. Fraleigh testified that he believed the purpose of this letter was to "operationalise" the agreement between the parties, not to set out it out.

Mr. Patterson, who is referred to in the letter, was the counsel retained by Unity-A to represent it in the POA charges. While he negotiated the resolution of the POA charges, he relied on information from Mr. Fraleigh for his understanding of the rest of the agreement. He testified that, based on what Mr. Fraleigh had told him about the agreement, he advised his client and Mr. Thangarajah, the principal of Unity-A, that the POA charges could not be raised at any subsequent time. His clear recollection of his discussions with Mr. Fraleigh was that subsequent proceedings would have to be based on fresh allegations.

Neither Mr. Fraleigh nor Mr. Patterson reduced the agreement to writing or documented their understanding of the agreement in any form.

Mr. Moore agrees with Mr. Fraleigh that he declined Mr. Fraleigh's proposal that the existing allegations would "never see the light of day again". He testified that his understanding of the agreement was that if Unity-A pled guilty to some of the charges, the rest would be withdrawn, the Notice of Proposal would be rescinded and Unity-A would be "given a second chance". The previous allegations could not be used as the basis of a fresh Notice of Proposal; there would have to be some subsequent "major violations" before a new Notice of Proposal would be justified. Mr. Moore testified that he did not direct his mind to what might happen if there were new allegations. However, Mr. Moore's recollection is that Mr. Fraleigh, on being told that Mr. Moore would not accept his original proposal, did not say the allegations could be revived and also did not say that they couldn't be raised again. Mr. Moore's interpretation of this was that these allegations could be revived in a subsequent Notice of Proposal because the parties never reached agreement about them. He notes that the Director has never agreed not to revive allegations in the few cases where a Notice of Proposal has been rescinded. He noted that it is common to include allegations that date back years in a Notice of Proposal. Mr. Moore believes that his letter sets out the terms of the agreement as he understood it.

Mr. Moore agrees that re-laying a withdrawn charge in a criminal proceeding could be an abuse of process. However, he regards these administrative proceedings as fundamentally different. Here, he asserts, both sides walked away; Unity-A walked away from the appeal and the Director walked away from the Notice of Proposal. Therefore, Mr. Moore believes, the withdrawn allegations are "open". If the Director can prove the allegations then he ought to be able to raise them in addition to the fresh allegations that gave rise to the current Notice of Proposal. The charges which resulted in convictions are also relevant to the determination of whether the Applicants' licenses and registration ought to be revoked. It is the totality of the Applicants' past conduct which is relevant, Mr. Moore said, and in response to a suggestion that the past allegations could be addressed in oral testimony, Mr. Moore noted that the Applicants have a right to know the case they must meet and to raise allegations at the hearing beyond those specified in the Notice of Proposal would be objectionable.

In the course of cross-examination and in subsequent argument, Mr. Zucker, counsel for the Applicants, suggested that the fact that Mr. Moore did not consult the Director

about his recollection of the agreement and did not review the Director's file on the matter ought to give rise to an adverse inference. However, Mr. Moore as the author of the agreement on behalf of the Director is in the best position to shed light on its nature. Further, there is no evidence before the Tribunal that the Director kept a separate file on this matter. Therefore, the Tribunal finds it inappropriate to draw an adverse inference from the fact that Mr. Moore did not consult the Director or review the Director's file, if any.

After the hearing of this matter, Mr. Zucker advised me that I had presided at the pre-hearing of the original appeal, which took place in July of 2007, but did not request a recusal. I have no recollection of this pre-hearing and any notes of it have long since been destroyed. The preamble to the pre-hearing Order reads in part:

> No agreements or settlements were reached during the pre-hearing. There was a general discussion of the issues and the disclosure expectations of the parties. The parties were informed of their disclosure requirements under Rule 6 of the Tribunal's Rules of Practice.

The Order simply sets the dates for the hearing. It is safe to conclude, based on the preamble to the pre-hearing and on Mr. Fraleigh's testimony, that settlement discussions did not begin until some time after the pre-hearing and in any event did not address the specific matter at issue in this motion until October or November of 2007. Therefore, there is no need for me to recuse myself from hearing this motion or rendering the decision which follows.

DECISION

There is no issue of credibility in this case. The Tribunal accepts the evidence of all three witnesses. What flows from the evidence is that this is a case of genuine misunderstanding of the terms of the agreement. Mr. Fraleigh genuinely believed that the Director had agreed that the existing allegations would be used as background, history or a "narrative" to any new proceeding and Mr. Moore genuinely believed that the agreement was to give Unity-A a second chance and not use the withdrawn allegations as the basis of a fresh Notice of Proposal. Mr. Moore believed that the question of how these existing allegations were to be handled if a new Notice of Proposal was made was left open. Thus, in Mr. Moore's understanding, while the existing allegations could not form the basis of a fresh Notice of Proposal, if there were substantial new allegations then the existing ones could be included as grounds for revocation. This is the Director's usual practice. The only documentation of the agreement is Mr. Moore's letter which does not address the issue of how the withdrawn allegations were to be treated in a subsequent Notice of Proposal.

It appears that the parties were never of one mind on the question of how these allegations were to be treated in a subsequent proceeding. Therefore there was never an agreement and the Director is not reneging on an agreement or undertaking when he seeks to raise the allegations again.

Mr. Zucker concedes that in the absence of a finding that the Director reneged on an agreement, giving rise to potential abuse of process, there is no obvious basis for his motion to strike the earlier allegations from the current Notice of Proposal. However, he argues that the question should be which party is to bear the burden of this misunderstanding. Mr. Zucker argues that the Director must accept Mr. Fraleigh's interpretation because otherwise the prejudice to his client is too great and the concomitant benefit to the Director is disproportionate. Some of the events that gave rise to the earlier allegations took place five years ago and it might be difficult for the Applicants to defend themselves given the passage of time and their understanding of the terms of the settlement.

Mr. Petrosoniak, counsel for the Director, argues that this is a question not of the admissibility of the evidence of these allegations but of what weight the Tribunal ought to give them. This is an issue that can be best addressed after all the evidence has been heard and can be raised in closing argument.

The Tribunal agrees that the proper question is not whether the allegations that were earlier raised ought to be admitted as evidence but what weight ought to attach to them. This is a matter that is better canvassed after all the evidence has been heard.

Under the Act, the Tribunal is to look at the past conduct of registrants to establish whether there have been breaches of the Act that justify revocation. The Act does not limit the time within which any alleged wrongdoing is to have occurred. When it comes to determining the weight that ought to be given to these prior allegations, then the fact that the Director had been prepared to permit the Applicants to continue in business despite these allegations is an issue relevant to weight as is the fact that the Director withdrew these allegations from the POA charges. The time that has passed since the events in these allegations goes to weight as does any difficulty the Applicants may face in responding to these allegations as a result of the misunderstanding. But these factors do not render these allegations inadmissible.

Accordingly, the Tribunal orders that this Motion be denied.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice Chair

RELEASED: October 8, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

HAMILTON AUTO SERVICES LTD

APPEAL FROM A NOTICE OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS UNDER THE *HIGHWAY TRAFFIC ACT,* R. S.O.1990 c. H.8

TO REFUSE REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: BRANDON O'RIORDAN, Counsel, representing the Applicant, Hamilton Auto Services Ltd.

PATRICK MOORE, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF HEARING: February 18, 2011 Hamilton

REASONS FOR DECISION AND ORDER

The Applicant, Hamilton Auto Services Ltd. ("Hamilton"), has applied to operate a Motor Vehicles Inspection Station ("MVIS") pursuant to the provisions of the *Highway Traffic Act* R. S. O. 1990 c. H. 8 (the Act) through which it will conduct annual safety inspections, issue annual safety stickers and issue safety standards certificates for motor vehicles.

The Director of Motor Vehicle Inspection Standards under the Act ("Director") has issued a Notice dated November 2, 2010 (the "Notice") proposing to refuse the MVIS licence for Hamilton.

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The grounds for the refusal consist of the following two allegations set out by the Director in the Notice:

a. That Hamilton is substantially the same corporation as 1419514 Ontario Inc o/a Inder Auto Centre ("Inder"), a corporation previously registered as a MVIS under the Act which registration was revoked by the Director in 2009 based on repeated incidents of performance standard violations and false statements; and

b. That Hamilton made false or misleading statements on October 13, 2010 to Ministry inspectors attending at the business premises.

Hamilton denies both allegations.

EVIDENCE

The Director's evidence was presented by two Ministry of Transportation officers. Officer Varrell ("Varrell") advised he was a transportation enforcement officer in October 2010 when he was asked to assist Officer Horton ("Horton") in the initial inspection of the garage premises for Hamilton. Varrell was aware that Hamilton had made an application for licence as a MVIS. A premises' inspection was part of the application procedure to ensure the application is complete, and the tools and the paperwork appropriate.

On initial attendance the officers were greeted by an individual whom Varrell identified from photograph evidence as "Kullar"[1]. Another individual was present who did not engage with the inspectors but who was identified by Varrell as Ricky Vanderboom. Both Kellar and Vanderboom were listed as mechanics for the MVIS in the registration application documentation[2]. While the Officers continued to wait for the arrival of the actual owner of the MVIS, Mr. Tegveer Singh Sidhu ("Sidhu"), Kellar assisted them in their review of the paperwork, office and garage equipment on location.

During this process, the inspectors noticed business cards for the MVIS were displayed on the counter. As is the custom, they took one to keep in the Ministry file for future ease of reference. The face of the card noted the owner as "Cam". Cam was the name of the lead mechanic for Inder, the licence of which had been revoked by the Director in July of 2009. When asked if Cam remained involved in the new operation, Kellar responded he was not and that these must be old cards. The Inspectors queried how long the garage had been operating and Kellar responded since July – a matter of some five months, a date later verified by Sidhu.

Sidhu arrived on the scene and, when Horton greeted him as "Cam" appeared to be confused. Horton then asked if his nickname was in fact "Cam", which Sidhu denied. At that point Kellar spoke to Sidhu saying he used the nickname Cam, which again Sidhu denied. Varrell described Sidhu as looking confused. He acknowledged that English was clearly not Sidhu's first language and that he, Varrell, had some difficulty in understanding Sidhu's responses to Horton's questions. His observation of the discussion led him to conclude that Sidhu had never used the name "Cam".

Horton has been an officer with the Ministry of Transportation for over fourteen years. He explained that he is one of only two officers responsible for overseeing the more than 1,048 MVIS operations in the Hamilton-Niagara region. Their duties include

[1] Exhibit 4, Tab 4, p. 17
[2] Exhibit 4, Tab 4, ps 12-13

performing initial inspections of each new business application. It was in order to assist him in performing two of these, that he requested Varrell's assistance in completing Hamilton's initial inspection last October.

Horton was familiar with the earlier corporation, Inder, and identified that "Cam" was the owner's husband who had been the main mechanic and apparent manager of the business. Inder had operated from the same address as was now being used by Hamilton. Horton provided Ministry of Transportation records corroborating the existence of the previous corporation at the same address[3] and illustrating it had operated as a registered MVIS from 2001 through to 2009 when its registration had been revoked. Its Director/owner/officer was Swarnjit Randhawa whose husband, Kulwant, appeared as one of the registered mechanics to the business[4]. Kulwant Randhawa ("Kulwant") was commonly known by his nickname "Cam".

Horton supplied evidence, supported by conviction records, of repeated offences of the Act from 2005 through to 2009 by both Inder and Kulwant, including issuance of false safety certificates and improper record-keeping. Horton further testified to repeated visits made by him to the premises of the garage where he discussed concerns with Kulwant who undertook to ensure such concerns would not be repeated. Nonetheless later random inspections of vehicles certified by mechanics at the garage demonstrated serious safety concerns including corroded bodywork and inadequate brake lines[5]. When Kulwant was not available, most of the mechanical work was performed by another mechanic licensed to the business, Jagdish. Only when neither were available, was Horton directed to deal with Mrs. Randhawa. The Officer stated that language was only a problem in communicating with the female owner.

It was on Horton's recommendation, based on the on-going failures to comply with Ministry safety provisions and regulatory requirements, that the Director issued the July, 2009 Revocation Notice against Inder. It was again on Horton's recommendation that the November, 2010 Notice of Refusal to register Hamilton as a MVIS was issued. He believed that the new application was a back-door attempt by Kulwant to regain registration. Horton identified Ricky Vanderboom as an individual he had seen on a number of occasions when dealing with the numbered company, although he had never been registered as a mechanic for that business operation as he was now with the Applicant. He further advised that a lawyer by the name of Anoop Paul had called him in the summer of 2010 inquiring as to what was required for a successful MVIS licence application for that business address. Anoop Paul would later be listed as the original Director on Hamilton's corporate documents filed with the Ministry[6]. The phone call was closely followed by an inquiry to Ministry Counsel, forwarded on to Horton, from "Cam" requesting information as to how he could re-apply for licensing[7]. On reviewing the

[3] Exhibit 4, Tab 9
[4] Exhibit 4, Tab 9, pgs 48-50
[5] Exhibit 4, Tabs 13 and 13
[6] Exhibit 3, Tab 1 See later Anoop resigns the day after incorporation and Sidhu assumes the position of sole officer and director (Tab 2).
[7] Exhibit 4, Tab 5

memo of this call, the Tribunal notes that the query also canvassed the legality of the earlier numbered company leasing part or all of its business premises to an applicant for registration.

Officer Horton also claimed Sidhu was not being honest when he advised that he did not know "Cam" and when he denied using the name "Cam". This belief was supported by copies of the lease agreements for Hamilton's garage which appear to be signed by both Kulwant as "Cam" and Sidhu.

Finally, Horton was troubled by the fact that the cheque provided by Hamilton accompanying its application request in October, 2010 was numbered 001 and did not include a business name or address despite the fact that the garage had been in operation since June.

Evidence for the Applicant was provided by Sidhu himself, as well as Mrs. Swarnjit Randhawa and Roman Bawa. The former two witnesses required the assistance of a translator whose qualifications were presented and accepted by the Ministry and the Tribunal. The translator was sworn in.

Sidhu is 26 years old. He came to Ontario from India in December 2008 and was first employed as a farm labourer. He and his wife worked on a mushroom farm until he was hurt in an accident in 2009. He has no mechanical experience. His brother, however is a mechanic and intends to come to this country in the near future. Their father, who remains in India, knows Kulwant and purchased the garage tools and equipment from Kulwant this past summer for C$65,000 in order to set up his two sons in business. Sidhu's cousin, Kellar, lives here, speaks English and is a mechanic. He has assisted Sidhu in setting up the business. Anoop Paul was also known to Sidhu from India. He is a resident Canadian lawyer who originally intended to help financially run the business, but he could not get the funding and left the organization one day after incorporation.

Kellar is Sidhu's prime support in running the garage as Sidhu cannot speak or write sufficient English to manage the business. He relies on another friend, Aurora, to do the book-keeping and accounting. In reviewing the accounts, invoices, tax and client statements of Hamilton, Sidhu acknowledged he had little familiarity with any of the records and relied on both Kellar and the accountant friend while he was learning the business process and requirements. He could not say how Hamilton had retained a number of corporate clients, nor in fact who these clients were. He did recognize two limousine services as major clients[8], but was certain Mrs. Randhawa was not instrumental in their coming to him.

Sidhu does not know Kulwant. Kulwant's wife, Mrs. Randhawa, worked, however, with Sidhu's wife at the mushroom plant. It was discussions between the two women at work which led to the idea of Sidhu purchasing the garage equipment in order to set up business after his accident. As noted, funding from his father was arranged back in

[8] Exhibit 3, Tabs 5and 6

India and the purchase was completed there between his father and Kulwant. Sidhu himself has no written documentation to establish the purchase.

The garage premises are leased. The lease is signed by the numbered corporation as landlord and Hamilton as leasee[9]. It is signed by Anoop Paul for Hamilton, and was mailed back to India for signing by Kulwant who return to India in 2009. Sidhu has faithfully made lease payments to Mrs. Randhawa of $2,500+GST in cash since commencement of the lease last July. He provided copies of the rent receipts[10] as provided to him by Mrs. Randhawa stamped by the numbered company. Since these are cash transactions, he has no bank records.

Sidhu advised that much of the garage business is also cash based and from this source he is able to make his rental payments. Sometimes, he is "under" and must borrow from his wife or father. He is only starting to realize the importance of documentation and up until very recently has relied on Kellar and the accountant for tax and business record-keeping. In response to questions put to him on cross-examination he was unable to explain why Hamilton tax returns claim over $600.00 was spent on advertising and promotion, whereas his evidence was that, other than the ordered business cards, which cost $50.00, Hamilton had been unable to afford any expenditure on advertising. He also acknowledged that the lease required Hamilton to maintain insurance liability coverage, but that it had not obtained this insurance until this January, some six months after commencing the lease. It was his position that he had relied on Kellar to ensure that the company was meeting its obligations under the lease which Sidhu himself had not read as he could not understand the language.

The business card which was picked up by the Officers during their inspection was newly ordered from Mr. Roman Bawa by Sidhu. Kellar was mistaken if he advised the Officers that these were old cards left over from the numbered company garage. When they were originally delivered, Sidhu had believed they properly represented the correct name and business information. He had no reason to believe otherwise and can not read English well enough to have discovered the error in the name himself. As soon as the problem was identified by Horton, he had contacted Roman Bawa to make the necessary correction. Sidhu himself uses the name of "Sam" and it was this name he had instructed Roman Bawa to include on the card.

Mrs. Swarnjit Randhawa is also a Punjabi speaker who required the translator services to provide her testimony. She corroborated Sidhu's evidence concerning her friendship with his wife and their discussing potential purchase of Inder's equipment to run a garage, following her husband's return to India in 2009. Although Mrs. Randhawa had been the only director of Inder, it had been managed largely by her husband. Although her husband had returned to Hamilton last summer, he had stayed only a short period having left the jurisdiction while on bail for having assaulted her in the home. She knew he later sold Inder's assets to Sidhu's father in India. She had received no income from the sale. She did, however, receive the rent payments for the business premises

[9] Exhibit 4, Tab 4
[10] Exhibit 3, Tab 14

personally and relied on these to support herself and children. It was her signature on the lease and she identified her husband's signature, placed there by him when the lease had been sent to India for that purpose.

She has no relationship or knowledge of Kellar and he was never employed by her company.

Roman Bawa testified that he works in real estate and graphic design in Hamilton. In September of last year he had been contracted by Sidhu who had placed an order over the telephone for business cards for Hamilton. Roman Bawa had misunderstood the correct spelling of the name "Sam" and this had caused the wrong name of "Cam" to be printed on the card. Sidhu had paid $50.00 in cash. Since it was a small order and since the correction was requested within a month, he had agreed to provide corrected cards at no cost.

Roman Bawa had no knowledge of "Cam" or the numbered company and had never provided any services to it in the past.

LAW

The Act regulates MVIS licensing as follows:

> **91.**(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence. R.S.O. 1990, c. H.8, s. 91 (1).
>
> **Issuance of licence**
>
> (2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence. R.S.O. 1990, c. H.8, s. 91 (2).
>
> **Grounds for refusal**
>
> (3) Subject to section 95, the Director may refuse to issue a motor vehicle inspection station licence where, in his or her opinion,
>
> (a) the past conduct of the applicant or, where the applicant is a corporation, of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity;…….
>
> **Power of Tribunal where hearing**
>
> 95(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal or refrain from carrying out his or her proposal and to take the action that the Tribunal considers the

> Director ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Director.

ANALYSIS

The Director has alleged Hamilton is not entitled to the registration it seeks as its past conduct is caught by subsection 93(1)(3)(a) in that it is in reality a continuation of Inder, the conduct of which resulted in revocation of a licence. The Director further alleges that the false statements made to the officers concerning the business cards during their inspection of the proposed MVIS in October, 2010, also provide reasonable grounds to conclude that Hamilton will not operate in accordance with the law, and with honesty and integrity.

I am not persuaded by the evidence that Hamilton is controlled by the earlier numbered company and/or Kulwant. While there is a clear connection between the two businesses in that the women worked together and there is a current lease arrangement between them for the premises, the Director has no evidence that the prior registrant plays any role in managing Hamilton. Indeed, the evidence is that, since Hamilton opened for business in July of 2010, Kulwant has been out of the country. Moreover, the testimony of both Sidhu and Mrs. Randhawa was clear and consistent that there is no connection of Kulwant and Mrs. Randhawa in the current operation of Hamilton. Both refute the Director's allegation otherwise. There is no reason for the Tribunal to disbelieve them.

There was evidence that Vanderboom played a role in the earlier company and is now registered as a mechanic for Hamilton. No further evidence links this individual with the illegal activities of Inder, or with the operation of Hamilton. Vanderboom was not called as a witness. The Tribunal can not conclude that, merely by his presence, there is an operational relationship between the two business entities. Kellar was clearly identified as an individual with no prior history connecting him to Inder.

Even were Mrs. Randhawa to have played a part in assisting Sidhu with clients and/or business contacts, which the evidence does not support, this would not be sufficient to conclude that Hamilton's license should properly be refused on the basis that its past conduct gives reasonable grounds for belief that it will not carry on business as required in paragraph 91(3)(a) of the Act.

The Director relies in part on a prior decision of this Tribunal, *S.B. Auto Services Ltd. v. Director, Vehicle Inspection Standards* [2010] O.L.A.T.D. NO.258, where the Tribunal held that the applicant in that case could not be granted licence, where some few months prior, its directing mind was denied such licence (para 15). In the facts of the case, however, the Tribunal found that the director of the applicant before it was in fact a "mere puppet" (para 14) of the prior refused applicant who was, in reality, "the directing mind" (para 14) of the applicant before it.

Such are not the facts as found in this proceeding. Given the absence of any clear connection between Inder and Hamilton, this Tribunal refuses to direct the Director to carry out the Proposal on this ground.

The evidence established that Kellar, a registered mechanic with Hamilton, had clearly mis-informed the Officers as to the name of Sidhu and the business cards on the premises. Both Officers Varrell and Horton appeared careful, detailed and well-intentioned such that their credibility is not doubted. Nonetheless, I am not able to infer from their evidence in this regard that there are reasonable grounds for belief that the MVIS of Hamilton will not be run in accordance with the law and with honesty and integrity. It seems to me that Kellar's response was equally indicative of an attempt to rationalize the error on the business cards as it was to mislead the Officers. Given the clear language difficulties experienced by Sidhu and the Officers in their communications that day, the same is possible concerning the efforts by Kellar to make reference to Sidhu as Cam. Even were this an attempt by Kellar to suggest improperly that Sidhu was Cam, such does not result in a fair conclusion that Hamilton will not be operated in compliance with the requirements.

Having seen the witnesses, heard their testimony and reviewed the facts, the Tribunal has no evidence that Sidhu has exhibited any past conduct which would trigger a refusal of his application as a MVIS under the Act. Certainly, his lack of experience in mechanics and business and his poor grasp of English will be significant hurdles for him to conquer in maintaining his operation in compliance with the numerous requirements of a regulated business in this province. These concerns however, do not provide legitimate grounds for the Director's Notice to refuse him registration as a MVIS, absent other evidence.

DECISION

Pursuant to the provisions of subsection 95(4) of the Act, the Tribunal orders the Director to refrain from carrying out his Notice, dated November 2, 2010 to refuse the licence of Hamilton as an MVIS.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

RELEASED: March 1, 2011

This decision may also be available on Quicklaw.

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Decisions under the Intercountry Adoption Act

Fiscal Year 2010 - 2011

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There have been no decisions released under this Act for the period selected.

Decisions under the Motor Vehicle Dealers Act, 2002

Fiscal Year 2010 - 2011

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

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- John Forsythe-Consent Order
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/jun/6012.mvda.Forsythe.consent.order.pdf>
- James Gordon Peterson
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- Abdol Rasoul Afrasiabi
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/jul/5982.nvda.Afrasiabi.pdf>
- Find-A-Car Auto Sales & Brokering Inc. and Michael Ryan O'Connor – Order
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/jul/5806.nvda.find-a-car.oconnor.order.pdf>
- Elie Vidal - Consent Order
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/aug/5987.mvda.Vidal.consent%20order.pdf>
- Roberto Towing Auto Services Inc. and I. Iraheta
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/aug/5971%20mvda%20roberto.final.pdf>
- Syed Hussain o/a M/A Motors
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- 2085716 Ontario Ltd. O/A Bennett Motor Sales and Lori-Ann Griffin (aka Bennett)-Consent Order
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- Felix Omoregie o/a Filazo International Auto Sales
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/oct/6040-mvda-Omoregie.pdf>
- Henry Oliha
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/nov/6148-MVDA%20Oliha.pdf>
- Mario Pacione
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/nov/6051.mvda.Pacione.consent%20order.pdf>

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  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/nov/6006.MVDA.Stein.consent%20order.pdf>
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  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/jan/6357-mvda-Imeri%20oa%20Albion%20Auto-motion.pdf>
- Find-a-Car Auto Sales & Brokering Inc. and Michael Ryan O'Connor
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- Mohammad Hameed O/A Ana Auto Sales
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- Edward Edmonds
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- Ali Youssef
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- Paolo Joseph Fasciani – Motion
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/mvda2002/mar/6440.MVDA.Fasciani.Motion.pdf>

MOTOR VEHICLE DEALERS ACT, 2002
S.O. 2002, c. 30, Sch. B

JOHN FORSYTHE-Consent Order

IN THE MATTER OF
JOHN FORSYTHE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: March 12, 2010

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

JOHN FORSYTHE

- Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by John Forsythe, the Applicant, and the Registrar under the *Motor Vehicle Dealers Act, 2002* for issuance of a Consent Order of the Tribunal without a hearing pursuant to Section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act, 2002* 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: June 10, 2010

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

SCHEDULE 'A'

TO: The Registrar
Motor Vehicle Dealers Act, 2002
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West
12th Floor
Toronto, Ontario M4V 1K6

FROM: John Patton Forsythe
c/o Polito Ford Lincoln Sales Ltd.
2 Harvest Street
Lindsay ON K9V 2S5

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 6(2) of the *Motor Vehicle Dealers Act*, *2002* ("Act") the parties to the proceeding, John Patton Forsythe ("Applicant"), and the Registrar, *Motor Vehicle Dealers Act, 2002* ("Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal ("Consent Order") based on the following terms and conditions:

1. The Applicant agrees that he will not be involved in the process of trading in motor vehicles without the benefit of registration. "Trading" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions.

2. The Applicant agrees not to transfer his registration as a salesperson under the Act or obtain registration to work as a salesperson for any additional dealers without having first obtained prior written consent of the Registrar.

3. The Applicant agrees not be an officer, director, shareholder, partner, manager or have direct or indirect control of a dealership for a period of 2 years from the date of the signing of these Terms and Conditions.

4. The Applicant agrees not to apply to be a dealer for a period of 5 years from the date of the signing of these Terms and Conditions.

5. The Applicant agrees not to be involved in the filing or remittance of retail sales tax on behalf of his sponsoring dealer(s). The Applicant further agrees not to be involved in any capacity in the financial management of his sponsoring dealer(s).

6. The Applicant agrees not to be the final signatory on any sales, financing or leasing documents on behalf of his sponsoring dealer(s).

7. The Applicant agrees to satisfy any and all outstanding debts and any financial obligations in a timely manner.

8. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.

9. The Applicant understands that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Applicant in support of the Applicant's application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Applicant's knowledge and belief and that the

Applicant has given full answer to all questions and requests made by the Registrar in connection with the Applicant's' application.

10. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty, integrity or his ability to comply with law.

11. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the terms and conditions set out herein.

12. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of this day of 2010.

_____

John Patton Forsythe (Signature)

These terms and conditions are acceptable to the Registrar, *Motor Vehicle Dealers Act, 2002*.

Date:

_____

Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

JAMES GORDON PETERSON

AN APPEAL OF A DECISION OF THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002* S.O. 2002, c. 30

TO REFUSE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: JAMES GORDON PETERSON, Applicant, self-represented

ANGELA A. LA VOILA, Counsel, representing the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: May 27, 2010 London

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, 2002* (the "Act"). The proposal dated February 23, 2010, sets out the Registrar's reason for refusing to register James Gordon Peterson (the "Applicant") as a salesperson, as follows:

> "The intention and objective of the Act is to protect the public interest. In doing so the Act prohibits the making of false statements in an application for registration or renewal and requires that Applicant be financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. James Gordon Peterson's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

In particular, the Registrar believes that the Applicant's failure to disclose pending criminal charges on his application for registration and his written explanation of his

conduct which led to the criminal charges, which the Registrar did not believe to be truthful, disqualify him from registration.

ISSUE

Does the past conduct of Applicant provide reasonable grounds to conclude that he will not carry on business with honesty and integrity and in accordance with the law?

EVIDENCE

The evidence of the Registrar consisted of documentation and the oral testimony of Police Officer Lincoln Boyd, and Carey Smith, Director of Investigation at the Ontario Motor Vehicle Industry Council ("OMVIC").

The evidence of the Applicant consisted of his oral testimony.

The following is a summary of the relevant evidence.

The Applicant was previously registered under the Act from February 1, 2005 to April 30, 2009. On March 30, 2009, Officer Boyd attended the dealership where the Applicant was employed in response to a complaint of a theft. It was alleged that the Applicant had been given $4,300 in cash from a customer for the purchase of a warranty on March 26, 2009; however, the money was not remitted to the dealership until a number of days later and only after the Applicant had been prompted to do so by his employer. The Applicant was subsequently charged with theft under $5000, possession of property obtained by crime, and fraud under $5000. He was also terminated from his employment at the dealership, where he had been the business manager.

Mr. Smith gave evidence that the eligibility for registration is based on honesty and integrity and that the application is the first test of a registrant. The Applicant's application for registration was received by OMVIC on July 16, 2009. In the application the signature of the Applicant was dated June 8, 2009. The signature of the employer was dated July 14, 2009. In response to question 9 on the application the Applicant responded 'No'. 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 were a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each".

The Applicant testified that, although his signature on his application for registration was dated June 8, 2010, he in fact had signed it much later. The June date was when he had joined the dealership. He was not clear as to why he would have put that date nor was he sure at to what date he did actually sign that application. However, it was his evidence that at the time he signed the application he was aware that 'diversion' was

available to him and that the criminal charges against him were going to be withdrawn. This was the reason why he answered 'No' to question 9.

The Applicant's interpretation of question 9 was that it did not include charges that were 'withdrawn'. He explained that the sentence 'this includes those instances where a conditional or absolute discharge has been ordered' somehow led him to conclude that his charges, which were to be withdrawn, did not need to be disclosed. He also expressed doubt that he had read the caution at the bottom of question 9 as to the consequences of providing false or incomplete disclosure.

The charges against the Applicant were withdrawn at the request of the Crown on August 20, 2009, and the Applicant was offered a 'diversion program'. It was the Applicant's testimony that he 'heard' about getting 'diversion' the week before a July 23rd court date, but it was at the July 23rd appearance that he 'officially' heard he would be getting 'diversion'. Ultimately this resulted in the Applicant making a $500 donation to a charity of his choice. According to the Applicant, he had intended to fight the charges but did not have sufficient funds to pay a lawyer to do so.

With respect to the event which gave rise to the charges, the Applicant's written and oral explanation is that it was simply the result in an error in judgment. He had received money from a client on March 26, 2009, for a warranty. He had processed warranty paperwork, or at least that relating to the client, and had provided the client with a copy. He testified he had left a copy of those warranty documents in a file on his desk. The Applicant then got engaged with another client and it slipped his mind to give the money to the receptionist, whose job it was to process clients' funds, and provide a receipt. When he was finished with the subsequent customer, the receptionist was gone for the day. Not being comfortable leaving the money at the dealership overnight, he took it home for safekeeping. He then forgot to bring it back until he was prompted to do so by the General Manager some days later. No paperwork was ever submitted to the dealership about the warranty, but apparently the Applicant's dealings with the client had been observed according to the evidence of Officer Boyd. The Applicant brought the cash back when told to do so on March 30, 2009, and had it properly processed.

The Applicant explained that he had transferred from another branch dealership where there was no safe and it was not uncommon for managers to take large amounts of cash home when the receptionist was not available to put it in the safe. The Applicant transferred to the dealership where the incident occurred in approximately November/December of 2008. There was a safe at this new dealership and there was a drop slot in the safe.

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

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;

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.

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

ANALYSIS

The issue before the Tribunal is whether the past conduct of the Applicant provides reasonable grounds to conclude that he will not carry on business in accordance with the law, and with honesty and integrity.

The Applicant has provided an explanation that it was an innocent oversight which lead to the criminal charges laid against him. The Tribunal has considered his explanation very carefully and does not find it credible. There was no reason for the Applicant to take the cash home with him. There was a safe with a drop slot at the premises, which the Applicant was aware of, and which one would expect an employee would use in just the circumstances the Applicant found himself in on March 26, 2009. The Applicant had been employed at the dealership for a number of months and should have known and followed the course of action expected by his current employer. The fact that there was no safe that could be accessed after the receptionist had left at the previous location where he was employed is not a credible explanation, in the Tribunal's opinion, for his failure to use the safe that he could access by means of a drop slot.

In addition, the Tribunal does not accept that the Applicant could have simply forgotten for days that he had taken such a large amount of cash home. According to his testimony the Applicant had left the paperwork relating to the warranty in a file on his desk. One would have expected that, if nothing else, this documentation on his desk would act as a reminder of the warranty transaction and the non-processed funds. Given that it was the Applicant's apparent concern for the security of the money that

allegedly led him to take it home, it does not seem feasible that this concern simply evaporated and was never thought of again and that the written evidence of the transaction sitting on the Applicant's desk did not prompt his memory. Regretfully, the Tribunal concludes that the Applicant's explanation provided in writing to OMVIC, and orally to this Tribunal, is not truthful.

With respect to his failure to disclose his criminal charges, the Applicant is a well educated and articulate man. It is, therefore, difficult to understand how he could have interpreted question 9 in such a way to conclude that 'pending charges' would not include the ones he was facing. His explanation is that he knew they were being withdrawn. Based on the evidence the Tribunal finds that the charges were withdrawn on August 20, 2009, and that the Applicant did not know conclusively that they were being withdrawn until July 23, 2009. Therefore, at the time he signed and filed his application for registration for OMVIC, which is stamped as received on July 16, 2010, there were charges pending and the Applicant knew that. He may have had hopeful expectations that they would be withdrawn, but the truth was that they were still outstanding at that time. Apparently the Applicant could not bring himself to disclose this and that is a failing which raises real concern.

In conclusion, after considering all the evidence and for the reasons outlined above, the Tribunal finds that the Applicant's past conduct does provide reasonable grounds to conclude that he will not carry on business with honesty, integrity and in accordance with the law.

DECISION

By virtue of the authority vested in it pursuant to the provisions of section 7(4) of the Act, the Tribunal directs the Registrar to carry out the Proposal dated February 23, 2010, to refuse the registration of the Applicant as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

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Elizabeth L. Sproule, Vice-Chair

RELEASED: June 24, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ABDOL RASOUL AFRASIABI

AN APPEAL FROM NOTICE OF PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002,* S.O. 2002 c. 30

TO REVOKE REGISTRATION

TRIBUNAL: TERRANCE A. SWEENEY, Vice-Chair

APPEARANCES:

ABDOL RASOUL AFRASIABI, Applicant, appeared on his own behalf

YOVANKA McBEAN, Paralegal, represented the Registrar under the *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: July 8, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing before the Licence Appeal Tribunal (the "Tribunal") arises out of a Notice of Proposal dated March 11, 2010, as supplemented by further particulars dated May 18, 2010, issued by the Registrar under the *Motor Vehicle Dealers Act, 2002* (the "Registrar" and the "Act" respectively). Under the Notice of Proposal, the Registrar proposed to revoke the registration of the Applicant as a salesperson under the Act. The Registrar alleges that the Applicant's past conduct and financial position are such as to disentitle him to registration under the Act.

The Registrar called three witnesses and filed two books of documents.[1]

The Applicant testified on his own behalf. He called no independent witnesses and filed one document.[2]

[1] Exhibit 3 and 4
[2] Exhibit 5

ISSUES:

The Registrar cited a number of reasons why the Applicant should not be registered under the Act.

1. He has been bankrupt twice.

2. He caused two companies controlled by him to fail to file numerous returns with the Ministry of Revenue of Ontario ("MOR") and that the MOR suffered losses of over $240,000.00.

3. The Applicant, on behalf of 1540981 Ontario Inc. o/a City Motor Sales and Service (the "Company"), failed to satisfy his obligations to the financier of the Company's automobile sales.

4. The Applicant caused the Company to sell warranties to consumers and fail to remit the premiums to the warranty company.

EVIDENCE:

The Case for the Registrar

Richard Wilson ("Mr. Wilson")

He testified that he is the Vice President, Sales and Marketing, for Clubb Finance Corporation ("Clubb") and knows the Applicant well, as Clubb had entered into a credit agreement with the Applicant's Company. Under that agreement, the Company was immediately to remit any of its sales proceeds to apply against its outstanding indebtedness. The Company did not do this in a number of cases. Moreover, because the Applicant has declared bankruptcy, the Company has suffered a financial loss of $167,000.00.

The Applicant has caused further problems for the Company. For example, in one case a consumer bought a car for $8,400.00 from the Company only to learn that Clubb had a $9,000.00 lien against the car. Clubb settled with that consumer for $6,000.00. In addition, Mr. Wilson said that Clubb had "to take a haircut" with a number of automobile wholesalers because of the Applicant's activities in order to try and maintain reasonable relations with the wholesalers.

Sean Kirkey ("Mr. Kirkey")

He is a Field Collections Officer with the MOR and testified as to the record of the Applicant's Company.

The Company was a monthly filer under the *Retail Sales Tax Act (Ontario)* (the "RST Act"). Yet the Company only filed four returns from March 3, 2003 to April 2009. The

Company failed to remit retail sales tax to such an extent that on the Applicant's declaration of bankruptcy in May, 2009, the Company owed over $236,000.00, including interest and penalties.

Mr. Kirkey further testified that on the Applicant's bankruptcy in 1991, the MOR lost $7,800.00 in retail sales tax in respect of another company controlled by the Applicant.

Mr. Kirkey explained that the Company is not bankrupt but has no assets and the Applicant, as the sole director of the Company, is responsible for the sales tax. The Applicant and the Company have evaded paying the tax, interest and penalties by the Applicant's bankruptcy.

Laura Halbert ("Ms. Halbert")

She is the Director of Compliance at the Ontario Motor Vehicle Industry Council (the "OMVIC") which was designated in 1997 to administer the Act. She is familiar with the files of the Applicant and the Company and said that the history of the Applicant demonstrates "what not to do if one is operating a dealership". She said that OMVIC does not want the Applicant selling cars in Ontario under any circumstances. She emphasized the following:

1. The Applicant has twice declared bankruptcy.
2. The failure of the Company to remit some of the premiums for warranties to Lubrico Warranty Inc. ("Lubrico") caused potential harm to those consumers as they had paid for protection they did not get.
3. The large indebtedness to the MOR, which was effectively evaded.
4. The grief caused to some consumers through the Applicant's actions. She referred, for example, to the Company's customer who had to pay an additional $6,000.00 on an $8,400.00 car to settle a lien with Clubb. This shows the cavalier attitude of the Applicant to his customers.
5. The Applicant and the Company breached terms and conditions they signed with OMVIC and the MOR [3].

In summary, she said that it is a question of financial responsibility which, combined with the Applicant's conduct since 1991, shows that the Applicant is not going to comply with the law.

The Case for the Applicant

The Applicant testified on his own behalf. He did not seriously challenge any of the allegations made against him by the Registrar. He said that he "was an honest person" and that he "did not hurt anybody". He referred to the $8,400.00-$6,000.00 car/Clubb

[3] Exhibit 3, Tab A

lien customer problem as “unfortunate”. He said his “customers like me”. He said that it has been very difficult for him for the past year or so and that he needs the licence to make a living.

FACTS FOUND PROVEN:

The Tribunal finds that the following facts have been proven on a balance of probabilities:

1. The Applicant has been registered as a salesperson under the Act for over 20 years.

2. The Applicant is the sole officer and director of the Company which has been registered as a dealer under the Act since March, 2003.

3. The Applicant and his wife filed for bankruptcy on or about the 29th day of May, 2009. That was the second time that the Applicant declared bankruptcy.

4. The 2009 bankruptcy left Clubb with an uncollectable debt of about $167,000.00 and the MOR with one of over $236,000.00.

5. The Company sold four Lubrico warranties to consumers and then failed to submit the payment collected from the consumers to Lubrico, thus exposing those consumers to potential economic loss.

6. The Applicant consistently, on the sale of an automobile, failed to remit payment to its creditor, Clubb. Clubb was forced to repossess the automobiles which often resulted in economic harm to the Company’s customers.

7. The Applicant and the Company breached an agreement with the Registrar dated August 13, 2008. This agreement contained terms and conditions which allowed the Applicant and the Company to continue to carry on business. Paragraph 26 of this agreement provided that

> “The Registrant will comply with all aspects of the Retail Sales Tax Act with regards to filing and ensuring that all tax collections are accurately reported and remitted to the Minister of Finance when due. The Registrant acknowledges that all taxes collected are deemed to be trust funds and will not be used for any other purpose other than remittances to the Minister of Finance.”

8. The Applicant, as a director of the Company, entered into an agreement with the MOR dated October 22, 2008. The Applicant and the Company breached this agreement on or about May, 2009. In a letter dated May 11, 2009[4] to OMVIC, an official of the MOR said, among other things,

> “… we do not consider the vendor to be financially responsible in the conduct of this business”.

[4] Exhibit 3, Tab 13

THE LAW:

Subsection 6(1) of the Act reads, in part, as follows:

> "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 …".

Section 8 of the Act allows the Registrar to refuse to register an applicant where, in the Registrar's opinion, the applicant is not entitled to registration under section 6.

The Registrar must prove his case on a balance of probabilities.

Subsection 22(1) of the RST Act, as it then was, read as follows:

> "Any amount collected or collectable as or on account of tax under this Act by a vendor shall be deemed, despite any security interest in the amount so collected or collectable, to be held in trust for Her Majesty in right of Ontario and separate and apart from the vendor's property and from property held by a secured creditor that but for the security interest would be the vendor's property and shall be paid over by the vendor in the manner and at the time provided under this Act and the regulations"

APPLICATION OF THE LAW TO THE FACTS:

The Applicant, in his testimony, expressed no remorse for the harm he caused to his consumers, the MOR, Clubb and Lubrico. He took no responsibility for his actions. He blamed the "economy" for his financial problems. He said that the situation with his customer who had to pay an extra $6,000.00 on an $8,400.00 car was "unfortunate". This illustrates with blinding clarity the selfish attitude he has had towards his customers.

He breached agreements with the Registrar and the MOR. The Tribunal notes particularly that the Applicant, through his second bankruptcy, breached a trust imposed on the Company and cheated the MOR out of a very large retail sales tax debt.

The Applicant has been in the motor vehicle business for over 20 years. He knew, or ought to have known, what his responsibilities were. Yet, although the Company was a monthly filer under the RST Act, he only filed four returns for the period March 2003 to April 2009.

The Tribunal has considered all of the evidence and concludes that the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business and that he will not carry on his business in accordance with law and with honesty and integrity.

The Act is consumer protection legislation. The people of Ontario need to be protected from the Applicant.

The Registrar has proved his case on a balance of probabilities.

DECISION:

By virtue of the authority vested in it under the Act, the Tribunal directs the Registrar to carry out his Proposal.

LICENCE APPEAL TRIBUNAL

Terrance Sweeney, Vice-Chair

RELEASED: July 23, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

FIND-A-CAR AUTO SALES & BROKERING INC. AND MICHAEL RYAN O'CONNOR – Order

APPEAL FROM A PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT,* R.S.O. 1990, c. M.42

TO REVOKE REGISTRATION

TRIBUNAL: CHANTAL PROULX, Vice-Chair

APPEARANCES: KEITH A MACLAREN, Counsel representing the Applicants

BERNARD LeBLANC, Counsel representing the Registrar, *Motor Vehicle Dealers Act*

PAUL BATTIN, Counsel representing Constable Daoust

DATE OF HEARING: July 14, 2010 Ottawa

ORDER

This motion arises in the course of an appeal by the Applicants to the Licence Appeal Tribunal (the "Tribunal") from a proposal by the Registrar, *Motor Vehicle Dealers Act* to revoke registrations. Counsel for the Respondent brings a motion for an order adjourning the hearing scheduled for July 14, 15 and 16, 2010 to provide the new counsel for the Registrar with sufficient time to respond to the Applicants' motion to stay the proceedings.

FACTS

The facts pertaining to this motion can be summarized as follows:

A hearing was previously scheduled for June 16 and 18, 2010. At the outset of that hearing, Mr. MacLaren presented a motion to stay the proceedings. Mr. Rothe, then counsel for the Respondent, requested an adjournment because he did not receive the Respondent's Factum and, therefore, was not able to present a response. Mr. MacLaren consented to the adjournment. The Tribunal adjourned the hearing to July 14, 2010, peremptory against both parties. The hearing was scheduled to continue on July 15 and 16, if necessary.

In a June 28, 2010 e-mail to Mr. Rothe, Mr. MacLaren raised the possibility that Mr. Rothe may be a witness in the proceedings as a result of an outstanding request. Upon receiving the request, Mr. Rothe retained new counsel for this file, namely Mr. LeBlanc.

Mr. LeBlanc was appointed on July 5, 2010, and on the same day he wrote to Mr. MacLaren and asked whether the Applicant would consent to an adjournment. Mr. MacLaren responded on July 7, 2010, and explained the reasons his client would not consent to an adjournment.

In light of the refusal to consent to an adjournment, on July 12, 2010, Mr. LeBlanc presented a notice of motion to adjourn the hearing and proposed that it be held by way of a teleconference call. Since Mr. MacLaren was not available for the conference call on July 13, 2010, the motion was heard at the beginning of the hearing scheduled for July 14, 2010.

Mr. LeBlanc asked for an adjournment for the following reasons:

1. He was retained on July 5, 2010 by Mr. Rothe because of the possibility that Mr. Rothe could be a witness in the proceedings. Mr. LeBlanc requires more time to review the Applicant's motion to stay the proceedings and to prepare a response.

2. Mr. MacLaren's letter dated June 29, 2010 raised new, serious and complex issues that require further investigation and consideration of a number of factual and legal issues.

3. It is unknown at this time whether or not the Provincial Crown Attorney or the RCMP will seek to intervene in this matter. In light of the allegations contained in Mr. MacLaren's letter of June 29, 2010, Mr. LeBlanc has been in contact with the Provincial Crown Attorney and the RCMP, both of whom advised that they are actively considering retaining their own counsel.

4. Since the Applicants are alleging that a common law rule has been breached, thereby resulting in a breach of their *Charter* rights, it appears that the Applicants failed to comply with section 109 of the *Courts of Justice Act* and Rule 8.1 of the *Rules of Practice of the Licence Appeal Tribunal*, both of which require a notice of constitutional question to the Attorney General of Ontario.

On July 13, 2010, Mr. Battin wrote to the Licence Appeal Tribunal and advised that as of that date he was representing Constable Daoust and he requested that the hearing scheduled for July 14, 2010, be adjourned to allow him time to prepare his client and ensure an effective hearing. On July 14, 2010 Mr. Battin confirmed that his client has not received a copy of the material and that he needed time to prepare.

Mr. MacLaren objected to the adjournment for the following reasons:

1. He pointed out that there has already been a considerable delay because the Registrar started its investigation of the Applicants in 2006, even though the notice of proposal to revoke the licence was issued on December 3, 2009.

2. He clarified that he is not seeking relief under the *Charter;* therefore, there is no need to adjourn on that basis.

3. He no longer intends to call Mr. Rothe as a witness.

4. He has not received materials in response to the motion to stay the proceedings, which suggested to him that the Respondent did not intend to file materials.

5. One of his witnesses may not be available at a future date because he will be out of the country.

DECISION

The Tribunal considered the arguments raised by the parties as well as the concerns raised by Mr. Battin. The Tribunal is mindful that the Appellants have been dealing with this matter in one way or another since 2006 and would like the matter to be resolved quickly. The Tribunal also took into consideration the fact that the hearing scheduled for June 14, 2010 was adjourned, on consent, at the request of the Respondent.

The Tribunal would not have adjourned the matter based solely on Mr. Battin's request because, in the Tribunal's view, it would have been possible to ensure Mr. Battin's client was given sufficient time to review the relevant material and prepare before testifying.

Although one witness scheduled to testify on behalf of the Applicants may not be available at a future date, the Tribunal finds that the testimony from this witness can be presented in a different manner.

However, in light of the rules of natural justice and procedural fairness, the Tribunal finds that the Respondent has not had sufficient time to review the material and prepare submissions. In order to render the best possible decision in this matter, the Tribunal requires submissions from both parties and at this time has not received any submissions from the Respondent. In light of the fact that Mr. LeBlanc was retained on July 5, 2010, and the fact that the issues raised in the motion to stay the proceedings and Mr. MacLaren's letter of June 29, 2010 are complex, the Tribunal finds that the best way to proceed is to allow a further adjournment of this matter to allow Mr. LeBlanc time to prepare a response to the Applicant's motion to stay the proceedings. This second adjournment is granted despite the fact that the matter has been previously adjourned on a peremptory basis.

ORDER

The Tribunal orders as follows:

1. The hearing is adjourned until **September 7, 2010** commencing at **9:30 a.m.** at the offices of Gillespie Reporting Services, 130 Slater Street, Suite 200, in Ottawa and will continue, if necessary, on September 8, 2010. These two days have been set aside to address the Applicant's motion to stay the proceedings. This adjournment is peremptory against all parties.

2. In the event the Applicant's motion to stay the proceedings is not successful, the hearing will resume on November 4, 2010 at the offices of Gillespie Reporting Services, 130 Slater Street, Suite 200, in Ottawa at 9:30 a.m. and will continue, if necessary, on November 5, 8 and 9, 2010.

3. Mr. MacLaren confirmed that he has no further information to submit in this matter. Consequently, the Tribunal orders that Mr. LeBlanc's deadline for filing his response to the motion to stay the proceedings and full disclosure of will say statements for his witnesses is August 16, 2010.

4. Mr. MacLaren will then be given until August 27, 2010 to file a reply.

5. Should Mr. Battin decide to request standing in these proceedings, he must do so by August 16, 2010.

6. All the documents the parties want to rely on during the hearing, including their Record and Factum, must be submitted to the Licence Appeal Tribunal no later than the morning of September 2, 2010.

7. Should any issues arise between the date of the order and September 7, 2010, the parties must communicate directly with the Licence Appeal Tribunal to address the matter.

LICENCE APPEAL TRIBUNAL

_____
Chantal Proulx, Vice-Chair

RELEASED: July 26, 2010

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

MOTOR VEHICLE DEALERS ACT, 2002
S.O. 2002, c. 30, Sch. B

ELIE VIDAL - Consent Order

IN THE MATTER OF
ELIE VIDAL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: March 11, 2010

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

ELIE VIDAL

- Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by Elie Vidal, the Applicant, and the Registrar under the *Motor Vehicle Dealers Act, 2002* for issuance of a Consent Order of the Tribunal without a hearing pursuant to Section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act, 2002* 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: August 4, 2010

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

SCHEDULE 'A'

TO: Licence Appeal Tribunal
1 St. Clair Avenue West, Suite 1200
Toronto, ON M4V 1K6

FROM: The Registrar
Motor Vehicle Dealer Act, 2002
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND FROM: ELIE VIDAL
c/o OMC (Ontario Motor Car)
5274 Hwy 7
Woodbridge, ON, L4L 1T3

Pursuant to subsection 6(2) of the *Motor Vehicle Dealers Act*, *2002* ("the Act") ELIE VIDAL ("the Applicant") and the Registrar*, Motor Vehicle Dealers Act, 2002*, ("the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees that he will not knowingly buy, sell, lease or trade in motor vehicles directly or indirectly with Stephen Gelman without confirming with the Registrar that Stephen Gelman is registered under the Act.

2. The Applicant agrees that if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.

3. The Applicant agrees that if he is convicted of any offences in the future, to immediately notify his employer and the Registrar in writing, giving particulars of the charge and conviction.

4. The Applicant agrees that his explanation of the circumstances of the charges that were laid against him is substantially as set out in the disclosure provided 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.

5. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.

6. The Applicant agrees not to transfer his registration as a salesperson under the Act to another dealer without prior written consent from the Registrar.

7. The Applicant agrees not to be involved in the buying, selling, leasing or trading of motor vehicles without the benefit of registration.

8. The Applicant agrees not be an officer, director, owner, partner or have direct or indirect control of a dealership and such condition as set out herein will be in force and effect for a period of two registration cycles as prescribed by the Regulations, that being the period commencing March 19, 2010 through to and including March 19, 2014.

9. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment.

10. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

11. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

12. The Applicant agrees to provide a copy of this Order to his employer forthwith.

13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the Terms and Conditions as set out herein.

Signed in the City of _____ this _____ day of August 2010.

ELIE VIDAL

_____ _____

Salesperson (Signature) Salesperson

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*, 2002.

Signed in the City of _____ this _____ day of August 2010.

_____

Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ROBERTO TOWING AUTO SERVICES INC. AND I. IRAHETA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT 2002*, R.S.O. c. M.42

TO REFUSE REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: E.EZRIN, Counsel representing the Registrar, *Motor Vehicle Dealers Act, 2002*

J. JUKUBIAK, Counsel, representing Roberto Towing Auto Services Inc. and I. Iraheta

DATE OF HEARING: July 5 and July 6, 2010 TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises out of a written Notice of Proposal, dated March 5, 2010, issued by the Registrar under the *Motor Vehicle Dealers Act, 2002* (the "Act") to refuse the applications of both Roberto Towing Auto Services Inc. (the "corporate Applicant"), owned and operated by Mr. I. Iraheta, to be a registered motor vehicle dealer under the Act, and Mr. I. Iraheta (the "Applicant") to be a registered salesperson under the Act.

Numerous particulars for the refusals were set out in the Proposal (Exhibit 1), some of which were admitted by the Applicants and some of which were withdrawn by the Registrar prior to hearing the evidence. In sum, the Registrar's concerns, as described in the opening statement of Counsel, were the following:

(1) a history of prior convictions,
(2) a history of non-responsiveness to queries made by the Registrar; and
(3) failure to remit sales tax.

As the hearing continued the further issue of the Applicants' continuing to sell vehicles whilst unregistered, became a significant concern.

In response, Mr. Iraheta's position was that his convictions were in some cases disclosed and in others were reasonably not disclosed; the communication history between the Parties demonstrated the Applicants were reasonably responsive to the on-going and repetitive requests for information made by the Registrar's office, and, finally, that the alleged failures to remit sales tax are in fact under appeal with the relevant tax authority.

EVIDENCE

Shannell Leggard is an employee with the Ontario Motor Vehicle Industry Council ("OMVIC"), the regulatory authority responsible for registered salespeople and dealers in the Ontario motor vehicle industry. During the relevant time period, Ms Leggard worked in the registration department where her duties included the processing of registration applications. In the course of these duties she reviewed the application for registration of the corporate Applicant dated September 10, 2008 (Exhibit 3, Tab 5), as well as the application for salesperson registration of the Applicant (Exhibit 3, Tab 6) – also received in September 10, 2008.

Financial records disclosed for the corporate Applicant suggested insufficient capital to operate. As well, further information concerning funding was required. In addition, Ms Leggard noted a negative response to the question of prior bankruptcy, despite the fact that both it and criminal record checks later undertaken by her reveal an earlier bankruptcy and additional criminal charges, beyond those disclosed on the application.

In a conversation with Mr. Iraheta on September 23, 2010, the Applicant advised he would supply the OMVIC office with additional information. This information included bank statements showing the corporate Applicant had received two different infusions of funds: one cheque in the amount of $125,000.00 (which subsequently was returned NSF by the bank); and another deposit of over $18,000.00. Mr. Iraheta informed Ms Leggard that the latter funds were a loan from a family member overseas. She requested additional information as to the source of the funds which she asserted was important information to the Registrar, given the potential influence a funder of that amount can wield over a registrant.

In November the Applicant wrote to advise the monies were a loan repayment from his employee/cousin. Ms Leggard passed her file on to her supervisor who again wrote the Applicant, in January, 2009, requesting further verification as to the origins of the money (Exhibit 3, Tab 14). The Applicant responded again that it came form his employee, "O", as a loan. When, in February, the supervisor further questioned the source of the money, the Applicant advised he had no access to "O"'s bank information and thus was unable to provide source details other than the cancelled cheque (Tab 17).

In cross examination Ms Leggard conceded that the Applicants did respond to OMVIC's requests for further information with reasonable promptness. She also advised that, given that bank records do not generally disclose the origin of funds an applicant might have, it is usual for OMVIC to request such information from the Applicant. She further acknowledged that other criminal charges of concern to the Registrar were later dropped by the Crown and that Mr. Iraheta had in fact disclosed his earlier bankruptcy in his first application for registration with OMVIC in 2004.

Jennifer Brake is an employee with the Ministry of Revenue, Collection Branch, (the "Ministry") where she has worked for twenty-eight years. The retail sales tax collected by vendors in the province is characterized as trust funds. The province relies on business people to collect and deposit such monies for the benefit of the community's revenue base. The Ministry informs and advises vendors of their obligations concerning collection by providing vendor permit applicants with a package laying out such information and encouraging those individuals to contact service representatives employed by the Ministry for explanation, assistance and/or further information.

Ms Brake testified that the Ministry advised the corporate Applicant that it is deemed to be close to $51,000.00 in arrears. This arrears amount is based on Ministry estimated returns since December, 2008 because of the corporate Applicant's failure to file such returns. The Ministry has attempted to contact the corporate Applicant by telephone regarding the outstanding debt and has issued two written Final Notices despite its usual process of only issuing one such Final Notice. Despite all of the above, the corporate Applicant has failed to remedy the arrears outstanding, and has not requested any appeal of the Ministry findings.

In cross-examination Ms Brake conceded that the actual sum of tax revenues not remitted was $12,593.52, given the most recent remittance of 648.99 in September, 2007 which, when added to previous payments, resulted in its total payment of $5,293.64 on an assessed amount owing of $18,484.55. The remaining $39,000 deemed owing consisted of penalty and interest charges.

Ms Brake also provided copies of Ministry written communications to Mr. Iraheta's earlier registered sole proprietorship which had operated from 2003 – 2007. It too was deemed to owe Retail Sales Tax based on late and omitted filings. The amount outstanding consists of a deemed audit figure of $19,282.00, which, when penalties and interest are added, is a debt due of $55,000.00.

Similar to the newly incorporated entity, the sole proprietorship has also failed to either respond to Ministry notices or appeal its estimated returns. Given this, the Ministry wrote to OMVIC offices on March 9th, 2010 to advise that the corporate Applicant was not financially responsible in the conduct of business and request the Registrar propose revocation of its registration under the Act (Exhibit 3, Tab 26). A similar letter was directed to the Registrar from the Ministry on March 8, 2010 regarding the Applicant (Exhibit 3, Tab 27).

Mary Jane South is the Deputy Registrar of OMVIC. Her primary function is to oversee the registration staff and process. She testified that applicants are entitled to registration unless they fail to meet certain requirements set out in the Act. An essential element concerns an applicant's honesty and integrity which the Registrar assesses, in significant part, on the disclosure provided by an applicant to questions contained in the application form. In this case both the individual Applicant and the corporate Applicant failed to disclose Mr. Iraheta's prior bankruptcy. In addition, checks conducted by Ms. South demonstrated two prior convictions for false documents/inadequate records, which had not been disclosed, that had been registered against the earlier sole proprietorship originating from a regulatory inspection (Exhibit 3, Tab 21). Further driver history searches undertaken by the Registrar's office revealed a number of driving convictions and fines levied on Mr. Iraheta from 1984 through 2004, none of which had been disclosed in response to questions on the application requiring disclosure of convictions.

Ms South concluded that the lack of disclosure in both applications signed by Mr. Iraheta were of grave concern given the fact that the business of a motor vehicle salesperson and dealer is predicated on disclosure to consumers. Moreover, earlier bankruptcy and convictions under related legislation such as the Highway Traffic Act and related regulatory legislation were also highly relevant.

Information provided in the applications revealed two sources of unidentified and unusual funds which Ms South noted Mr. Iraheta never adequately explained. Despite a number of months of back and forth communications and numerous written requests from the Registrar's office, the Registrar still does not know where the funds originate. Ms South concluded that the Applicants' varied responses to her office's request for information as to funding sources remained of great concern. She noted that Mr. Iraheta had first advised the funds were from a family member, then later that they were a pay back from his employee and then later proffered a third explanation that they represented a loan from that employee.

Ms South provided a copy of Terms and Conditions entered into by Mr. Iraheta when first registered as a sole proprietorship in 2004 (Exhibit 3, Tab 1). At that time, these Terms and Conditions were required to be met by new dealers to ensure certain requirements for business were clearly understood. Condition #26 sets out the obligation concerning remittance of retail sales tax; Condition #27 articulates the Registrar's right to be provided within a reasonably short and specified time frame with information concerning new sources of funding. There is also a condition which makes clear the prohibition of trading vehicles without registration. In regards to this last requirement, Ms South relied on documentation from the Ministry of Transportation showing that, despite not receiving approval for registration since 2008, the corporate Applicant had apparently continued trading. Over 40 traded vehicles were registered as being transferred into and out of its possession since the 2008 lapse of registration.

In response to a proceeding commenced by OMVIC against the Applicant before the regulatory authority's Discipline Panel in 2008, the Registrar and Applicant agreed to a settlement which included the Applicant accepting additional conditions on its licence for registration. One was a condition setting out the requirement for any salesperson connected with the dealership to undertake additional training which Ms South alleged had not been completed by either Mr. Iraheta or his employee "O".

Mr. Iraheta's evidence was that he had successfully owned and operated a sole proprietorship registered dealership without any consumer complaints and/or issues for four years from 2004 through to 2008 when he applied for registration under his newly incorporated business name. This most recent application had, however, caused him months of uncertainty, months of frustration and finally, one and a half years later, resulted in the Proposal of the Registrar to reject his request.

The Applicant claims that not one of the grounds upon which the Registrar relies is, substantial. Mr. Iraheta noted that he had received a pardon for one of the convictions he allegedly failed to disclose; he had disclosed his bankruptcy when first registered and had no idea it was necessary for him to repeat the same disclosure each and every time he re-applied; he had admittedly not disclosed various speeding tickets and other traffic violations but queried how relevant such were for registration as a salesperson and/or dealer; he admitted his failure to commence the re-training as required under the Terms and Conditions and explained this as a lapse which, once reminded of the requirement, he had rectified by now registering for that training. Regarding the retail sales tax, Mr. Iraheta acknowledged that he had arrears, but relied on the fact that he had made numerous payments during his earlier registration and that the vast amount of what was currently deemed owing consisted of interest and penalty. He had hired a bookkeeper, three years prior who had filed an appeal of the Ministry of Revenue's assessments. As to the vehicles he had traded since 2008, Mr. Iraheta believed he was entitled to sell up to ten vehicles annually without benefit of registration and the others had all been sold outside the country and therefore were not predicated on provincial consumer protection registration requirements such as OMVIC.

Mr. Iraheta is married and supports his family. The family first came to Canada in 1980 and are now Canadian citizens. Since the age of eighteen he has been in the car business, other than the first few years of coming to this country when he was employed as a cleaner.

The original sole proprietorship grew out of a garage where he worked for eight years. Both it and the new business consist of a licensed mechanical shop, a motor vehicle inspection station (the subject of the inadequate records leading to earlier convictions) and a body shop. He has one employee, "O".

His English language skills being somewhat imperfect, he relied on his wife to assist him in completing the application forms. All further information he had provided to the Registrar's office promptly when asked, often after consultation with his lawyer. The reason he had not taken the ongoing training course as required was only because he

was not aware of his commitment to do so and, once reminded by his Counsel, had registered. It was to commence in the week following the hearing.

Ashok Kumar operates a tax/accounting/book-keeping service. He testified he had been hired by Mr. Ireheta "over one year ago" to assess his finances. As a result he filed a "Notice of Objection" with the Ministry of Revenue concerning its assessment of the Applicants' outstanding tax debts. The filing was by regular mail dated January 14, 2010.[1] Although he has received no response from the Ministry to date, such is not unusual as often objections/re-assessments take a number of years to resolve.

In cross examination Mr. Kumar advised he has only known Mr. Iraheta for one year and maybe two months. He conceded that the Notice of Objection he prepared was filed late, but understood a simple request for re-assessment was sufficient to initiate the review process nonetheless.

Jennifer Brake was called for reply evidence. She stated that the Ministry has still not received any Notice of Objection or appeal concerning the Applicants' two assessments. Further, an appeal filed over two years late, as was alleged to have occurred by Mr. Kumar, was so completely out of time that it would most certainly be disallowed.

THE LAW

The following provisions of the Act are particularly relevant:

> s.6. (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

[1] See copies of letters faxed to Tribunal by the Applicants' Counsel on July 9, 2010 signed by Kumar and directed to the Ministry of Revenue formally objecting to Ministry audits for the period ending December, 2007.

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,

(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, 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 43;

(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. B, s. 6 (1); 2004, c. 19, s. 16 (4-6).

(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. 2004, c. 19, s. 16 (7).

(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 9, as are ordered by the Tribunal or as are prescribed. 2002, c. 30, Sched. B, s. 6 (2).

(3) A registration is not transferable. 2002, c. 30, Sched. B, s. 6 (3).

(4) For the purposes of this section, a person shall be deemed to be an interested person in respect of another person if the person is associated with the other person or if, in the opinion of the registrar,

(a) the person has or may have a beneficial interest in the other person's business;

(b) the person exercises or may exercise control either directly or indirectly over the other person; or

(c) the person has provided or may have provided financing either directly or indirectly to the other person's business. 2002, c. 30, Sched. B, s. 6 (4); 2004, c. 19, s. 16 (8).

s.8. (1) Subject to section 9, 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 6. 2004, c. 19, s. 16 (10).

s.9. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(a) refuse under subsection 8 (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. 2002, c. 30, Sched. B, s. 9 (1); 2004, c. 19, s. 16 (11).

(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. 2002, c. 30, Sched. B, s. 9 (2).

(5) If a hearing is requested, the Tribunal shall hold the hearing and may by order direct the registrar to carry out the registrar's proposal or substitute its opinion for that of the registrar and the Tribunal may attach conditions to its order or to a registration. 2002, c. 30, Sched. B, s. 9 (5).

The following section of the Regulation 333/08 is also relevant:

S. 11. (1) The following are prescribed, for the purposes of subsections 5.1 (1) and 6 (1) of the Act, as requirements for registration or renewal of registration as a motor vehicle dealer:

1. The fee required under clause 9 (b) is paid.

2. If the applicant is an individual, the applicant is at least 18 years of age.

3. The applicant does not owe money to the Crown under the Retail Sales Tax Act or, if the applicant does owe such money, the applicant has made arrangements, acceptable to the Ministry of Finance, to pay the money.

4. Every person who is associated with the applicant as described in subsection 1 (2) of the Act also satisfies the requirements set out in paragraph 3.

DECISION AND ORDER

The Registrar relied on the Tribunal decision of *Khambiz Barghi and Canada Car Import Inc. o/a Canada Car Import v. Registrar, Motor vehicle Dealers Act* (LAT, released October, 2009) for its position that the public needs to be protected from the Applicants given their disregard of their fiduciary obligations concerning retail sales tax. In that decision Vice-Chair D'Amours noted:

"The Applicants' failure to comply with the reporting and remittance provisions of the *Retail Sales Act* establishes that they have not carried on business in accordance with the law. The taxes collected from consumers are entrusted funds which the Applicants do

> not have the discretion to allocate at pleasure. The deviant use of the tax funds is fraudulent and dishonest. Consumers must be protected form motor vehicle dealers and salesperson (sic) who disregard statutory fiduciary obligations."

Counsel for the Registrar submitted that this decision, released prior to the enactment of the current Act, (which, by virtue of Regulation, now makes it mandatory for registrants to be compliant with the *Retail Sales Tax Act*) acts as a bar to the Applicants' gaining registration under the Act.

Counsel for the Applicants stressed that, unlike the facts of that case, in this matter his clients had in fact made regular payments of these taxes up until 2008 and have initiated an appeal of the Ministry findings that it is delinquent in remittances.

While the facts do establish that the Applicants did make some payments as obligated under the *Retail Sales Tax Act*, they also establish that neither has continued with this obligation in recent years. The facts also demonstrate that the appeal, if filed, was filed after numerous notices had been sent by the Ministry over a period of many months, advising of the arrears. There is also the question raised by the witnesses as to whether the appeal was filed correctly or was ever received by the correct authority. There is also some disturbing contradiction in the evidence of Mr. Iraheta and Mr. Kumar as to how promptly the consultant was hired by the Applicants. The Applicant testified it was three years ago but the consultant was clear it was less than one and a half years ago.

Based on this evidence, the Tribunal is not convinced that the Applicants have acted responsibly and responsively to the Ministry's clear requirements for further filings.

Given this finding, even were the amount of the alleged arrears be found on appeal (if the appeal is accepted), to be less than that currently claimed by the Ministry, the fact remains that as of this date the Applicants are not compliant with section 11 of the Regulation. They have not arranged for satisfactory monetary payments to the Ministry. Moreover, the evidence demonstrates that when contacted for an explanation, the Applicants chose to ignore rather than co-operate with the Ministry. As a consequence, regardless of conclusions this Tribunal may reach as to the effect such actions has on implications for honesty and integrity, there is no doubt the applications failed to comply with the requirements now mandatory upon them as registrants under the Act. As such, they have failed to meet the legislative requirements for registration and thus their applications must properly be denied on this basis.

The Tribunal is not convinced that Mr. Iraheta failed to co-operate with the Registrar's demands for on-going information as to the source of the financing as alleged. It also does not conclude that the three responses received from the Ministry over the source of those funds reasonably led to a conclusion that the Applicants lack the integrity and/or honesty required of a registrant.

However, the Tribunal is concerned that convictions stemming from inadequate record keeping as required by the regulatory legislation concerning the Applicants' inspection station were not disclosed as required.

It is also concerned that, despite signing terms and conditions clearly agreeing not to trade/sell vehicles without registration, the facts establish a number of such trades having taken place by Mr. Iraheta since his registration lapsed in 2008.

Consequently, the Tribunal finds that there are sufficient grounds to conclude that the past conduct of Mr. Iraheta affords reasonable grounds for belief that the Applicants will not carry on business in accordance with the law and with integrity and honesty.

ORDER

By virtue of the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out his Proposal to Refuse the registration of the Applicants.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

RELEASED: August 23, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

SYED HUSSAIN o/a M/A MOTORS

AN APPEAL OF A DECISION OF THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002* S.O. 2002, c. 30

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Member

APPEARANCES: SYED HUSSAIN, Applicant, self-represented

CHRISTOPHER EZRIN, Counsel representing the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: July 22, 2010 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 9 of the *Motor Vehicle Dealers Act, 2002* (the "Act"). The proposal dated March 30, 2010, sets out the Registrar's reasons for revoking the registration of Syed Hussain o/a M/A Motors (the "Applicant") as a motor vehicle dealer under the Act as follows:

> "The intention and objective of the Act is to protect the public interest. In doing so the Act prohibits the making of false statements in an application for registration or renewal and requires that Applicant be financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. Syed Hussain o/a M/A Motors' past conduct is inconsistent with the intention and objective of the Act, and therefore, warrants disentitlement to registration under the Act.

In the particulars, the Registrar states the following reasons for the proposal:

1. Syed Hussain o/a M/A Motors (the "Dealer") is currently registered as a motor vehicle dealer under the Act and was originally registered on or about November 15, 2007. The registration is subject to terms and conditions attached hereto as Schedule "A" is a copy of the conditions.

2. On or about August 6, 2009, the Dealer purchased a 2008 Honda Civic at a wholesale auction from State Farm Insurance Company for $6,600.00 excluding fees and taxes. The purchase receipt for the vehicle indicates the "Loss Type" as "collision".

3. On or about October 13, 2009, the Dealer sold the 2008 Honda Civic at a wholesale auction for $13,000.00 excluding fees and taxes. At the time of sale, the Dealer failed to disclose that the vehicle had substantial damages in excess of $15,000.00 from a collision.

4. The purchaser only obtained approximately $100.00 in compensation through arbitration available at the auction. The Dealer refused to provide any additional compensation and refused to reverse the transaction.

5. On or about December 1, 2009, the Registrar's office received a complaint regarding the 2008 Honda Civic sold by the Dealer.

6. The Dealer failed to promptly respond to the Registrar's office regarding a request for particulars and supporting documents regarding the complaint. The Dealer's failure to promptly respond is in direct contravention of OMVIC'S Standard's Business Practice.

7. The Dealer has breached paragraphs 6 and 20 of his terms and conditions by failing to disclose the damage sustained by the 2008 Honda Civic when he sold it at auction and by failing to promptly responding to the Registrar regarding the complaint.

8. The Dealer has failed to comply with the Act, in particular, section 6.

ISSUE

Does the past conduct of Applicant provide reasonable grounds to conclude that he will not carry on business with honesty and integrity and in accordance with the law?

EVIDENCE

The evidence of the Registrar consisted of two books of documents (Exhibits #3 and #4) and the oral testimony of Lisa Arrigo, Manager, Arbitration Department, Toronto Auto Auction, Chrystal Johns, OMVIC Complaints Handler and Tim Hines, OMVIC Manager, Complaints Services.

The evidence of the Applicant consisted of his oral testimony as well as two documents, one an invoice for repairs and the other a Medical Doctor's note regarding his present health and medications (Exhibits #5 and # 6).

The following is a summary of the relevant evidence.

The first witness for the Registrar was Lisa Arrigo, who was sworn and testified she has been working in the auto auction business since 1999. She stated she has been the Manager of the Arbitration Department for the last three years where she oversees the arbitration matters. She stated she is the Canadian point person for others requiring assistance re policies as she has helped develop arbitration policies for the business.

Ms. Arrigo testified that the dealers at auto auctions are aware of the disclosure policy and such policy is handed out to dealers if there are changes. In the arena there are

large display signs regarding the policy to disclose. This policy clearly states it is the seller's responsibility to disclose any damages that a vehicle has sustained.

Ms. Arrigo explained the vehicle history identification system on the board when a vehicle is up for auction. A green light would indicate a vehicle declared by the seller as no damage or accident history; yellow light would indicate buyer beware as the vehicle has some safety issues or mechanical issues like transmission concerns; a red light would indicate "as is" mechanical issues of more than $750.00. In this case she stated the Applicant sold the vehicle under the green light when an honest disclosure would have shown yellow or red. A purchaser would not pay as much for the vehicle. She stated that the Honda was sold for $13,000.00, but with full disclosure a purchaser would pay around $8,000.00.

She stated there are levels of damage, such as collision write-offs, two adjacent panels replaced and structural/frame damage or damage over $3,000.00. These must be declared. She continued her testimony by stating that the 2008 Honda Civic required three different declarations by the Applicant but he chose not to declare any. He sold the vehicle as if it was clear of any damages.

Ms. Arrigo testified that a buyer has seven days to get a deal reversed if the vehicle is not as declared by the seller. In this case, she stated, the buyer notified them and applied for arbitration on the ninth day and the Applicant offered the buyer $100.00 but would not take the Honda back and was of the opinion that the buyer was too late.

Ms. Arrigo testified there was another vehicle, a 2003 Camry that the Applicant sold at the auction but he had not declared it had been branded "salvage" as it was an insurance write-off. She stated insurance write-offs have had to be disclosed by the seller since 1999, and the Applicant would have known this. However, this sale was reversed and the Applicant had to take the vehicle back because he was caught during the arbitration timeframe. This transaction was at the same time period as the 2008 Honda Civic non disclosure incident.

There were no allegations about this vehicle in the Notice of Proposal, and the Tribunal did not take this evidence into account.

The second witness for the Registrar was Chrystal Johns, who was sworn and testified she is a Complaints Handler for OMVIC. She stated she has been in this position for over a year and previously she was a service consultant with a car dealership for nearly 10 years. She reviewed and explained the complaint summary and process (Exhibit #3 Tab#3).

She testified that she tried to resolve the 2008 Honda Civic complaint without success. She testified that she had requested the Applicant's position in this matter in writing. As well, she advised the Applicant that there would soon be training sessions regarding the Act.

Ms. Johns stated when she spoke to the Applicant, he knew the 2008 Honda Civic had been in an accident as he had purchased it damaged and he told her he had to fix it before selling it. She stated it was an out of province sale, so it took longer for the purchaser out west to determine the damages and apply for arbitration and, thus, he was two days outside the time limit by policy for arbitration by the auction centre.

Ms. Johns testified that her research demonstrated that there had been evidence that the 2008 Honda had extensive damage and it had been declared a total loss.

Ms. Johns contacted the Applicant when she became aware of the complaint in early December. On the 18th of December she wrote to him confirming the complaint and requesting his position and supporting documents by December 29, 2009.

She received some of the requested information and documents on January 3 and 4, 2010. The Applicant's position regarding the complaint she received on January 6, 2010. She did acknowledge this was during the holiday season and some of the days were not business days, however, the Applicant was slow in responding.

Ms. Johns testified she tried to get the Applicant to reverse the sale but he would not. When she contacted the buyer he wanted more than the $100.00 and wanted the seller to take the 2008 Honda back or pay him several thousand dollars to repair it correctly. The Applicant's response was that the buyer was too late and he did not know the condition of the vehicle now.

The third witness for the Registrar was Tim Hines, who testified he was the Manager, Complaint Services and is the compensation fund manager with OMVIC. He stated OMVIC is a not for profit agency established in 1997 to administer the *Motor Vehicle Dealers Act.* Prior to this position, Mr. Hines was a complaint handler and an inspector.

Mr. Hines explained the branding categories of vehicles to the Tribunal. A "none" brand means the vehicle had no damage nor was there structural damage. "Irreparable" means the vehicle will never be back on the road. "Salvage" means repairable. "Rebuilt" means the same as none but does not mean the vehicle was not in an accident, also means no structural damage.

Mr. Hines testified that after Ms. Johns could not resolve this matter, he attempted to do so without success. He stated the Applicant was aware of the requirement to disclose when he reviewed the terms and conditions of his registration. Also, the Applicant was given a copy of standards and guidelines regarding dealer conduct. This would have been reviewed at the initial inspection while the inspector was there.

Mr. Hines testified that when he contacted the buyer about the 2008 Honda, the buyer wanted a full refund. He contacted the Applicant and was told by the Applicant he was not willing to take the vehicle back. He stated that the Applicant's failure to disclose allowed a vehicle into the market place when it should not be there.

Mr. Hines concluded his testimony stating that the Applicant, despite the help of OMVIC, has failed to understand the rules regarding disclosure.

The Applicant testified on his own behalf. In his sworn testimony he stated he has not been that successful in the automotive business. He testified that he has made mistakes and he has trouble surviving properly. He continued stating he never made the mistakes intentionally, but at the present time he is financially in bad shape and only sells one or two vehicles a month.

The Applicant testified that he is presently under doctors' care, taking medication for depression and he needs to rest for 90 days. Also, his health is bad because of too much stress. He stated he never had physical health problems before but has since this matter began.

He testified he is a 45-year old married man with three children, one girl and two boys and wants to provide them with a good living.

The Applicant testified that if he made a mistake, he apologizes for it. He stated he would take the vehicle back, but would need eight months to arrange the funds. He stated the reason he could not negotiate with the buyer for up to $6,000.00 was because he had no money and no way to arrange for it. This is why he told Mr. Hines he could not go any higher during the negotiations with the buyer.

The Applicant testified that he was not aware of the arbitration rule, but he thought if a vehicle was in an accident and the damage was less than $4,000.00 you could sell it on a green light and you did not need to make declarations. He thinks someone at the auction told him but he did not know who. He stated he now understands this was wrong. He stated he checked the vehicle's brand on the Carfax system and found it to be clean. However, he stated he did know the vehicle was damaged because he repaired it.

On cross-examination the Applicant stated he did not disagree with the evidence presented by the Registrar to the Tribunal, but he believes it was a misunderstanding. He stated he does understand the English language fairly well and uses it for his business, but he is still learning as it is not his first language. He stated he was aware that item #20 of his terms and conditions agreement with the Registrar says he must disclose information on the vehicle history. When asked if he knew the damage was greater than $4,000.00 the Applicant answered "yes" but he thought the insurance companies made the damage values higher than reality.

On further questioning during cross-examination he admitted he was told about the disclosure rules by an inspector in 2007, by teachers during the Georgean College course and again in 2008 by another OMVIC employee.

With regard to the request for information for OMVIC regarding the complaint, the Applicant did not offer any reason for the delays.

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
>
> 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;
>
> 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.
>
> 8. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

ANALYSIS

The issue before the Tribunal is whether the past conduct of the Applicant provides reasonable grounds to conclude that he will not carry on business in accordance with the law, and with honesty and integrity.

The Tribunal did not find the delay in providing information to the Registrar when requested of major concern due to the holiday season and business days being limited. However, the concern of non disclosure of vehicle history to fellow dealers at an auction does cause the Tribunal great concern. This places vehicles, which may not be road worthy, in the market place for unsuspecting public to purchase.

The Applicant testified he was told by someone, but he did not know who, at the auction that if the vehicle damage was under $4,000.00 he could sell the vehicle under the green light. He presented no supporting evidence in this matter.

There was an agreement during the testimony that the Applicant had been advised during his college course as well as by OMVIC employees that he must disclose the vehicle history honestly. Also, he was aware that the seller has the responsibility to disclose the vehicle accident history. The Applicant stated his mistakes were not

intentional, but the Tribunal finds that difficult to believe. He has had opportunities to learn and know the rules of the automotive business both from OMVIC staff and college staff. The Tribunal finds that in this case there was more than sufficient evidence of deliberate intent to deceive on the part of the Applicant when he sold the vehicle under the green light when he knew it was insurance write-offs. In addition, the Tribunal believes that, due to the difficult financial times the Applicant was experiencing, the Applicant chose to sell his vehicles under the green light designation in order to increase the sale value to help remedy his financial burdens.

The Applicant was presented with several options to make the deal right with the buyer and he chose not to do so. The Applicant did not choose to follow the recommendation of OMVIC staff and take the vehicle back. This would make one question his governability, however, during the Applicant's testimony he stated he could not raise the necessary funds to have the deal reversed.

The MVDA is a public protection statute and to permit the Applicant to continue as a licenced dealer as a member of the motor vehicle industry would send the wrong message to the industry and to the public in view of the Applicant's lack of honesty and integrity when selling vehicles. His conduct is not considered, by the Tribunal, as acting with honesty and integrity and in accordance with the law.

Although the Tribunal is sympathetic toward the Applicant's health issues, they are no excuse for his conduct and have no bearing on the case before the Tribunal.

In conclusion, after considering all the evidence and the reasons outlined above, the Tribunal finds that the Applicant's past conduct does provide reasonable grounds to conclude that he will not carry on business with honesty, integrity and in accordance with the law.

DECISION

By virtue of the authority vested in it and pursuant to the provisions of section 7(4) of the Act, the Tribunal directs the Registrar to carry out the Proposal dated March 30, 2010, to refuse the registration of Syed Hussain o/a M/A Motors as a motor vehicle dealer.

LICENCE APPEAL TRIBUNAL

_____

Donald Benninger, Member

RELEASED: August 18, 2010

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

2085716 ONTARIO LTD. O/A BENNETT MOTOR SALES AND LORI-ANN GRIFFIN (AKA BENNETT)-Consent Order

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*, *2002,* S.O. 2002, c. 30, Sch. B

TO REVOKE REGISTRATION

TRIBUNAL: LYNDA TANAKA, Chair

APPEARANCES: LORI-ANN GRIFFIN aka Bennett, representing herself and 2085716 Ontario Ltd.

ANGELA LA VIOLA, Counsel, representing the Registrar*, Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: August 23, 2010 Toronto

CONSENT ORDER

A hearing was held in this matter on August 23, 2010 in the presence of Lori-Ann Griffin (aka Bennett), representing herself and 2085716 Ontario Ltd. o/a Bennett Motor Sales (the "Applicants") and Angela La Viola, Counsel appearing on behalf of the Registrar, *Motor Vehicle Dealers Act, 2002* (the "Registrar" and "Act"), with respect to the Applicants' appeal of the Notice of Proposal of the Registrar to revoke the Applicants' licences dated March 29, 2010.

At the commencement of the hearing the parties advised that the parties had executed terms and conditions of settlement that were marked Exhibit 3 to resolve the appeal. Ms Griffin (aka Bennett), has secured a position with a dealer in good standing with the Registrar.

The Tribunal makes the following order:

1. On consent of the parties, the Tribunal approves the terms and conditions of the settlement executed August 23, 2010.

2. The Registrar is directed to revoke the registration of 2085716 Ontario Ltd. o/a Bennett Motor Sales as specified in Item 1 of the terms and conditions of settlement and to not carry out the proposal to revoke the salesperson's licence of Lori-Ann Griffin aka Bennett but to continue it with the terms and conditions as outlined in the attached settlement.

LICENCE APPEAL TRIBUNAL

_____
Lynda Tanaka, Chair

RELEASED: August 26, 2010

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

TO: Licence Appeal Tribunal
1 St. Clair Avenue West, Suite 1200
Toronto, ON M4V 1K6

FROM: The Registrar
Motor Vehicle Dealer Act, 2002
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND FROM: LORI-ANN GRIFFIN (aka BENNETT)

c/o BENNETT MOTOR SALES
7468 Marden Road
Guelph, ON, N1H 6J2

Pursuant to subsection 6(2) of the *Motor Vehicle Dealers Act, 2002* ("the Act") LORI-ANN GRIFFIN (aka BENNETT) ("the Applicant") and the Registrar, *Motor Vehicle Dealers Act, 2002*, ("the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant acknowledges and consents to the revocation of the Registration of 2085716 ONTARIO LTD. o/a BENNETT MOTOR SALES.

2. The Applicant acknowledges and undertakes not be an officer, director, owner, partner or have direct or indirect control of a dealership and such condition as set out herein will be in force and effect for a period of two registration cycles as prescribed by the Regulations, that being the period commencing October 15, 2010 through to and including October 15, 2014.

3. The Applicant acknowledges and undertakes not to transfer her registration as a salesperson under the Act to another dealer without prior written consent from the Registrar.

4. The Applicant acknowledges and undertakes not to be involved in the buying, selling, leasing or trading of motor vehicles without the benefit of registration.

5. The Applicant acknowledges and undertakes not to be the final signatory on any buying, selling, leasing or trading contracts of motor vehicles on behalf of any motor vehicle dealer.

6. The Applicant acknowledges and undertakes to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment; and provide proof of successful completion within 60 days.

7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke her registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to her financial circumstances and her honesty and integrity.

8. The Applicant acknowledges and undertakes to repay, or enter repayment arrangements with the Motor Vehicle Dealers Compensation Fund ("MVDCF"), within ten (10) days of receiving notice from the MVDCF of any claims being paid out against her former dealership 2085716 ONTARIO LTD. o/a BENNETT MOTOR SALES.

9. The Applicant acknowledges and undertakes to pay any outstanding amounts, or enter repayment arrangements with the Ministry of Revenue as against her former dealership 2085716 ONTARIO LTD. o/a BENNETT MOTOR SALES and undertakes to provide proof thereof to the Registrar.

10. The Applicant acknowledges that the Registrar is relying on the accuracy and of all documents, statements or information provided by the Registrant in support of the Registrant's application for registration. The Registrant confirms that all documents, information or statements provided to the Registrar are true to the best of the Applicant's knowledge and belief and that the Applicant

has given full answers to all questions and requests made by the Registrar in connection with the Applicant's application.

11. The Applicant acknowledges and undertakes to ensure that full disclosure of all material facts upon the sale of a motor vehicle is effected to customers and to motor vehicle dealers as may be given and shall make the disclosure at such time as may be given. Material facts include, but are not limited to, disclosure of salvage, previous salvage, accidented and repaired, frame damage, theft recovery, unibody damage, previous taxi cab, previous police car, previous daily rental, insurance write-off and any other material fact which, in the Registrar's opinion, may affect a customer's decision to purchase or lease the motor vehicle. In the case of damaged vehicles, the Applicant further acknowledges and undertakes to disclose as much detail as possible with respect to the nature and severity of the damage.

12. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

13. The Applicant hereby acknowledges and undertakes to provide a copy of this Order to her employer forthwith.

14. The Applicant hereby acknowledges that she has obtained or has had the opportunity to obtain independent legal advice with respect to her consent to the Terms and Conditions as set out herein.

Signed in the City of _____ this _____ day of August 2010.

LORI-ANN GRIFFIN (aka BENNETT)

_____ _____

Salesperson (Signature) Salesperson

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*, 2002.

Signed in the City of _____ this _____ day of August 2010.

_____

Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

FIND-A-CAR AUTO SALES & BROKERING INC. AND MICHAEL RYAN O'CONNOR

APPEAL FROM A PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT* R.S.O. 1990, c. M.42

TO REVOKE REGISTRATION

TRIBUNAL: CHANTAL PROULX, Vice-Chair

APPEARANCES: KEITH A MACLAREN, Counsel representing the Applicants

BERNARD LEBLANC, Counsel representing the Registrar, *Motor Vehicle Dealers Act*

PAUL BATTIN, Counsel representing the Attorney General (on behalf of the RCMP)

DATE OF TELECONFERENCE: September 1, 2010 Ottawa

REASONS AND ORDER

This motion arises in the course of an appeal by the Applicants to the Licence Appeal Tribunal (the "Tribunal") from a proposal by the Registrar, *Motor Vehicle Dealers Act* to revoke registration. Counsel for the Attorney General, on behalf of the Royal Canadian Mounted Police (the "RCMP") is requesting standing in this matter.

Background

On July 13, 2010, Mr. Battin wrote to the Licence Appeal Tribunal and advised that as of that date he was representing one of the witnesses, Constable Daoust, and requested that the hearing scheduled for July 14, 2010 be adjourned to allow him time to prepare his client. At the beginning of the hearing on July 14, 2010, Mr. Battin indicated that he may be seeking standing on behalf of the RCMP. The Tribunal adjourned the July 14, 2010 hearing for the reasons listed in the order dated July 26, 2010. The order also stipulated that the deadline for Mr. Battin to request standing in these proceedings was August 16, 2010.

On August 16, 2010 Mr. Battin filed a request for standing on behalf of the RCMP. The Tribunal also received Mr. Battin's Book of Authorities.

Decision and Reasons

Mr. Battin is requesting standing in these proceedings because the Applicants alleged that the RCMP engaged in wrongdoing and breached the *Privacy Act*[1], resulting in the removal of the Applicants' licence.

On June 3, 2010 the Applicants filed a Notice of Motion with the Tribunal. The relief sought by the Applicant was:

> a) An Order staying the revocations of the Applicants' licences;
> b) An Order preventing the Registrar from relying on any evidence obtained from the police which formed part of the confidential Crown disclosure; and
> c) An Order prohibiting the Registrar from relying on the transcripts of the criminal proceedings.[2]

The Licence Appeal Tribunal received the Applicants' Factum on June 14, 2010. The Factum raises allegations of wrongdoing on the part of the RCMP. To put some context to this request, some of the allegations are as follows: the RCMP was "working in concert" with OMVIC[3], the RCMP provided OMVIC confidential information relating to the Applicants[4] and the RCMP breached the *Privacy Act*[5].

Mr. Battin argued that the allegations raised by the Applicant were serious and they directly involve the RCMP as well as federal legislation, the *Privacy Act*. He submitted that the relief sought by the Applicants is directly linked to the wrongdoing of the RCMP and therefore it would be a denial of procedural fairness if the Attorney General was not entitled to participate.

Mr. Battin submitted that the Tribunal has the legislative authority to grant the RCMP standing in these proceedings. Counsel relied on section 5 of the *Statutory Powers Procedure Act*[6] which reads as follows:

> Parties
> 5. The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceedings arises or, if not so specified, persons entitled by law to be parties to the proceedings.

To determine if a party is entitled by law to be added as a party to the proceedings, the Ontario Courts have followed Rule 13.01 of the *Rules of Civil Procedure*[7]. Rule 13.01(1) reads as follows:

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[1] R.S.C. 195, c. P-21.
[2] Notice of Motion of the Applicants, Motion Record of the Applicants, Tab 1, at pages 1 and 2.
[3] Applicant's Factum, Tab 1, par. 11.
[4] Applicant's Factum, Tab 1, par 17.
[5] Applicant's Factum, Tab 1, at par. 102 and 103.
[6] R.S.O. 1990, c. S.22.
[7] R.R.O. 1990, Reg. 194 [Rules of Civil Procedure].

> **Leave to Intervene as Added Party**
>
> 13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
> (b) that the person may be adversely affected by a judgment in the proceedings; or
> (c) that there exists between the person and one or more of the parties to the proceedings a question of law or fact in common with one or more of the questions in issue in the proceedings.

Mr. Battin also addressed the less onerous test applied to determine standing before administrative Tribunals. In this regard, he relied on the Divisional Court of Ontario decision in *McFayden*[8] where the Court stated

> "The Tribunal is not restricted to the test that is applicable to court proceedings, but may consider other matters, including the subject-matter of the decision-making power, the nature of the issue to be decided at the hearing and the object of the governing legislation."

Mr. Battin also relied on the *Motor Vehicle Dealers Act, 2002*[9] to support his argument that the Tribunal has discretion to grant standing to an interested party. Subsection 9(6) of the MVDA reads as follows:

> **Parties**
> (6) The registrar, the applicant or registrant and such other persons as the Tribunal may specify are parties to the proceedings under this section.

Finally, Mr. Battin referred to the definition of "party" to a proceeding under *the Licence Appeal Tribunal Rules of Practice*[10]. The definition of party reads as follows:

> "**Party**" means a person or corporation recognized by the Tribunal as having the status to participate in the proceedings as applicant, or respondent, or party specified by the Tribunal as an added party.

On the issue of costs, Mr. Battin indicated that it was too early in the proceedings to determine whether or not the Attorney General would be requesting costs.

Mr. MacLaren did not consent to the Attorney General obtaining standing in these proceedings; however, he did not make representations and he did not file any materials. Mr. MacLaren accepted that the law on the issue of standing was accurately cited in Mr. Battin's Book of Authorities. The only concern raised by Mr. MacLaren related to costs.

Mr. LeBlanc supported Mr. Battin's request for standing and agreed that the law on the issue of standing was accurately cited in Mr. Battin's Book of Authorities.

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[8] *McFadyen v. Ontario (Mining & Lands Commissioner),* 2007 CarswellOnt 8040 (Ont. Div. court) at para. 35.
[9] S.O. 2002, c.30 Sch. B [MVDA].
[10] LAT Rules of Practice, Licence Appeal Tribunal, online:<http://www,lat.gov.on.ca/english/appeals/rules.htm>.

The Tribunal has considered its own Rules of Practice, the *Statutory Powers Procedure Act* as well as the *MVDA* and finds that it has the authority to add a party as an added party to the proceedings. The remaining issue is whether the particular circumstances of this case warrant the Attorney General to be added as a party to the proceedings.

The Tribunal accepts Mr. Battin's argument that the relief sought by the Applicants in the June 3, 2010 motion is directly linked to allegations of a breach and/or wrongdoing by the RCMP. The Tribunal finds that without the participation of the Attorney General, it may not have all the necessary information to address the allegations raised by the Applicants.

The Tribunal will review the requirements listed in Section 13. 01 (1) of the *Rules of Civil Procedure* regarding leave to intervene as a party.

a) Does the RCMP have an interest in the subject matter of the proceedings?

The proceeding in question is the Applicants' motion to stay the proceedings. The Tribunal finds that the RCMP is not directly mentioned in the Applicants' motion to stay the proceedings; however, the request for "an Order preventing the Registrar from relying on any evidence obtained from the police which formed part of the confidential Crown disclosure" speaks directly to the alleged breach of the *Privacy Act*. The Tribunal is also mindful that the Applicants' Factum raises many allegations of wrongdoing by the RCMP. In light of these allegations, the Tribunal finds that the RCMP has an interest in the subject matter of the proceedings. Therefore the RCMP should be given the opportunity to address these allegations.

b) Would the RCMP be adversely affected by a judgment in the proceedings?

The Tribunal accepts Mr. Battin's submissions that the RCMP could be adversely affected if the Tribunal were to find that the RCMP breached the *Privacy Act*. The Tribunal finds that it cannot resolve the allegations raised by the Applicant without addressing the RCMP actions. The outcome of the hearing could therefore adversely affect the RCMP.

c) Are there similar questions of law or fact between the Applicant, OMVIC and the RCMP?

The Applicant alleged that the RCMP shared information with OMVIC which contravenes the *Privacy Act*. The Tribunal is being asked to issue "an Order preventing the Registrar from relying on any evidence obtained from the police which formed part of the confidential Crown disclosures". The manner in which the RCMP conducted its investigation is a question that concerns the Applicant and OMVIC, as well as the RCMP.

Although the Tribunal finds that the RCMP has established that it should be an added party based on the Rules of Civil Procedures, the Tribunal is mindful that the Divisional

Court of Ontario has considered elements such as: (1) the subject matter of the decision-making power, (2) the nature of the issue to be decided at the hearing, and (3) the object of the governing legislation.

In matters involving revocation of registrations, the issue before the Tribunal is usually whether or not the Registrar should be directed to revoke registration. However, in this case, the Applicants' Motion to Stay the Proceedings has called into question the RCMP's actions as well as a possible breach of the *Privacy Act*. The Tribunal concludes that the RCMP should be given an opportunity to address these issues.

As mentioned above, to decide the motion to set aside the proceedings, the Tribunal will have to address the actions of the RCMP as it relates to the investigation and the breach of the *Privacy Act*.

Finally, both the *Statutory Powers Procedure Act* and the *MVDA* allow the Tribunal to add a party to a proceeding.

Order

For the reasons explained above, the Tribunal finds that the Attorney General should be added as a party to the proceedings.

The Tribunal would like to remind the parties of the order previously issued on September 3, 2010.

> 1. The motion to stay the proceedings scheduled for September 7 and 8, 2010 has been cancelled. Consequently, the parties were no longer required to submit all their documents to the Licence Appeal Tribunal by September 2, 2010.
>
> 2. The motion to stay the proceedings will resume on November 4, 2010 at the offices of Gillespie Reporting Services, 130 Slater Street, Suite 200, in Ottawa at 9:30 and will continue, if necessary, on November 5, 8 and 9.
>
> 2. In the event the Applicant's motion to stay the proceedings is not successful, the hearing will resume on January 10, 2011 at the offices of Gillespie Reporting Services, 130 Slater Street, Suite 200, in Ottawa at 9:30 and will continue, if necessary, on January 11, 12 and 13.
>
> 3. Mr. Battin will have until September 17, 2010 to file a Factum and Affidavits with the parties and the Licence Appeal Tribunal.
>
> 4. Mr. LeBlanc will have until September 30, 2010 to file a Factum and any other material with the parties and the Licence Appeal Tribunal.

5. Mr. MacLaren will have until October 15, 2010 to reply to the material submitted by both Mr. Battin and Mr. LeBlanc.

7. Should any issues arise between the date of this order and November 4, 2010, the parties must communicate directly with the Licence Appeal Tribunal to address the matter.

LICENCE APPEAL TRIBUNAL

_____
Chantal Proulx, Vice Chair

RELEASED: September 14, 2010

This decision,may also be available on Quicklaw.

MOTOR VEHICLE DEALERS ACT, 2002
S.O. 2002, c. 30, Sch. B

JOHN ANTONIADIS-Consent Order

IN THE MATTER OF
JOHN ANTONIADIS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act, 2002*
TO REFUSE REGISTRATION
- Proposal dated: April 30, 2010

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

JOHN ANTONIADIS

- Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by John Antoniadis, the Applicant, and the Registrar, under the *Motor Vehicle Dealers Act, 2002* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar, under the *Motor Vehicle Dealers Act, 2002* as to the disposition of these proceedings which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon 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: September 15, 2010

This decision may also be available on Quicklaw.

SCHEDULE "A"

Pursuant to subsection 6(2) of the *Motor Vehicle Dealers Act, 2002* ("the Act") JOHN ANTONIADIS ("the Applicant") and the Registrar, *Motor Vehicle Dealers Act, 2002*, ("the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant acknowledges and undertakes that if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.

2. The Applicant acknowledges and undertakes that if he is convicted of any offences in the future, to immediately notify his employer and the Registrar in writing, giving particulars of the charge and conviction.

3. The Applicant acknowledges that his explanation of the circumstances of the charges that were laid against him is substantially as set out in the disclosure provided to the Registrar and further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these Terms and Conditions.

4. The Applicant acknowledges and undertakes to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.

5. The Applicant acknowledges and undertakes not to transfer his registration as a salesperson under the Act to another dealer without prior written consent from the Registrar.

6. The Applicant acknowledges and undertakes not to be involved in the buying, selling, leasing or trading of motor vehicles without the benefit of registration.

7. The Applicant acknowledges and undertakes not to be an officer, director, owner, partner or have direct or indirect control of a General dealership consisting of new and used motor vehicles and used motor vehicles subclasses; as defined and authorized by the Act and Regulations set out therein.

8. The Applicant acknowledges and undertakes not to be a Wholesaler as defined and authorized by the Act and the Regulations set out therein. Such condition as set out herein will be in force and effect for a period of one registration cycle as prescribed by the Act and the Regulations set out therein.

9. The Applicant acknowledges and undertakes to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment; and provide proof of successful completion within sixty (60) days.

10. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

11. The Applicant acknowledges that the Registrar is relying on the accuracy of all documents, statements or information provided by the Applicant in support of his application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Applicant's knowledge and belief and that the Applicant has given full answers to all questions and requests made by the Registrar in connection with the Applicant's application.

12. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

13. The Applicant acknowledges and undertakes to provide a copy of this Order to his employer forthwith.

14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the Terms and Conditions as set out herein.

Signed in the City of _____ this _____ day of September 2010.

JOHN ANTONIADIS

_____ _____

Salesperson (Signature) Salesperson

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*, 2002.

Signed in the City of _____ this _____ day of September 2010.

_____

Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

SERGIO De CARVALHO

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Member

APPEARANCES: JUSTIN M. JAKUBIAK, Counsel, representing Sergio De Carvalho

CHRISTOPHER L. EZRIN, Counsel, representing the Registrar*, Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: September 30, 2010 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 (the "Proposal") issued by the Registrar under the *Motor Vehicle Dealers Act, 2002* (the "Registrar" and the "Act" respectively). The Proposal dated May 6, 2010, proposed to refuse the registration of Sergio De Carvalho (the "Applicant") as a motor vehicle salesperson under the Act.

The Registrar's Proposal is brought pursuant to section 8 of the Act as read with section 5.1 and section 6 of the Act.

The reasons given by the Registrar in his Proposal are as follows:

> The intention and objective of the Act is to protect the public interest. In doing so, the Act prohibits the making of false statements in an application for registration or renewal and requires that Applicants be financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. Sergio De Carvalho's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

In support of the Registrar's Proposal the following particulars are stated:

1. Sergio De Carvalho (the "Applicant") applied for registration as a motor vehicle salesperson on or about December 29, 2009. The Applicant proposes to work for Humberview Pontiac Buick GMC Ltd. o/a Humberview Motorsports.

2. The Applicant was previously registered under the Act, between on or about March 23, 1993 and on or about July 24, 2009.

3. 1423326 Ontario Inc. o/a Autoforum ("Autoforum") was previously registered under the Act, between on or about August 23, 2000 and on or about July 24, 2009. At all material times the Applicant was and remains the sole officer and director of Autoforum.

4. On the December 29, 2009 individual application, question 9 of section E asks:

   "Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or the conviction, and the circumstances surrounding each.

   The Applicant said "Yes" and further wrote:

   "MISCHIEF, WEAPONS DANGEROUS, ASSAULT POLICE (COURT IN JULY 2010) I HAVE NO CRIMINAL RECORD OR PREVIOUS CHARGES. THIS JUST HAPPENED I CAUGHT THIEVES STEALING MY CAR IN MY DRIVEWAY AND I WAS CHARGED. THE ASSAULT POLICE WAS VERBAL...I CANT COMMENT AS NO TRIAL HAS BEEN SET..."

5. On or about September 29, 2009, the Applicant was charged with:

   Mischief Over C.C. 430(3)
   Weapons Dangerous C.C. 88(1)
   Cause Disturbance-Disorderly Conduct
   Disturbs Occupants-Dwelling House C.C. 175 (1)(d)
   Threatening Death C.C. 264.1 (1)(a)
   Mischief Under C.C. 430(4)
   Assaulting a Peace Officer (x2) C.C. 270(1)

6. The Applicant provided the Registrar with written particulars surrounding his charges that were inconsistent with the particulars obtained by the Registrar from the Toronto Police Service.

7. …

8. Sergio De Carvalho has failed to comply with the Act, in particular, section 6.

Paragraph 7 of the Proposal was withdrawn by the Registrar at the commencement of the hearing.

In the Notice of Further and Other Particulars the Registrar alleged as follows:

9. On or about June 21, 2010, the Applicant submitted a false bill of sale to the Registrar which purported to reflect the sale of a vehicle in 2008.

10. From on or about May 27, 2010 onwards, the Applicant submitted email correspondence to representatives of the Registrar which was in breach of s. 8 and 9 of the *Code of Ethics and Operation of Committees*, O. Reg. 332/08.

THE EVIDENCE

The evidence introduced by the Registrar consisted of two Books of Documents, Volume 1 and 2 (Exhibit #3 and Exhibit #4) and the oral testimony of Kevin Baker, Constable Ryan Angus and Mary Jane South.

The evidence introduced by the Applicant consisted of a Book of Documents (Exhibit #5) and the oral testimony of the Applicant and a representative of his current employer.

Kevin Baker

Kevin Baker was sworn and testified that he is employed as a bailiff and has been in the industry for eight years. He is appointed by the provincial government and one of his duties requires him to repossess vehicles.

Mr. Baker testified that on September 25, 2009, after he received information that a creditor's vehicle was at the Applicant's residence, he, in his uniform, attended the residence at approximately 5:00 a.m., and verified that it was the subject vehicle by checking the VIN number. Then he called a tow truck to remove the vehicle. He stated that there was a dealer licence plate on the rear of the vehicle but a regular licence plate on the front.

Mr. Baker testified that while waiting for the tow truck, a young woman came out of the residence and told him to leave the subject vehicle alone. The Applicant came running toward him from the rear of the residence, shouting at him to get off the driveway, using vulgar language and saying "I will put a cap in you". Mr. Baker stated that he tried to explain to the Applicant why he was there, but the Applicant yelled that he had not called the police.

Mr. Baker testified that when someone makes a firearms comment like the Applicant did, he always calls the police and "backs off" until the police arrive. He did so in this case and advised the tow truck driver to come away from the Applicant's property.

Mr. Baker testified that the Applicant had a screwdriver in his hand and removed the dealer licence plate. He stated the Applicant had another sharp object with him, which he used to stab and deflate all the tires of the subject vehicle. Then the Applicant went back into the garage and returned with a hammer in his hand and proceeded to break all the windows in the subject vehicle. Mr. Baker stated that the Applicant's behaviour was out of control and that he feared for his safety and the safety of the people with him so they waited for the police to arrive.

Mr. Baker testified that when the police arrived, the Applicant was still calling him vulgar names and would not put down the tools he had in his hands when ordered to do so by the police. Eventually the Applicant threw the items in the bush and the police then cuffed him and with difficulty placed the Applicant in the police cruiser.

Mr. Baker stated that he explained to the police the vehicle was being repossessed; however, the police wanted the subject vehicle taken to the police station as evidence to support the charges.

On cross-examination, Mr. Baker confirmed that he did not have an opportunity to advise the Applicant why he was there to take the vehicle, nor could he show or give the Applicant any paperwork as the Applicant was too out of control.

Constable Ryan Angus

The second witness for the Registrar was Constable Ryan Angus who was sworn and testified that he has been with the Toronto Police Service for four years.

Constable Angus testified that he was the Primary Response Officer on the early morning of September 25, 2009 and was in uniform and driving a marked cruiser. He stated that when he arrived at the Applicant's residence, he found the Applicant on the front lawn with a hammer and a screwdriver in his hands, and noted that the tires on the subject vehicle were flat. He testified that the Applicant shouted at him to get off the lawn or he would "pop him". He testified that the Applicant was agitated and belligerent. He could not calm the Applicant down, but eventually the Applicant put down the object he had under his arm. He then arrested the Applicant, cuffed him, and advised him that he was charged with mischief and damage to a vehicle. He stated that the Applicant was read his rights but he was calling the police vulgar names and had to be forcibly placed in the rear seat of the cruiser. While in the rear seat of the cruiser, the Applicant attempted to kick out the windows and it was necessary to use pepper spray on him before his behaviour stopped.
During cross-examination, Constable Angus confirmed that the Applicant did kick the cruiser window out of its seat. He stated the Applicant resisted arrest when the police attempted to place the cuffs on him, and there was a struggle on the ground before the police got the cuffs on him. When asked by the Tribunal why several charges were withdrawn, Constable Angus stated he was not part of the court process and thus, could not explain why there was a guilty plea and a conviction on two charges.

Mary Jane South

The final witness for the Registrar was Mary Jane South, who during her affirmed testimony stated that she is currently the Deputy Registrar of the Ontario Motor Vehicle Industry Council ("OMVIC"), which position she has held since 1997. Her duties include overseeing the registration of dealers and salespersons under the Act. She explained that OMVIC is a not-for-profit organization and has been delegated with authority to administer the Act. She explained that the Act is a consumer protection statute.

Ms. South reviewed, in detail, the documents contained in Exhibit #3 and Exhibit #4, testifying that the Applicant had been previously registered as a salesperson and had been the sole officer and director of Autoforum, an auto dealership registered under the Act for many years.

Ms. South testified that she was familiar with the Applicant's application for registration and the Registrar's Proposal. She stated that the application is seen by the Registrar as the first test of honesty and integrity of an aspiring applicant. She stated the Applicant's lack of detail and non-disclosure of all the details regarding the circumstances surrounding his charges were of concern to the Registrar. She testified that the Applicant's version of the circumstances were a much different version than that of the Toronto Police Service's report. She stated that on his December 29, 2009 application form, the Applicant did declare that he had charges before the court, but his statement regarding thieves stealing his vehicle was not an honest reflection of what occurred. She stated she believes the police report, as it was used in court and the Applicant agreed, by his guilty plea, with the facts from the police synopsis.

She testified that the Applicant demonstrated he is ungovernable by the tone and language which he used in the e-mails to the Registrar's staff. This conduct was a breach of sections 8 and 9 of the *Code of Ethics and Operation of Committees*, O. Reg. 332/08.

Ms. South concluded her testimony stating that the Registrar does not believe the Applicant would act with honesty and integrity and in accordance with the law in the automotive business, and thus the reason for the issuance of the Proposal.

The Applicant

The Applicant was sworn and testified that he completed the application form for registration as a motor vehicle salesperson and that he did declare his criminal charges. He stated he has been in the automotive industry since the age of 14, and after completing grade 12 he went to work full-time selling cars.

In 1986, the Applicant worked for an exotic car dealership, which was winding down so he then went and sold cars for another dealership. He started his own business selling high-end exotic cars in 1990 until 2009. He testified that he had a business partner initially, but he was the sole officer and director.

In 2008 the Applicant became very sick, fell into a serious depression and was unable to work from March 2008 until March 2009. He went back to work on a part-time basis in September 2008, but was not involved in the business aspect of the dealership. While he was absent due to his illness, he hired an employee to operate his business. This employee had attended Georgian College to obtain a salesperson certificate and had applied to OMVIC for registration and was registered. The Applicant thought this employee would not be registered because he had a criminal record. This employee did not do a good job of operating the business and, as a result, there were funds missing and the bookkeeper could not complete the required tax forms.

As well, there were more vehicles on the list of inventory than were on the lot. As a result, the Applicant had to "wrap-up" the business. This employee was terminated and there are civil actions before the courts regarding these matters.

The Applicant testified that he was addicted to painkillers and he commenced counselling for his addiction in 2004.

The Applicant testified that the September 2009 incident resulted from what he thought was someone stealing his vehicle because three or four weeks before, his wife's vehicle had been stolen from their driveway. He stated that on the morning of the incident he made a complete "ass" of himself. He did not see any court orders regarding the vehicle which was about to be towed, but when he saw the Bailiff he "snapped and lost it" and "said things I never should have said and I regret it".

The Applicant testified that as a result of his court appearance, he is on probation for one year with a condition to attend an anger management course. He noted that he is registered for this course, but it will not begin until December.

The Applicant testified that his e-mails to OMVIC resulted from unsatisfactory explanations and telephone calls that did not seem to get him anywhere. With regard to the tone of his e-mails, he stated that he does not usually act this way.

The Applicant testified that the Bill of Sale (Exhibit #4, tab #2, page 6) is a complete fabrication even though it is on an Autoforum form. He noted that he did not provide this document to OMVIC and he believes that his former disgruntled employee prepared and submitted it. He pointed out that the signature on the Bill of Sale is not the same as the signature on his application form. The Applicant stated that he had a former customer who wanted this Bill of Sale and noted that he had to ask OMVIC for an "over-ride" to register the vehicle appropriately. He explained that the OMVIC process frustrated him and that was why he expressed his anger in the e-mails. He noted that his wife had seen a difference in him during the last couple of years, and stated he was never like that before his illness.

During cross-examination, the Applicant stated that the GST Remittance for his business could not be completed while his employee was in charge of the business and eventually he had to go bankrupt. With regard to the vehicle about to be towed from his driveway, the Applicant stated that a friend had loaned it to the Applicant's wife for her use, as her vehicle had been stolen. He knew it was leased but he was sure there were no arrears owing and the insurance was paid, so he believed there was no need for the Bailiff to repossess the vehicle.

When asked about the e-mails to the Registrar's staff from May 27, 2010 to July 22, 2010 (Exhibit #3, tab 10, pages 72 to 110), the Applicant stated that he wanted to put on the record what was happening and he agreed that some of the tone of the e-mails were threatening.

During cross-examination when the Applicant was questioned regarding his activities and actions with respect to the Bill of Sale, the Applicant stated he "played" along with the consumer because he needed evidence to use in his civil lawsuit against his ex-employee. The Applicant agreed with Counsel for the Registrar that he had been attending counselling with a psychiatrist, a psychologist and a social worker for the past few years in order to assist him with his behaviour and his illness. The Applicant concluded his testimony by stating that he has no explanation for his conduct.

The Employer's Representative

The next witness for the Applicant was a representative of his current employer who testified that he is the Vice-President of People and Organizational Development within a large family owned auto dealership business involving 11 dealership locations, some of which are wholly owned and some are leasing operations. The company recently acquired a new dealership and they purchase exotic cars from the United States. He stated this is a capital intensive sector.

He testified the Applicant has been employed by the company since December 2009 and is working at a location where they sell exotic cars. The witness stated that the Applicant is involved in servicing and supporting clients, but he does not show or sell vehicles. If the Applicant obtains his licence, the company would employ him in the sales department. He testified that prior to working with their company the Applicant sold five to ten percent of the exotic cars in the area.

The witness testified that the Applicant is not presenting any issues, there are no complaints from the managers, salespeople or any customers, and confirmed that the Applicant is doing what he is supposed to do.

He confirmed that the Applicant told the company about the charges and the pending court dates before he was hired. He testified that initially he recommended not hiring the Applicant, but was overruled by other members of the team, and noted that after what he has seen, he is now satisfied with the decision and would hire the Applicant. The employer does not see any issue with governability because the Applicant takes the advice given. Also, there are plenty of supervisory levels in the sales section to monitor the Applicant's conduct. The witness reiterated that the company would be content with the Applicant in a sales capacity, as long as he was closely supervised. They would not have the Applicant buying cars until he had proven himself.

In conclusion, the witness testified that he was not aware of the e-mails sent to the Registrar, but if he had been, he would have advised the Applicant that the e-mails were inappropriate and not helpful to his registration process. He noted that he would have encouraged the Applicant not to send them.

THE LAW

The Act states as follows:

> 5.1 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.
>
> 6. (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 ground 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 make a false statement or provided 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 43.

ISSUE

The issue in this case is whether or not the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

FACTS FOUND PROVEN

The facts found proven by the Tribunal are as follows:

1. The Applicant applied for registration as a motor vehicle salesperson on or about December 29, 2009.

2. The Applicant was previously registered under the Act between on or about March 23, 1993 and on or about July 24, 2009.

3. The Applicant was the sole officer and the director of 1423326 Ontario Inc. o/a Autoforum, which was previously registered under the Act between on or about August 23, 2000 and on or about July 24, 2009.

4. The Applicant indicated on the application form that he had a criminal history by checking “Yes” in response to question #9.

5. When the Applicant gave his explanation to question #9, he wrote “mischief, weapons dangerous, assault police…I have no criminal record or previous charges...I caught thieves stealing my car in my driveway and I was charged, the assault police was verbal...”.

6. The explanation set out in point #5 above is inconsistent with the particulars obtained by the Registrar from the Toronto Police Service and Constable Angus’ testimony, in that they stated when the police arrived the Applicant was carrying weapons - a hammer and a screwdriver and yelling obscenities at the Bailiff, the tow truck driver and the police, and his behaviour required restraints. Both the police report and the oral testimony of Constable Angus stated that the Bailiff had legally seized the vehicle. There was no indication in the police reports or during Constable Angus’ testimony that the vehicle was being stolen.

7. On September 20, 2010, the Applicant pled guilty to Mischief Under $5,000.00 and Resisting Arrest, and was granted a conditional discharge and placed on probation for 12 months.

8. While on probation, the Applicant must keep the peace and be of good behaviour, and attend an anger management course.

9. The Applicant stated that he is registered for an anger management program, but it will not commence until December 2010.

10. The Applicant’s inappropriate language during conversations with the Registrar’s staff and the e-mails submitted to representatives of the Registrar breach s. 8 and 9 of the *Code of Ethics and Operation of Committees*.

11. The signature on the Bill of Sale (to reflect the sale of a vehicle in 2008) and on the Applicant’s application for registration are not similar.

12. The Applicant has failed to comply with the Act.

ANALYSIS

The onus falls upon the Registrar 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 Applicant of registration has been proven, showing no deference to the Proposal of the Registrar.

Whether or not the Applicant provided correct information to the Registrar is a crucial matter in assessing the honesty of an applicant, as this information is clearly intended to be relied upon by the Registrar. If any information is intentionally concealed, or if false information is given, the Registrar has good reason to have serious concerns that the Applicant will withhold information or provide false information in the future in his dealings with the Registrar or with others and thus, perhaps, with members of the public. A motor vehicle salesperson deals with members of the public who are purchasing or selling products of substantial value, and who depend upon the salesperson not to misrepresent the value or quality of the vehicles. By withholding or falsifying information, motor vehicle salespersons are in a position to take advantage of a vulnerable consumer and the public must have confidence that the salesperson will not put his own personal interests ahead of his responsibility to conduct business with honesty and integrity.

The Applicant clearly understood the process of providing honest and accurate information to the Registrar, as he had experience with this registration process in the past.

The Tribunal finds that there is more than sufficient, clear and convincing evidence of deliberate intent to deceive on the part of the Applicant, in the omission or in the providing of inaccurate information regarding his recent charges and the circumstances leading to the charges in his Individual Application. The changing of the facts, from the vehicle being repossessed legally to being stolen, which the Applicant provided to the Registrar demonstrate that the Applicant will attempt to deceive in order to serve his own purposes. The Applicant had plenty of time from the September event until the completion of his Individual Application form for registration to ensure the facts were accurate. The Applicant's guilty plea in court means that he concurred with the information contained in the police synopsis. The Tribunal accepts the police reports as fact.

The Applicant testified that he was addicted to drugs but is now clean other than medication for his depression. However, he did not offer any evidence to explain his behaviour or conduct, other than he doesn't usually act like that, on the early morning of September 25, 2009 when he said he "lost it". The Tribunal is convinced that the destruction of the Applicant's friend's vehicle by using a sharp object to flatten all four tires and the use of a hammer to break all the windows in the vehicle clearly demonstrate an out of control individual. In addition, when the police arrived and ordered the Applicant to calm down, his conduct deteriorated to the point where he had to be restrained and placed in the police cruiser for the protection of those in the area. This behaviour is not seen by the Tribunal as abiding by the law and acting with honesty and integrity. This conduct resulted in the Resisting Arrest and Mischief charges.

During the court process, there were guilty pleas entered and convictions, resulting in a one year probation order with a condition to participate in an anger management course.

The Tribunal finds that the Applicant did not accept responsibility for his actions that resulted in his charges. Instead, he attempted, without success, to blame others such as the Bailiff and the police.

Although the Tribunal is sympathetic towards the health concerns of the Applicant, his conduct cannot be reasonably explained and there was no persuasive evidence presented to the Tribunal that this behaviour would not reoccur.

The Applicant's past charges and convictions raise serious doubt that the Applicant's future conduct would be law abiding and that he would act with honesty and integrity when dealing with the public as a motor vehicle salesperson.

The allegation that the Applicant submitted a false bill of sale to reflect the sale of a vehicle in 2008 was not substantiated. The evidence presented by the Registrar, along with the Applicant's denial that the signature on the document was not his, convinced the Tribunal that someone other than the Applicant prepared the document.

The e-mails from the Applicant to the representatives of the Registrar cause the Tribunal significant concern. The tone and the inappropriate comments as well as the use of offensive language demonstrate that the Applicant does not have respect for the individuals responsible for the administration of the Act. For many years, the Applicant has been involved in the automotive industry and stated he appreciates the efforts made by the Registrar to clean up the industry. The e-mails containing threats to the Registrar's representatives and their relatives are clearly unacceptable to anyone in the industry. After reviewing the documents contained in Exhibit #3, tab #10, and hearing the testimony of Ms. South, there is no doubt that the Applicant, over a significant period of time, demonstrated contempt for the regulator, the Act, and most of all, the front line staff who by virtue of their positions, must deal with him and other members of the industry in a business-like manner. The Registrar has the responsibility to ensure that his staff and the public are protected from this type of verbal and written abuse. The Tribunal finds that this conduct is not only a breach of sections 8 and 9 of the *Code of Ethics and Operation of Committees*, but also offensive and renders the Applicant undeserving of the privilege to be registered as a motor vehicle salesperson under the Act.

The Act is a public protection statute. In view of the Applicant's lack of honesty and integrity and his conduct of not acting in accordance with the law, to permit the Applicant to be registered as a motor vehicle salesperson as a member of the motor vehicle industry would send the wrong message to the industry and to the public.

On the basis of the facts as found and the application of the law to those facts, the Tribunal finds that the past conduct of the Applicant, taken as a whole, provides reasonable grounds to believe that the Applicant would not carry on business as a salesperson with honesty, integrity and in accordance with the law.

DECISION

Therefore, by virtue of the authority vested in it under section 9(5) of the Act, the Tribunal directs the Registrar to carry out his Proposal dated May 6, 2010, to refuse the registration of the Applicant as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

_____
Donald Benninger, Member

RELEASED: October 26, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

FELIX OMOREGIE o/a FILAZO INTERNATIONAL AUTO SALES

AN APPEAL OF A DECISION OF THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002* S.O. 2002, , c. 30, Sch. B

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: FELIX OMOREGIE, Applicant, self-represented

CHRISTOPHER EZRIN, Counsel, representing the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: September 10, 2010 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 9 of the *Motor Vehicle Dealers Act, 2002* (the "Act"). The proposal dated March 5, 2010 sets out the Registrar's reasons for revoking the registration of Felix Omoregie o/a Filazo International Auto Sales (the "Applicant") as a motor vehicle dealer under the Act as follows:

> "The intention and objective of the Act is to protect the public interest. In doing so, the Act prohibits the making of false statements in an application for registration or renewal and requires that Registrants be financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. Felix Omoregie o/a Filazo International Auto Sales's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act."

In the particulars, the Registrar states the following reasons for the proposal:

1. Felix Omoregie o/a Filazo International Auto Sales (the "Dealer") has been registered as a motor vehicle dealer since on or about May 7, 2008.

2. On or about May 6, 2008, the Dealer signed Registrar imposed terms and conditions. Attached hereto as schedule “A” is a copy of the Terms and Conditions.

3. Between February 19, 2009 and August 4, 2009, Felix Omoregie, in his personal capacity had 9 Highway Traffic Act convictions, which included but were not limited to:

    M AKE FALSE STATEMENT
    OPERATING MOTOR VEHICLE NO INSURANCE
    USE OF PLATE NO IN ACCORDANCE WITH ACT
    FAIL TO HAVE INSURANCE CARD
    FAIL TO SURRENDER PERMIT FOR MOTOR VEHICLE

4. On or about November 18,2009, the Dealer engaged in conduct that resulted in the following charges:

    POSSESSION OF PROPERTY OBTAINED BY CRIME (X4)

5. The charges are industry specific and related to the possession of 4 stolen motor vehicles.

.

6. The Dealer has failed to comply with the Act, in particular, section 6.

ISSUE

Does the past conduct of Applicant provide reasonable grounds to conclude that he will not carry on business with honesty and integrity and in accordance with the law?

EVIDENCE

The evidence of the Registrar consisted of the book of documents (Exhibits #3) and the oral testimony of Detective Constable Thomas Hockney and Laura Halbert, Director of Compliance with OMVIC.

The evidence of the Applicant consisted of his oral testimony and a copy of his Ministry of Transportation Three Year Driver Record Search.

The following is a summary of the relevant evidence:

The first witness for the Registrar was Detective Constable Thomas Hockney who in his sworn testimony, stated that he has been with the Halton Regional Police Services since January 2008 as a criminal investigator, dealing mostly with property crimes and stolen autos. From 2006 to 2008, he testified, he was a constable with the Halton Police Services and from 2001 to 2006 he was with the Toronto Police Services at 31 Division. The Detective Constable testified that on November 17, 2009 he received a telephone call from Durham Regional Police regarding an ongoing investigation that involved vehicles stolen from driveways. He stated that the police followed a stolen Rav4 to the Applicant’s shop but did not enter the premises. They placed another police vehicle to

watch what was happening while they went for a search warrant. When they returned with the search warrant, they located four stolen vehicles: a Rav4, a Honda Civic, a Honda CRV, and another Rav4. When the police entered the trailer used as an office, they found four sets of keys belonging to the stolen vehicles and plaques on the wall belonging to the Applicant and his friend and employee. The Detective Constable also testified that the police found chains and mattresses used for shipping vehicles overseas.

The following day, Detective Constable Hockney testified, he spoke to the Applicant who explained to him that two men contacted him regarding shipping vehicles overseas and had left two vehicles a week earlier. They told the Applicant that the paperwork would follow within a short time. However, the Applicant said the paperwork never arrived. Detective Constable Hockney testified that he charged the Applicant with four charges of possessing property obtained by crime. He stated that the four stolen vehicles were void of personal property but other police officers had a video of the Applicant's employees removing the personal property, placing it in a suitcase and dumping it in a dumpster west of Toronto. He concluded his testimony by stating that the paperwork and documentation for the four stolen vehicles never arrived.

During cross-examination, Detective Constable Hockney confirmed that he never saw the Applicant driving the stolen vehicles but the police had video of the Applicant's employees driving the vehicles at the Applicant's shop as well as removing and discarding the personal effects from the vehicles. He stated neither he nor other police officers saw the Applicant dumping the suitcase containing the personal effects in the dumpster but they did have video of his employees throwing the suitcase in the dumpster. When asked if he had seen the Applicant's dealer plates on a stolen vehicle, the Detective Constable answered that they were on the Honda CRV.

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The second witness for the Registrar was Laura Halbert who affirmed and testified that she has been the Director of Compliance since 1997 and oversees field inspectors with the Ontario Motor Vehicle Industry Council ("OMVIC"). .She explained that OMVIC is a not for profit organization, delegated the responsibility of administering the Ontario Motor Vehicle Dealers Act since 1997.She continued to state that OMVIC is responsible for investigations of non-compliance, inspections, complaint handling and the regulation component of the Act. The regulation of the Act includes a review of the terms and conditions of a registrant as well as clarifying expectations regarding garage registry maintenance and the code of ethics.

After the registration of the Applicant in 2008, the witness stated that OMVIC staff reviewed with the Applicant, the information he used to record the vehicles on the dealer premises as well as all the other expectations OMVIC has of Registrants. She testified that the vehicle record log notes whether vehicles are used and who the registered owner of the vehicle is. She added that dealer files contain wholesale bills or other dealer's records and since the Applicant exports vehicles, his files must contain shipping bills and other relevant documentation. This requirement, she explained, is part of the terms and conditions which were explained to the Applicant at the time of

registration. Ms. Halbert went on to state that the Applicant is the sole proprietor of the business and the terms and conditions document, the OMVIC Standards of Business Practice, as well as the certification course are tools he uses in his business. Thus, she stated, the Applicant ought to have known the proper way to maintain files on these vehicles to abide by the law.

Ms. Halbert reviewed the Applicant's Driver Record document (Exhibit #3, Tab 6), provided by the Ministry of Transportation. She testified that the Applicant has had ten Highway Traffic Act ("HTA") charges and convictions in the past seven years. These convictions include failure to have insurance, failure to have insurance cards, failure to surrender permit for motor vehicle, driving or operating a vehicle on a closed road and speeding in a 50 kmh zone. She stated that these charges and convictions demonstrate that he is ungovernable and does not maintain his insurance records very well. Ms. Halbert testified that the four charges of possession of stolen property are industry related and are extremely serious. She stated that the Registrar must protect the public in accordance with the Act and these charges speak to the Applicant's lack of ability to follow the law and to act with honesty and integrity. This is a major concern to the Registrar as it demonstrates that the Applicant acted with willful blindness by allowing stolen vehicles to remain on his property and allowing his friends and employees to remove and dispose of personal property from the stolen vehicles. Clearly, she stated, the Applicant's conduct is not in compliance with the terms and conditions of his registration.

During cross-examination, Ms. Halbert stated that the Applicant had not disclosed his HTA charges and convictions but he had advised OMVIC when his business address was changing. She agreed that the Applicant's licence had been suspended on April 15, 2010 and reinstated in August 2010.

The Applicant testified on his own behalf. At the beginning of the Applicant's testimony, he stated that he was afraid to testify because the information he gives may be used against him during his criminal trial and he wanted to be protected from that. The Tribunal decided to grant him this request and stated that in its Decision and Order, it will include that any evidence given by the Applicant cannot be used against him in any criminal trial or criminal proceedings. The Tribunal referred to The Canada Evidence Act Section 5 (2), the Ontario Evidence Act Section 9(2), the Statutory Powers Procedure Act, Section 14(1), and The Canadian Charter of Rights and Freedoms, Section 13.The Tribunal ruled that the Applicant is deemed to have objected to each question on that basis.

In his sworn testimony, the Applicant stated that he registered as a dealership with OMVIC in 2008. He testified that he has two businesses; one is the dealership that involves buying cars and the other is the operation of shipping goods overseas. The Applicant explained that he had moved on several occasions as the locations were not suitable for his vehicle dealership business to display vehicles, but he still carried on his business during the moves. He testified that he had distributed flyers advertising his business and two men, names unknown, came to see him regarding sending vehicles

overseas. Within a day or so they arrived with two vehicles for him to store until shipping time and advised him that the paperwork would follow. He stated that about a week later, they arrived with two more vehicles and said they did not have the paperwork for the first two vehicles nor did they have paperwork for the other two vehicles. He stated that he was suspicious but did no investigation.

That same evening, the Applicant testified that the police arrived, cut the gate lock open and found the stolen vehicles and left a police business card for him in his office. He then went to the police officer to sort this out and was charged with four counts of possession of stolen property, one for each vehicle. The Applicant explained that the reason for his no insurance convictions was because his insurance on his dealership plates had been cancelled. He stated that he could not afford the premium and the insurance company cancelled his insurance. The Applicant testified that he has since appealed some of these convictions and they are scheduled to be heard in court around October 16, 2010.

In his closing testimony, the Applicant stated that when he goes to court on his four charges of possession of stolen property, he will tell the court that he is 100% innocent. He also stated that he would not ship stolen vehicles. He then went on to say "if they prove I stole the cars, I will say I did not know the cars were stolen."

In cross-examination, the Applicant agreed that he was the sole proprietor of the dealership and responsible for what happens at his place of business. He stated that he completed the Georgian College Certificate course and is familiar with the paperwork that is required before a vehicle can be shipped overseas. He testified that he never knew the two men who brought the stolen vehicles to his premises and had not done business with them before, but he knew they were not car dealers. The Applicant also acknowledged that he did not take any steps to determine who the four vehicles belonged to or report the situation to the police. He provided the Tribunal with another Ministry of Transportation Driver Record that did not include the 2006 conviction for speeding but it did include the remaining charges and convictions that were identical.

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

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;

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.

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

ANALYSIS

The issue before the Tribunal is whether the past conduct of the Applicant provides reasonable grounds to conclude that he will not carry on business in accordance with the law and with honesty and integrity. In this case, the Tribunal needs to consider two concerns. First, do the recent criminal charges of possession of property obtained by crime afford reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with honesty and integrity? Second, do the Applicant's HTA charges and convictions and his non-disclosure of the same afford reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty? In considering the past conduct of the Applicant, the Tribunal owes no deference to the deliberations of the Registrar. It must arrive at its own conclusion in an unfettered manner. As stated by Divisional Court in First Place Fine Cars Inc. and Dominic Cerullo v. Ontario (Motor Vehicle Dealers Act) (2007) O.J.1043, it is clear that the Registrar believes there are such grounds, otherwise there would be no proposal. The question to be decided is in light of all the evidence, does the Tribunal find there are reasonable grounds for this belief.

The Applicant testified that he distributed a flyer advertising his business for storage of vehicles and shipping vehicles overseas. When the two men came to inquire about the cost and container availability, the Applicant did not exercise due diligence by getting their names, addresses or telephone numbers. He stated that he did not know them and had not done business with them before. When the two men brought him the two vehicles to store until shipping time, an experienced, educated business man like the Applicant ought to have required the proper documentation before accepting the vehicles. Even if he thought the customers would return with the proper documentation, he should have known after 6 days, the timeframe to register ownership by law, that something was wrong and he should have contacted the police regarding this unusual situation. If he had done so, the outcome would not have been the four charges

presently before the courts. The Applicant agreed he did not take any steps to determine who the vehicles belonged to.

The Tribunal believes this to be willful blindness on the part of the Applicant. He was aware his friends and employees were preparing the vehicles for shipping and took no action to supervise them or inquire about the contents of these vehicles. The Applicant is the sole proprietor and responsible for everything that occurs at his place of business. By the Applicant turning a blind eye to these happenings, he is deemed by the Tribunal to condone this conduct. Therefore, he is not acting within the terms and conditions agreed to when he established the business. The Applicant's decision to not take any steps to determine who the vehicles belonged to is considered by the Tribunal as a failure to act with honesty and integrity. Although the Applicant testified that he is innocent of the charges, the Tribunal found evidence to the contrary. The vehicles were on his premises and remained there with his permission. Likewise, it was his decision to do nothing to find the rightful owners. This is not responsible and law abiding conduct.

The four charges of possession of stolen property are very serious, are industry related and cannot be tolerated in the motor vehicle industry. This conduct undermines the credibility of the industry. The HTA charges and convictions are numerous, and occur over a lengthy period of time. Many of them are industry related.

The Applicant testified that it was his non-payment of the insurance premiums that resulted in his convictions for:

- Operating/Misuse of a Motor Vehicle with no insurance;
- The use of a dealer plate; and
- The failure to surrender the permit

There is no reasonable excuse and no evidence presented that the possession and insurance related offences are not industry related. The conviction for making a false statement cannot be viewed as acting with honesty and integrity. The speeding conviction is of less concern.

The conduct leading to all of these charges and convictions does not demonstrate the standards required by the Act. The Act is a public protection statute and to permit the Applicant to continue as a licenced dealer and as a member of the motor vehicle industry would send the wrong message to the industry and to the public in view of the Applicant's lack of honesty and integrity and his failure to act in accordance with the law.

In conclusion, after considering all the evidence and for the reasons outlined above, the Tribunal finds that the Applicant's past conduct does provide reasonable grounds to conclude that he will not carry on business with honesty, integrity and in accordance with the law.

DECISION

By virtue of the authority vested in it pursuant to the provisions of section 7(4) of the Act, the Tribunal directs the Registrar to carry out the Proposal dated March 5, 2010, to revoke the registration of the Applicant as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

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Donald Benninger, Presiding Member

RELEASED: October 1, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

HENRY OLIHA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Member

APPEARANCES: HENRY OLIHA, Applicant, representing himself

CHRISTOPHER L. EZRIN, Counsel, representing the Registrar*, Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: October 22, 2010 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 (the "Proposal") issued by the Registrar under the *Motor Vehicle Dealers Act, 2002* (the "Registrar" and the "Act" respectively). The Notice of Proposal dated June 17, 2010, proposed to refuse the registration of Henry Oliha (the "Applicant") as a motor vehicle salesperson under the Act.

The Registrar's Proposal is brought pursuant to section 8 of the Act as read with section 5.1 and section 6 of the Act.

The reasons given by the Registrar in his Proposal are as follows:

> The intention and objective of the Act is to protect the public interest. In doing so, the Act prohibits the making of false statements in an application for registration or renewal and requires that Applicants be financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. Henry Oliha's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

In support of the Registrar's Proposal the following particulars are stated:

1. On or about June 5, 2009, Henry Oliha (the "Applicant") applied for registration as a motor vehicle salesperson. The Applicant had proposed to work for Joseph Ogbebor o/a Kenjo Ventures.

2. A credit check revealed the Applicant has a number of unpaid and written off debts and a substantial unpaid collection to MBNA MasterCard in excess of $7,000.00.

3. On the June 5, 2009 individual application, question 9 of section E asks:

   "Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If "yes" list all charges and/or the conviction, and the circumstances surrounding each.

   The Applicant answered "Yes" and disclosed the following:

   "-Conspiracy to commit an indictable offence S. 465(!) (c) CCC
   -Attached is the court decision-A conditional discharge"

   The Applicant attached a copy of his probation order with the application.

4. A criminal search for applicant revealed the following:

November 21, 2008 Brampton	Conspiracy to Commit Fraud over $5,000.00 SEC 465 (1) (A) CC	Conditional Discharge & Probation 12 Mos"

5. At the time of the June 5, 2009 application, the Applicant was on probation which did not expire until November 21, 2009.

6. On or about April 8, 2010, the Applicant submitted a Salesperson Notice, transferring his application to Phildoff Business Ventures Ltd.

7. On May 5, 2010, at the request of the Registrar, the Applicant submitted a new individual application for registration to work at Phildoff Business Ventures Ltd.

8. On the May 5, 2010 individual application, question 6 of section E asks :

   "Have you ever been found guilty or convicted of an offence under any law or are any charges pending? If "yes" provide the circumstances and particulars surrounding each. Make sure to include those cases where a conditional, absolute discharge or pardon has been ordered /granted."

   The Applicant said "Yes" and disclosed the following:

   "On March 22nd2007, police came to our house with a search warrant based on an arrest they had made on my brother (whom we both live in the same house) at somewhere in Mississauga and charged for fraud a few days prior. On searching the house, they found Identity card that was issued or made on different names with my picture. Based on that, the police charged me with conspiracy to commit fraud and possession of counterfeit mark despite my claim of being innocent. After a long battle in court, I was given a discharge on November 21st, 2008 as indicated on the document I had earlier sent to you. Thank you."

9. The Applicant provided the Registrar with written particulars surrounding his charges that were inconsistent with the particulars obtained by the Registrar from the Peel Regional Police.

10. Michael Oliha, the Applicant's co-accused in relation to the November 21, 2008 finding of guilt, was also found guilty of Conspiracy to Commit Fraud over $5,000 and received a conditional discharge and 12 months probation.

11. Michael Oliha paid the Applicant's processing fee for the June 5,2009 individual application.

12. On or about June 2, 2008, Michael Oliha was charged with seven (7) counts of buying/selling vehicles without the benefit of registration pursuant to section 3 of the Motor Vehicle Dealers Act. On or about June 23, 2008 Michael Oliha plead guilty to two (2) of the counts, received suspended sentences for two (2) of the counts and the other three (3) counts were withdrawn.

13. Michael Oliha is an interested person as defined under the Act, in relation to the Applicant.

14. Henry Oliha has failed to comply with the Act, in particular, section 6.

THE EVIDENCE

The evidence introduced by the Registrar consisted of a Book of Documents, (Exhibit #3) and the oral testimony of Mary Jane South.

The evidence introduced by the Applicant was his own testimony.

Mary Jane South

The witness for the Registrar was Mary Jane South, who, during her affirmed testimony, stated that she is currently the Deputy Registrar of the Ontario Motor Vehicle Industry Council ("OMVIC"), which position she has held since 1997. Her duties include overseeing the registration of dealers and salespersons under the Act. She explained that OMVIC is a not-for-profit organization and has been delegated with authority to administer the Act. She explained that the Act is a consumer protection statute.

Ms. South reviewed, in detail, the documents contained in Exhibit #3. She testified that she was familiar with the Applicant's application for registration and the Registrar's Proposal. She stated that the application is seen by the Registrar as the first test of honesty and integrity of an aspiring applicant. She stated the Applicant's lack of detail and non-disclosure of all the details regarding the circumstances surrounding his charges were of concern to the Registrar. She testified that the Applicant's version of the circumstances was much different than that of the Peel Regional Police report. She stated that on his first Individual Application for registration as a salesperson dated June 5, 2009, the Applicant did declare he had been charged and convicted, but the details he submitted were not honest and in addition he did not declare his credit debts and the circumstances around his

charge of fraud over $5.000. She stated she believes the police report, as it was used in court and the Applicant agreed, by his guilty plea, with the facts from the police synopsis. Ms. South testified that on May 4, 2010 the Applicant advised OMVIC that he had found another possible employer because the previous one indicated on his earlier application was no longer registered or in business. She advised the Tribunal it is this individual's application for registration that is the matter of this hearing.

Ms. South testified that the Applicant had successfully completed the compulsory Georgian College Motor Vehicle Salesperson course. She stated during the course the participants are taught the law and the ethics related to the statutes and the importance of disclosure to the Regulator. Thus the Applicant ought to have known to disclose all the information to the Registrar. She stated instead he chose to deliberately withhold critical information from the Registrar.

Ms. South reviewed Exhibit #3 Tab# 10 stating the Applicant's credit rating is extremely poor as he owes approximately $7,000.00 to numerous establishments and some have been written off as not collectable. She stated some were forged money orders and this conduct is not acting with honesty and integrity. She testified the Applicant had instruments of forgery and this was a well organized fraud organization that had committed extensive frauds.

She stated that another area of concern to the Registrar was on the individual application where the Applicant checked off "yes" to the question "will you be in charge of day to day operation?" She indicated that with the Applicant's previous charges the Registrar would not want the Applicant holding that responsibility. She also testified that the Registrar believes the Applicant by his offences has shown a lack of honesty and integrity and that he will not comply with the law. The failure of the Applicant to honestly and fully disclose the circumstances around his criminal convictions is a concern. Another concern is the Applicant's financial irresponsibility. Ms. South concluded her testimony stating that the Registrar does not believe the Applicant would act with honesty and integrity and in accordance with the law in the automotive business, so the proposal was issued .

The Applicant

The Applicant was sworn in and testified that he completed and signed the individual application form for registration as a motor vehicle salesperson. He testified that he accepts the fact that the criminal record is his responsibility. He advised the Tribunal he is not a bad person but fell in with the wrong crowd.

The Applicant stated that he needs to be given a second chance because he is a changed person. He stated, if given a chance, he would move out of his brother's house where he rents a room because at the present time he cannot afford to live anywhere else. To rent from his brother is his only financial alternative.

The Applicant testified he got into a credit and financial troubles after his mother passed away and he was going to school. He stated he was receiving OSAP but it was not enough

so he used credit cards to supplement his income. He stated that he made a mistake while filling out the individual application for registration as a salesperson when he checked off the answer to question # 3 indicating he would be in charge of the dealership. He stated he should have checked the “no” box instead of the “yes” box because he will not be in charge of the dealership. In closing, the Applicant testified that he has worked hard at school and now he hopes to get employment and get out of financial difficulty.

During cross-examination the Applicant stated he is still in financial difficulty and still living at his brother’s house but when he gets a job he will move out. He stated if he had not been living at his brother’s house he would not have been involved with the charges and the convictions. He stated he was not aware of the fraud occurring until the police arrived and arrested him. He maintained that the fake I.D. cards with his picture on them and the items used to make them were not in his room. He stated he was advised by his lawyer to plead guilty to the conspiracy to commit fraud in court. On questioning about his probation the Applicant stated it ended in November 2009 and he has not been in trouble since. He stated that he needs an opportunity to prove himself.

THE LAW

The Act states as follows:

> 5.1 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.
>
> 6. (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 ground 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 make a false statement or provided 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 43.

ISSUE

The issue in this case is whether or not the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

FACTS FOUND PROVEN

The facts found proven by the Tribunal are as follows:

1. The Applicant applied for registration as a motor vehicle salesperson on or about June 5, 2009. He proposed to work for Joseph Ogbebor o/a Kenjo Ventures.

2. A credit check revealed the Applicant has a number of unpaid and written off debts and a substantial unpaid collection to MBNA MasterCard in excess of $7,000.00.

3. On the Applicant's June 5, 2009 individual application form the Applicant answered question 9 section E indicating he had been found guilty and convicted under the law and disclosed the following:
"Conspiracy to commit an indictable offence S. 465(1)(c)CCC
Attached is the court decision-A conditional discharge"

   The Applicant attached a copy of his probation order with the application.

4. A criminal history search for the Applicant revealed he was convicted on November 21, 2008 of Conspiracy to Commit Fraud over 5,000.00 and was given a Conditional discharge and 12 months probation.

5 At the time of the June 5, 2009 application, the Applicant was on probation which did not expire until November 21, 2009..

6. On or about April 8, 2010, the Applicant submitted a salesperson Notice, transferring the application to Phildoff Business Ventures Ltd.

7. On or about May 5, 2010, at the request of the Registrar, the Applicant submitted a new individual application for registration to work at Phildoff Business Ventures Ltd.

8. On the Applicant's May 5,2010 individual application question #6 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? If "yes" provide the circumstances and the particulars surrounding each. Make sure to include those cases where a conditional, absolute discharge or pardon has been ordered / granted"

The Applicant answered “Yes” and disclosed the following:

“On March 22nd 2007, police came to our house with a search warrant based on an arrest they made on my brother (whom we both live in the same house) at somewhere in Mississauga and charged for fraud few days prior. On searching the house, they found identity card that was issued or made on different names with my picture. Based on that, the police charge me on conspiracy to commit fraud and possession of counterfeit mark despite my claim of being innocent. After a long battle in court, I was given a discharge on November 21st, 2008 as indicated on document I had earlier sent to you. Thank you.”

9. The Applicant provided the registrar with written particulars surrounding his charges that were inconsistent with the particulars obtained by the Registrar from Peel Regional Police, in that there were charges for eleven fake identity cards with the Applicant’s picture but with different names on them. Also the police report stated the Applicant was in possession of materials and tools to produce fraudulent identity cards..

10. The Applicant lives with the co-accused and is dependent upon him for accommodations and financial assistance.

11. The co-accused has demonstrated conduct that is not acting with honesty and integrity and within the law not only with his conspiracy to commit fraud and the convictions but also his actions leading to the charges and conviction of buying and selling vehicles without the benefit of registration under the Act.

12. The Applicant has failed to comply with the Act.

ANALYSIS

The onus falls upon the Registrar 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 Applicant of registration has been proven, showing no deference to the Proposal of the Registrar.

Whether or not the Applicant provided correct information to the Registrar is a crucial matter in assessing the honesty of an applicant, as this information is clearly intended to be relied upon by the Registrar. If any information is intentionally concealed, or if false information is given, the Registrar has good reason to have serious concerns that the Applicant will withhold information or provide false information in the future in his dealings with the Registrar or with others and thus, perhaps, with members of the public. A motor vehicle salesperson deals with members of the public who are purchasing or selling products of substantial value, and who depend upon the salesperson not to misrepresent the value or quality of the vehicles. By withholding or falsifying information, motor vehicle salespersons are in a position to take advantage of a vulnerable consumer, and the public

must have confidence that the salesperson will not put his own personal interests ahead of his responsibility to conduct business with honesty and integrity.

In this case, the Applicant put his own interests first by not providing the Registrar with the honest version of his criminal conduct. Instead he minimized his involvement by withholding details of the circumstances around his charges and convictions and blamed his brother for the police action which led to his charges. The Applicant's guilty plea in court means that he concurred with the information contained in the police report. The Tribunal accepts the police reports as fact.

In order for an applicant to be registered as a motor vehicle salesperson under the Act, it is reasonable to expect an applicant to act with financial responsibility. In this case, the Applicant has numerous unpaid and written off debts and a substantial unpaid collection to MBNA MasterCard in excess of $7,000. The Applicant testified these debts were due to him going to school, but the Tribunal is convinced an alternative such as part-time employment would have been a better choice rather than over-extending his credit cards. The Tribunal commends the Applicant for attempting to improve his education but finds the Applicant's conduct as not acting with financial responsibility.

In summary the Tribunal finds that there is sufficient, clear and convincing evidence of the Applicant's deliberate intent to in the omission or in the provision of inaccurate information regarding his recent charges and the circumstances leading to the charges in his individual application. The Applicant's charges and convictions do not convince the Tribunal that the Applicant's future conduct would be in accordance with the law or that he would be acting with honesty and integrity when dealing with the public as a motor vehicle salesperson.

The misuse of the credit cards and the significant amount of unpaid or written-off debts lead the Tribunal to believe that the Applicant will act in business with financial **irresponsibility.**

The Applicant is presently living with the co-accused. The criminal conduct of the co-accused not only regarding the conspiracy to commit fraud but also his charges of buying and selling vehicles without registration are of concern to the Tribunal. The Tribunal finds the co-accused a person of interest under the Act.

With regard to the co-accused, the Tribunal finds that he is in part responsible for the Applicant's conduct of not living in accordance with the law. The co-accused has been charged and convicted of fraud over $5,000. In addition he has been charged under the Act with buying and selling vehicles without registration. The Tribunal understood the reason for the Applicant living with his co-accused to cut costs, but this has not been a healthy environment from a legal perspective for the Applicant. The Tribunal finds the conduct of the co-accused to be unacceptable and finds that it demonstrates that he would not assist the Applicant in carrying on business in accordance with the law and with integrity and honesty.

The Act is a public protection statute. The Applicant's lack of honesty and integrity and his conduct of not acting in accordance with the law, as well as his financial irresponsibility

clearly demonstrate an applicant not deserving of registration. To permit the Applicant to be registered as a motor vehicle salesperson and as a member of the motor vehicle industry would send the wrong message to the industry and to the public.
The Applicant's past conduct and his non-disclosure to the Registrar of the details of his criminal history and the circumstances around them demonstrate he did not act with honesty and integrity and within the law during the application for registration process

On the basis of the facts as found and the application of the law to those facts, the Tribunal finds that the past conduct of the Applicant, taken as a whole, does provide reasonable grounds to believe that the Applicant would not carry on business as a salesperson with honesty, integrity and in accordance with the law. The appeal is dismissed.

DECISION

Therefore, by virtue of the authority vested in it under section 9(5) of the Act, the Tribunal directs the Registrar to carry out his Proposal dated June 17, 2010, to refuse the registration of the Applicant as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

_____
Donald Benninger, Member

RELEASED: November 3, 2010

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This decision may also be on Quicklaw

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MARIO PACIONE

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: GARY L. WISEMAN, Counsel, representing Mario Pacione, the Applicant

CHRISTOPHER L. EZRIN, Counsel, representing the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: October 27, 2010 Toronto

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal (the "Tribunal") by Mario Pacione, the Applicant, and the Registrar, under the *Motor Vehicle Dealers Act, 2002* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar, under the *Motor Vehicle Dealers Act, 2002* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon 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

_____
David Gregory Flude, Vice-Chair

RELEASED: November 4, 2010

This decision may also be on Quicklaw.

SCHEDULE 'A'

Pursuant to subsection 6(2) of the *Motor Vehicle Dealers Act, 2002,* Mario Pacione ("the Applicant") and the Registrar*, Motor Vehicle Dealers Act, 2002*, ("the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following terms and conditions:

1. The Registrar agrees to register the Applicant as a salesperson under the Act subject to these terms and conditions.

2. The Applicant agrees that his registration will be subject to the Registrar's approval of his sponsoring dealership. Such approval will not be unreasonably withheld.

3. The Applicant agrees to make good faith efforts to repay amounts owing to the Ministry of Revenue, and to provide confirmation in writing to the Registrar of his repayment efforts.

4. The Applicant agrees not to trade in motor vehicles (as defined in the *Motor Vehicle Dealers Act, 2002*) without benefit of registration.

5. The Applicant agrees not to be a partner, shareholder, officer, director or controlling mind of a dealer for a period of 2 years

6. The Applicant agrees not to apply to be a motor vehicle dealer for a period of 2 years.

7. The Applicant agrees not to transfer his registration as a salesperson under the Act to another Registrant without having first obtained prior written consent of the Registrar.

8. The Applicant agrees not to invite the public to deal in a place other than the registered premises authorized in his registration.

9. The Applicant understands that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Applicant in support of the Applicant's application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Applicant's knowledge and belief and that the Applicant has given full answer to all questions and requests made by the Registrar in connection with the Applicant's application.

10. 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.

11. The Applicant acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out herein.

12. The Applicant acknowledges that he has taken the time to carefully review these terms and conditions.

13. The Applicant will provide a copy of this order to his employer forthwith.

14. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which shall include the terms and conditions set out herein.

Signed in the City of this day of 2010.

Mario Pacione (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act, 2002.*

Date:

Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTOR VEHICLE DEALERS ACT, 2002
S.O. 2002, c. 30, Sch. B

ROBERT W. STEIN, PLAZA HOLDINGS LTD. O/A PLAZA KIA OF TORONTO, 2157689 ONTARIO INC. O/A PLAZA KIA OF THORNHILL, PLAZA MOTORS INC. O/A PLAZA HYUNDAI AND PLAZA KIA OF TORONTO-Consent Order

IN THE MATTER OF

ROBERT W. STEIN, PLAZA HOLDINGS LTD. O/A PLAZA KIA OF TORONTO, 2157689 ONTARIO INC. O/A PLAZA KIA OF THORNHILL, PLAZA MOTORS INC. O/A PLAZA HYUNDAI AND PLAZA KIA OF TORONTO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act, 2002*
TO REVOKE AND REFUSE REGISTRATION
- Proposal dated: March 22, 2010

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

ROBERT W. STEIN, PLAZA HOLDINGS LTD. O/A PLAZA KIA OF TORONTO, 2157689 ONTARIO INC. O/A PLAZA KIA OF THORNHILL, PLAZA MOTORS INC. O/A PLAZA HYUNDAI AND PLAZA KIA OF TORONTO

- Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by Robert W. Stein, Plaza Holding Ltd. o/a Plaza Kia of Toronto, 2157689 Ontario Inc. o/a Plaza Kia of Thornhill, Plaza Motors Inc. o/a Plaza Hyundai and Plaza Kia of Toronto, the Applicant, and the Registrar, under the *Motor Vehicle Dealers Act, 2002* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar, under the *Motor Vehicle Dealers Act, 2002* as to the disposition of these proceedings which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon 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: November 9, 2010

This decision may also be available on Quicklaw.

SCHEDULE 'A'

TO: The Registrar, M*otor Vehicle Dealers Act, 2002*

AND TO: The Licence Appeal Tribunal

FROM: Plaza Holdings Ltd. o/a Plaza Kia of Toronto

AND FROM: 2157689 Ontario Inc. o/a Plaza Kia of Thornhill

AND FROM: Plaza Motors Inc. o/a Plaza Hyundai

AND FROM: Plaza Kia of Toronto Ltd. o/a Plaza Kia of Toronto

AND FROM: Robert W. Stein

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act, 2002*, (hereinafter the "MVDA" or the "Act") the parties to the proceeding, Plaza Holdings Ltd. o/a Plaza Kia of Toronto, 2157689 Ontario Inc. o/a Plaza Kia of Thornhill, Plaza Motors Inc. o/a Plaza Hyundai, Plaza Kia of Toronto Ltd. o/a Plaza Kia of Toronto (collectively the "Dealers"), Robert W. Stein ("Stein"), and the Registrar, *Motor Vehicle Dealers Act, 2002* (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 Dealers and Stein acknowledge that the restrictions concerning the activities of salespersons referred to in these terms and conditions apply to trading on behalf of the Dealers. "Buying, selling and leasing", refers to showing a vehicle to a prospective purchaser or lessee or any form of negotiation concerning the purchase sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auction to buy or sell on behalf of the Dealers and positions commonly referred to as Sales Manager, Finance and Insurance Manager, Branch Manager, Business Manager, General Manager or any individual who has supervisory authority over salespersons.

2. Stein agrees that his registration as a motor vehicle salesperson will be suspended from July 1, 2011 through July 31, 2011, inclusive.

3. The Dealers and Stein will ensure that all personnel, agents, assignees or anyone acting on behalf of the Dealers are informed concerning the terms and conditions contained in this document to the extent necessary to ensure compliance with these terms and conditions.

4. The Dealers and Stein will require that all personnel, agents, assignees or anyone acting on behalf of the Dealers to trade in motor vehicles shall be registered as a salesperson to the Dealers.

5. The Dealers and Stein will maintain a process whereby Stein is advised of legitimate customer complaints that are not resolved within thirty [30] days and require notification to OMVIC.

6. The Dealers agree to review their bills of sale and instruct all salespersons that optional charges to the bill of sale must be accurately and clearly described and noted in accordance with the *MVDA,* the *Consumer Protection Act, 2002* (the "CPA"), the *Sale of Goods Act* (the "SGA"). The customer will be given an opportunity to waive charges not mandated by law.

7. The Dealers agree that they will ensure that where they are charging liquidated damages in respect of a cancelled transaction, the Dealers and Stein will ensure that the total amount is reasonable and that each particular charge can be substantiated. The Dealers and Stein further agree to provide the customer with written disclosure particularizing each charge which makes up the total liquidated damages.

8. The Dealers and Stein agree that they will immediately provide a complete and full refund of a customer's deposit upon demand in every situation where the customer does not receive a signed duplicate of their bill of sale at the time the agreement is entered into in accordance with the MVDA.

9. The Dealers shall not demand payment or make any representation that a customer is require to make payment in respect of any unsolicited and/or optional goods or services except as permitted under the MVDA, CPA, or SGA.

10. The Dealers shall provide the Registrar with written particulars of any customer complaints the dealer is unable to resolve within thirty (30) days after being contacted by the complainant. Particulars will include the name and contact information of the complainant, the nature of the complaint and the steps taken by the dealer to resolve the complaint.

11. The Dealers and Stein will ensure that they and all salespersons when dealing with customers are clear and truthful in describing vehicle features, benefits, prices and in explaining products, programs and charges.

12. The Dealers and Stein agree that they and all personnel, agents, assignees or anyone acting on behalf of the Dealers to trade in motor vehicles will respond promptly, honestly and courteously to all customer inquiries and complaints.

13. The Dealers and Stein will advise all personnel, agents, assignees or anyone acting on behalf of the Dealers to trade in motor vehicles will cooperate in a prompt manner with representatives of the Registrar carrying out the Registrar's administrative activities.

14. The Dealers and Stein will comply with the Code of Ethics and OMVIC's Standards of Business Practices, as may be amended from time to time.

15. The Dealers and Stein will comply with the CPA. Without limiting the generality of the foregoing, the Dealers will not collect any funds or assets towards the purchase or lease of a vehicle unless the customer has been provided with full disclosure of any applicable financing or leasing terms in accordance with the MVDA or CPA. The Dealers further acknowledge that if they are not able to provide financing or leasing at the agreed upon previous terms, the customer will be advised of other options to purchase, lease or finance or offered a refund of their deposit.

16. The Dealers agree to maintain a written record of any repairs or reconditioning done to their vehicles including, but not limited to, work orders, invoices and diagnostic reports.

17. All salespersons acting on behalf of the Dealers will be given free access to any records maintained relevant to the condition of the vehicle, including repairs, reconditioning, and odometer reading, to allow the salesperson to disclose all material facts concerning the vehicle to the customer.

18. The Dealers acknowledge that they are under a positive obligation to disclose in writing on the bill of sale all material facts about the vehicles it sells or leases to its customers, whether or not the Dealers and Stein agree with the disclosure and whether or not the vehicle has been branded through the Ministry of Transportation. Material facts include but are not limited to, disclosure of salvage, previous salvage, accidented and repaired, frame damage, theft recovery, unibody damage, previous taxicab, previous police car, previous daily rental, insurance write-off or any other material fact which would reasonably affect a customer's decision to purchase or lease a vehicle. In the case of damaged vehicles, the Dealer agrees to disclose as much detail as possible with respect to the nature and severity of the damage.

19. The Dealer further agrees that any vehicles purchased for resale will be subject to a “car proof inquiry” and will be inspected by a qualified mechanic prior to sale if the sale is for a “certified” vehicle. If the sale is for an “as is” vehicle there will be no requirement to conduct an inspection of the vehicle unless its sales price exceeds $3,000.00.

20. The Dealers and Stein agree to maintain all books and records as required by the Act at the Dealer's registered premises. The Dealer and Stein further agree to ensure that free access is provided to the books and records of the Dealer to any authorized representative of the Registrar.

21. The Stein further agree to reply, in writing, to any written request for further information or material to be submitted to the Registrar within a reasonable time period.

22. The Dealers and Stein will comply with all aspects of the *Retail Sales Tax Act* with regards to filing and ensuring all tax collections are accurately reported and remitted to the Minister of Finance, when due. The Dealer and Stein acknowledge that all taxes collected are deemed to be trust funds and will not be used for any other purpose other than remittance to the Minister of Finance.

23. The Dealers and Stein understand that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Dealer and Stein. The Dealer and Stein confirm that all documents, information or statements provided to the Registrar are true to the best of their knowledge and belief and that the Dealer and Stein have given full answer to all questions and requests made by the Registrar in connection with this proceeding.

24. The Dealers and Stein agree that these terms and conditions will remain in force for a period of thirty [30] months from the date of execution.

25. The Dealers and Stein hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

26. The Dealers and Stein acknowledge that they have obtained independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of , this day of October 2010.

_____

(Signature) Robert W. Stein

_____

(Signature)
Plaza Pontiac Buick GMC Inc.
I have the authority to bind the dealerships

_____

(Signature)
Plaza Holdings Ltd. o/a Plaza Kia of Toronto
I have the authority to bind the dealerships

_____

(Signature)
2157689 Ontario Inc. o/a Plaza Kia of Thornhill
I have the authority to bind the dealerships

_____

(Signature)
Plaza Motors Inc. o/a Plaza Hyundai
I have the authority to bind the dealerships

_____

(Signature)
Plaza Kia of Toronto Ltd. o/a Plaza Kia of Toronto
I have the authority to bind the dealerships

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act.*

Date:

_____

Carl Compton
Registrar, *Motor Vehicle Dealers Act*

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1220689 ONTARIO INC. o/a INTERNATIONAL BUSINESS CENTRE and BISMARK D. OWUSU-ANSAH

AN APPEAL FROM A NOTICE OF PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REVOKE and REFUSE REGISTRATIONS

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: BISMARK D. OWUSU-ANSAH, Applicant, self-represented on his own behalf and for 1220689 Ontario Inc.

CHRISTOPHER L. EZRIN, Counsel, representing the Registrar, Motor Vehicle Dealers Act, 2002

DATE OF HEARING: November 15 and 16, 2010 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 9 of the *Motor Vehicle Dealers Act, 2002* (the "Act"), dated February 25, 2010. The Proposal sets out the reasons relied upon by the Registrar under the Act (the "Registrar") for (a) revoking the registration of 1220689 Ontario Inc. o/a International Business Centre ("Dealer") as a dealer under the Act; and (b) refusing to register Bismark D. Owusu-Ansah as a salesperson under the Act, as follows:

> The intent and objective of the Act is to protect the public interest. In doing so, the Act prohibits the making of false statements in an application for registration or renewal and requires that Registrants be financially responsible in the conduct of business and that they carry on business in accordance with the law, and with integrity and honesty. Owusu-Ansah and the Dealer's past conduct are inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The Registrar stated numerous Particulars as reasons for the Proposal, a number of which were subject to agreement by the Parties prior to the Hearing. These include:

1. 120689 Ontario Inc. o/a/ International Business Centre (the "Dealer") is currently registered as a motor vehicle dealer and was originally registered on or about May 22, 1997.

2. Bismark D. Owusu-Ansah ("Owusu-Ansah") applied for registration as a salesperson on or about June 9, 2009. He was previously registered from on or about June 1, 2001 until on or about June 1, 2009.

3. Owusu-Ansah is the sole officer and director of the Dealer.

4. On the individual short-form application for registration, submitted June 9, 2009, question 1(a) of Section A asks:
   "Are there currently any charges pending or has the applicant ever been found guilty or convicted under any law?"
   Owusu-Ansah answered "no".

7. On or about April 17, 2009 the Dealer submitted a business short-form application for renewal of registration.

8. On the business short-form application submitted by the Dealer on April 17, 2009, question 1(a) of Section A asks:
   "Are there any charges pending or has the applicant been found guilty or convicted under any law?"
   There is a notation above the question that states:
   "For the purpose of this application the applicant means the sole proprietor, each partner of a partnership or each officer or director of a corporation."
   Owusu-Ansah answered "no" on behalf of the Dealer.

9. On or about July 17, 2009, representatives of the Registrar attended the Dealer's premises for the purpose of conducting an inspection.

11. On or about November 5, 2007, Owusu-Ansah attended the registrar's office for the purpose of a follow-up inspection of the Dealer's books and records.

13. The Dealer failed to provide all of the records requested as a result of the October, 2007 inspection.

14. On or about October 17, 2007 representatives of the Registrar attended the Dealer's premises for the purpose of conducting an inspection.

15 At the time of the October, 2007 inspection, the Dealer did not have all of his books and records at his registered premises. The Dealer advised there had been a flood at his business premises. A follow-up inspection was scheduled at the Registrar's office.

The following Particulars contained in the Proposal were not agreed to:

5. Owusu-Ansah engaged in conduct that resulted in criminal charges being laid for the following offences:
   Possession of Property obtained by Crime (x12)

Theft Over $5000
Public Mischief

6. The conduct that resulted in criminal charges is industry-specific, as it relates to the export of stolen motor vehicles.

10. At the time of the July, 2009 inspection, it was found that the Dealer was not consistently disclosing, in writing, material facts about vehicle condition on bills of sale. It was further found that the Dealer did not consistently maintain purchase or sale agreements for trades in motor sales.

12. At the time of the November, 2007 inspection, it was found that the Dealer had failed to disclose former daily rental vehicles in accordance with OMVICs Standards of Business Practice. It was further found that the Dealer had failed to disclose, in writing, material facts about vehicle condition on bills of sale and the Dealer had failed to maintain books and records in accordance with Ontario Regulation 801 under the Ontario Motor Vehicle Dealers Act, RSO 1990, c. M-42.

16. In Justice Corbett's 2004 Ontario Superior Court of Justice decision*, R. v. Francis*, it was alleged that Mr. Francis had attempted to defraud his insurance company. The alleged fraud arose out of a cancelled agreement between Francis and the Dealer to sell Francis' vehicle on consignment.

17. In the Court's 2004 decision, Justice Corbett made factual findings regarding the conduct of the Dealer's business as well as adverse findings of credibility against Mr. Owusu-Ansah. Francis was acquitted of all charges. The Registrar repeats and relies on the findings of Justice Corbett.

The Notice of Proposal was duly appealed on March 13, 2010. No particulars were provided. The initial pre-hearing conference held by the Tribunal was adjourned as the paralegal representing the Dealer and Mr. Owusu-Ansah sent a substitute in his place who was not registered to act as a representative. A second pre-hearing conference took place on July 16, 20120, where the above noted Particulars were agreed to by the Parties.

On November 3rd, 2010 the Registrar served Notice of Further and Other Particulars (the "FOP") based on new information made available to the Regulator concerning both the Dealer and Mr. Owusu-Ansah. This consisted of the following:

9. From on or about November 4, 2009 to on or about December 30, 2009, Mr, Owusu-Ansah a engaged in conduct which resulted in his being charged with six counts of Possession of property obtained by crime, all relating to motor vehicles.

10. From on or about November 3, 2009 to on or about January 14, 2010, Mr. Owusu-ANsah engaged in conduct which resulted in his being charged with one count of conspiracy to commit theft over $5000.00, two counts of breaking and entering and twenty-six counts of theft over five thousand dollars, all relating to motor vehicles.

These Particulars are disputed.

Preliminary Issue:

At the commencement of the Hearing Mr. Owusu-Ansah the Applicant was not present nor was the Applicants' representative. The matter was stood down for thirty minutes to allow additional time to appear. Mr. Owusu-Ansah did so and the matter resumed with the Applicant's request the hearing be adjourned. He noted his representative paralegal had initially sought the Registrar's consent to an adjournment on November 3, 2010 by letter advising he was called out of the country during the time scheduled for the hearing due to his sister's untimely death. The Registrar's Counsel refused to consent to the adjournment in writing. At the hearing, in response to questions posed by the Tribunal, the Applicant advised that he had not sought alternative representation, nor made any effort to follow up with Counsel for the Registrar.

The Tribunal noted that the pre-hearing conference had required an initial adjournment due to the Applicant's representative. Further, the hearing proceeding was one of revocation of a licence based on serious allegations which, if made out, illustrate significant public risk. Nonetheless, the dates provided by the Applicant's representative for when he would be available are not until February and March of 2011. Further, although notified at least one week in advance of the hearing and, despite the Applicants' paralegal working from an office which appears, from the letterhead, to be a consortium or partnership of more than one, no effort was made to arrange for an alternate representation in the event the adjournment was not granted. The Registrar was prepared to proceed; the matter was scheduled for two full days; witnesses and Tribunal staff were positioned to proceed. The Tribunal process is one whereby individual unrepresented parties often appear and that the Tribunal advised it would assist the self-represented Applicants in any appropriate manner available to it should the need arise. The adjournment was not granted.

EVIDENCE

(a) For the Registrar:

Mr. Jeff Ross worked in the inspection and consumer complaints division of the Ontario Motor Vehicle Council ("OMVIC") from 2005 until this year. OMVIC is responsible for administering the Act, including investigating and inspecting registrants subject to its provisions.

Mr. Ross attended the business premises of the Dealer to conduct an inspection on July 17, 2009. The results were written up and left with Mr. Owusu-Ansah. They included the notation that material facts were not disclosed as required on some bills of sale where the information that a vehicle had been purchased by the Dealer from an insurance company following an accident was not disclosed on documentation provided to the consumer purchaser of the vehicle.[i] Further, bills of sale for vehicles exported to foreign markets were, in a number of instances, not available at the inspection contrary to the regulatory

requirement that all such documents be retained by the dealer for two years. Mr. Owusu-Ansah was also advised that, contrary to his current practice, any vehicle purchased by the Dealer which he intended to export, was required to first be transferred into the Dealer's ownership.[ii]

In cross-examination Mr. Ross acknowledged that the documents noted as missing were promptly provided to OMVIC as required.

Mr. Ryan Willmer has been a police constable since 2006. He was involved in a police operation concerning auto theft in the Toronto area whereby he was instructed to attend a container at a trucking yard in Rexdale on December 30, 2009. After obtaining a search warranty, police determined all four vehicles in the container were stolen property. Mr. Willmer conducted the subsequent investigation. Some of the vehicles were rental cars which had been apparently rented under false names with forged documentation. The driver who had transported the container to the yard claimed that Mr. Owusu-Ansah had called in to the office to arrange for the pick-up. The driver's employer, the owner of the freight forwarder, corroborated this information, advising Mr. Willmer that he often did deliveries for Mr. Owusu-Ansah. Mr. Owusu-Ansah was arrested on January 18, 2010 and charged with six counts of possession of property obtained by crime. All charges were dropped by the Crown in August of this year when an essential witness declined to co-operate.

In cross-examination Mr. Willmer re-iterated that he was informed the phone call arranging for the container to transport the cars had been made from Owusu-Ansah's unpublished cellphone. The driver had stated that Mr. Owusu-Ansah had later personally called him to verify the container had picked up the vehicles. Mr. Willmer acknowledged that Mr.Owusu-Ansah had advised him that his freight forwarding business had been sold in the fall of 2009 to an unrelated party. However, Constable Willmer's investigation and interview with the alleged purchaser revealed no sale documents and it was his conclusion the sale did not relate to the freight forwarding operation run by Mr. Owusu-Ansah.

Mr. Chris O'Conner has worked as a customs officer with the Canada Border Agency for over thirty-two years. Since 1986 he has held the position of Intelligence Officer. He explained the process involved in exporting vehicles, commencing with the role and responsibility of the freight forwarder including the necessity of completing the customs declaration form known as a B-13 which, since 1978, has been required for goods over $2,000.00 in value. Mr. O'Conner also described the process of sealing the container to ensure liability for the goods is minimized. Where the freight forwarder or sender fails to provide a seal, the rail yard will do so.

Mr. O'Conner first met Mr. Owusu-Ansah in the late 1980s when, as part of his employment, he attended freight-forwarder operators to educate and inform them of the requirements and recommended safeguards in their business practice. A voluntary association of freight forwarders operating in the Toronto area set up a standard of "best

practices" in reaction to the large number of stolen vehicles being found in the containers shipped, which Mr. O'Conner attempted to spread to the standard to operators in the Toronto vicinity. One of these was the process of identifying vehicles prior to loading them, the benefit of which was explained to operators – including Mr. Owusu-Ansah – as reducing liability for transport cost in the event the goods were in fact stolen and thereby seized in transit by alerted border security agents. One method discussed was the use of recording a client's vehicle licence plate number in the event of any suspicion by the freight-forwarder as to the name of the client provided.

Nonetheless, Mr. O'Conner rarely received such sheets from Mr. Owusu-Ansah and described him as one of a few such operators who consistently failed to provide such information. As a consequence, his premises and containers were subjected to a number of covert investigations resulting in a number of charges involving of stolen motor vehicles.

Mr, O'Conner noted that many freight-forwarders receiving unwanted police attention have taken up the practice of hiring a second freight-forwarding business to bear responsibility for filling out the customs declaration based on information provided from the first freight-forwarder and suggested that this was a practice which Mr. Owusu-Ansah frequently employed with the outfit involved in Mr. Willmer's investigation.

In cross-examination Mr. O'Conner explained that, despite having attended the premises of the Dealer on more than one occasion to execute search warrants, he had never been able to properly identify a client from Mr. Owusu-Ansah's records since the records often either failed to establish the sender or listed a false name for the sender. He acknowledged that the freight-forwarders obligation did not include investigating ownership documentation proffered by a client to establish identity. He further agreed that the use of second freight-forwarders in the scenario he presented was not indicative of an attempt to hide the identity of the first freight-forwarder since his or her information would be required to be recorded. He further agreed that the freight-forwarder often used by Mr. Owusu-Ansah might have had a better price from shippers given the large volume it shipped.

The final witness for the Registrar was Ms Laura Halbert, Director of Compliance for OMVIC. She oversees the inspection team of OMVIC, as well as compliance and educational registration components for dealers and salespersons. She advised that registrants under the Act are required to keep accurate business records for a two year period. This is necessary to ensure inspectors can verify compliance with the detailed paper trail imposed by the Act in light of its mandate of consumer protection. She further noted the existence of Standards of Business Practice (SBP) developed by the industry which sets out a code of ethics applicable to motor vehicle dealers, amongst others, who operate in the province. This Code was sent to all dealers in early 2000 and highlighted regularly in monthly newsletter available on the internet which, until recently, was mailed monthly to all registered dealers in the province.

Ms Halbert stressed that the findings of Mr. Ross' inspection of the Dealer in 2009 were of serious concern given the results of a prior inspection on the Dealer on October 19, 2007.[3] The inspection, too, had raised a number of concerns with the Dealer's record keeping, all of which were discussed with Mr. Owusu-Ansah, including missing mandated information required to be kept on the garage records as well as a number of car sales omitting disclosure requirements. A specific serious concern noted at that time was inadequate disclosure of "material facts", including that certain sales were of accident repaired vehicles. One deal, for example, concerned a RAVA 4 sold by the Dealer and Mr. Owusu-Ansah for export which merely noted on the Bill of Sale "as is", despite having been written off by an insurance company as a salvage vehicle.[4]

Of further note in this inspection is a copy of an Auction Sales Contract provided to OMVIC inspectors by Mr. Owusu-Ansah for one of the deals then being reviewed wherein the contact phone number for the Dealer is identical to a number that came up in the stolen vehicle investigation undertaken by Constable Willmer that is Mr. Owusu-Ansah's unpublished cell phone number from which a call had been placed concerning a container of stolen vehicles.

A number of documents were not available to the inspectors at the time of the October, 2007 inspection for a variety of reasons advanced by Mr. Owusu-Ansah, including that his business premises had recently been flooded. He was asked to attend at the OMVIC office in a follow-up and bring the missing information with him. While he attended at the office as scheduled some weeks later, he was not able to locate a number of the missing documents required. The explanation given by Mr. Owusu-Ansah for the occurrence in other cases of photocopied bills of sale was that it was an oversight and unusual. Nonetheless a number of photocopies, rather than the original documents, were in fact proffered by him for transactions throughout the months of December to August.

Ms Halbert advised that the OMVIC staff concluded, not only that material facts involving prior accidents on sale vehicles and/or prior rental use of sale vehicles, were not consistently disclosed as required and that books and records were not properly maintained, but also that the veracity of Mr. Owusu-Ansah was suspect.

Despite discussions with Mr. Owusu-Ansah by OMVIC staff in 2007 of the concerns raised and requirements that must be followed, the results of Mr. Ross' 2009 inspection revealed the same types of failures and concerns. Ms Halbert concluded that such repeat non-compliance demonstrates a registrant who is either unwilling or unable to comply with the competency and compliance demands of the legislation of those who work in this regulated industry.

In issuing the Proposal, including the Supplemental particulars, Ms. Halbert stressed that the Registrar further relied upon the fact that three separate sets of criminal charges have been laid against Mr. Owusu-Ansah, each of which are industry specific. While, in all but one instance, these changes have been withdrawn by the Crown or otherwise not proceeded with, they demonstrate at best on-going inadequacies by Mr. Owusu-Ansah of

due diligence in determining the legality of his export vehicles, and – at worst – public risk of consumer fraud and theft which is primarily what the Act is intended to protect against. For these reasons, the Registrar has concluded that the Dealer and Mr. Owusu-Ansah's past conduct provide reasonable grounds to conclude they will not conduct their business with honesty and integrity and in accordance with the law.

In cross-examination Ms Halbert acknowledged that, since initial registration 13 years ago, no consumer complaints have been made to OMVIC regarding the Dealer and/or Mr. Owusu-Ansh, but noted that, especially with a registrant dealing primarily in an export market, the lack of complaints is not a necessary indication of honesty and integrity by registrants.

(a) For the Dealer and Owusu-Ansah

Mr. Owusu-Ansah testified. He came to Canada from West Africa in 1986. By 1988 he had a taxi driver's licence. After three years of driving, he was able to purchase and manage a total of four different cabs and no longer needed to drive himself. Having taken automotive courses back in Ghana, and working in partnership with a Canadian certified mechanic, he opened his own repair shop in 1991. Most of his clients were colleagues in the taxi business in Toronto, including the drivers of his own four vehicles, which had expanded to number eight drivers by 1994, and to a total of eleven vehicles by 1995.

In 1995 he began to purchase vehicles in Ontario for sale overseas working through a separately run freight forwarder. Quickly catching on to the business requirements, Mr. Owusu-Ansah in 1996 incorporated his own business – the Dealer – and added freight forwarding to the company operations. He was soon able to sell the taxi cab component and concentrate on the vehicle sales, their repair and freight forwarding.

In 1997 he decided to apply for registration under the Act as a motor vehicle salesperson in order to capitalize on the auction purchase market for overseas sales. Profits were significant and a number of his clients were doing very well in similar activity. By the year end he was registered with both OMVIC and the Toronto vehicle auction houses. His clients for freight forwarding still represented the bulk of his income, but his own vehicle export sales to Ghanian clients had reached about 20% of his overall business.

Mr. Owusu-Ansah testified that he had inadvertently not disclosed the charges outstanding against him in his most recent application for registration.

Concerning the three OMVIC inspections since his initial registration thirteen years ago, he noted the first one was straight-forward. It was his belief the second one in 2007 was attributable to press attention following the laying of charges against him by York Regional Police, which charges were subsequently dropped. In both this inspection and the more recent one conducted by Mr. Ross, it was his understanding that, once certain missing documents were made available to the Registrar, concerns raised at the inspections were laid to rest.

Mr. Owusu-Ansah denied any knowledge of any stolen or fraudulently owned vehicles in any of the shipments conducted through his freight forwarding business. He noted that he had co-operated completely with the police the first time a stolen vehicle was determined to have been part of one of his shipments when he acted as a crown witness in alleged fraud charges subsequently laid against one Mr. Francis in 2003. In fact, it was due to Mr. Owusu-Ansah's co-operation and recorded information on the bill of lading that police were able to determine the vehicle was stolen.

Mr. Owusu-Ansah had a similar explanation for the numerous charges laid against him in 2007. The investigating officer in that case never reviewed Mr. Owusu-Ansah's documentation which would have provided the names and information necessary to determine the perpetrators of the illegal action. It was not Mr. Owusu-Ansah. While he had booked the container for those vehicles, he had not done the loading. Both in that case as well as in the more recent charges, the incidents occurred in winter. Given the small area of his premises, he does not load containers in the winter months but rather arranges for the containers to be delivered to the clients who themselves are responsible for the loading. As a consequence he is not privy to the contents which are described by the client on the bills of lading documentation. There is no legal requirement that he verify any of such information. All but one of these charges have since been dropped against him. The outstanding charge will, he is certain, be dropped eventually.

Despite his innocence, he was again targeted in 2009 following further charges by police. At this time the Toronto Star published the incident and consequent attention in local business press as well as media in Ghana led Mr. Owusu-Ansah to decide to sell the freight forwarding aspect of his corporation entirely. He contacted one of his clients who agreed to purchase the enterprise and in the fall of 2009 the sale was finalized. [5]

He was therefore shocked in January 2010 to be arrested by Const. Willmar. He told the constable he no longer was responsible for the freight forwarding operation. He further telephoned the driver of the container and his employer – both well known to him as entities he had done business with in the past. He was advised that they thought it had been he who called given the African accent. But a third party had actually provided the driver with a deposit owing to the fact he was unknown when he arranged for the pickup and transportation service. These charges were dropped by the Crown in August.

Mr. Owusu-Ansah is back to driving taxis for a living. He has sold the freight forwarding operation; he has no registered salesperson who can sell vehicles for the Dealer given the Registrar's Proposals and he has quit the mechanic/bodywork he once operated.

In cross examination Mr. Owusu-Ansah claimed that he was constantly improving the information and documentation of his business operation. While in 2006 he admitted he had not verified information provided to him as to ownership of contents in containers filled by clients, this was in keeping with the industry practice where no freight forwarders

[5] Exhibit 6

attempted to check the accuracy of such information. Following 2007 he was aware, in part from information provided by Mr. O'Conner,that he needed to verify the contents himself. He could not do so where containers were filled outside of his premises. The 2007 charges were not sustained against him (save for one which he is confident will not proceed) since he had not been responsible for loading the containers involved. He was not involved in any of the vehicles found in the container in December 2009 as by then he had sold the business.

In response to questions posed by the Tribunal, Mr. Owusu-Ansah undertook to ensure the appropriate disclosure is provided on bills of sale in the future should he be allowed to retain his licence. He had not done so heretofore as he was of the opinion that it was clear from the condition of the vehicle whether or not it had been in an accident in the one case; and in the other, he did provide the requisite disclosure in situations where his body shop had preformed a repair. As to the transfer of ownership, he had been advised from the Provincial Sales Tax office that he is not required to transfer ownership of vehicles which are being sold to an export market.

LAW:

The Act states in part as follows:

> 5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
> a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
> b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or….
>
> 6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.
>
> 8. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

REASONS

The issue before the Tribunal is whether the past conduct of the Applicant provides reasonable grounds to believe that the Applicant will not carry on business in accordance with the law and with honesty and integrity.

Mr. Owusu-Ansah was arrested and charged with twelve counts of possession of stolen vehicles, theft over and public mischief by York Regional Police in May of 2007. These charges remained pending when he completed the applications forms for registration relevant to this proceeding. In both the application for salesperson registration and the renewal for Dealer registration Mr. Owusu-Ansah gave false information in stating there were no charges pending. Before the Tribunal he gave no evidence as to why he had provided false responses to these questions. At the time of submitting the written appeal, he advised the false information was not intentional. It appeared from his testimony that it

was his position the charges were incapable of being upheld as he was innocent. For this reason he did not consider himself to have done wrong.

A similar explanation was provided for the repeated failure to disclose previous accident history on bills of sale as was noted by inspectors with OMVIC first in 2007 and repeated in 2009. Despite the inspectors advising Mr. Owusu-Ansah of the disclosure requirement, he apparently considered he did not need to since the accident history was physically apparent in the one case, and the tax authority had allegedly advised him disclosure was not required where the consumer was overseas in the other.

In both cases the Tribunal concludes that Mr. Owusu-Ansah feels justified in acting outside the direct requirement of the regulator when doing so suits his purpose.

The testimony of Mr. O'Conner, painted a similar picture of a confident individual unwilling to follow business practice either recommended or required provided by an authority. Certainly Mr. O'Conner's requests that the Dealer's freight forwarding business take greater care to record identifying characteristics of clients was not a practice followed by Mr. Owusu-Ansah, in contrast to others in the industry and industry best practice recommendations. This failure is even more surprising given Mr. Owusu-Ansah's recent experience of previous clients having clearly provided him false identification information on vehicles they had provided to him to ship, with the result of his appearing in court as a crown witness before Justice Corbett at the end of 2003 in the charges against Mr. Francis

There was no reason provided as to why Mr. Owusu-Ansah was unwilling to meet these additional record-keeping practices. The Tribunal concludes his failure was either intentional and therefore to hide or mislead, or it was inadvertent. Either way, it agrees with the Registrar that the failure demonstrates an ungovernability on the suit if the Appllicants.

The Act is consumer protection legislation. It exists to protect often unsophisticated consumers involved in reasonably complex trade transactions involving a significant sum of money. It does so by setting up a regulatory system whereby additional protection is made available to consumers of motor vehicles by requiring the salesperson/dealer be obligated to meet more onerous conditions of disclosure, record-keeping and business practice than is required in common market transactions. If those regulated individuals demonstrate an inability or unwillingness to meet the requirements of regulation, then the very protection the Act seeks to provide is compromised.

The Act also requires a registrant demonstrate honesty and integrity in business. It does so indirectly, by declaring that a lack of such characteristics can be grounds for refusal of initial or continuing registration. The testimony of Mr. Owusu-Ansah was that he need not disclose material facts of prior accident history on vehicles intended for the export market. In fact, it was his position that such vehicles did not need to be officially transferred into his name as vendor when they are sold to overseas purchasers. He continued to hold this

position despite being informed otherwise by OMVIC inspectors during their inspections of the Dealer. In part he relied for his position on alleged information he had received from a taxation official.

The Tribunal finds this testimony self-serving and unconvincing. It finds honesty and integrity in business would motivate a businessman with thirteen years experience to properly disclose such material information – especially when advised to do so by industry ethical standards and regulatory authorities notwithstanding contrary information from an employee of a taxation office. Again, as with the position of not recording a client's identification, not disclosing when it is clear such disclosure is recommended or expected even if not required, is evidence of a lack of honesty and integrity. The Act in section 5(1) (b) clearly envisions that "honesty and Integrity and carrying on business in accordance with the law" are three separate requirements such that neither honesty nor integrity are synonymous with legality.

The Tribunal does not accept Mr. Owusu-Ansah's explanation of his and the Dealer's conduct concerning the numerous industry-related criminal charges which were in evidence. During this hearing Mr. Owusu-Ansah claimed that it was not his business to know what clients placed in the containers which they filled outside of his presence and loaded off his premises. This may be sufficient to avoid criminal liability given the higher burden of proof required. In this proceeding however, it fails to protect him against the regulatory removal of his licences. It was clear from his testimony that Mr.Owusu-Ansah opted to arrange his business so that containers would be filled off his premises and thereby remove from him the obligation to verify the contents. This allowed him to avoid having direct knowledge of those contents. In doing so he also felt able to avoid improving his business practice to include protective records and information as recommended by Mr. O'Conner and industry ethics voluntarily created by colleagues concerned with the number of car thefts in Toronto. This demonstrates to the Tribunal a cavalier and irresponsible attitude not in keeping with what this Tribunal concludes a person of integrity and honesty would have done (see *Felix Omoregie o/a Flilazo International Auto Sales* (2010) LAT, page 7) – at least prior to Christmas of 2009 when a large number of additional charges were laid by Toronto (Mr.Willmer) and Halton Police.

The legal sale of the dealer's freight forwarding business in 2009 was verified by Mr. Owusu-Ansah in the submission of the sale document. The testimony of Const. Willmer as to Mr. Owusu-Ansah's continued involvement was hearsay. However, the Tribunal is not persuaded that illegal activity discovered by Police in December, 2009 in Rexdale occurred entirely absent the activities of Mr. Owusu-Ansah. He himself acknowledged that he still worked out of the Dealer's premises daily. The cell phone number used in arranging delivery of the stolen goods was identical to Mr. Owusu-Ansah's cell number and the information provided to Mr. Willmer by involved individuals with some extensive historical relationship with Mr. Owusu-Ansah was that he was responsible for the container shipment.

Further, there was no filing by Mr. Owusu-Ansah of corporate records to verify the sale of the freight forwarding aspect of the Dealer's enterprise. Finally, no witnesses were brought forward by Mr. Owusu-Ansah to corroborate what was his unsubstantiated and self-serving testimony in this regard.

In sum, the Tribunal believes that Mr. Owusu-Ansah continues to play a role in the freight forwarding of the Dealer regardless of the sale in the fall of 2009.

Given all of the above, the Tribunal concludes that the past conduct of Mr. Owusu-Ansah, and thereby also of the dealer, afford reasonable grounds for the belief that they will not carry on business with honesty and integrity and in accordance with the law.

DECISION:

By virtue of the authority vested in it pursuant to the provisions of section 7 of the Act, the Tribunal directs the Registrar to carry out the Proposal dated February 25, 2010 to revoke the registration of the dealer and refuse the registration of Mr. Owusu-Andsah under the Act.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice Chair

Released: December 2, 2010

[1] Exhibit 4, Tab 14, p. 91
[2] *Ibid* p. 92
3 Exhibit 4, Tab 12
4 *ibid*, p. 3

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

FEHMI IMERI o/a ALBION AUTO SERVICE-Motion- extension of time

APPEAL FROM A DECISION OF THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002,* S.O. 2002, c 30

TO REVOKE REGISTRATION

TRIBUNAL: TERRANCE SWEENEY, Vice Chair

APPEARANCES: FEHMI IMERI, THE APPLICANT, unrepresented

ANGELA LA VIOLA, Counsel, representing the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: December 20, 2010 Toronto

ORDER

The Applicant has brought a motion for an Order granting an extension of time to file an appeal from the Notice of Proposal, dated October 21, 2010,[1] in which the Registrar of the *Motor Vehicle Dealers Act, 2002* (the "Act") proposes to refuse registration of the Applicant as a motor vehicle dealer under the Act.

THE LAW:

Section 7 of the *Licence Appeal Tribunal Act, 1999*, grants this Tribunal the discretionary power to grant such an extension if there are "reasonable grounds for applying for the extension and for granting relief".

[1] Exhibit 1

The Tribunal and the Courts have established that in order to be successful, an Applicant must show:

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

2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if he did so as soon as the true situation was apprehended.

3. That there is not some overriding prejudice to the Registrar in allowing the application.

4. That there is some substantial point in issue and the Applicant has some reasonable chance of success.

Moreover, the Tribunal must be cognizant of the principle that justice must be done. See: *Re Bilodeau and ONHWP* (1994), 25 CRAT 930; *Frey v. MacDonald*, [1989] O.J. No. 236.

The Case for the Applicant

The Applicant solemnly affirmed and testified that he received the Notice of Proposal on or about October 25, 2010. He said, however, that he did not open the package containing the Notice of Proposal until he received the Final Notice from the Registrar, dated November 23, 2010, which indicated that as no appeal had been filed the Registrar would carry out his Proposal and refuse registration to the Applicant.

The Applicant then filed his Notice of Appeal[2] late with the Tribunal on or about November 30, 2010.

The Registrar refused to consent to an extension of time to file the appeal.

In his notice of appeal, the Applicant stated, in part:

> … I understand that I have made a mistake and prepared to accept the consequence; however, as I was unaware I needed a license at the time to buy/sell vehicles… I would appreciate a new opportunity to make things right.

The Tribunal notes that the Applicant did not deny any of the allegations against him in the Notice of Proposal.

[2] Exhibit 2

The Case for the Registrar

Counsel for the Registrar filed a Motion Record[3]. She did not call any witnesses. She sought to make her case by cross-examining the Applicant and argument.

FACTS PROVEN

The Tribunal finds that the following salient facts have been proven:

1. The Applicant lied in his application for registration when he said that he had not bought or sold vehicles within the last two years. In fact, he bought or sold over 20 vehicles.

2. The Registrar asked him about his relationship with two individuals who are more likely than not related to him. He denied that he had any connection with them.

3. The Applicant lied again when he told the Registrar that a certain employee named "Franco" did not have any enforcement history with the Ministry of Transportation - Ontario. In fact, "Franco" was convicted, in December 2008, of seven counts of "issuance of false safeties".

APPLICATION OF LAW TO THE FACTS

The Applicant admitted that he received the package containing the Notice of Proposal in time. The Tribunal does not accept his testimony that he did not open the package containing the Notice of Proposal until he got the Final Notice. The Tribunal accepts the argument of Counsel for the Registrar that it is simply incredible that he would ignore correspondence from the very person from whom he wants a licence. Accordingly, the Applicant has failed to establish that he intended to appeal within the time limit.

The appeal was not served on time and there is no reason that the late filing should be excused.

The Registrar conceded that there is no prejudice to the Registrar as the Applicant is not currently licensed.

This leaves the fourth prong of the test set forth under LAW, *supra*.

There is no substantial point in issue. The Applicant did not deny the allegations against him in the Notice of Proposal. He is, therefore, deemed to admit them. He lied in his application and he lied in response to questions put to him by the Registrar. It is unlikely that registration would be granted by the Tribunal if a hearing were to be held.

[3] Exhibit 3

ORDER

The Tribunal refuses to grant an order to extend the time for filing a Notice of Appeal of the Registrar's Notice of Proposal to refuse the Applicant's registration.

Licence Appeal Tribunal

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Terrance Sweeney, Vice Chair

RELEASED: January 5, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

FIND-A-CAR AUTO SALES & BROKERING INC. AND MICHAEL RYAN O'CONNOR

APPEAL FROM A PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT* R.S.O. 1990, c. M.42

TO REVOKE REGISTRATION

TRIBUNAL: CHANTAL PROULX, Vice-Chair

APPEARANCES: KEITH A. MACLAREN, Counsel representing the Applicants

BERNARD LEBLANC, Counsel representing the Registrar, *Motor Vehicle Dealers Act*

PAUL BATTIN, Counsel representing Constable Daoust

DATE OF HEARING: January 10 and 11, 2011 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises from a written Notice of Proposal (the "Proposal") dated December 3, 2009, issued by the Registrar under the *Motor Vehicle Dealers Act*[1] (the "Act") to revoke the registration of Find-A-Car Auto Sales & Brokering Inc. ("FAC") as a motor vehicle dealer and to revoke the registration of Michael Ryan O'Connor (the "Applicant") as a salesperson.

At the hearing, the parties agreed that the only issue before the Tribunal was the revocation of Mr. O'Connor's registration. The registration of FAC is no longer at issue because the business closed and the registration lapsed. Consequently, the Tribunal will only deal with the issue of Mr. O'Connor's registration.

The Registrar proposes to revoke the registration of Mr. O'Connor for the following reasons:

a) Between December 2001 and May 2007, O'Connor engaged in conduct that resulted in being charged with 11 counts of fraud over $5000, contrary to the Criminal Code.

[1] *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42 (The parties agreed and the Tribunal finds that the older version of the legislation applies in this case).

b) On or about November 6, 2009, O'Connor pled guilty to 2 counts of fraud over $5000.
c) The conduct that resulted in the charges and subsequent guilty pleas was industry specific and relates to the financing of motor vehicles. The conduct involved Find-A-Car.
d) O'Connor and Find-A-Car have failed to comply with the Act, in particular, section 5.

Section 5 of the Act reads as follows:

> Registration
> 5.(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business, or
> (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
> (c) the applicant is a corporation and,
>
> (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
> (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
>
> (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The Registrar may suspend or revoke a registration. Section 6 of the Act reads as follows:

> Refusal to register
> 6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.
>
> Suspension or revocation
> 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.

EVIDENCE

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence, as well as the oral testimony of Carey Smith and Constable Bernard Daoust.

Mr. Smith testified that he has been the Director of Investigations with the Ontario Motor Vehicle Industry Council ("OMVIC") since 2002. OMVIC is responsible for administering the Act.

His prior experience consists of approximately 26 years on the police force. He was employed by the Halton Police Services and spent several years investigating motor vehicle fraud and commercial crimes.

Mr. Smith testified that he is familiar with this case. In 2006 he was contacted by the Kingston Police in relation to alleged fraudulent activities taking place at the Kingston location of FAC. Charges were laid against four individuals, including Mr. O'Connor, for activities that took place between December 2001 and May 30, 2007[2].

Constable Daoust works for the Commercial Crime Section of the Kingston detachment of the Royal Canadian Mounted Police (RCMP). In May 2006 Constable Daoust became involved in the investigation of the Kingston location of FAC. Constable Daoust testified that FAC had agreements with financial institutions to provide on the spot financing to customers which was facilitated by an internet portal company called Huromax. It is Constable Daoust's understanding that Huromax requires every financial manager and director of the company to have a personal password. On cross-examination, Constable Daoust indicated that he believes Mr. O'Connor had a password; however, there is no evidence that Mr. O'Connor had used his password.

The evidence presented by the Applicant consisted of documentary evidence, as well as the oral testimony of Mr. O'Connor and three witnesses.

Mr. O'Connor testified that he started his car business in Sudbury in 1998 with the assistance of a self-employment benefit program designed to assist entrepreneurs. Shortly afterwards, Mr. O'Connor moved his business to Ottawa where the used car business was less competitive at the time.

Between 2001 and 2005, FAC's business grew quickly. By 2007 FAC had approximately one hundred and twenty employees, with stores in Ottawa (Richmond), North Bay, Kingston, Trenton, and Montreal. A manager was responsible for each location which allowed Mr. O'Connor to spend most of his time at the auction and some time at the Ottawa (Richmond) FAC location. Mr. O'Connor testified that he attended the other FAC locations a handful of times annually.

In June 2006, Mr. O'Connor was hearing rumours of a police investigation related to the Kingston location of FAC. Shortly thereafter Mr. O'Connor required all sales staff, business managers and managers to sign an undertaking which reads as follows:

> You are required as a representative of Find-A-Car, when submitting any application to any bank, finance or leasing company to ensure accurate information is provided to our lenders. Any misrepresentation to our lenders will not be tolerated and will result in immediate dismissal.

In the summer of 2006, two banks – Toronto Dominion ("TD") and the Bank of Nova Scotia ("BSN") – ended their business relationship with FAC.

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[2] Counsel for the Applicant highlighted that the transcript indicates the transactions in question would have occurred on two separate dates rather than over many years. The Tribunal finds that this explanation is unsupported by the material before the Tribunal. The Tribunal acknowledges that the word "between" appears to be missing from the transcript; however, based on the information available to the Tribunal, the only logical and possible conclusion is that the word "between" should be read into the sentence.

Mr. O'Connor and FAC relied on the Royal Bank of Canada ("RBC") for a commercial mortgage, lines of credit and the financing of their client's car purchase(s). Mr. O'Connor met with the head of Security at RBC and the bank decided to continue its business relationship with FAC and Mr. O'Connor on this condition that Mr. O'Connor advance $200,000 in the form of a personal GIC. The agreement was that the bank could take money from the GIC to cover any FAC customer claims and Mr. O'Connor would replenish the funds to ensure the GIC remained at $200,000. The relationship with RBC changed in 2007 when a search warrant was issued pertaining to FAC. RBC called all the commercial mortgages and the lines of credit although the land mortgage was not due and he had not missed any payment. Mr. O'Connor liquidated his inventory to pay down the loan. FAC closed in May 2007 because Mr. O'Connor was not able to secure new financing. Mr. O'Connor testified that he does not owe any money to RBC.

Mr. O'Connor testified that over the years, when he was made aware of a problem with the financing of one of the cars purchased at FAC, he would resolve the problem by "throwing money at it" instead of addressing the problem directly with the FAC employees. Mr. O'Connor believes that he resolved all the complaints OMVIC brought to his attention and he continued to resolve the problems after FAC ceased its operation. To his knowledge, there are no outstanding issues with OMVIC, he has no outstanding bank loans and there are no pending law suits.

Mr. O'Connor has been working for a used car dealership since November 2007. His main responsibilities include purchasing vehicles and marketing. He has no ownership interest in the business and he is paid based on the number of cars he purchases.

Mr. O'Connor testified that he took responsibility for everything that happened in all FAC locations. In November 2009 he pled guilty to the following two charges of fraud:

> Ryan O'Connor charged with others that on or about the 1st day of December 2001 and the 30th day of May 2007 at the City of Kingston in the said East Region and elsewhere in the Province of Ontario, count three, did by deceit, falsehood or other fraudulent means defraud Bank of Montreal of money, the sum over $5000 by knowingly obtaining credit for people who would not qualify nor be able to repay their liability, using false statements in writing to financial institutions, through his company, contrary to Section 380(1)(a) of the Criminal Code of Canada.
>
> Count four and further that at the time and place aforesaid the said Ryan O'Connor with another did by deceit falsehood or other fraudulent means defraud the Royal Bank of Canada and the Bank of Nova Scotia of money, the sum over $5000, by knowingly obtaining credit for people who would not qualify nor be able to repay their liability, using false statements in writing to financial institutions through his company, contrary to Section 380(1)(a) of the Criminal Code of Canada.

As a result, on consent by counsel for Mr. O'Connor and the Crown Attorney, the Court ordered that Mr. O'Connor be given a conditional jail sentence of two years less a day to be served in the community. The first six months of the sentence was to be served under house arrest. The Court also imposed other conditions that the Tribunal does not intend to summarize. The conditional jail sentence started on December 11, 2009.

Witness A testified that he has been in the car business since 1969. He owns property in Richmond and FAC was a tenant for several years. He described FAC as an ideal tenant because the rent was always paid on time and Mr. O'Connor honoured the lease despite the fact that FAC ceased its operation. In the fall of 2007, witness A opened a used car dealership. He hired Mr. O'Connor to handle the marketing and the purchase of cars on behalf of his company. Witness A indicated that business has increased significantly since 2007. The company started with about half a dozen employees and now employs approximately 80 employees. Witness A testified that Mr. O'Connor is the best buyer in the business and he trusts Mr. O'Connor.

Witness B described Mr. O'Connor as a man with moral integrity, deep rooted core values and a businessman that gives back to the community. He testified that he knew Mr. O'Connor as a student and as his boxing coach. He has kept in touch with Mr. O'Connor over the years. Mr. O'Connor was invited to address students during a graduation ceremony and he donated and raised money for the football field where Witness B was the principal. Witness B also testified to Mr. O'Connor's dedication to amateur boxing and helping young athletes.

On cross-examination by counsel for the Registrar, Witness B indicated that he was aware that Mr. O'Connor pled guilty to two charges of fraud and stated that it does not represent what he knows of Mr. O'Connor.

Witness C is currently the Ottawa Manager for a marketing company. Between 2000 and 2006 he was the district manager for indirect lending for the Royal Bank of Canada. Witness C met Mr. O'Connor because of the business relationship with FAC. He testified that Mr. O'Connor did not have a credit background and therefore to his knowledge Mr. O'Connor would not know his way around the financing system for customers. He also testified that if a car loan was delinquent or if a problem arose with the financing of a car, Mr. O'Connor would resolve the issue. Witness C acknowledged that he was aware of the guilty plea related to two counts of fraud; however, he stated that he never saw Mr. O'Connor's name on a loan application.

FACTS FOUND PROVEN

The Tribunal finds that the following facts have been proven:

1. Mr. O'Connor has been registered as a motor vehicle salesperson under the Act since on or about March 12, 2001.
2. Mr. O'Connor was the director and officer of FAC.
3. On or about November 6, 2009, Mr. O'Connor pled guilty to two counts of fraud over $5000 for conduct related to the financing of motor vehicles, therefore industry specific.
4. Mr. O'Connor received a conditional jail sentence of two years less a day with the first six months to be served under house arrest.

5. Mr. O'Connor continues to serve the conditional jail sentence of two years less one day which was imposed at the sentencing proceedings on December 11, 2009.
6. On or about December 3, 2009 the Registrar issued a Notice of Proposal to Revoke Mr. O'Connor's registration as a salesperson.

ANALYSIS

Counsel for the Registrar requested that the Tribunal direct the Registrar to carry out its proposal dated December 3, 2009 and revoke Mr. O'Connor's registration as a motor vehicle salesperson under the Act. Counsel argued that the transcript of the guilty plea and the proceedings at sentencing clearly demonstrate that Mr. O'Connor was charged and pled guilty to fraudulent activities specific to the motor vehicle industry, and therefore does not meet the requirements set out in section 5 of the Act.

Counsel for Mr. O'Connor requested that the Tribunal consider the circumstances surrounding the guilty plea and Mr. O'Connor's subsequent actions. Counsel for Mr. O'Connor requested that the Tribunal substitute its decision for that of the Registrar. It was submitted that it would be appropriate in this case to place conditions on Mr. O'Connor's registration such as not dealing with the public and not submitting credit applications to financial institutions on their behalf. This would allow Mr. O'Connor to continue working with Witness A until he can satisfy OMVIC that the restrictions on his registration should be lifted.

Tribunal's Decision

The powers of the Tribunal are defined in section 7 of the Act which reads as follows:

> Powers of Tribunal where hearing
> 7. (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 Tribunal must decide if Mr. O'Connor's past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.[3] The Tribunal is mindful that the Registrar is a not a trier of fact and consequently, the Tribunal does not give any deference to the Registrar's opinion.[4]

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[3] *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen),* [1983] O.J. No. 1017 (Div. Ct.) and *Ontario (Motor Vehicles Act, Registrar) v. Khan*, [2007] O.J. No. 1459 (Div. Ct.)
[4] *Amerato v. Ontario (Motor Vehicle Dealers Act, Registrar),* [2005] O.J. No. 3713 (C.A.)

The undisputed evidence in this matter is that Mr. O'Connor pled guilty in November 2009 to two counts of fraud over $5000. The fraud in question related to the falsification of documents to obtain credit for people who would not qualify or be able to repay their liability. The charges are specific to the motor vehicle industry and they relate to transactions that occurred between December 2001 and May 2007. The criminal charges were laid against Mr. O'Connor personally, not against the corporation.

The charges against Mr. O'Connor and his guilty pleas are sufficient to address the issue of the revocation of his registration. However, since charges were laid against other FAC employees, the Tribunal is reminded that the case law supports the finding that the Applicant, as a director and officer of FAC, had the obligation to supervise his employees and their actions. In *Prestige Toys*[5], the Court stated that "there is no presumption that corporate wrongdoing is automatically attributable to the individual officer and director." The Tribunal must examine each case based on the evidence presented. In this particular case, the Tribunal heard evidence that when the Applicant was made aware of irregularities pertaining to the financial information submitted to financial institutions, he resolved the matter by “throwing money at it” rather than addressing the problem with his employees. The Tribunal finds that Mr. O'Connor failed to take reasonable steps to carry on business in accordance with law and with honesty and integrity.

While the Tribunal can consider the specific circumstances of this case for the purpose of mitigation, it cannot do so for the purpose of determining whether or not the fraud took place[6].

The Tribunal was pleased to hear evidence relating to Mr. O'Connor's contribution to the community, his involvement with the amateur boxing community, the resolution of all claims with OMVIC and his current employment with Witness A. While Mr. O'Connor's witnesses testified that they trust him and that the charges appear to be out of character, the fact remains that he pled guilty to two counts of fraud over $5000 which are industry related. Mr. O'Connor's evidence of efforts to mitigate the fraud must be balanced with all the evidence before the Tribunal, including the charges and the two guilty pleas which involved transactions over a period of several years. Furthermore, the fraud was directly related to the industry, involved other FAC employees and cannot be considered as an isolated mistake.

OMVIC's mandate is to maintain a fair, safe and informed marketplace in Ontario by protecting the rights of consumers, enhancing industry professionalism and ensuring fair, honest and open competition for registered motor vehicle dealers.

The legislation is intended to protect the unsuspecting public and promote the integrity and honesty of salespersons registered in the industry. The Tribunal must consider the intent of the legislation when applying the facts to the law. In light of the particular

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[5] *Prestige Toys Ltd. v. Ontario (Motor Vehicle Dealers Act, Registrar),* [2009] O.J. No. 347 (Div. Ct.)
[6] *Ontario (Motor Vehicles Act, Registrar) v. Jacobs*, [2004] O.J. No. 189 (Div. Ct.) and *Re Arulappu* , [2010] O.L.A.T.D. No. 194 (Licence Appeal Tribunal)

circumstances of this case, the Tribunal would be sending an inappropriate message to the public and the industry in general if it supported the Applicant's request for registration, even if conditions were imposed. The Applicant's guilty pleas related to a very serious industry related offence, it involved other FAC employees, the conduct spanned many years and he is still serving a conditional jail sentence of two years less a day.

The Tribunal finds that Mr. O'Connor, by virtue of his guilty pleas for industry specific fraud, is ineligible for registration, because his past conduct gives reasonable grounds to believe he 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 Act, directs the Registrar to carry out his proposal dated December 3, 2009 to revoke the registration of Mr. O'Connor as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

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Chantal Proulx, Vice Chair

RELEASED: February 1, 2011

This decision may be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOHAMMAD HAMEED O/A ANA AUTO SALES

AN APPEAL FROM A NOTICE OF PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REVOKE REGISTRATION AS A DEALER AND SALESPERSON

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: MOHAMMED HAMEED, representing himself and ANA Auto Sales

ANGELA LA VIOLA, Counsel, representing the Registrar, *Motor Vehicle and Dealers Act, 2002*

DATE OPF HEARING: January 21, 2011 Toronto

REASONS FOR DECISION AND ORDER

Background:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal) from a Proposal (the "Proposal") of the Registrar (the "Registrar") pursuant to section 9 of the *Motor Vehicle Dealers Act, 2002*, S.O. 2002, Chapter 30 (the "Act"). The Proposal is to revoke the registration of Mohammad Hameed o/a ANA Auto Sales ("the Applicant) as a salesperson and dealer under the Act. The Proposal is dated April 20, 2010 and sets out the following reasons:

> The intention and objective of the Act is to protect the public interest. In doing so, the Act prohibits making false statements in an application for registration and requires that Registrants are financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. MOHAMMAD HAMEED's past conduct and financial instability is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The Particulars relied upon by the Registrar can be generally summarized as the following:

(a) non-disclosure by the Applicant of on-going bankruptcy and continued refusal by the Applicant to provide details of such bankruptcy to the Registrar when requested; and
(b) a failure by the Applicant to reveal material facts as required by the Act on the sale of a vehicle; and
(c) allegations the Applicant tampered with documentation concerning the above referenced vehicle sale to remove disclosure made on his purchase of the vehicle.

The Applicant appealed the Proposal on the basis that:

(a) the bankruptcy concerned his personal capacity and was not made in the name of his sole proprietorship. As such the Applicant's position was there was no requirement that such be disclosed, nor was the Registrar entitled to any information concerning the bankruptcy;
(b) the alleged failure to disclose material information on a bill of sale was simply an oversight by the Applicant which he immediately corrected by telephone to his purchaser with the result that the vehicle's eventual sale to a consumer did include the required disclosure and so no harm was occasioned by the inadvertence;
(c) there is no reason for the Applicant to have removed the original disclosure as alleged given that he verbally advised the purchaser of the material information immediately after the sale upon realizing he had omitted to include the condition on the paperwork.

A preliminary detail concerned the fact that the Applicants' registrations as dealer/salesperson had terminated pending this Hearing. As a consequence, the Parties agreed that the Proposal was now one to refuse registration under the Act.

EVIDENCE

Mary Jane South is Deputy Registrar of the Ontario Motor Vehicle Industry Council ("OMVIC"), the non-profit organization set up to administer the Act. It was her testimony that the Applicant had been originally registered under the Act subject to specified Terms and Conditions signed in June of 2004. Clauses 21 and 22 of these stipulate the importance of disclosing material facts in writing on any bill of sale completed; clause 14 stipulates that the Applicant will maintain accurate books and records and will not create any document which misleads the nature of any transaction; and clause 31 states that the Applicant recognizes that the Registrar relies *"..on the accuracy and completeness of all documents, statements or information provided by the (Applicant) in support of (its) application for registration."*[1]

[1] Exhibit 1, Tab 2

OMVIC inquiries from Companies Branch of the Ministry last spring revealed that ANA is a sole proprietorship operated by the Applicant who also operates an incorporated entity called ANAR International Incorporated.[2]

Ms South presented a copy of the Applicant's application for registration renewal of July 29, 2008. It asks for completion of a number of questions, noting: *"For the purposes of this application, the applicant means the sole proprietor, each partner of a partnership or each officer or director of a corporation, or the corporation."* The Applicant responded "no" to question number 1(c) inquiring: "Has the applicant declared bankruptcy, been involved in bankruptcy proceedings or are there any outstanding judgments or court orders against the applicant?"[3]

A similar response was provided by the Applicant to the same question in the 2009 application for renewal.[4]

Yet, on OMVIC's running an on-line bankruptcy search of the Applicant in March, 2010, it was discovered the Applicant had declared bankruptcy on August 3, 2007, almost one year prior to completing his 2008 application for registration, which, to date, had only been conditionally discharged.[5]

As a consequence of the Applicant's refusal to provide the Registrar with information and documents concerning the bankruptcy, the Registrar was required to seek such information from the Trustee-in-Bankruptcy directly. These reveal that on August 2, 2007 the Applicant had sworn to a Statement of Affairs document before the Trustee-in-Bankruptcy stating that he had "formerly" operated as ANA Auto Sales and was currently unemployed. This declared position was reinforced by responses to questions 6 and 8 on his sworn Information in which he stated he was unemployed and specified he had operated ANAR International Inc from 2004 to 2007, a corporation with a principle business activity of trucking; and ANA Autos Sales from 2003 to 2006, a sole proprietorship with a principle business activity of auto sales.[6] The reason provided by the Applicant for his bankruptcy in question 14 was "business failure".[7] Ms South believed that the obvious conclusion to be drawn by the Trustee from this information was that the Applicant was no longer in the business of auto sales.

The Registrar requested the Applicant attend OMVIC offices in February, 2010 for a regulatory inspection of his books and records. It was during this interview that the Inspector noted that the copy of the Bill of Sale for the Applicant's purchase of a Mazda (VIN No. ***801) from an auction in Toronto appeared to have the printed disclosure of it being a salvage vehicle rubbed off.[8] The fact that the information had been readily visible was verified on a review of the original Bill of Sale obtained by OMVIC from the

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[2] Exhibit 1, Tab 4
[3] Exhibit 1, Tab 6
[4] Exhibit 1, Tab 5
[5] Exhibit 1, Tab 7
[6] Exhibit 2
[7] *ibid*
[8] Exhibit 1, Tab 16

seller auction house. [9] The Applicant's consequent Bill of Sale for this vehicle to a dealer purchaser failed to disclose the accident history.[10]

In cross examination Ms South surmised the attempt to remove the disclosure on the purchase from the Auction had occurred when the Applicant realized he had failed, for whatever reason, to make the disclosure on his own later sale of the vehicle and was asked to attend at OMVIC for a review of his records. Despite the fact that his buyer/dealer later did disclose the salvage condition to the eventual consumer buyer, the Registrar's concern was that, given no written disclosure had been provided by the Applicant, his buyer/dealer would have been justified in not providing disclosure to the eventual consumer purchaser – the very risk which the Act and the terms and conditions of the Applicant's own registration are intended to protect against.

Mr. Mohammad Hameed stated he had immigrated to Canada in 2001 with his family after having lived and worked as a vehicle dealer in the USA for 15 years since coming from his original country of Pakistan. By 2004 he had passed the written test required to obtain his licence as a motor vehicle dealer under the Act. He registered as the sole proprietorship in March of 2004 and began operating in June of that year after receiving his OMVIC licence to do so, subject to terms and conditions earlier referenced. Mr. Hameed stated that ANA Auto Sales was always more of a hobby than a significant source of income for him. Generally his annual sales of motor vehicles were less than six (6). His main business activity occurs through a separate and distinct entity, ANAR International Incorporated, which he incorporated in November, 2004. Its primary activity is trucking and it is registered and licensed as such under provincial authority.

His auto sales business has never had any consumer complaints. Most of his clients are the auction houses in the Toronto area, not one of which has criticized his business operations. As a result, the Applicant's position is that he poses no risk to consumers in his registered capacity and has no record of any concerns regarding his professional integrity or honesty.

The concern raised by the Registrar stemming from the Bill of Sale for the Mazda fails to establish any dishonesty. Simple error caused him to neglect to provide the material information as to salvage on his sales documentation to his purchaser. However, that purchaser was called by him immediately following the sale and told of the vehicle condition. The original of the Bill of Sale allegedly tampered with was submitted by the Applicant who claimed it demonstrated simply that the print concerning the disclosure was weaker than other print on the document.[11]

Mr. Hameed advised that his registered corporation acts as an umbrella entity which encompasses both ANA Auto Sales and ANA Logistics, the latter being the trucking company. He submitted documents titled Master Business Licence issued by the

[9] Exhibit 1, Tab18
[10] Exhibit 1, Tab 17
[11] Exhibit 5

Province referencing ANA Auto Sales [12] and ANA Logistics [13] as both operating under the legal name of Anar International Incorporated. Since the corporation had not filed for bankruptcy, it was his position his personal bankruptcy is not relevant to his registration. He maintains this position regardless of the wording of the disclosure requirement on the OMVIC application for registration and reiterates that his personal credit issues are of no concern to his motor dealer business which has operated for 6 years without any concern or complaint.

In cross-examination the Applicant advised he was aware that the sole proprietorship and the corporation had registered at separate times and were separate entities and that he understood the distinction between them. He claimed he had not declared bankruptcy in the name of the sole proprietorship; such had been done by the Trustee-in-Bankruptcy. At the time of swearing the Information, the Applicant testified he had stopped working and was therefore unemployed. He acknowledged that his businesses continued to operate and that he had not identified his trucking business, ANA Logistics, to the Trustee-in-Bankruptcy. He re-iterated that the bankruptcy was made in his personal capacity. In response to questions as to why he had not yet been discharged, despite the usual process of a first time bankrupt receiving a discharge within months of his/her bankruptcy, the Applicant advised he believed that others were responsible for his financial losses and, as a result, continued to refuse to make payments as required to discharge the bankruptcy.

The Applicant admitted that his purchase and sale of the Mazda had taken place in 2008, almost one year after declaring bankruptcy.

THE LAW

Section 5, Subsection (1) (a) and (b) of the Act read as follows:

> An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

The onus is on the Registrar to prove his case on a balance of probabilities.[14] The Tribunal's role is to determine from the evidence whether there exist reasonable grounds to conclude the Proposal of the Registrar should be upheld or not.[15]

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[12] Exhibit 3
[13] Exhibit 4
[14] *F.H. v. McDougall* [2008] SCC 53
[15] *Ontario (Motor Vehicle Dealers Act, Registrar) v. Khan* [2007] O.J. No. 1459

DECISION AND ORDER

The evidence, including the Applicant's own submissions, made it clear that he fails to recognize the relevance of his bankruptcy on his on-going fitness for registration as a dealer/salesperson under the Act. It appears he also continues to deny the effect of that bankruptcy on his other business activities.

The Tribunal is also concerned that the Applicant remains adamant that, notwithstanding the clear wording contained in the 2008 and 2009 registration applications requiring disclosure of any personal bankruptcy, he misled the OMVIC Office by falsely declaring there was no bankruptcy. In responding with a "no", he went beyond a mere refusal to disclose; instead his response was false and misleading. So too were the sworn statements he provided to the Trustee-in-bankruptcy averring ANA Autos Sales had not operated since July 2007 and his failure to advise the Trustee of the existence of what, at this Tribunal, he declared was his principle source of income, being ANA Logistics.

The Tribunal concludes from this past conduct that he is, at best, unwilling to be governed by the regulatory authority of OMVIC.

The Tribunal concludes that there was a clear attempt to erase the salvage disclosure information on the Bill of Sale document for his purchase from the auction of the Mazda. A review of the document leads to no other conclusion and the Tribunal rejects the Applicant's assertion that the failure to clearly see the disclosure is the result of some printing weakness. It finds this also demonstrates a disregard for veracity and honesty in business affairs.

Based on the above findings the Tribunal does not hesitate in finding that the Applicant has proven himself to be ungovernable and is quite willing to provide false and misleading information if and when it suits his purpose.

The Tribunal also accepts the notion that, by remaining an undischarged bankrupt and continuing to operate as an officer and director of a corporation and continuing to enter into trades, he not only would appear to be in breach of the *Bankruptcy and Insolvency Act* [16] and the *Business Corporations Act*,[17] but also thereby poses a significant risk to consumers who enter into transactions with him as a consequence of their having no recourse to sue a bankrupt under the legislation. For other reasons he has determined that this situation is preferable to paying off the amounts necessary to achieve a discharge from the Trustee-in-Bankruptcy. As a consequence, the Tribunal finds that the Applicant has purposely placed himself clearly within the ambit of section 5(1)(a) of the Act.

Therefore by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his Proposal

[16] R.S.C. 1985, c. B-3 see sections 11.1. 69.3 and 198
[17] R.S.O. 1990, c. B.16 see Section 118

dated April 20, 2010 originally to Revoke, but now to Refuse the Registration of Mohammad Hameed o/a ANA Auto Sales.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

Released: February 2, 2011

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Ontario Superior Court of Justice or Divisional Court (http://www.ontariocourts.on.ca/) 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, may also be posted on the Licence Appeal Tribunal's website http://www.lat.gov.on.ca/ within three weeks time. The decision may also be available on Quicklaw at a later date.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

EDWARD EDMONDS

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: EDWARD EDMONDS, the Applicant, unrepresented

POEME C.H. MANIGAT, Counsel, representing the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: February 7, 2011 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, *Motor Vehicle Dealers Act, 2002* (the "Registrar" and the "Act" respectively). The Notice of Proposal dated August 25, 2010, proposed to refuse to grant the registration of Edward Edmonds (the "Applicant"), as a salesperson under the Act.

FACTS

The Applicant was arrested on December 16, 2008, and charged with four counts under the *Criminal Code* of Canada, R.S.C. 1985, c. C-46.[1] Of the four counts, one has subsequently been withdrawn. The remaining charges are set for trial in October of 2011. The Applicant also owes roughly $10,000.00 in family support arrears.

[1] Two counts of living off the avails of prostitution and counts of controlling a prostitute and running a common bawdy house.

In the face of these difficulties, the Applicant has successfully obtained a realtor's licence, passed the necessary course to become a car salesperson and located an automobile dealer, 970910 Ontario Inc. o/a Prestige Motors, which is prepared to hire him as a salesman.

The Registrar has refused to register the Applicant as a salesperson under the Act for reasons which, at the conclusion of this hearing, boiled down to the following:

i) The Applicant's disclosure of his criminal circumstances was less than perfect and in particular, despite the Registrar's attempts, there is still no confirmation in the Registrar's file that the proposed employer is fully aware of the criminal charges the Applicant is facing. Hence, it is argued, there are reasonable grounds to believe that the Applicant will not conduct himself in the position of salesperson, in accordance with the law and with honesty and integrity;

ii) Similarly, the conduct underlying the charges is such that there are reasonable grounds to believe that the Applicant will not conduct himself in the position of salesperson, in accordance with the law and with honesty and integrity; and

iii) The Applicant's failure to abide by a court order and pay family support arrears of $10,000.00 means that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.

THE LAW

The pertinent provisions of the Act are:

> **Registration**
>
> 6. (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.

8. (1) Subject to section 9, 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 6.

Conditions

(2) Subject to section 9, the registrar may,

(a) approve the registration or renewal of a registration on such conditions as he or she considers appropriate; and

(b) at any time apply to a registration such conditions as he or she considers appropriate.

Notice re: refusal, suspension, etc.

9. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(a) refuse under subsection 8 (1) to grant or renew a registration; …

Hearing

(5) If a hearing is requested, the Tribunal shall hold a 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.

ANALYSIS

Stripped of the criminal allegations that are yet to be proven in a court, the concerns that relate to the Applicant are better served by attaching conditions to his registration as opposed to a blanket refusal to register him. At present, there are allegations related to non-industry specific charges that will be tried in October 2011. The Registrar should be notified of the progress of those criminal charges, and any others that emerge in the near future. However, the Applicant is a 55-year-old man with no criminal record. No direct evidence of any crimes committed by the Applicant was called at this hearing.

In his application for a salesperson licence, amongst other things, the Applicant attached an accurate Criminal Background Check, prepared by the York Regional Police Service. That document disclosed to the Registrar the full extent of the charges the Applicant was facing. Thus, there can be no concern regarding the Applicant's disclosure of his criminal charges to the Registrar. There is, however, some concern regarding the full extent of the proposed employer's knowledge of the Applicant's outstanding charges. That concern can be ameliorated by attaching a condition to the registration, to which the Applicant at this hearing consented, that the full list of charges be signed off on by the proposed employer.

Finally, there are *bona fide* concerns regarding the Applicant's financial predicament. It is of note, however, that this is not a case where the Applicant has done nothing to improve his financial position. He has obtained a realtor's licence and taken every step he could to obtain a car salesman's licence. Presumably, these are steps which will lead to the extinguishing of the $10,000.00 family support obligations sooner than would occur if the Applicant settled for lower paying employment. Thus, this is not a case like *1302406 (c.o.b. Colson Motor Cars) (Re)* [2002] O.L.A.T.D. No. 268, where the dealership was sued by a group of consumers, in respect of car sales, and was ordered by judgment to pay $40,000.00 in damages. The dealer in *Colson* then took no steps to satisfy the judgment.

Thus, in conclusion, the Tribunal finds an absence of reasonable grounds upon which the Registrar could believe that the Applicant will not carry on business in accordance with law and with integrity and honesty. However, on the Applicant's consent, the Tribunal will order conditions in respect of clearing up any ambiguity regarding what the Applicant's proposed employer knows about his charges and ensuring that the Registrar be promptly apprised of the disposition of those charges and any others that may emerge.

The Tribunal does, however, find that having regard to the financial position of the Applicant, he cannot reasonably be expected to be financially responsible in the conduct of business. That is not to impute ill-motive on the Applicant. Simply put, his financial position (caused by family support arrears and recent and prolonged stints on social assistance during the last two years) is such that he is not in a position to manage his day-to-day affairs the way he could if he had been gainfully employed during these last two years. Again, these shortcomings can be addressed through a condition that, for a period of time, the Applicant not hold any managerial position with his employer. The Registrar, as an alternative submission to the submission that the appeal be dismissed, sought a long-term prohibition on the Applicant handling money or being in a position to obtain credit information. There is no evidence of any financial impropriety in the Applicant's past or any evidence of misuse of personal information. Thus, the Tribunal has rejected these proposed long-term prohibitions as they appear unfounded and may considerably hinder the Applicant's ability to make sales. A brief period where the Applicant is out of management, on the other hand, means that material transactions at the dealership will be the responsibility of someone else, thus allowing for enhanced accountability in the event of a problem.

The Tribunal wishes to add that all of the above is without prejudice to the Registrar seeking to issue a proposal in the event that the Applicant is convicted of the offences with which he is charged.

ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs that the Registrar not carry out the Notice of Proposal and further orders that the Registrar approve the registration of the Applicant as a salesperson, subject to the following conditions:

1. That the dealer with whom the Applicant is registered be provided with an up-to-date copy of a Criminal Background Check Results ("C.B.C.R.") in respect of the Applicant and forward a copy of that C.B.C.R. to the Registrar. The forwarded C.B.C.R. copy is to evidence, on its face, that the dealer is aware of all outstanding charges that the Applicant is facing;

2. That the Applicant advise the Registrar of the disposition by the trial court of the charges he is currently facing, within five business days of that disposition;

3. That the Applicant advise the Registrar in writing, within five business days, of any other charges that he is facing under any federal legislation or provincial legislation where the charge would fall under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P.33;

4. That the Applicant advise the Registrar in writing if he is charged, subsequent to the release of these reasons, with any charge of the nature described in paragraph 3 above. Such advice shall disclose the full extent of those charges and be delivered to the Registrar within five business days of the date of charge; and

5. That, for a period of one year from the date of the release of these Reasons, the Applicant is not to be employed with managerial roles or responsibilities with his registered dealer.

LICENCE APPEAL TRIBUNAL

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Richard Macklin, Vice-Chair

RELEASED: February 18, 2011

This decision may also be available on Quicklaw.

MOTOR VEHICLE DEALERS ACT, 2002
S.O. 2002, c. 30, Sch. B

JOSEPH RILEA SACRIPANTI-Consent Order

IN THE MATTER OF
JOSEPH RILEA SACRIPANTI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act, 2002*
TO REFUSE REGISTRATION
- Proposal dated: December 22, 2010

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

JOSEPH RILEA SACRIPANTI

- Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Tribunal by Joseph Rilea Sacripanti, the Applicant, and the Registrar, under the *Motor Vehicle Dealers Act, 2002* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar, under the *Motor Vehicle Dealers Act, 2002* as to the disposition of these proceedings which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon 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

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Lynda Tanaka, Chair

RELEASED: February 28, 2011

This decision, may also be available on Quicklaw.

SCHEDULE 'A'

TO: Licence Appeal Tribunal
1 St. Clair Avenue West, Suite 1200
Toronto, ON M4V 1K6

FROM: The Registrar
Motor Vehicle Dealers Act, 2002
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, Ontario M3C 1T5

AND FROM: Joseph Rilea Sacripanti
c/o Courtesy Ford Lincoln Sales Limited
684 Wharncliffe Road South
London, ON N6J 2N4

Pursuant to subsection 6(2) of the *Motor Vehicle Dealers Act, 2002*, Joseph Rilea Sacripanti (the "Applicant") and the Registrar*, Motor Vehicle Dealers Act, 2002*, (the "Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following terms and conditions:

1. The Applicant shall not be an officer, director, owner, partner, shareholder or investor in a dealership.

2. The Applicant further agrees not to apply to be a motor vehicle dealer.

3. The Applicant agrees not to be involved in the trading of motor vehicles without the benefit of registration.

4. The Applicant agrees if he is charged in the future, criminally or otherwise, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.

5. The Applicant confirms that the particulars and circumstances of his charge(s) and/or conviction(s) are substantially as disclosed to the Registrar and further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.

6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.

7. The Applicant agrees to pay any and all outstanding debts when due.

8. The Applicant further agrees to satisfy any unpaid collection accounts and to comply with the terms of any repayment schedules entered into.

9. The Applicant agrees not to drive in test drives without a valid driver's licence.

10. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances, his honesty, integrity or his ability to comply with law.

11. The Applicant will provide a copy of this order to his employer forthwith.

12. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the terms and conditions set out herein.

13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of this day of 2011.

_____
Joseph Rilea Sacripanti (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act, 2002.*

Date:

_____
Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MASOUD POURAZIZ – Order

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR, UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: MASOUD POURAZIZ, the Applicant, unrepresented, appearing by teleconference

YOVANKA McBEAN, Paralegal, representing the Registrar*, Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: March 2, 2011 Toronto

ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar, *Motor Vehicle Dealers Act, 2002* (the "Registrar" and the "Act" respectively). The Notice of Proposal dated July 14, 2010, proposed to refuse to grant the registration of Masoud Pouraziz (the "Applicant"), as a salesperson under the Act.

At the commencement of the hearing, the Applicant was not present in the hearing room. The Tribunal telephoned the Applicant and he was present thereafter by teleconference.

The Applicant had called a Tribunal staff member the day of the hearing, at approximately 9:15 a.m., saying that he knew the hearing was this month but he did not know the day. The Tribunal does not accept this explanation. The Applicant was present at the pre-hearing on November 30, 2010, when the original hearing dates of January 4 and 5, 2011, were adjourned to this date.

The Applicant said that he had an appointment with a lawyer that afternoon. Even if this were true, the Applicant left it too late to seek legal counsel. The Applicant said he could not proceed without a lawyer. The Tribunal told him that many applicants appear before this Tribunal without counsel.

Ms. McBean was present with her witnesses and opposed an adjournment but if one were to be granted she asked for costs.

The Tribunal makes the following order:

1. The hearing in this matter is adjourned *peremptory on the Applicant* to **Thursday, May 12, 2011**, commencing at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

2. The Tribunal invites the Registrar to comply with Rule 14 of this Tribunal's Rules of Practice and seek costs either before or on May 12, 2011.

3. The hearing will proceed on May 12, 2011, whether or not the Applicant is able to retain counsel.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: March 22, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

IOANNIS (JOHN) FLOROS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: IOANNIS (JOHN) FLOROS, the Applicant, unrepresented

SARAH AOUCHICHE, Student-at-Law, representing the Registrar, *Motor Vehicle Dealers Act, 2002* (the "Registrar")

DATE OF HEARING: February 7, 2011 Windsor

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 9 of the *Motor Vehicle Dealers Act, 2002* (the "Act"). The Proposal dated July 20, 2010, sets out the Registrar's reason for refusing to register Ioannis (John) Floros (the "Applicant") as a salesperson, as follows:

> The intention and objective of the Act is to protect the public interest. In doing so, the Act prohibits the making of false statements in an application for registration or renewal and requires that Applicants be financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. Ioannis (John) Floros's (*sic*) past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The particulars relied upon are set out in the Proposal and in the Notice of Further and Other Particulars dated December 16, 2010. In summary, the Registrar believes that the Applicant's 2007 plea of guilty to the offence of "Fraud Over", his non-compliance with the Restitution Order related to his fraudulent conduct, his failure to provide particulars of an outstanding judgment when asked, his subsequent failure to resolve

the outstanding judgment despite providing assurances and details of his intentions to do so, and finally, the fact that the Applicant has not completed his probation period, disqualify him from registration.

ISSUE

Is the past conduct of the Applicant inconsistent with the intention and objective of the Act and therefore warrants disentitlement to registration under the Act?

EVIDENCE

The evidence of the Registrar consisted of documentation and the oral testimony of Police Detective Mark Denomee, Robert Ward, the credit manager for Dan Kane Leasing, and Mary Jane South, Deputy Registrar.

The evidence of the Applicant consisted of documentation and his oral testimony.

There were no objections to any of the documents submitted to the Tribunal for consideration by either party. The Proposal was marked as Exhibit #1. The Notice of Further and Other Particulars dated December 16, 2010, was not initially marked as a separate exhibit as the Tribunal was advised by the Registrar's representative that it had been reproduced in the Respondent's Book of Documents - Volume 2, which was marked as Exhibit #4. Through inadvertence it would appear that a copy of the Notice of Further and Other Particulars was not included in that Book of Documents, and therefore, the Notice of Further and Other Particulars filed with the Tribunal was subsequently marked as Exhibit #4a.

The facts of this case are not in dispute. The Applicant engaged in conduct between July 12, 2004 and June 29, 2005, which resulted in his being charged with defrauding his then employer of an amount exceeding $5000. The Applicant was employed by a furniture store and was found to have been involved in over 80 fraudulent transactions involving consumers and furniture purchases. The Applicant was charged on or about August 12, 2005.

The Applicant had first applied for registration as a salesperson on or about June 27, 2005, prior to the charges noted above. The Registrar issued a proposal to refuse on October 7, 2005, which was not appealed.

The Applicant entered a plea of guilty of the offence of "Fraud Over" on November 21, 2007. He admitted to defrauding his employer of over $350,000. He was sentenced on or about July 14, 2008, to a conditional sentence of imprisonment for a period of two years less a day, to be followed by three years probation, and a Restitution Order for $355,284.95 was issued. The Applicant successfully completed the Conditional Sentence on July 12, 2010. The Probation portion of the sentence then commenced

and will be terminated on July 12, 2013. As of the time of these proceedings, the Applicant had repaid approximately $300.00 of the Restitution Order.

The Applicant submitted a second application for registration as a salesperson in March of 2010.[1] The Applicant proposed to work for his father. In his application form, the Applicant answered "Yes" to question 3, that there were "unsatisfied judgements (*sic*), court orders or collections currently pending" against him, and question 6, that he had "been found guilty or convicted of an offence". The application form required the Applicant to provide written details to explain his "Yes" answers. He provided a one and a half paged letter, dated March 17, 2010, in which he described how he had been suffering from an addiction to gambling since his graduation from high school and this addiction led to the fraud charges. The details provided related solely to his answer to question 6 and his criminal charges, and no details were provided as to the unsatisfied judgments, court orders or collections.

The Ontario Motor Vehicle Industry Council ("OMVIC") requested that the Applicant provide further particulars. In response, the Applicant sent a letter dated April 7, 2010,[2] explaining that he had returned a leased vehicle after 37 months of a 48 month lease. He did this as he believed it was the right thing to do at the time, given his financial situation. When subsequently asked about a judgment in favour of the lessor, the Applicant indicated that he had not been aware of an outstanding judgment. He acknowledged that he had been aware, through overdue notices, that there were monies owing. He stated in his April 16, 2010, letter to OMVIC that:

> i (*sic*) wish desperately to work a (*sic*) out a solution to finalize this matter with the leasing company in the future.

In a further letter to OMVIC dated April 26, 2010,[3] the Applicant reiterated that it had been OMVIC which had brought the judgment to his attention and stated that:

> Upon notification, i (*sic*) have implemented an affordable repayment schedule regarding this matter.

He indicated that he planned to contact the leasing company directly to determine the total amount owing, as his "figures" suggested a different amount owing. He then stated in this letter that:

> Upon a successful agreement by both parties, I will pay $1000.00 immediately, and commence with monthly payments to pay it off.

Mr. Ward testified that he first heard from the Applicant on February 2, 2011, after having received a summons for these proceedings. He stated that no monies have been received to date from the Applicant although he had provided the Applicant with an offer to settle on February 3, 2011, which offer was to expire on February 7, 2011.

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1 Exhibit #3, tab 8
2 Exhibit #3, tab 11
3 Exhibit #4, tab 14

He confirmed that a monthly invoice had been sent to the Applicant since his default, approximately 56 invoices in total.

At the outset of these proceedings, the Applicant indicated to the Tribunal that he had brought a bank draft with him to deal with the leasing judgment. The Tribunal called a brief recess to allow the Applicant to deal with this issue. Later, during his testimony, the Applicant produced the bank draft. The Applicant testified that he had borrowed the funds necessary to pay off this debt from family, and in his opinion, this was not a responsible act. He advised the Tribunal that he had not actually had the bank draft in hand at the outset of the hearing: it was not available to him until the lunch recess. Mr. Ward had testified and had left the proceedings before that time. At the end of the proceedings, it was not clear to the Tribunal what the Applicant's intentions were with respect to paying the creditor given his statements that he thought paying the debt with borrowed funds was irresponsible. Subsequently, the Tribunal was forwarded confirmation that the payment had in fact been made, which the representative for the Registrar subsequently verified.

In support of his application for registration and this appeal, the Applicant submitted a letter dated November 22, 2010, from his father, the Dealer with whom the Applicant has been employed for approximately six years. In his letter, the Applicant's father states that there have been no issues with the Applicant during his employment, that the Applicant has been successful in recovering from his addiction and that he now trusts the Applicant.

The Applicant also provided letters from his Probation Officer, a Problem Gambling Consultant, an individual with the Problem Gambling Services, an individual from Gamblers Anonymous, and a high school teacher in whose class the Applicant has volunteered on a number of occasions to speak to the negative effects of problem gambling. In summary, the Applicant has been cooperative, compliant and self-motivated in regard to the conditions of his sentence, he has taken and continues to take steps to deal with his addiction and has been successful in this regard. He also has been active in the education and support of others on this issue.

LAW

The Act states as follows:

> 5.1 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.
>
> 6. (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 ground 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 make a false statement or provided 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 43.

ANALYSIS

The issue before the Tribunal is whether the past conduct of the Applicant is inconsistent with the intention and objective of the Act and therefore warrants disentitlement to registration under the Act. The intention and objective of the Act is to protect the public interest. It requires that an applicant be financially responsible in the conduct of business and to conduct that business in accordance with the law and with integrity and honesty.

In denying the Applicant's registration, the Registrar has stated concern not only about the Applicant's fraud conviction and the limited effort he has made to pay off the Restitution Order, but also his reluctance to provide particulars regarding his debt to the leasing company and his failure to deal with the outstanding judgment relating to that debt. The Registrar is also concerned that any positive steps that have been taken with respect to paying the Restitution Order and leasing debt have been solely motivated by the desire to be registered and during a period when the Applicant is under significant supervision and scrutiny. The concern is of course that this may not be indicative of his conduct when not under supervision. Registration at this point is, therefore, considered by the Registrar to be premature, if appropriate at all.

The Tribunal accepts the Applicant's evidence that he has worked hard to overcome his gambling addiction and has been successful in keeping it under control. His supporters confirm that he is a changed and better man, husband and father.

The Applicant has explained that his fraud conviction was the direct result of an all consuming, judgment impairing addiction, and that the little progress on the repayment of the Restitution Order has been the result of his inability to pay. Unfortunately, these factors do not explain his conduct with respect to his outstanding debt to a car leasing company. This matter has been outstanding up until these proceedings and during a time where the Applicant was not under the influence of his addiction.

The Tribunal has noted a disconnect between what the Applicant has stated to be his intended actions and his actual conduct in regard to his judgment creditor. The Applicant was provided with over 50 notices of the debt over a number of years, although he claims not to have received any documents relating to the legal action that led to the judgment. When advised of the judgment, he indicated in writing to OMVIC, in April of 2010, that he was "desperate" to settle the matter and that he had worked out a repayment schedule. He gave the impression that he was intending to start addressing this issue immediately. This is not what he did. He made no efforts to either contact the creditor or pay anything. It was only on February 2, 2011, days before these proceedings, that he took action. If he was not in a financial position to pay this debt, then that is what he should have said.

The Applicant stated to the Tribunal, more than once in his testimony, that honesty is an absolute: that a person is either honest or not. The Tribunal respectfully suggests that being "honest" includes saying what you mean and meaning what you say. The ability to be forthright, even when it is not to one's benefit, is essential in the industry in which the Applicant wishes to work.

The Applicant's fraud conviction is not a bar to his registration; however, it has obviously brought his ability to be financially responsible and carry on business with honesty and integrity into question. Unfortunately, his persistent lack of response to the demands of a legitimate creditor, until forced to do otherwise, and the apparent disconnect between his statements and actions on this point, has done nothing to promote or restore confidence in his ability to conduct himself in a manner consistent with the Act.

Given the facts, the Tribunal finds that registration of the Applicant would be premature, as insufficient time has lapsed to establish confidence in the Applicant's ability to act in compliance with the intention and objective of the Act. It would be appropriate and in the best interest of the public, that the Applicant be required to at least successfully complete his probationary period before being considered for registration.

Although not raised by the Applicant, the Tribunal did consider whether registration with conditions might be sufficient to ensure the Applicant's future conduct is consistent with the intention and objective of the Act. In this particular case, the Applicant proposes to work for his father, who, the Tribunal has no doubt, is a man of honesty and integrity. This gentleman has already done what many a parent could not do, expose his son's wrongdoing. Although he may be able to do so again, the Tribunal does not believe that the best interest of the public would be served in placing the monitoring responsibility of the Applicant on this gentleman at this time.

DECISION

By virtue of the authority vested in it pursuant to the provisions of section 9(5) of the Act, the Tribunal directs the Registrar to carry out the Proposal, dated July 20, 2010, to refuse the registration of the Applicant, as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

_____
Elizabeth L. Sproule, Vice-Chair

RELEASED: March 16, 2011

This decision may also be available on Quicklaw.

MOTOR VEHICLE DEALERS ACT, 2002
S.O. 2002, c. 30, Sch. B

BLUE MOUTAIN CHRYSLER LTD.; SLY, KEVIN M.; BROWN, TERRANCE R.

IN THE MATTER OF

BLUE MOUTAIN CHRYSLER LTD.; SLY, KEVIN M.; BROWN, TERRANCE R.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act, 2002*
TO REVOKE AND REFUSE REGISTRATION
- Proposal dated: August 18, 2010

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

BLUE MOUTAIN CHRYSLER LTD.; SLY, KEVIN M.,; BROWN, TERRANCE R.
- Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*
- Respondent

CONSENT ORDER

Upon the application to the Tribunal by BLUE MOUTAIN CHRYSLER LTD.; SLY, KEVIN M.,; BROWN, TERRANCE R., the Applicants, and the Registrar, under the Motor Vehicle Dealers Act, 2002 for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar, under the *Motor Vehicle Dealers Act, 2002* as to the disposition of these proceedings which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon 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: March 22, 2011

This decision may also be available on Quicklaw.

SCHEDULE "A"

TO: The Licence Appeal Tribunal
1 St. Clair Avenue West, Suite 1200
Toronto, ON M4V 1K6

FROM: The Registrar
Motor Vehicle Dealers Act, 2002
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND FROM: Blue Mountain Chrysler
9950 Highway 26 East
Collingwood, ON L9Y 3Z1

AND: Kevin M. Sly

AND: Terrance (Kip) R. Brown

Pursuant to subsection 6(2) of the *Motor Vehicle Dealers Act, 2002* (the "Act"), Kevin M. Sly, Terrance R. Brown and Blue Mountain Chrysler ("the Registrants") and the Registrar, *Motor Vehicle Dealers Act, 2002*, ("the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following terms and conditions:

1. By initialing, Kevin M. Sly confirms that he has authority to bind Blue Mountain Chrysler

   Initials: ____

2. The parties consent to resolving the Proposal to revoke and refuse the registrations of the Registrants on these terms and conditions.

3. These terms and conditions shall be in force from the date of signing for a period of two (2) years.

Trade in motor vehicles

4. The Registrants will ensure that all personnel, agents, assignees or anyone acting on behalf of the Registrants to trade motor vehicles shall be registered as a salesperson to the Registrants.

5. The Registrants further acknowledges that the restrictions concerning the activities of salespersons referred to in these Terms and Conditions apply to trading on behalf of the Registrants. "Trading" refers to buying, selling, leasing, advertising or exchanging an interest in a motor vehicle or negotiating or inducing or attempting to induce the buying, selling, leasing or exchanging of an interest in a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auction on behalf of the Registrants and positions commonly referred to as Sales Manager, Finance and Insurance Manager, Branch Manager, Business Manager, General Manager or any individual who has supervisory authority over salespersons.

6. The Registrants will insure that any lease and credit agreements they use are compliant with the *Consumer Protection Act, 2002*.

7. The Registrants agree to comply with OMVIC's "Best Practices for Retail Consignments". By initialing, the Registrants confirm that they have read and understood this document:

   Kevin M. Sly: ____
   Terrance M. Brown: ____

8. Upon signing a new lease, the Registrants agree to provide consumers with a current safety standards certificate for the leased vehicle.

9. The Registrants will ensure that all personnel, agents, assignees or anyone acting on behalf of the Registrants are informed concerning the terms and conditions contained in this document to the extent necessary to ensure compliance with these terms and conditions.

DISCLOSURE

10. The Registrants agree that they are under a positive obligation to disclose **in writing on the bill of sale** all material facts about the vehicles they sell or lease to customers, whether or not the Registrants agree with the disclosure and whether or not the vehicle has been branded through the Ministry of Transportation. "Material facts" include, but are not limited to, disclosure of salvage, previous salvage, accidented and repaired, frame damage, theft recovery, unibody damage, previous taxi cab, previous police car, **previous daily rental**, previous limo or Emergency Service Vehicle, insurance write-off and any other material fact which, in the Registrar's opinion, may affect a decision to purchase or lease the vehicle. In the case of damaged vehicles, the Registrants further agree to disclose as much detail as possible with respect to the nature and severity of the damage in order to ensure compliance with Section 42 of the Regulations. The Registrants will make reasonable efforts to research the history of all their vehicles prior to sale to ensure all material facts are disclosed.

11. Furthermore, and without limiting the generality of the foregoing, the Registrants agree to provide consumers with a "Carproof" vehicle history, and to review it with the consumer.

Other

12. The Registrants agree that, if they receive a consumer complaint which they are unable to resolve, they will notify the Registrar in writing within 10 business days.

13. The Registrants understand that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Registrants. The Registrants confirm that all documents, information or statements provided to the Registrar are true to the best of the Registrants' knowledge and belief and that the Registrants have given full answers to all questions and requests made by the Registrar in connection with the Registrants' registration.

14. The Registrants acknowledge that the Registrar may take further administrative action, including a proposal to revoke registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.

15. The Registrants acknowledge that they have obtained or had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out herein.

16. The Registrants hereby consent to an Order of the Licence Appeal Tribunal including the Terms and Conditions set out herein

Signed in the City of _____ this _____ day of _____ 20_____.

_____
Kevin M. Sly (please print)

_____
(Signature) I have authority to bind the dealership.

_____
Kevin M. Sly (please print)

_____
(Signature)

_____
Terrance M. Brown (please print)

_____
(Signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act, 2002.*

Date:

_____
Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ALI YOUSSEF

AN APPEAL FROM A NOTICE OF PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: ALI YOUSSEF, the Applicant, unrepresented

SARAH AOUCHICHE, Student-at-Law, representing the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: February 4, 2011 London

REASONS FOR DECISION AND ORDER

BACKGROUND

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal (the "Proposal") issued by the Registrar, *Motor Vehicle Dealers Act, 2002* (the "Registrar" and the "Act" respectively). The Proposal dated August 18, 2010, proposed to refuse to grant the registration of Ali Youssef (the "Applicant"), as a salesperson under the Act.

FACTS

The reasons that the Registrar issued the Proposal, and the Particulars thereof, are stated in the Proposal itself, found at Tab 1 of Exhibit #3.

In effect, the Registrar alleged that there were reasonable grounds for belief 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 9 of the *Motor Vehicle Dealers Act, 2002* (the "Act") the Registrar is proposing to refuse the registration of Ali Youssef as a motor vehicle salesperson under the Act.

REASONS

The intention and objective of the Act is to protect the public interest. In doing so, the Act prohibits the making of false statements in an application for registration or renewal and requires that Applicants be financially responsible in the conduct of business and that they carry on business in accordance with the law and with integrity and honesty. Ali Youssef's past conduct and financial position are inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The particulars on which the Registrar relied are as follows:

PARTICULARS

The reasons for this proposal are:

1. Ali Youssef (the "Applicant") applied for registration as a motor vehicle salesperson on or about July 14, 2010. The Applicant proposes to work for Gabies Paint & Auto Sales Ltd.

2. On the application to become a registered salesperson Question 6 asks:

   "Have you ever been found guilty or convicted of an offence under any law, or are there any charges pending?"

   The Applicant answered "Yes" and provided a written explanation on a separate sheet.

A criminal history search revealed that the Applicant engaged in conduct which resulted in a finding of guilt for several offences, the most recent being in June 2005.

The particulars also state:

4. On the application to become a registered salesperson Question 3 asks:

   "Are there any unsatisfied judgements (*sic*), court orders or collections currently pending against you?"

   The Applicant checked "Yes".

5. As part of the sentencing for the applicant's 2005 Theft under (*sic*) $5000 and conspiracy was a restitution order in the convictions for the amount of $44,951.27. To date, this amount remains outstanding as the Applicant has not fulfilled the required payments.

6. The Applicant has failed to comply with the Act, in particular section 6.

In addition to the Proposal, the Registrar served and filed a Notice of Further and Other Particulars, dated November 29, 2010, as a result of further information having come to the attention of the Registrar. The further particulars, found at Tab 2 of Exhibit #3, state:

> 7. A search of Companies Branch database, revealed that Youssef Ali o/a Cellular Accessories ("Cellular Accessories") is sole proprietorship, which was registered on or about April 15, 2009.
>
> (*sic*)9. On or about November 3, 2010, a search of the records of the Ministry of Transportation ("MTO") revealed that between August 2009 and September 2010, Cellular Accessories has been involved in the trading of at least fourteen (14) motor vehicles without the benefit of registration in contravention of the Act.
>
> 10. On or about November 3, 2010, a search of the records of the MTO revealed that between November 2001 and October 2010, the Applicant has been involved, through his personal capacity, in the trading of at least sixteen (16) motor vehicles without the benefit of registration in contravention of the Act.

The Applicant appealed to this Tribunal.

The Registrar based its refusal on three main issues: (1) the Applicant's past criminal record; (2) the Applicant's late restitution payment to his previous employer; (3) the repeated curbsiding conducted by the Applicant.

In response, the Applicant submitted that he has been crime-free for the last five years, and has not committed any offences in that period of time. Further, he paid the restitution to his previous employer in a lower amount than the Court had ordered, but in an amount on which he and his previous employer agreed. Lastly, he denied that he was curbsiding.

Evidence of Ralph Bayley

Mr. Bayley is an investigator with the Ontario Motor Vehicle Industry Council ("OMVIC"). OMVIC is responsible for administering the Act. Its mandate includes its responsibility to maintain a fair, safe and informed marketplace in Ontario by protecting the rights of consumers.

Mr. Bayley deals with complaints that arise under the Act and with violations of the Act for which he can also charge wrongdoers. He is a 33-year veteran of the Toronto Police Service and began to work for OMVIC in 2001 after retiring from the police force.

His evidence dealt with the issue of curbsiding. The term "curbsiding" is used in the motor vehicle industry to refer to an individual who buys and sells vehicles when that person is not registered as a salesperson under the Act. Buying from a curbsider is a very serious matter because a consumer who purchases from a curbsider does not have the protection offered to consumers under the Act, and has no recourse to the compensation fund under the Act.

Mr. Bayley came across the Applicant and the Applicant's business while he was investigating another matter entirely. When he checked some Vehicle Identification Numbers, he came across a business that the Applicant owned. He discovered that the Applicant's business owned and then sold numerous vehicles, but that neither the Applicant nor the Applicant's business had been registered under the Act to sell vehicles. The legal department at OMVIC had not been aware of this activity on the Applicant's part. Mr. Bayley then further discovered that the Applicant was the subject of this current appeal before this Tribunal.

Mr. Bayley then began to suspect that the Applicant was engaged in curbsiding. The factors that he considers in a curbsiding investigation include the volume of vehicles sold, the length of time they were owned by the seller, whether licence plates had been issued for the vehicles before their sale and whether the vehicles had been insured. A high volume of sales after a short ownership period is not normal behaviour, according to him, because most people own their vehicles for several years.

Through his searches, Mr. Bayley discovered that the Applicant was the sole proprietor of a business registered with the Ontario Ministry of Consumer and Commercial Relations on April 15, 2009. In Tabs 10 to 29, inclusive, of Exhibit #3 are Bills of Sale confirming twenty sales of vehicles within a nineteen-month period from a salvage company to the Applicant's business. The first sale occurred on June 5, 2009, less than two months after the Applicant's business was registered, and the last sale was shown to have occurred on November 1, 2010. In fact, the last three sales took place on August 10, 2010, September 7, 2010, and November 1, 2010. The vehicle that the Applicant purchased on August 10, 2010, was later sold to a consumer on September 7, 2010. The dates after July 2010 are significant because it was on July 14, 2010, that the Applicant applied to be registered under the Act, after he had successfully completed the training course that OMVIC requires all registrants to take. The fact that the Applicant had not yet been registered under the Act but had subsequently sold a vehicle without first being registered was a violation of the Act and a serious concern to OMVIC.

Mr. Bayley then testified about conversations that he had with four consumers who had purchased vehicles from the Applicant before he was even registered under the Act to sell vehicles. The content of the discussions, together with the registration details of the vehicles that the consumers had purchased, are found at Tabs 31 to 34, inclusive, of Exhibit #4. Mr. Bayley detailed a pattern of behaviour that he considered to be curbsiding.

Without detailing each individual transaction, the pattern took the following form in all four cases. The Applicant's business bought a vehicle from a salvage company. The vehicles had previously been written off by the insurance companies that had insured them, so that the vehicles were all branded as "salvage". According to Mr. Bayley, only a business, not an individual, could buy a salvage vehicle. The Bills of Sale all stated that the vehicles were sold "as is where is" and without any warranties. The purchaser in all four sales was the Applicant's business.

Mr. Bayley filed photographs showing the damage to each vehicle sold. The photos were filed as Exhibits #7 to #10, inclusive. The vehicles were still in their damaged state when the Applicant's business purchased them.

The Applicant did not obtain a licence plate for any of the vehicles either in his name or in the name of his company, to indicate that the vehicle was for his personal use. He then sold each vehicle to a consumer. The consumers all confirmed that it was the Applicant who sold the vehicles to them.

In one case (Tab 31), the Applicant sold the vehicle to a consumer on November 9, 2009, the very same day that his business bought it from the salvage company (see Tab 16, Exhibit #3 for the date on which the vehicle was transferred into the name of the consumer).

In another case (Tab 32), the Applicant's business purchased the vehicle on August 7, 2009. It was then registered in the name of the Applicant on October 20, 2009, who then sold it to a consumer on November 2, 2009 (see Tab 13, Exhibit #3).

In another case (Tab 33), the Applicant's business purchased the vehicle on August 10, 2010. It was then registered in the name of the Applicant on August 12, 2010, who then sold it to a consumer on September 7, 2010 (see Tab 27, Exhibit #3). This was the transaction that occurred after the Applicant had completed the OMVIC exam and after he had applied to be licensed as a salesperson under the Act on July 14, 2010, but had not yet been registered. Having completed the course successfully, he should have been aware of the need for registration by July 2010, at least.

In the final case that Mr. Bayley detailed (Tab 34), the Applicant's business purchased the vehicle on December 14, 2009. It was then registered in the name of the Applicant on December 15, 2009, who then sold it to a consumer on February 11, 2010 (see Tab 20, Exhibit #3).

After he detailed each transaction, Mr. Bayley stated that he concluded that the Applicant was curbsiding, considering the factors that he outlined previously.

In addition, Mr. Bayley testified that the Applicant was acting as an unregistered salesperson. As well, two of the consumers had told Mr. Bayley that they had not been told of the damaged condition of the vehicle that each had purchased from the Applicant. This failure to inform the consumer is also a breach of the Act. Therefore, Mr. Bayley also testified that the Applicant had engaged in an unfair business practice.

Many of the questions that the Applicant asked of Mr. Bayley during his cross-examination dealt with whether a person would know if it was illegal to curbside. Mr. Bayley replied that it would be logical for someone to "do their homework" (to use his words) and make enquiries about the matter before selling a vehicle. There are advertisements and pamphlets available from OMVIC. As well, OMVIC has its own website.

A person could also make enquiries at the Ministry of Transportation or ask an existing car dealer. There is also the OMVIC certification course that makes the registration requirement quite clear. It was this course that the Applicant had successfully completed.

Evidence of Mary Jane South

Ms. South is the Deputy Registrar under the Act. It is her responsibility to deal with complaints under the Act and to oversee the registration of motor vehicle dealers and salespersons under the Act.

She explained that OMVIC administers the Act, which she characterized as public protection legislation.

Her testimony dealt mainly with the Applicant's criminal record and his outstanding restitution Order.

She confirmed that the Applicant signed his application for registration as a salesperson on July 14, 2010, and that the OMVIC office received it the following July 26. She explained that the application is the first test for any applicant of the applicant's honesty and integrity. The application must be made before a person conducts any activities under the Act because all applicants must first be approved by OMVIC. The reason that applicants must reveal whether they have a criminal record is so that OMVIC can assess the person's conduct and assess the person's compliance with the law. The fact that the Applicant disclosed his entire criminal record correctly was not enough to satisfy OMVIC, because OMVIC still had to consider the person's conduct and determine whether the Applicant had taken responsibility for that conduct. In this case, considering the explanations that the Applicant gave for his criminal record (Tab 4, Exhibit #3, page 23), Ms. South was not satisfied that the Applicant took responsibility for his actions. The Tribunal notes that, in the Applicant's Notice of Appeal, filed a little over one month after he submitted his application, the Applicant provided a different response concerning his record; namely, that he took full responsibility for his actions.

The Applicant's criminal record covered a period of six years. The three most troublesome convictions for OMVIC were (1) a conviction in 2004 for possession of property obtained by crime under $5,000.00; (2) a conviction three months later in 2004 for theft under $5,000.00; (3) and a conviction in 2005 for theft over $5,000.00. This last conviction was particularly troublesome because the Applicant had committed the crime against a financial institution that was his employer at a time that the Applicant was in a position of trust.

Ms. South further pointed out that the Applicant's explanation for that offence (Tab 4, Exhibit #3, page 23) was that he did not realize that it was improper to move money from one account to another at the request of a cousin. Ms. South considered that that reason was just "not plausible", to use her wording.

In all, the Tribunal notes that there were a total of eight criminal convictions against the Applicant.

OMVIC considered that the convictions suggested a lack of honesty and integrity.

Ms. South then confirmed that the Applicant completed the OMVIC certification course sometime before he submitted his application for registration. A grade of 60% is needed to pass. Subsequent evidence before this Tribunal revealed that the Applicant obtained a grade of 75%. The completion of the course does not automatically entitle an applicant to registration. An applicant must first be approved by OMVIC. Ms. South emphasized that the course instructs the person taking the course that a person must first be registered as a salesperson before the person can sell vehicles. It also emphasizes the need for disclosure to a consumer (such as if a vehicle was branded as salvage) and outlines the information that is to be included in a proper Bill of Sale. In the case of this Applicant, Ms. South expressed concern that the evidence indicated that he did not inform the consumers to whom he sold the vehicles of the salvage status of the vehicles.

She further stated that it is common knowledge that a person must be registered in order to sell vehicles so that she did not accept the Applicant's explanation that he did not know he had to be registered. In fact, on the subsequent cross-examination of the Applicant by the Registrar's representative, the Applicant acknowledged that he had worked for a dealership for about 1½ years before he even took the certification course and knew from the dealer that he (the Applicant) had to be registered before he could sell vehicles.

On the Applicant's cross-examination of Ms. South, the Applicant emphasized that the information on his application form was correct, thus showing honesty. However, Ms. South stated that the information on the application form, alone, was not sufficient and that other factors that she outlined in her examination-in-chief were also to be considered. She further stated that she was concerned that there was a restitution Order made in 2005 in the amount of $44,951.27 that was still outstanding at the time of the application, on July 14, 2010.

The Applicant then pointed out to Ms. South that his business dealt in cellular phone accessories and repair, and that that kind of business did not involve the sale of vehicles. Ms. South agreed, but further pointed out that, despite the description of the work to be done by the Applicant's business, as stated in the business registration documents (Tab 6, Exhibit #3, page 27), the actual activity of the business was buying salvaged vehicles and re-selling them.

In addition, when describing his employment history in the application form, the Applicant made no mention whatsoever of his cellular phone business. Despite the Applicant's assertion that the reason for that was that the cellular phone business was just a hobby, Ms. South replied that the business was more than just a hobby because the Applicant actually made the effort to register that business with the appropriate government ministry.

Evidence of the Applicant

The Applicant himself was the only person to testify on his behalf. His testimony-in-chief was very short. He was very passionate in his presentation and appealed to this Tribunal to grant his appeal on compassionate grounds. He was recently married and supports not only his wife but also other family members and siblings. He is an engineer by training and has a passion for cars. He feels he can do well financially if he were allowed to sell vehicles. He stated that he is even willing to submit to any conditions that this Tribunal might impose on his registration.

He stressed that he had been honest in completing his application form. Despite his criminal record, he emphasized his age difference between the present and when the crimes were committed. He testified that he is now a changed person, having been crime-free for the last six years. He admitted the accuracy of the criminal record filed with this Tribunal.

On the question of the outstanding restitution Order, he stated that he paid to his former employer the sum of $3,900.00 on March 20, 2007. Subsequently, after negotiating with that former employer, he paid the sum of $10,000.00 on January 11, 2011, in full and final satisfaction and settlement of the restitution Order. A letter from that employer, found at page 1 of Exhibit #6, confirms that settlement. The Applicant stated that the former employer agreed to this settlement on compassionate grounds, although there was no evidence presented to this Tribunal to substantiate that.

The Applicant acknowledged that the Registrar considers that the payment in January 2011, was only in response to OMVIC's refusal to grant his application for registration by way of the Proposal that was dated August 18, 2010. But, the Applicant stated that the payment was not made just to satisfy OMVIC, but was also made so that he could now buy a house for him and his wife, and, in doing so, satisfy a promise he made to his father-in-law.

He stated that he takes full ownership for the crimes that he committed. He also stated that he did not know it was illegal to buy and sell vehicles before he wrote the certification test. However, as stated earlier in these reasons, by his own admission, he acknowledged, during his cross-examination, that the dealer for whom he worked for 1½ years before taking the test had made him aware of that.

On a vigorous and relentless cross-examination by the representative for the Registrar, the Applicant acknowledged as accurate all the sales of vehicles to his business by the salvage company, and documented in Tabs 10 to 29 of Exhibit #3.

He admitted that his business purchased the vehicles, that they were all branded "salvage", and that he then sold them to consumers. The Applicant, to his credit, did not deny that the transactions documented in Tabs 31 to 34 in Exhibit #4 actually occurred.

At first the Applicant stated that he did not know that he did not qualify automatically to sell vehicles after passing the certification exam successfully. Subsequently, after the Registrar's representative referred him to a letter that he received after passing the test, he admitted that he knew he had to apply to OMVIC to sell vehicles, as the letter stated. The letter was not filed as an Exhibit.

He also admitted, as has been stated already in these reasons, that, having worked for a dealership for 1½ years before he took the certification exam, he knew he had to be registered as a salesperson before he could sell vehicles.

Certainly, by the time he completed the application form on July 14, 2010, he stated that he knew that he had to be registered before he could sell vehicles. Yet, despite this knowledge, and in response to questioning from this Tribunal, the Applicant admitted that his company still purchased a vehicle from the salvage company on August 10, 2010, and sold it on September 7, 2010; that is, after he completed the exam and made application for registration. In response, the Applicant stated that the vehicle was for personal use and that the majority of the vehicles that were purchased were for personal use.

The Registrar's representative also pointed out that the Applicant gave an incorrect amount in his appeal (Tab 3, Exhibit #3, page 8), when he said that he paid $5,000.00 against his restitution Order, whereas, in fact, he actually paid only $3,900.00.

The Registrar's representative also pointed out that the Applicant's payment to his former employer in the amount of $10,000.00 on January 11, 2011, as a complete settlement of the restitution Order, occurred only after the pre-hearing in this matter on January 4, 2011. In view of the Applicant's delayed payment, OMVIC had concerns about his willingness to obey a Court Order. The Applicant stated that there were family reasons for paying off the outstanding debt, and that he was not just trying to satisfy OMVIC.

The Registrar's representative also questioned why the Applicant did not refer to his business in setting out his employment history in his application. He stated that the business was just a hobby. However, the Registrar's representative pointed out that the Applicant made the effort to register it, and that it was that business that actually purchased all the vehicles referred to in the material filed with this Tribunal.

In response to the Applicant stating that he has been crime-free for the last six years, the Registrar's representative reminded him that, in that period of time, he bought and sold vehicles without being registered, contrary to the Act. The Applicant responded, as he did on several occasions during this hearing, that he believed he had to be registered only if he worked at a dealership.

The Tribunal notes that this is contrary to the provisions of section 4(1)(b) of the Act, set out below. The Applicant subsequently stated that he now knows that it is illegal to sell vehicles if he had not purchased them for personal use.

In response to his cross-examination, the Applicant stated that his business was created to sell cell phones and was registered only to claim and pay the necessary government taxes. It was not intended to buy and sell cars. However, he stated that someone (whom he did not identify) from the salvage company told him that he could use his business to purchase vehicles from that company.

He further stated that he had not been employed as a salesperson at the dealership where he worked for 1½ years before he took the exam. He was only a "lot boy" who performed errands around the dealership.

He also repeated that the payment of the restitution Order on January 11, 2011, was prompted by family matters and not by OMVIC's initial refusal of his application for registration, nor by the pre-hearing having been held on January 4, 2011.

THE LAW

The Act states in part as follows:

> **Prohibition**
>
> 4. (1) No person shall,
>
> (a) act as a motor vehicle dealer unless the person is registered as a motor vehicle dealer under this Act; or
>
> **(b) act as a salesperson unless he or she is registered as a salesperson.**
>
> (Emphasis is added)
>
> **Name and place of business**
>
> (2) A motor vehicle dealer shall not,
>
> (a) carry on business in a name other than the name in which the motor vehicle dealer is registered; or
>
> (b) invite the public to deal in a place other than the place that is authorized in the registration of the motor vehicle dealer.

Unregistered salesperson

(3) A motor vehicle dealer shall not retain the services of a salesperson unless the salesperson is registered in that capacity.

Supply to unregistered person

(4) A motor vehicle dealer shall not supply motor vehicles to another motor vehicle dealer for the purpose of trading in motor vehicles unless the other motor vehicle dealer is registered in that capacity.

Salespersons

(5) A salesperson shall not trade a motor vehicle on behalf of a motor vehicle dealer unless the salesperson is registered to that dealer.

Regarding the right to registration, the Act states:

Registration

6. (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

...

Refusal to register, etc.

8. (1) Subject to section 9, 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 6.

Conditions

(2) Subject to section 9, the registrar may,

(a) approve the registration or renewal of a registration on such conditions as he or she considers appropriate; and

(b) at any time apply to a registration such conditions as he or she considers appropriate.

Notice re: refusal, suspension, etc.

9. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(a) refuse under subsection 8 (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.

Content of notice

(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.

ISSUE

The issue that this Tribunal is called upon to determine is as follows:

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?

APPLICATION OF LAW TO FACTS

(a) <u>The question of curbsiding</u>

Section 4(1)(b) of the Act is clear and unambiguous. No person shall act as a salesperson unless he or she is registered as a salesperson.

The evidence discloses, and the Applicant admits, that his business, of which he was the sole proprietor, purchased, over a period of 19 months, the 20 vehicles documented in the material presented to this Tribunal. The Applicant stated that he did not have to be registered unless he was selling cars for a dealership. That is not what section 4(1)(b) states. Yet, by his own admission, he acknowledged that he knew, even before he wrote the certification exam, that he had to be registered as a salesperson before he could sell vehicles.

He also stated that the majority of the vehicles were purchased for personal use, thereby exempting him from registration. However, the evidence reveals that he sold vehicles, at least those documented in Exhibit #4, without having first plated them in his name or in his business name. He also sold them very soon after acquiring them. To say that he bought them for personal use, therefore, in the circumstances of this case, stretches reason, common sense and credibility. There was a high volume of purchases by the Applicant's business in a nineteen-month period. The Applicant owned, for only a short period of time, the four vehicles that Mr. Bayley had investigated. The Applicant had not even plated them before selling them.

Considering this evidence, and considering the factors that Mr. Bayley uses in determining whether curbsiding has occurred, the Tribunal is satisfied, on a balance of probabilities, that the Applicant was engaged in curbsiding. He was acting outside the parameters of the legislation.

In doing so, the Applicant deprived the consumer purchasers of those vehicles of the protection offered by the Act. He did not even tell them of the salvage status of those vehicles, as he must do under the Act. This failure should not be allowed to happen. The Act is consumer protection legislation, and, therefore, should be given a fair, large and liberal interpretation to protect the consumer. Section 64(1) of the *Legislation Act, 2006*, S.O 2006, c.21, Sch. F, states as follows:

> 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.

In view of the finding that the Applicant was engaged in curbsiding, and considering that the object of the Act is consumer protection, as Ms. South testified, this Tribunal is satisfied that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

(b) Criminal Record and Outstanding Restitution Order

Ms. South expressed particular concern over three particular criminal convictions of the Applicant. One involved possession of property obtained by crime “under $5,000.00”, another involved “theft under $5,000.00” and a third involved “theft over $5,000.00”. The third conviction referred to involved theft from the Applicant’s employer while he was in a position of trust. The Applicant blamed that conduct on his immaturity. However, this Tribunal considers that he should have known that theft from an employer is just plain wrong. He did not conduct himself in accordance with law. The consumer public should be protected from such conduct as much as may be possible. He displayed a lack of honesty toward his employer. That type of activity demonstrates dishonesty and conduct that is not in accordance with law.

The Applicant states that he is a changed person since the last date of those convictions. He states that he has been crime-free for the last six years. While it may be true that he has not been convicted in that period of time of any criminal offence, he still has violated the law by selling vehicles without first being licensed. The evidence discloses that he knew he had to be licensed. His time working at the dealership made him aware of that. The certification course made him aware of that; yet he still bought and sold a vehicle after completing the course. He states that the vehicle involved in that sale was for personal use, and, therefore, he would be exempt from registration. However, as this Tribunal has already held, the fact that he owned it for such a short period of time and the fact that he did not plate it belies his assertion of personal use.

The Tribunal is also concerned that the Applicant allowed the restitution Order to be outstanding for six years, with only one payment made on it in that period of time. The timing of the final settlement of $10,000.00 is suspect, inasmuch as it was made within one week of the pre-hearing in this matter. The Tribunal is not satisfied that such conduct is that of a person acting with honesty and integrity.

Once again, it must be stated that the Act is consumer protection legislation. In view of his convictions for some very serious matters touching on the Applicant's honesty, and the length of time he waited in order to comply with a Court Order to pay restitution, this Tribunal concludes that the Registrar has satisfied the Tribunal, on a balance of probabilities, that the past conduct of the Applicant arising from the criminal convictions affords grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Applicant stated that he would be willing to comply with conditions that this Tribunal might see fit to impose. The Registrar vigorously opposed the imposition of any conditions. The Registrar argued that there is a letter of reference, dated January 17, 2011, and found in Exhibit #6, from a dealership at which the Applicant had been employed. However, although the dealership owner stated that he would be willing to give the Applicant a job at the dealership, he did not go so far as to state that he would be willing to take the Applicant on as an employee if conditions were imposed on the Applicant's registration.

Furthermore, the Applicant filed, as Exhibit #11, another letter of reference, dated January 12, 2005. However, in addition to the letter having been written six years previously, it is not from an automobile dealer.

In addition, the Tribunal notes that the Applicant's violations of the Act were numerous. Six of the purchases by his business occurred within less than one year before this hearing. Before considering the imposition of any conditions, and considering the consumer protection purpose of the Act, the Tribunal would prefer to see a longer period of time within which the Applicant has demonstrated honesty and integrity, before he is licensed.

ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out the Proposal to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

_____
Kenneth W. Koprowski, Vice-Chair

RELEASED: March 7, 2011

This decision may also be available on Quicklaw.

MOTOR VEHICLE DEALERS ACT, 2002
S.O. 2002, c. 30, Sch. B

WINDSOR AUTO CONNECTION LTD-Consent Order

IN THE MATTER OF
WINDSOR AUTO CONNECTION LTD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act, 2002*
TO REFUSE REGISTRATION
- Proposal dated: October 1, 2010

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

WINDSOR AUTO CONNECTION LTD
- Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*
- Respondent

CONSENT ORDER

Upon the application to the Tribunal by Windsor Auto Connection Ltd, the Applicant, and the Registrar, under the *Motor Vehicle Dealers Act, 2002* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar, under the *Motor Vehicle Dealers Act, 2002* as to the disposition of these proceedings which is filed and attached hereto as Schedule “A”;

NOW THEREFORE, upon 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: March 2, 2011

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

SCHEDULE 'A'

TO: The Licence Appeal Tribunal
1 St. Clair Avenue West, Suite 1200
Toronto, ON M4V 1K6

FROM: The Registrar
Motor Vehicle Dealers Act, 2002
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND FROM: Windsor Auto Connection Ltd.
1375 Crawford Avenue West
Windsor, ON N8X 2A7

AND: Fulvio Faroni

Pursuant to subsection 6(2) of the *Motor Vehicle Dealers Act, 2002* (the "Act"), Fulvio Faroni and Windsor Auto Connection Ltd. ("the Registrants") and the Registrar, *Motor Vehicle Dealers Act, 2002*, ("the Registrar"), in accordance with section 4.1 of the *Statutory Powers Procedure Act*, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following terms and conditions:

1. By initialing, Fulvio Faroni confirms that he has authority to bind Windsor Auto Connection Ltd.

2. The parties consent to resolving the Proposal to refuse the registrations of the Registrants on these terms and conditions.

3. These terms and conditions shall be in force from the date of signing for a period of two (2) years.

Trade in motor vehicles

4. The Registrants will ensure that all personnel, agents, assignees or anyone acting on behalf of the Registrants to trade motor vehicles shall be registered as a salesperson to the Registrants.

5. The Registrants further acknowledges that the restrictions concerning the activities of salespersons referred to in these Terms and Conditions apply to trading on behalf of the Registrants. "Trading" refers to buying, selling, leasing, advertising or exchanging an interest in a motor vehicle or negotiating or inducing or attempting to induce the buying, selling, leasing or exchanging of an interest in a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auction on behalf of the Registrants and positions commonly referred to as Sales Manager, Finance and Insurance Manager, Branch Manager, Business Manager, General Manager or any individual who has supervisory authority over salespersons.

6. The Registrants will ensure that all personnel, agents, assignees or anyone acting on behalf of the Registrants are informed concerning the terms and conditions contained in this document to the extent necessary to ensure compliance with these terms and conditions.

Books and Records

7. The Registrants agree that, in the event their books and records are lost, stolen or destroyed in whole or in part, they shall advise the Registrar, in writing within 5 days of discovery of the event and shall include all relevant documentation including, but not limited to, police report, insurance claim, affidavits etc. The Registrants further agree to make all reasonable efforts to reconstitute the lost, stolen or damaged records.

8. The Registrants agree, prior to the removal of any records from the registered premise of the Registrants, to obtain a receipt including the recipient's name, address, phone number, description of records taken, time of return and signature of recipient. The Registrants further agree to make said receipt available to any representative of the Registrar, upon request.

9. The Registrants shall maintain books and records which accurately record the nature of transactions involving the purchase, sale or lease of a motor vehicle. The Registrants will not be involved in the creation of books and records which are misleading as to the nature of a transaction involving the purchase, sale or lease of a motor vehicle.

10. Without limiting the generality of the foregoing, the Registrants agree to maintain records in accordance with sections 52, 53, 54, 55, 56 and 57 of Ontario Regulation 333/08.

DISCLOSURE

11. The Registrants agree that they are under a positive obligation to disclose **in writing on the bill of sale** all material facts about the vehicles they sell or lease to customers, whether or not the Registrants agree with the disclosure and whether or not the vehicle has been branded through the Ministry of Transportation. “Material facts” include, but are not limited to, disclosure of salvage, previous salvage, accidented and repaired, frame damage, theft recovery, unibody damage, previous taxi cab, previous police car, previous daily rental, previous limo or Emergency Service Vehicle, insurance write-off and any other material fact which, in the Registrar's opinion, may affect a decision to purchase or lease the vehicle. In the case of damaged vehicles, the Registrants further agree to disclose as much detail as possible with respect to the nature and severity of the damage in order to ensure compliance with Section 42 of the Regulations. The Registrants will make reasonable efforts to research the history of all their vehicles prior to sale to ensure all material facts are disclosed.

Financial Responsibility

12. The Registrants will comply with all of their obligations regarding the Harmonized Sales Tax and will ensureensure all tax collections are accurately reported and remitted when due. The Registrants acknowledge that all taxes collected are deemed to be trust funds and will not be used for any other purpose other than remittance to the appropriate tax authority.

13. The Registrants agrees to provide the Registrar with written notice of any new sources of financing or guarantors for the dealership within 5 days of having arranged for or received the financing, whichever comes first. This does not apply where the Registrants have applied on their own account and obtained financing from a corporation registered under the *Loan and Trust Corporations Act*, *The Bank Act* or from a credit union or league to which the *Credit Unions and Caisses Popularies Act*, as amended from time to time, applies. The Registrants agree to provide written verification of any sources of funds upon request of the Registrar.

14. The Registrants agree to maintain bank accounts in accordance with section 59 of Ontario Regulation 333/08.

15. The Registrants agree to retain the services of an accountant or bookkeeper, and to ensure that financial statements (including a balance sheet and income statement) accurately reflecting the company's financial position are prepared annually. The Registrants further agree to ensure monthly bank reconciliations are prepared.

16. The Registrants acknowledge that the *Motor Vehicle Dealers Act, 2002* requires them to keep accurate financial records, and to present any relevant records upon the request of an OMVIC Inspector.

Other

17. The Registrants agree that Robert Faroni will not be an officer or director of Windsor Auto Connection Ltd or have direct or indirect control over Windsor Auto Connection Ltd. without the prior written consent of the Registrar.

18. Fulvio Faroni acknowledges that he has taken the time to carefully review these terms and conditions, and, by signing and initialling, acknowledges that he understands their significance and agrees to abide by them.

19. The Registrants understand that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Registrants. The Registrants confirm that all documents, information or statements provided to the Registrar are true to the best of the Registrants' knowledge and belief and that the Registrants have given full answers to all questions and requests made by the Registrar in connection with the Registrants' registration.

20. The Registrants acknowledge that the Registrar may take further administrative action, including a proposal to revoke registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.

21. The Registrants acknowledge that they have obtained or had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out herein.

22. The Registrants hereby consent to an Order of the Licence Appeal Tribunal including the Terms and Conditions set out herein

Signed in the City of _____ this _____ day of _____ 20_____.

_____
Fulvio Faroni (please print)

_____

(Signature) I have authority to bind the dealership.

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act, 2002.*

Date:

_____
Carl Compton
Registrar

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

TOUFIC RADA ZABIAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MOTOR VEHICLES UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002* S.O. 2002, c. 30, Sch. B

TO REFUSE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: TOUFIC RADA ZABIAN, Applicant, Self-Represented

CHRISTOPHER EZRIN, Counsel, appearing for the Registrar, *Motor Vehicle Dealers Act, 2002*

DATE OF HEARING: March 14, 2011 London

REASONS FOR DECISION AND ORDER

Pursuant to the provisions of s. 9 of the *Motor Vehicle Dealers Act, 2002* S. O. 2002 c. 30 Sched. B (the "Act"), the Applicant appeals the Notice of Proposal to Refuse Registration (the "Proposal") issued by the Registrar on October 7, 2010. The allegations in the Proposal relate to the Applicant's role as the directing mind of three corporations, 1377506 Ontario Inc. o/a Hayats Auto Sales and Leasing ("Hayats 1"), Hayats Auto Sales and Leasing 2 Inc. ("Hayats 2"), both operating from premises located at 1777 Dundas Street East in London, and Hayats Auto Sales of Woodstock Inc. ("Hayats Woodstock") operating from premises located at 771 Dundas Street in Woodstock (collectively referred to as the "Hayats Group").

FACTS

At the outset of the hearing the Tribunal reviewed each of the allegations against the Applicant and he admitted the majority of them. The admitted facts are set out as Particulars in the Proposal, as follows:

PARTICULARS

The reasons for this proposal are:

1. Toufic Rada Zabian (“Toufic") applied for a transfer of registration as a motor vehicle salesperson under the Act on June 17, 2010. He proposes to work for 6317758 Canada Corp. o/a Silver City Auto Sales.

2. 1377506 Ontario Inc. o/a Hayats Auto Sales and Leasing ("Hayats 1") is an Ontario corporation that was registered as a motor vehicle dealer under the Act from on or about May 29, 2000 until on or about May 29, 2010. The registration was subject to terms and conditions. Hayats 1 operated from of 1777 Dundas Street East, London.

3. Hayats Auto Sales and Leasing 2 Inc. ("Hayats 2") is an Ontario corporation that was registered as a motor vehicle dealer under the Act from on or about May 9, 1997 until on or about May 10, 2010. Hayats 2 operated from 1777 Dundas Street East, Unit B in London.

4. Hayats Auto Sales of Woodstock Inc. ("Hayats Woodstock") is an Ontario corporation that was registered as a motor vehicle dealer under the Act from on or about May 28, 2008 until on or about May 28, 2010. The registration was subject to terms and conditions. Hayats Woodstock operated from 771 Dundas Street in Woodstock.

5. The books and records for Hayats 1, Hayats 2 and Hayats of Woodstock were stored at 1777 Dundas Street East in London.

6. At all material times Toufic was the directing mind of 1377506 Ontario Inc. o/a Hayats Auto Sales and Leasing, Hayats Auto Sales and Leasing 2 Inc. and Hayats Auto Sales of Woodstock Inc.

Inspections

7. On or about June 11, 2009, a representative of the Registrar attended 1777 Dundas Street East in London for the purpose of conducting an inspection. The Registrar’s representative met with Toufic and Hiyem Zabian.

8. At the time of the June 11, 2009 inspection, not all of the books and records were available for inspection. The Registrar’s representative was advised by Toufic that, among other things, the liens on vehicles were being paid immediately as the bank would place a hold on funds until liens are paid out.

9. On or about July 10, 2009, a representative of the Registrar attended 1777 Dundas Street East in London for the purpose of conducting an inspection. This was a follow-up to complete the review of books and records from the June 11, 2009 inspection.

10. At the July 10, 2009 inspection it was discovered that liens were not being paid in full on vehicles traded in by consumers and that the monthly payments were being made in lieu. Toufic advised the Registrar’s representative that, among other things, approximately $80,000.00 in outstanding liens against consumer trade-ins were at issue and that all of the consumers involved had been contacted.

11. On or about August 14, 2009, a representative of the Registrar attended 1777 Dundas Street East in London for the purpose of conducting an inspection. At that time Toufic advised that there were problems with his previous accountant and it resulted in retail sales tax issues and lien issues for all of his dealerships. Toufic supplied the Registrar‘s representative with copies of lien payouts that he claimed had been ‘caught

up' and further advised that the remaining outstanding consumer liens would be paid shortly.

12. On or about March 16, 2010, a representative of the Registrar attended 1777 Dundas Street East in London for the purpose of conducting an inspection. At that time Toufic advised the Registrar's representative that he was in process of selling the property and repair business located at 771 Dundas Street in Woodstock. Toufic advised the Registrar‘s representative that he intended to continue to sell vehicles from that location despite the sale of the property.

14. Toufic provided the Registrar's representative with documentation confirming that two liens had been satisfied regarding the lien payout issue discovered in July 2009. The Registrar's representative was further advised that at that time there were possibly an additional 5 consumers with outstanding lien issues. Documents obtained on inspection indicated that monthly payments were continuing to be made towards lien balances as opposed to paying out the liens in their entirely.

15. The Registrar's representative left findings, signed by Toufic, which highlighted among other things, requirements to pay out liens against vehicles as well as the obligation for dealers to submit warrant paperwork/payments to third party providers within 7 days of providing the warranty.

16. On or about June 3, 2010, a representative of the Registrar attended 1777 Dundas Street East in London for the purpose of conducting an inspection. At the time of the inspection the Registrar‘s representative met with Toufic who advised that he had laid off all staff and the dealerships were not conducting business. At that time the Registrar‘s representative was advised that Toufic was working on "making it right" regarding the consumer liens.

Non-Submittal of Warranties

18. On or about June 8, 2010, Toufic sent correspondence to the Registrar's office outlining a list of warranties that had been supplied to consumers where the warranty premiums had not been paid to the warranty companies.

Consumer Liens

20. On or about March 29, 2010, the Registrar's office sent correspondence to Toufic as a result of recent inspections conducted. The Registrar's office raised concerns regarding the financial position of Toufic's dealerships and indicated that despite the circumstances of these difficulties, the financial risk to consumers as a result of liens not being paid out was an issue of serious concern to the Registrar. The Registrar's office requested proof that all outstanding consumer liens had been paid in full and indicated that monthly payments in lieu was not a satisfactory resolution. The Registrar's correspondence requested a response, including supporting documentation by April 8, 2010.

21. On or about April 9, 2010, Toufic sent a one-page letter via fax to the Registrar's office. In said letter, Toufic advised that he was working on rectifying the lien situation and was making arrangements to obtain an alternate source of funding to clear all of the liens in full as soon as possible.

22. On or about June 3, 2010, the Registrar's office received correspondence from Toufic detailing as at June 1, 2010, 12 consumers who had liens that remained outstanding. Of the 12 consumers there were 10 liens totaling $92,876.43 no amounts were submitted for two of the consumers.

Motor Vehicle Dealers Compensation Fund (MVDCF Claims)

23. In August 2010, the Registrars office received 8 claims to the MVDCF in relation to Toufic's dealerships. The issues involved outstanding liens and non-submittal of warranty premiums.

24. On September 16, 2010, the MVDCF paid out a claim in the amount of $5,917.09 which related to a judgment obtained by a consumer against Hayats 2. The judgment related to the failure of Hayats 2 to pay out a lien registered against a trade-in vehicle.

25. The MVDCF is continuing to receive claims in relation to Toufic's dealerships.

Registration Status: Hayats 1, Hayats 2 and Hayats Woodstock

28. On or about May 10, 2010, the registration for Hayats 2 terminated as the dealer did not meet the preconditions for the renewal of its registration.

29. On or about May 29, 2010, the registration for Hayats 1 expired and no application was submitted requesting a renewal or reinstatement of the registration.

30. On or about May 29, 2010, the registration for Hayats Woodstock terminated as it failed to submit a renewal application before the expiry date.

A number of the allegations remained in issue as follows:

13. At the time of the March 16, 2010 inspection, Toufic advised the Registrar's representative that he was currently facing trial for approximately $880,000.00 of outstanding GST with the federal government. Toufic also advised that his dealerships were recently audited by the Ministry of Revenue for retail sales tax and the amount owing was assessed at approximately $2,000,000.00. Toufic raised concerns about the outstanding tax liability affecting the preconditions of registration on his dealerships' upcoming renewals. Toufic further advised that he was confident that he would not be found liable due to the problems with his previous accountant.

15. The Registrar's representative left findings, signed by Toufic, which highlighted among other things, requirements to pay out liens against vehicles as well as the obligation for dealers to submit warrant paperwork/payments to third party providers within 7 days of providing the warranty.

17. At the time of the June 3, 2010 inspection, Toufic advised the Registrar's representative that, among other things, he was behind approximately one month with Nationwide Auto Warranty. Toufic supplied a list of contracts that had not been paid. The list involved 23 consumers and the value of the warranties was approximately $10,000.00. Toufic also indicated that he was behind with Coast-to-Coast Warranty Company and that he was in the process of compiling a list but believed he owed approximately $48,000.00. It was agreed that a list would be supplied to the Registrar's office.

19. As at June 2010, Toufic's dealerships had failed to remit approximately $10,000.00 in warranty premiums to Nationwide Auto Warranty on behalf of approximately 25 consumers and failed to remit approximately $70,000.00 in warranty premiums to Coast-to-Coast Warranty Company on behalf of over 50 consumers.

Non-Compliance with the Retail Sales Tax Act.

26. Hayats 1 and Hayats 2 have failed to comply with the requirements of the Retail Sales Tax Act as to the filing of returns, remitting of tax due and paying assessments when due.

27. As a result of failure to comply with the Retail Sales Tax Act, Hayats 1 and Hayats 2 are indebted to the Ministry of Revenue in excess of $ 2,100,000.00 as of October 7, 2010.

Unauthorized Trading in Motor Vehicles (Advertising)

43. On or about July 20, 2010, a representative of the Registrar cautioned Toufic and advised that if he or his dealerships traded in motor vehicles (including advertising) without the benefit of registration, they would be in violation of the Act.

44. In or around July, August and September 2010, Hayats 1 has continued to trade in motor vehicles by advertising vehicles for sale without the benefit of registration.

45. Toufic, Hayats 1, Hayats 2 and Hayats Woodstock have failed to comply with the Act, in particular, section 6.

In light of the Applicant's admissions, the Registrar's evidence focused on five areas; the failure to discharge liens; the failure to pay warranty premiums; continued advertising in breach of the Act; outstanding provincial and federal sales tax ("RST" and "GST" respectively) and the claims made on the Motor Vehicle Dealers Compensation Fund ("MVDCF"). At all material times the Applicant was working as the directing mind of the Hayats Group and never on his own behalf. As the evidence discusses amounts outstanding, the Tribunal will refer to those debts as being the Applicant's without distinguishing between the corporations. This approach meshes closely with the stance taken by the Applicant in this proceeding that he intends to make payment in full to these creditors, especially the warranty companies because of the faith they reposed in him through difficult times.

Galynne Ethier, an inspector with the Registrar's office, testified concerning a series of inspections she had conducted at the Applicant's business premises. She determined that there were a number of transactions where liens had not been discharged on a number of vehicles the Applicant took as trade-ins. When a consumer purchases a new vehicle and part of the consideration is that the dealer takes the consumer's older vehicle as a trade-in, the dealer must pay off any loans outstanding on the traded-in vehicle and discharge any registered liens. Failure to do so has consequences for both the consumer who traded the vehicle and any subsequent purchaser. The selling consumer remains liable on the loan and may suffer credit rating damage. The purchasing consumer may discover a tow truck seizing the newly purchased vehicle and be without remedy other than discharging the outstanding lien.

Ms. Ethier brought the lien issue to the Applicant's attention. On each occasion the Applicant advised her that he was in the process of selling off land and would discharge outstanding liens from the proceeds of sale. The Applicant has failed to do so and a number of vehicles remain subject to liens.

Ms. Ethier also brought the failure to pay warranty premiums to the attention of the Applicant. Two warranty companies were involved: Nationwide and Coast-to-Coast. The Applicant was indebted to Nationwide in the amount of approximately $10,000.00 and he was indebted to Coast-to-Coast in the amount of $70,000.00. The Applicant admitted to owing Coast-to-Coast $52,500.00 and stated that he had paid Nationwide off completely.

The Tribunal also heard the evidence of Laura Halbert. Ms. Halbert is the Director of Compliance at the office of the Registrar. She also administers the MVDCF. She testified that there are a number of outstanding liens with respect to vehicles. A number of these liens dated back to early 2009 and others arose in 2010. In Ms. Halbert's view, the Applicant has had ample time to discharge these liens and ensure that consumers are protected.

According to Ms. Halbert, at least one of these lien and unpaid warranty issues has made its way to the MVDCF and a payment has been made and a number of other claims are pending. Because none of the corporations involved has declared bankruptcy, consumers must first get a judgment against the selling corporation before making a claim to the fund. She expects a number of new claims to be made in the future.

The witness also reviewed correspondence from the Ontario Ministry of Revenue regarding unpaid RST. According to the Ministry's correspondence, the Applicant owes in excess of $2,000,000.00 in unpaid RST. The Ministry correspondence requested the Registrar to issue a Notice of Proposal to revoke the Registration of the defaulting corporate entities. The Applicant advised the Registrar that he is being prosecuted for non-payment of $880,000.00 in unpaid GST.

With respect to unauthorized advertising, Ms. Halbert referred the Tribunal to correspondence with the Applicant wherein he was advised that he should not advertise vehicles for sale following the expiry of the corporate registrations on May 10 and May 29, 2010. She then reviewed a number of internet advertisements identifying one of the Applicant's corporations as a dealer selling cars. She stated that this type of activity was contrary to the Act. She went on to outline an incident when one of her staff members had called a listed number. The phone was answered with the name of the corporation and, when the caller enquired about a specific vehicle, she was advised a salesperson would call her back. There was no evidence that a salesperson ever did call back.

In his testimony before the Tribunal the Applicant outlined a tale of trust and betrayal that is almost epic in its scope. He started in the car sales business in 1997. He was successful. Until the events that give rise to this appeal, he had an unblemished record in the business and a good reputation. He has had an "A" rating with the Better Business Bureau for 10 years and was recently given a plaque for that achievement.

In 2009 he was operating three dealerships and was contemplating opening a fourth. He owned numerous properties and was worth several million dollars. Early on in his business he had hired the services of an accounting firm, 1307997 Ontario Limited o/a First Accounting. He became very close with the principal of that business, establishing an almost filial relationship with him. The older accountant referred to him as son. In and around 2003 his accountant recommended that he hire the accountant's son to handle his books and internal financial management. The Applicant was so impressed with the son's performance that he ultimately promoted him to general manager of the business and left the day to day running to the son while the Applicant focused on expanding the business. He reposed total trust in the accountant and his son. The son had to approve every sale made at each of the Applicant's business locations. In addition to this business relationship, in 2003 the Applicant also made an investment in a scheme put forward by the accountant and his son.

Unfortunately for the Applicant, the accountant and his son were rogues. In early 2009 the Applicant discussed an upcoming RST audit with his accountant. The accountant urged him to declare bankruptcy because his RST liability would be huge. This puzzled the Applicant as he had been paying his RST as required by the regulations. A previous audit in 2003 had resulted in an assessment of approximately $300,000.00 an amount which the Applicant could manage. He had no worries about the upcoming audit. His accountant insisted that the audit would disclose a tax liability that would require the Applicant to go bankrupt. The result of the audit was an assessment in excess of $2,000,000.00.

In and around May 2009 it came to the Applicant's attention that the business had not paid out liens on traded-in cars. He found that, rather than paying off the liens, the business was providing consumers with cheques to make their monthly loan payments. He immediately fired the general manager. On cleaning out the office, he discovered a stack of bills of sale where the liens on the trade-in vehicles had not been paid. He admitted that currently there is about $120,000.00 outstanding on unpaid liens.

As soon as he fired the general manger, the general manager and his accountant father began a campaign of slandering the Applicant with his suppliers. In particular, they called the motor vehicle auction house where the Applicant had a $600,000.00 line of credit and told it that the Applicant was about to go bankrupt because of an huge unpaid tax liability. The auction house immediately cancelled the line of credit and repossessed all of its vehicles. The Applicant, having three locations on the go, immediately found himself with sufficient vehicles to support only one location. Throughout 2009 and into early 2010 he continued to pay the loan payments for consumers whose trade-ins were subject to liens. He also hired a forensic accountant and began to piece together the fraud that had been perpetrated against him.

The rogue accountant was responsible for preparing RST returns and submitting them to the Ministry of Revenue. It became a practice for the accountant to call the Applicant's office late in the afternoon when the return was due. He would advise the Applicant's sister, who was handling office functions of the amount outstanding. He

would also advise her that it would be too late for her to get a cheque to him for payment. He stated that he would send a cheque over from his own account so the Applicant would not incur penalties and that the Applicant's sister could deliver a cheque payable to the accounting firm the next morning. The accountant would then forward a false return and a cheque to the Ministry for a much lesser tax liability and pocket the difference between what he paid the Ministry and what the Applicant paid him. With an audit looming, the accountant tried to force the Applicant into bankruptcy so the facts would not come out.

As part of the forensic audit, the Applicant has discovered numerous boxes of documents with the accountant that would seem to indicate that he does not owe any money for GST. While at this point in time the charges are still proceeding, he was expecting the receipt of a report that would effectively terminate the issue. Of note is the fact that the two main crown witnesses in that case are the accountant and his son, the former general manager.

The Ministry of Revenue conducted an investigation. As a result of that investigation charges are pending against First Accounting for breaches of the RST reporting requirements. A second result seems to be that the outstanding tax liability of the Applicant's corporations has been reduced to $400,000.00 and charges are pending against Hayats 1 for failure to report. No charges have been laid against the Applicant personally for failure to remit RST. The Applicant testified that the Ministry investigator was satisfied that he had not falsified returns, all returns having been signed by the accountant.

Through early 2010 the Applicant continued his business from one location. He also entered into a number of transactions to sell his land to pay off his liabilities. He maintained the loan payments to consumers to cover the outstanding liens. On most occasions the land sales either fell through or did not generate sufficient funds to make the required payments. Given his indebtedness to the Crown, his corporations did not meet the prescribed requirements for renewal under the Act so their registrations automatically expired in May 2010. At the time of the expiry he had several deals where sales had been completed but ownership transfers had not occurred until after the expiry date. Since he was no longer a registered dealer, he could not transfer vehicles at the Ministry of Transportation, so financing on these transactions fell through and liens were not discharged. The Applicant called the Registrar's office and asked for an extension of his registration to permit these transactions to go through but was refused. There are currently 12 vehicles with liens for a total of $120,000.00.

Since May 2010 the Applicant has had no source of income. He remained in his office until the electricity was turned off and applied his time to helping consumers if he could. He has been living on savings initially set aside for his children. Those savings are now depleted. He seeks registration as a salesperson under the Act to reestablish himself financially, to pay off the corporate debts and regain his reputation. To this end he has refused to take the corporations into bankruptcy. To do so would be to lose control of his efforts to gain recompense from the accountant and his son.

One problem with the lack of income is the continued corporate presence on the Internet. The Applicant owes the webmaster of these sites several thousand dollars. Having run out of money, he cannot afford to pay the bill and the webmaster has refused to do anything on the sites without payment. The Applicant testified that he has not sold any vehicles since the corporate registrations expired. With respect to the phone call from an employee of the Registrar's office, he stated that the webmaster has been forwarding his calls to other dealers. The numbers on the sites are no longer in service.

The Applicant is currently suing the accountant for approximately $1.7 million dollars. The accountant's son has declared bankruptcy. It is the Applicant's estimate that the son defrauded him of $1.5 million. It came out in the bankruptcy that the Applicant's 2003 investment was diverted to purchase the son's house while the Applicant was told the investment had failed. Due to the bankruptcy, however, there are no assets to seize if an action against the son were to be successful.

THE LAW

The Registrar relies on the provisions of s. 6(1)(a)(i) and (ii) of the Act which state:

> **6.** (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
>
> (a) the applicant is not a corporation and,
>
> (i) having regard to the applicant's financial position or the financial position of an interested person in respect of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business,
>
> (ii) the past conduct of the applicant or of an interested person in respect of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty,

The right to appeal to this Tribunal is set out in s. 9 and the powers of the Tribunal on an appeal or set out as follows in s. 9 (5):

> (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.

It is now well settled law that the Tribunal owes no deference to the Registrar in approaching its decision. It is the function of the Registrar to investigate and to put the facts before the Tribunal. It is then up to the Tribunal to make a decision unfettered by the Registrar's decision.

In a recent decision before the Divisional Court, *Lapcevich v. Registrar, Real Estate & Business Brokers Act* 2010 ONSC 1145, the court identified that, before the Tribunal can consider any remedy other than refusal of the Registrar's Proposal, it must first

make a finding that an applicant falls within one of the exceptions set out in s. 6. While *Lapcevich* dealt with an appeal under a different act, the wording is identical to the wording in the Act and the statutory scheme is aimed at the same goal, protection of consumers. The court's analysis is applicable to the current proceedings.

ANALYSIS

At the outset of this analysis, let it be noted that based on the Applicant's own evidence, having regard to his financial position, he cannot reasonably be expected to be financially responsible in the conduct of business. He is functionally, if not actually, bankrupt. All of his property is currently subject to power of sale proceedings and it is far from clear if these sales will leave sufficient excess funds to discharge the corporate tax, warranty and lien liabilities. While the Tribunal recognizes that the liabilities are those of the Hayats Group and no action has been brought against the Applicant personally, he was the directing mind of the corporations and must bear the responsibility for their demise.

The greater difficulty comes when considering whether there are reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. To a large extent the analysis depends on the credibility of the Applicant.

Overall the Tribunal found the Applicant to be a credible witness. He approached his evidence in an almost eager manner because it was clear that he wanted the opportunity to tell his side of the story for the first time. In a number of cases he did place blame for specific incidents on other individuals but overall he accepted his responsibility and evinced a clear intention to do his best to put things right. While there was not a perfect documentary record, what documents were produced did support his evidence of wrongdoing on the part of his accountant and his general manager.

As the directing mind of three corporate entities, the Applicant was guilty of lax supervision. In a perfect world, rogues would bear traits that would make them and their schemes obvious, but this is not a perfect world. Rogues exist and succeed because of their plausibility. They know how to work people and deflect inspection. In the end the Tribunal is satisfied that the Applicant was the victim of a well executed and long lasting fraud scheme and has no stain on his personal honesty and integrity.

Nor can the Tribunal find in the history of the Applicant's business grounds for belief that he will not carry on business in accordance with the law. The fact that there are still websites showing the Applicant's corporations as motor vehicle dealers does cause the Tribunal some concern but the Tribunal is satisfied that the contact phone numbers are not active and that, where a link from the sites is made it links to another registered dealer.

The Applicant argues that he is seeking registration as a sales person only until such time that he gets his financial house in order. He is prepared to accept terms on his registration. In the case of *Arulappu v. Registrar, Real Estate and Business Brokers Act*, 2011 ONSC 797, the Divisional Court made it clear that it would be reversible error for this Tribunal not to put its mind to the imposition of terms on the Applicant.

The Registrar's position is that this is not a case for terms. He argues that the failure to pay RST is, and has always been considered by this Tribunal to be, a serious breach of trust and grounds for denial of registration. In support of this position the Registrar relies on the case of *Santec Enterprises Inc. (Re)* [2006] O.L.A.T.D No. 450. In *Santec*, the owner of the corporation made numerous promises to purchase cars from auction on behalf of consumers. He took consumers to the auction and had them identify the car they wished to purchase. The consumer would then pay for the vehicle on the promise by the dealer that he would purchase the vehicle for them. In most cases the consumer got neither car nor refund. In addition, the dealer owed RST but took absolutely no steps to enter into negotiations to make payment. It is clear that the dealer considered money as something he received and would in no circumstances pay back.

The current facts are markedly different. In this case the Applicant's money was stolen. Since that time he has expended great efforts to determine the exact extent of his liabilities, to minimize them and to repay them. The Tribunal notes that as a salesperson the Applicant will not have responsibility for the management of a dealership. The Tribunal's concerns about his financial conduct can best be dealt with by provisions that ensure that he is not responsible for dealing with money for a period of time to let him reestablish himself and his reputation. Accordingly, this is a case for registration on terms. Neither side submitted clear terms so it is left to the Tribunal to determine what those terms should be.

DECISION

Pursuant to the authority vested in it by the provisions of s. 9(5) of the Act, the Tribunal orders the Registrar not to carry out his proposal to deny the Applicant registration. The Registrar shall register the Applicant on the following terms:

1. For a period of two years from the date of this order, the Applicant shall not apply for registration as anything other than a motor vehicle salesperson under the Act.

2. For a period of two years from the date of this decision the Applicant shall not act in a managerial capacity with a motor vehicle dealer nor shall he handle or be responsible for the handling of cash or consumer deposits without supervision but a properly registered manager of his employing dealership.

3. The Applicant will take all reasonable steps to make payment to the webmaster of the 13 Internet sites currently showing members of the Hayats Group as motor vehicle dealers and to have the advertisements removed.

4. The Applicant shall enter into an undertaking with the Registrar that the net proceeds after legal fees and expenses from any litigation against his former accountant shall be applied first to discharge the liabilities of the Hayats Group, including the payment of any and all outstanding RST, GST, MVDCF liabilities, lien and warranty liabilities.

5. At six monthly intervals commencing September 1, 2011, the Applicant shall provide the Registrar with an update of the status of the litigation against his former accountant and shall forthwith advise the Registrar of any judgment, settlement or other final determination of the litigation.

6. Nothing in these terms shall prevent the Registrar from opposing an application by the Applicant, or by an interested person in respect of the Applicant for any registration other than as a motor vehicle salesperson on such grounds as the Registrar may see fit.

7. These terms may be amended by mutual consent of the Applicant and the Registrar at any future renewal of the Applicant's registration.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

RELEASED: March 21, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

PAOLO JOSEPH FASCIANI – Motion

AN APPEAL FROM A NOTICE OF PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002, c. 30, Sch. B

TO REVOKE REGISTRATION

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: PAOLO JOSEPH FASCIANI, Unrepresented

SARAH AOUCHICHE, Counsel, representing the Registrar, *Motor Vehicle Dealers Act 2002*

DATE OF MOTION: March 14, 2011 Toronto

REASONS FOR DECISION AND ORDER

The Applicant has brought a motion for an Order extending the time to file an appeal from a Notice of Proposal, dated August 6, 2008, in which the Registrar under the predecessor legislation, being the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42 (the "Act"), proposed, among other things, to revoke the registration of the Applicant as a motor vehicle salesperson under the Act.

The Applicant has appealed on time from a Notice of Proposal, dated January 26, 2011, in which the Registrar proposes to refuse the registration of the Applicant as a motor vehicle salesperson under the *Motor Vehicle Dealers Act, 2002,* S.O. 2002, c. 30, Sch. B.

During the hearing, the Applicant indicated that he would withdraw this motion if he could be assured that, by doing so, he would not be deemed to admit any facts in the Notice of Proposal of August 6, 2008 or that he ever received it.

Counsel for the Registrar readily agreed to this.

The Tribunal, therefore, makes the following Order:

The Tribunal accepts the withdrawal of this motion by the Applicant without prejudice to him in any regard in respect of his appeal from the Notice of Proposal of January 26, 2011. In particular, he shall not be deemed to admit any fact in the Notice of Proposal of August 6, 2008 or that he ever received such Notice of Proposal.

This matter is now concluded and the Tribunal file is closed.

LICENCE APPEAL TRIBUNAL

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Terrance A. Sweeney, Vice-Chair

Released: March 22, 2011

This decision may also be available on Quicklaw.

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Decisions under the Motor Vehicle Dealers Act

Fiscal Year 2010 - 2011

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

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- Mohamad Assaf o/a A & S Auto Sales
- Unity-A-Automotive Inc. & Ramanathan Thangarajah
- Rocky Moors o/a Rocky.S Auto Sales
- Mario Farenga and Classy Autoservice Ltd.
- Find-A-Car Auto Sales & Brokering Inc. and Michael Ryan O'Connor-Motion

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOHAMAD ASSAF o/a A & S AUTO SALES

APPEAL FROM A DECISION OF THE REGISTRAR, *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42

TO REFUSE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: MOHAMAD ASSAF, the Applicant, self-represented

CHRISTOPHER EZRIN, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF HEARING: May 10, 2010 London

DECISION AND ORDER

The Applicant, Mr. Assaf operating as A & S Auto Sales, appeals to the Licence Appeal Tribunal (the "Tribunal") from a decision by the Registrar, *Motor Vehicle Dealers Act,* (the "Act") to refuse his application for registration as a motor vehicle dealer.

FACTS

Mr. Assaf has been previously registered as a motor vehicle salesperson. Starting in 2000, he worked for his brother, who was a motor vehicle dealer. However, both the dealership and the two brothers had their registrations suspended for six months as a result of an Order from this Tribunal in 2003. Key among the concerns was the failure to disclose material information about certain vehicles and the poor maintenance of financial records. During the six month suspension, the two brothers continued to sell cars, in contravention of the Act. When this was discovered, the Registrar revoked their registrations and Mr. Assaf did not appeal that revocation.

In April, 2009, Mr. Assaf applied for a new registration as a sole proprietor of a proposed dealership. In his application he did not disclose that he had previously been

registered or that his registration had been revoked despite questions on the application form that very specifically request such information. He also denied having a criminal record. A criminal record search performed on behalf of the Registrar revealed a previous assault charge and a failure to comply with his probation. On request, he explained the circumstances surrounding the charge but his explanation as to why he did not disclose it - that he did not think it was still on his record but that in any event, the Registrar probably knew about it - was inconsistent and not credible.

Mr. Assaf was also asked on the application form whether he had engaged in buying and selling cars in the past two years and he answered "no". Sometime after the application, Mr. Assaf was charged with 12 counts of "curbsiding" or buying and selling cars without being registered under the Act. When asked to explain this, both as part of his application process and during this hearing, Mr. Assaf asserted that he was not curbsiding. Rather, he said he merely chose bad cars and had to re-sell them, 12 times in two years. He also said he understood that he was entitled to sell up to six cars a year without being registered. The witness for the Registrar testified that no such provision exists. Mr. Assaf was subsequently convicted of 12 counts of curbsiding. His credibility at the hearing was substantially undermined when he asserted, incorrectly, that 11 of those charges had been dismissed.

Mr. Assaf elected not to give sworn or affirmed evidence at the hearing, relying instead on an oral statement. Such a statement has very limited value as evidence. In this case, his explanation of why he did not disclose his prior registration, his prior revocation and his prior criminal record is not credible. In addition to the other assertions noted above, he alleged that he misunderstood the various questions concerning these matters. Mr. Assaf is an intelligent man who is quite capable of understanding the clearly worded questions or of phoning the Ontario Motor Vehicle Industry Council, which administers the Act, to seek clarification. In the application form, there is a specific invitation to phone the Council if applicants have any questions.

Concerning the previous revocation of his registration, Mr. Assaf asserted at the hearing that he had merely been a salesman and that his brother had been the controlling mind of the dealership. It was a finding of the previous hearing that he had been more directly involved in the offenses that gave rise to the original suspension. In his application, he asserted that he had very little contact with his brother. However, investigation on behalf of the Registrar revealed that his brother was the co-signatory on the line of credit Mr. Assaf proposes to use to fund his business, suggesting a closer relationship that gives Mr. Assaf's brother a beneficial interest in the proposed business.

DECISION

Mr. Assaf is applying for a new registration as a sole proprietor of a dealership. The application itself represents the first opportunity to demonstrate that a dealer meets the criteria set out in Section 6 of the Act. Under that section, an applicant is entitled to registration unless certain circumstances exist. In this case, the key criteria are 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 . . .”

Mr. Assaf, in light of his past history, had particular reason to be honest and forthright in his responses on the application for registration and to seek clarification of the meaning or intent of certain questions if he was in doubt as to the scope of information sought. Instead, he gave a series of answers that were misleading, incomplete or untruthful. His subsequent explanations for these shortfalls show a consistent pattern of attempting to avoid responsibility for his past and present actions. There are excellent reasons, on the basis of his performance on this application, to believe that Mr. Assaf will not carry on his business in accordance with law and with integrity and honesty.

ORDER

Accordingly, pursuant to subsection 9(5) of the Act, the Tribunal orders the Registrar to carry out his proposal of December 17, 2009 to refuse the registration of Mohamad Assaf, operating as A & S Auto Sales.

LICENCE APPEAL TRIBUNAL

_____
Laurie Sanford, Vice Chair

RELEASED: May 12, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

UNITY-A-AUTOMOTIVE INC. & RAMANATHAN THANGARAJAH

APPEAL FROM A DECISION OF THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT*, R.S.O. 1990, c. M.42

TO REFUSE REGISTRATIONS

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: JUSTIN JAKUBIAK, Counsel representing the Applicants

CHRISTOPHER EZRIN, Counsel representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF HEARING: April 26 and 27, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to this Tribunal from a Notice of Proposal (the "Proposal"), dated May 13, 2008, to refuse registration to the Applicants under then section 7 of the *Motor Vehicle Dealers Act* ("MVDA" or the "Act").

The Registrar, in his Reasons in the Proposal, said that the intention and objective of the Act is to protect the public interest. He alleged that the past conduct of the Applicants is inconsistent with the intention and objective of the Act and, therefore, warrants disentitlement to registration under the Act.

The Applicants (Mr. Ramanathan Thangarajah, the individual Applicant, and Unity-A-Automotive Inc., the Corporate Applicant) successfully appealed to the Tribunal which, on January 9, 2009, directed the Registrar to register the Applicants as a dealer and salesperson, respectively, under the MVDA.

The Registrar then appealed that decision of the Tribunal to the Divisional Court. The Divisional Court, which released its judgment on December 3, 2009, allowed the appeal, set aside the order of the Tribunal and referred the matter to the Tribunal for a new hearing before another member.[1]

Agreed Facts

At the opening of this hearing, counsel agreed upon the following facts which the Tribunal accepts as proven:

1. Mr. Ramanathan Thangarajah ("Mr. Thangarajah) immigrated to Canada from Sri Lanka in 1991. He trained as a mechanic at Centennial College between 1994 and 1999.

2. On June 30, 1999, Unity-A-Automotive Inc. ("Unity") was incorporated. It employs seven people and does mechanical and body work. On three occasions, it was convicted of being an unregistered dealer under the MVDA ("curbsiding") - ten counts in February 2002, four counts in May 2003 and twelve counts in April 2005.

3. On December 19, 2005, Unity informed OMVIC in writing that it had sold three cars that year without a licence.

4. In December 2006, Mr. Thangarajah completed the Automotive Certification course required by the Registrar of all OMVIC applicants. The course is geared to people with grade eight level skills. One of the instruction topics in the course was dealer requirements under the MVDA.

5. Mr. Thangarajah studied for the course at home. Because of his problems with English, his son helped him. He failed the course twice, but passed the third time, and he was certified on December 13, 2006.

6. On November 22, 2007, Unity, in its operations as a motor vehicle inspection station, was convicted of two counts of not filing required documentation on time and one count of issuing a false safety certificate under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA"). The employee who had given the false safety certificate was fired in February 2007, prior to the conviction.

7. On January 15, 2008, Unity applied to become registered as a dealer and Mr. Thangarajah applied to become registered as a salesperson under the MVDA. The application was filled out by his wife, who copied it from earlier versions of applications that he had not pursued. On the applications, the reply was "no" to

[1] Registrar, *Motor Vehicle Dealers Act v. Unity-A-Automotive Inc.*, 2009 CanLII 67420 (On. S.C.D.C.)

the question whether Unity had been found guilty of an offence under law, or whether there were any charges pending.

8. Unity breached OMVIC's Standards of Business Practice by failing to disclose "TKU" (true kilometres unknown) status.

9. Unity engaged in conduct that resulted in charges being laid on or about March 30, 2009 and April 21, 2009, for 22 counts of making a false statement in a structural inspection certificate contrary to the HTA.

10. Mr. Thangarajah engaged in conduct that resulted in charges being laid on or about April 21, 2009, for 21 counts of making a false statement in a structural inspection certificate contrary to the HTA.

11. Eight of the offences alleged in paragraphs 9 and 10, above, occurred between January and March 2009.

12. Unity has been advertising vehicles for sale without the benefit of registration.

Mr. Jakubiak stated that while his clients admitted the charges against them, as set out in 9 and 10, they were going to defend vigorously those charges in court.

The Case for the Registrar

Daniel Ventura was sworn and testified that he is the head of the Mandatory Vehicle Branding Unit ("MVBU"), a division of the Ministry of Transportation. The MVBU is charged with licensing and enforcement in respect to Motor Vehicle Inspection Stations. If an auto body repair shop or collision repair shop is issued a licence to issue motor vehicle inspection certificates, it does so as an agent of the Ministry. Branding is the process of assigning "brand types" that indicates whether a vehicle has been severely damaged in the past. The MVBU uses four brand types including "irreparable", "rebuilt" and "salvage". When a brand is assigned to a damaged vehicle the brand is recorded in the Ministry's Vehicle Registration System. This service protects the consumer by providing important information about possible past damage to a vehicle.

When a licence is issued to a "Qualified Tradesperson", one of Mr. Ventura's officers meets with the licensee and explains what is expected, including the standards that have to be met before a damaged vehicle is allowed back on the road.

Mr. Ventura referred only to some of the documents submitted in respect to the charges laid against the Applicants under the HTA. In 2008 the Applicants had submitted the required documents to his group, but on inspection the MVBU found that in one case, notwithstanding that the vehicle was severely damaged and that the repairs did not conform to Ministry specifications, the Applicants issued a vehicle inspection certificate for that vehicle.[2]

[2] Exhibit 6, Tab C

Mr. Ventura then referred to other documentation[3] where, again, the Applicants sent the required documentation for a particular car to the MVBU. The MVBU inspected and found that on the Applicants' own documents the car was condemned, yet the Applicants issued a certificate.

Mr. Ventura next took the Tribunal through other documents.[4] He said the documents dealt with the same issue. The documents sent to the MVBU condemned the car and the inspection by the MVBU so confirmed, but the Applicants issued a certificate. It was Mr. Ventura's opinion that the Applicants simply do not understand the required documentation. For example, a square in the form signifies that the engine is in the vehicle when testing is done. A circle indicates that the engine was not in the car when the testing was done. The Applicants consistently mixed these up.

Allan Gibson

Mr. Gibson is a structural inspection advisor with MVBU. He testified that he attended on Mr. Thangarajah and his son, who is fluent in English, a number of times from and after 2007. He went over the legislation and Regulation 601 with them. He offered to help them in any way he could and was prepared to answer any questions they might have. He mentioned that it was required by the legislation that the forms in respect to a damaged vehicle and a certificate issued must be sent to the MVBU within seven days. The Applicants were chronically late. He referred to a spreadsheet[5] which lists the numerous warning letters issued to the Applicants and convictions against them. He pointed to another spreadsheet[6] which details the number of times that the Applicants were late in submitting the required forms to the MVBU during the 2005-2007 period. He described the case of a false certificate issued for a car.[7] In another case the same insurance estimate was used on two different automobiles.[8] In 2006 Officer Gee of the MVBU attended on the Individual Applicant and his son to go over the requirements in the Act. When he was there, he discovered pre-signed certificates. Pre-signing certificates is contrary to the Act and procedures of the MVBU.

Jennifer Andrew

Ms. Andrew testified that she is an inspector with the Ontario Motor Vehicle Industry Council ("OMVIC"). It is a not-for-profit organization which administers the MVDA.

She inspected the premises of the Applicants in June 2009, where she met with Mr. Thangarajah and his son. She referred to a "New Dealer Report"[9] which she prepared.

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[3] *Ibid*, Tab D
[4] *Ibid,* Tab E
[5] Exhibit 4, Tab 14
[6] Exhibit 5, Tab 27
[7] *Ibid*, Tab 32
[8] *Ibid*, Tab 33
[9] Exhibit 6, Tab 37

She found that the Applicants had purchased a vehicle from "Impact" which buys "insurance write-offs". Under OMVIC's Standards of Business Practice, when this happens and the vehicle is sold, the invoice must show clearly "TKU"- true kilometres unknown.

The Applicants failed to disclose TKU on the invoice when they sold the vehicle.

Mary Jane South

Ms. South is the Deputy Registrar of OMVIC and is familiar with the Applicants' file.

Her evidence:

1. The Applicants had a series of convictions in 2002, 2004 and 2005 for curbsiding. The Applicants continued to curbside in 2005 notwithstanding the convictions. This shows that the Applicants are ungovernable.

2. The Applicants failed to disclose previous convictions three times in filing applications as a motor vehicle dealer and salesperson.

3. The Individual Applicant completed the automotive certificate course in 2006. The course material deals with the requirement in respect to the TKU notation. Nevertheless, the Individual Applicant failed to comply in 2009, as discussed above by Ms. Andrew.

4. She noted that some of the charges against the Applicants under the HTA occurred in early 2009 when the Applicants were operating as a dealer and salesperson, respectively.

5. She checked the Applicants' website recently and saw that they were advertising vehicles without the benefit of registration.

6. She said that the Applicants cannot be relied upon and should be refused registration.

7. She has no confidence that, if OMVIC were to agree to conditional licensing, the Applicants would comply with the terms of such a conditional registration.

Case for the Applicants

Kumanan Ramanathan

Kumanan Ramanathan is the son of Mr. Thangarajah. He is a graduate of the University of Toronto (2009) in Commerce and is currently employed at a national accounting firm as a student. He hopes to earn his CA designation.

He is fluent in Tamil and English and has worked for his father over the years in dealer servicing and management of the Corporate Applicant. He referred to the meeting with Ms. Andrew and the TKU issue in 2009.

He said that it was his fault that the Corporate Applicant's website still advertised vehicles for sale. Apparently, he removed one link but forgot to delete a link at the bottom of the website. He will do this immediately.

On cross-examination, he agreed that he is busy at the national accounting firm everyday but is available to help his father after hours and on weekends.

Ramanathan Thangarajah (the Individual Applicant)

Mr. Thangarajah was sworn and the Tamil interpreter, Mr. Kanapapahypillai Uthayamoorthy (the "Interpreter"), solemnly affirmed.

Mr. Thangarajah answered a few questions from his counsel but it was obvious that he has no real knowledge of the English language and needed the Interpreter to communicate in English.

Mr. Thangarajah is the sole director and officer of Unity. He has taken courses in auto mechanics, brakes and air conditioning. He is currently taking a course in English.

He explained that a friend had completed the applications to MVDA the first time and that the subsequent applications were completed first by his sister and then his wife. In each case the person simply copied the earlier application. The question as to previous convictions was answered "No" as he thought he only had to report "criminal charges".

He said that the Ministry withdrew the Proposal to revoke his motor vehicle inspection station licence in May 2007 as a result of a plea bargain where he pleaded guilty to the three charges under the HTA.

He switched his testing and measurement system to Car-O Liner in 2007 after MVBU asked him to upgrade. He plans to acquire a new laser system which, according to him, will significantly reduce the risk of mismeasuring damaged vehicles.

On cross-examination, he candidly admitted signing safety certificates without making sure that the vehicles were inspected properly. He said that following the 2007 convictions, he changed his practices including firing a "body" man whom he blamed for part of his problems.

He remarkably admitted to continuing curbsiding after his conviction in 2005 for that offence because he had "financial difficulties" ... and he had a "number of vehicles in stock...".

THE LAW

Subsection 6(1) (a) of the MVDA reads, in part, as follows:

> An applicant that meets the prescribed requirements is entitled to registration ... unless,
> ...
>
> (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;

Section 8(1) of the Act reads, in part, as follows:

> Subject to section 9, the registrar may refuse to register an applicant ... if, in his ... opinion, the applicant ... is not entitled to registration under section 6.

The Registrar must prove his case on a balance of probabilities.

The Divisional Court in its decision in this case[10] provides guidance to the Tribunal in determining cases of this kind. For example:

> The Tribunal was then required to ask if the past conduct of the respondent provides reasonable grounds to believe that he will act in accordance with the law and with honesty and integrity in the future.[11]

And later:

> The legislation does not create a subjective test to determine whether the applicant... knowingly acts outside the law. The legislation asks whether the conduct of the applicant affords reason to believe that he...will act within the law.... 'Conduct does not require evidence of deceit or even of wilful blindness'.[12]

And again:

> The MVDA is consumer protection legislation and, therefore, it is important for an applicant for registration to know his obligations under the governing legislation.[13]

Reasons for Decision

The Tribunal has carefully considered all of the evidence in the case. There is no real dispute as to the facts. Indeed, all of the salient facts have been admitted by the Applicants.

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[10] *Registrar, Motor Vehicle Dealers Act*, *supra*
[11] *Ibid*, para. 20
[12] *Ibid*, para. 22
[13] *Ibid,* para. 27

The task of the Tribunal is to weigh the evidence and determine if the past conduct of the Applicants is such as to afford reasonable grounds to believe that they will not conduct business in accordance with law and with integrity and honesty. This, as has been pointed out by the Divisional Court, is an objective test.

There are numerous damaging facts against the Applicants. The following figured prominently in the Tribunal's deliberations:

1. The Tribunal accepts the evidence of Mr. Ventura and finds that it is probable that the Applicants issued at least three false structural inspection certificates in 2008. It is a particular concern to the Tribunal that no less than eight charges for this offence have been levied against the Applicants during the time in 2009 that they operated as a dealer and salesperson, respectively. The Tribunal notes that the Applicants have said that they intend to fight these charges. That may be so, but there the Crown is burdened with the criminal standard of proof. In this Tribunal the Registrar need only prove his case on a balance of probabilities, which he has done, at least in respect to the 2008 charges.

2. Mr. Thangarajah continued to curbside in 2005 after being convicted a number of times for that offence. Mr. Thangarajah, on his own testimony, destroyed any semblance of a defence when he admitted that he continued to sell vehicles in order to meet his financial obligations and to clear out his inventory.

3. The Applicants failed to comply with OMVIC's best business practice in 2009 when it failed to put TKU on a bill of sale.

4. The Applicants continued to advertise vehicles for sale on the website right up to the day of this hearing.

The MVDA is consumer protection legislation and is to be interpreted liberally to best achieve its objects. It might be that any one of the above factors would be sufficient for the Registrar to refuse registration. When combined with all of the other facts admitted and found, the evidence is overwhelmingly against the Applicants.

The Tribunal owes no deference to the Registrar, but the Tribunal agrees that the Applicants are not governable and conditions on a licence for these Applicants would be inappropriate.

The Registrar has easily proven his case.

DECISION

There are reasonable grounds to believe that the past conduct of the Applicants is such that in the future they will not carry on business in accordance with law and with integrity and honesty. Accordingly, by the power conferred on it in section 9 of the Act the

Tribunal orders the Registrar to carry out his Proposal and refuse registration to the Applicants.

LICENCE APPEAL TRIBUNAL

_____
Terrance Sweeney, Vice-Chair

RELEASED: May 25, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ROCKY MOORS O/A ROCKY'S AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*, R.S.O. 1990, c. M.42

TO REVOKE REGISTRATION

TRIBUNAL: PATRICIA L. CASSIDY, Vice-Chair

APPEARANCES: ROCKY MOORS O/A ROCKY'S AUTO SALES, the Applicant, unrepresented

ANGELA LA VIOLA, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF HEARING: April 26, 2010 Sudbury

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing, before the Licence Appeal Tribunal (the "Tribunal"), arose out of a Notice of Proposal (the "Proposal") issued under the *Motor Vehicle Dealers Act* (the "Act"). The Registrar, in the Proposal dated December 10, 2009, proposed to revoke the registration of Rocky Moors o/a Rocky's Auto Sales (the "Applicant") as a motor vehicle dealer under the Act. The Applicant appealed the Proposal to the Tribunal by Notice of Appeal dated January 11, 2010, and received by the Tribunal on January 14, 2010.

The intention and objective of the Act is to protect the public. The Act requires that registrants be financially responsible in the conduct of business, that they carry on business in accordance with the law and that they do so with honesty and integrity.

In the Proposal, the Registrar took the position that the Applicant's past conduct and financial position were inconsistent with the intention and objective of the Act, and, therefore, warranted disentitlement to registration under the Act.

ISSUE

The issues to be determined are whether or not the past conduct and the financial position of the Applicant give reasonable grounds to believe that the Applicant will not carry on business in accordance with the law and with honesty and integrity.

THE EVIDENCE

The Registrar's Case

Carey Smith, the Director of Investigations for the Ontario Motor Vehicle Industry Council ("OMVIC"), testified that OMVIC was established in 1997 to administer the Act, a public protection statute, which requires all motor vehicle dealers and salespersons to be licensed.

Mr. Smith testified that his initial involvement in this matter was in April 2004, when he received a telephone call from the Halton Regional Police - Auto Squad, regarding a Corvette Stingray automobile which had been advertised in the Auto Trader from the Applicant. His evidence was that the police advised him a private citizen had contacted the police with the belief that the advertised car was, in fact, the private citizen's vehicle, which had been stolen. The police advised that the new owner of the vehicle was Consumer A, and confirmed that they had driven by Consumer A's home a number of times but had not seen the car. Mr. Smith elaborated that the police advised him they did not know what Consumer A's involvement in the situation was.

Mr. Smith testified that there was an open complaint at OMVIC from Consumer A, who complained that he felt the Corvette Stingray he claimed to have purchased from the Applicant was inferior to what he thought he was buying.

Mr. Smith testified that, on hearing from the Halton Regional Police, he telephoned Consumer A, who advised him that the car was at a custom restoration shop. Mr. Smith presumed that is why the Halton Regional Police did not see the car when they had driven by Consumer A's home, in response to the private citizen's complaint they had received. It was Mr. Smith's evidence that, after speaking with Consumer A, he attended the custom restoration shop where the car was. He elaborated that this particular shop does nothing but Corvette Stingray restorations. Mr. Smith testified that, at the shop, he was told the body of the vehicle had been removed from the frame at some point.

Mr. Smith testified that the V.I.N. (vehicle identification number) is explicit to the vehicle. His evidence was that he looked for the V.I.N. on the car under the glove compartment where he should have found a factory plate bearing the V.I.N. unique to this particular vehicle. His evidence was that what he found was a manufactured plate bearing a V.I.N., which did not belong to the subject vehicle.

Mr. Smith elaborated that the V.I.N. he found under the glove compartment did match the ownership but it had not been factory installed. He stated that he knew this because a factory installed plate would have been secured by rivets resembling rosettes and these were not present. He also stated the fourth digit of the V.I.N. that he found riveted under the glove compartment was a "6" which means the vehicle is a convertible. However, the car in question is not a convertible model. Mr. Smith confirmed that he saw holes underneath where the factory installed V.I.N. plate would have been. His evidence was that, consequently, the Halton Regional Police attended the restoration shop and seized the vehicle for investigation. Mr. Smith noted that the police investigation showed the body on the subject vehicle had been reported stolen from Lexington, Kentucky and that the frame had been reported stolen from California.

Mr. Smith testified that he spoke with the Applicant on April 13, 2004, at which time the Applicant advised him the car had been his personal vehicle and he had sold it for personal reasons. Mr. Smith was advised by the Applicant that he did not have a Bill of Sale for the car because it was a personal vehicle. The Applicant noted that he would be happy to take the car back because he felt that he had let it go for less money than he should have. On April 14, 2004, Mr. Smith spoke with the Applicant. He was advised that the Applicant and Consumer A were in the process of negotiating the return of the car to the Applicant, who was in turn, going to sell the vehicle and refund Consumer A's money. Mr. Smith testified that since the car had been seized, the Applicant could not sell it, and testified further, that since the car had been stolen, at some point, the deal negotiated between the Applicant and Consumer A could not be finalized.

Mr. Smith spoke with the Applicant again on April 16, 2004, to advise him of the outcome of the police investigation, at which point the Applicant was told that he would have to pay back Consumer A. Mr. Smith's evidence is that the Applicant disagreed with that assertion, claiming the sale had been a private one. Mr. Smith replied to the Applicant that Consumer A had read an ad for the vehicle, which stated to contact Rocky's Auto Sales, and noted that the vehicle had been insured through Rocky's Auto Sales; therefore, the Applicant would have to reimburse the consumer. Mr. Smith advised the Applicant that he could pursue the person from whom he had purchased the car but noted that OMVIC would not be involved because no dealership would be involved. The Applicant did not accept Mr. Smith's advice. The Applicant continued to assert that the sale had been a private one and that the car had not been owned by or sold by Rocky's Auto Sales.

Mr. Smith's evidence was that the basis of this matter was a complaint by the purchaser, Consumer A, who, ultimately was compensated by the Motor Vehicle Dealers Compensation Fund (the "Fund") set up under the Act, and although the Applicant was given opportunities to respond, he refused and remains indebted to the Fund.

Laura Halbert, the Director of Compliance with OMVIC, testified that OMVIC is the regulatory body created by the Province of Ontario to oversee the Act. Ms. Halbert testified that the Fund was created in 1986 and replaced bonding. She elaborated that motor vehicle dealers make a one time contribution of $300.00 to the Fund, and stated that the Fund is administered by a board of trustees made up of car dealers and consumers. The composition of the board is split five to four between those two groups. Ms. Halbert testified that she manages the Fund, that her office collects information and makes sure the board has the information necessary to sort out any claims. She elaborated that they first try to assist the consumer with working out a resolution to their complaint with the dealer.

Ms. Halbert testified that Consumer A had sued the Applicant and obtained judgment, which the Applicant did not pay, so the Fund stepped in and reimbursed the purchaser, Consumer A, to the extent that it could. Given that the Applicant has not paid the judgment or reimbursed the Fund, the Proposal to revoke registration was issued.

In her testimony, Ms. Halbert reviewed the first contact on March 8, 2004, which OMVIC had with Consumer A, who was seeking restitution. Ms. Halbert also testified about the many contacts between OMVIC and the Applicant, beginning with three separate telephone calls on March 24, 2004, and including letters, facsimile transmissions and further telephone discussions up to and including a telephone discussion on July 29, 2008. On that date, OMVIC had contacted the Applicant asking what he intended to do, given that the consumer had obtained judgment against him from the Ontario Superior Court of Justice. OMVIC offered the Applicant the opportunity to resolve the matter without the need for it to go through the Fund, but the Applicant refused to consider it.

Ms. Halbert further testified that, after the consumer received judgment against the Applicant, the Applicant brought a motion before the Ontario Superior Court of Justice seeking to have the judgment obtained by Consumer A set aside. The evidence is that the Applicant was successful with that motion. The order granted on October 10, 2008, by Madame Justice Baltman who decided the motion, provided that the judgment of Sproat J. granted on February 5, 2008, be set aside, and that the Applicant post security by paying the judgment amount of $18,240.29, plus costs of $6,000.00, into court within 30 days of the date of her order, or the judgment granted by Mr. Justice Sproat on February 5, 2008, would be restored. The Applicant did not comply with the conditions set out by Madame Justice Baltman, and, consequently, the judgment of Mr. Justice Sproat was restored.

Ms. Halbert testified that there is a cap under the legislation, whereby the maximum a consumer may be compensated by the Fund is $15,000.00, plus costs. She elaborated that, since the Applicant did not pay any monies to the consumer, the board reviewed the claim made by Consumer A and approved the claim for the maximum permitted under the Act, being $15,000.00 plus the costs awarded to him by the court of $6,000.00, for a total of $21,000.00.

Ms. Halbert confirmed that, by letter dated February 10, 2009, the Applicant was advised of the board's decision regarding Consumer A's claim, and given 21 days to make payment to the Fund of the full amount of $21,000.00. The letter further advised the Applicant that if he failed to make the payment to the Fund, there would be a recommendation made to the Registrar to pursue legal action against him, which could include a proposal to revoke his dealership licence.

In cross-examination by the Applicant, Ms. Halbert testified that the Fund cannot go behind a court judgment. They were presented with the judgment obtained by Consumer A, wherein the Applicant was ordered to pay Consumer A the total sum of $24,240.29, and the Fund paid the maximum allowable under the legislation, totalling $21,000.00.

The Applicant's Case

The Applicant has been an automotive car dealer for almost 24 years, having been registered since September 11, 1986. He owns and operates Rocky's Auto Sales, which is a sole proprietorship, and the Applicant is the only salesperson registered to the dealership. The Applicant testified that he has a good reputation and many repeat customers. He elaborated that he is familiar with and follows OMVIC's Code of Ethics.

The Applicant testified that he bought the Corvette Stingray automobile privately and for his own use. His evidence is that he owned the vehicle for two years before he sold it and was surprised by the deficiencies the purchaser complained about. On cross-examination, the Applicant confirmed that he bought the car and registered it under his name and his company name.

The Applicant testified that he put the vehicle into his business' name solely for insurance purposes and then sold the vehicle privately; not through his business. He stated the only receipt given to Consumer A was an "as is, where is". He deposed that although the address given, in Auto Trader, was the address of his business, that address is also his home address since he resides where he sells cars. Further, his evidence was that the payment made by Consumer A to purchase the vehicle was made to him personally, and not to Rocky's Auto Sales. Copies of the bank drafts used to pay for the vehicle form part of the evidence in this matter, which confirm that payment was made to the Applicant personally and not his business. Further, the Applicant testified that Consumer A only paid Provincial Sales Tax when the purchaser bought the car from the Applicant, and, as a dealer, he would have had to have charged Goods and Services Tax as well if it had been sold through his business instead of a private sale.

The Applicant testified that he thought everything was "legit" when he purchased the car and that he had no reason to suspect it had ever been stolen. He elaborated that he did not misrepresent the car in any way, and noted that the vehicle had ten previous owners but he is the one "getting picked on".

With regard to the outstanding judgment of the Ontario Superior Court of Justice, the Applicant deposed that when he found out about Justice Sproat's order, he obtained legal counsel and moved to have the order set aside. He was successful on his motion in that judgment was set aside, but it was conditional upon him paying close to $25,000.00, but he did not have that kind of money. He elaborated that his only recourse is through the current process and opined that OMVIC should never have become involved in his private sale to Consumer A.

The Applicant's friend testified and confirmed that the Applicant had paid cash for the car, that Consumer A bought the car from the Applicant without ever even seeing the vehicle and that she has always known the Applicant to be a very honest person.

FACTS

1. The Act is a public protection statute, which sets out the parameters to protect the public.

2. The Applicant was originally registered as a motor vehicle dealer on September 11, 1986.

3. In March 2004, the Registrar's office received a complaint from a consumer, Consumer A, regarding his purchase of a Corvette Stingray automobile from the Applicant.

4. Consumer A commenced a claim at the Ontario Superior Court of Justice and obtained judgment against the Applicant on February 5, 2008, in the amount $18,240.29, plus $6,000.00 costs.

5. The Applicant successfully brought a motion to set the judgment aside but it was conditional upon him posting security, which he did not do. Accordingly, pursuant to the order of the Court, the judgment was reinstated.

6. Consumer A brought the judgment from the Ontario Superior Court of Justice to the Fund.

7. The Applicant was given the opportunity to deal with this matter and avoid the proposal to revoke being issued but he did not do so.

THE LAW

The Act states as follows:

Registration Required

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.

Dealer to ensure salesperson registered

4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this Act.

Registration

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

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

Suspension or revocation

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.

APPLICATION OF LAW TO FACTS

This is a very unfortunate situation. The Applicant has made his living as a motor vehicle dealer for close to 24 years, and, prior to the current situation, has conducted his business without issue or problems. He has been registered for an extensive period of time without incident. Unfortunately, the Applicant does not seem to appreciate the situation that evolved. This Tribunal is not a process to re-litigate. The Ontario Superior Court of Justice has found him liable to Consumer A for a significant amount of money which he did not pay. Consumer A is entitled to try to enforce that judgment. One remedy available to the consumer is to make application to the Fund, which cannot go behind a judgment of the Court. While this Tribunal has some sympathy for the manner in which this matter evolved and the situation in which the Applicant finds himself, the fact is that the intention and objective of the Act is to protect the public and that must be the primary focus. Simply stated, the Applicant has an outstanding judgment against him, granted by the Ontario Superior Court of Justice. The person to whom that judgment is owed made a claim against the Fund, as was his right.

The Board of Trustees, which administers the Fund, determined to allow the claim and paid the consumer the maximum permitted under the Act, which is less than the amount of the outstanding judgment. The Act provides, in part, that where the past conduct of an applicant provides reasonable grounds to believe that the applicant will not carry on business in accordance with the law and with integrity and honesty, registration may not be granted. The Act also requires that the Applicant act in a financially responsible manner in the conduct of his business. By not abiding by the terms of the judgment granted by the Ontario Superior Court of Justice and by simply refusing to try to resolve this matter, the Applicant has failed to meet the requirements of the Act.

ORDER

Pursuant to the authority vested in it by section 7(4) of the Act, the Tribunal directs the Registrar to carry out the Proposal, dated December 10, 2009, to revoke the registration of the Applicant as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

_____
Patricia L. Cassidy, Vice-Chair

RELEASED: June 4, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MARIO FARENGA and CLASSY AUTOSERVICE LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT,* R.S.O. 1990 C.M. 42

TO REFUSE REGISTRATIONS

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: ROLAND PASKAR, AGENT, Representing the Applicants

A.MICHAEL ROTHE, COUNSEL, representing the Registrar under the *Motor Vehicle Dealers Act*

DATE OF HEARING: MAY 11, 2010 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 December 3, 2009, proposed to refuse the registrations of Classy Auto Service Ltd. (Corporate Applicant) as a motor vehicle dealer and Mario Donny Farenga as a motor vehicle salesperson ("the Applicant"), under the Act.

PRELIMINARY ISSUE

A preliminary issue was raised by Counsel for the Registrar who advised that Roland Paskar could not represent the Applicants as he was not licensed by the Law Society of Upper Canada and had no approved exemption from the Society. Counsel for the Registrar provided the following reference to support his position, *Paskar (Re)* 2000 CanLII 16891 (O.N.L.S.D.C.).

The Applicant stated without Roland Paskar to help him the hearing would not be fair; however, he added he did want to get this hearing over today as it has been going for a long time.

Roland Paskar completed the Licence Appeal Tribunal, Declaration Of Representation/ Change in Representation form, indicating and signing that he was a person not in the business of providing legal services and occasionally that he provides assistance to a friend or relative for no fee. He stated the Applicant was his friend and he was not charging a fee for his services at this hearing.

The decision of the Presiding Member was, in the interest of fairness as suggested by the Applicant, to allow Roland Paskar to assist the Applicant and the hearing commenced.

FACTS and PARTICULARS

In the Notice of Proposal to Refuse Registration from the Registrar dated December 3, 2009, the Reasons and Particulars paragraphs indicate the Registrar's allegations.

Briefly Summarized, the Registrar alleges that the intention and objective of the Act is to protect the public interest. The requirements of the Act include that the Registrants be 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 Registrar alleges that the past conduct of the Applicant is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. .

The reasons in detail for this proposal are set out in Exhibit #3, Tab #1, Notice of Proposal to Refuse Registration. A summary of the same follows:

1. The Corporate Applicant, who applied for registration as a motor vehicle dealer on or about October 19, 2009, was previously registered from on or about September 30, 2005, until September 30, 2009.The Dealer's registration was subject to terms and conditions.

2. The Applicant applied for registration as a salesperson on October 19, 2009. The Applicant was previously registered under the Act from September 30, 2005, until September 30, 2009.

3. The Applicant is the sole officer and director of the Corporate Applicant.

4. On the Short Form Application for Business Registration and on the Short Form for Individual Registration submitted on October 19, 2009, question 1(a) of Section A asks:

> Are there currently any charges pending or has the applicant been found guilty or convicted under any law?

The Applicant on behalf of the Corporate Applicant and on his individual form answered "no".

5. On April 27, 2005, the Corporate Applicant was convicted of one count of violating section 90(3) (a) of the *Highway Traffic Act* (HTA), which relates to the issuance of safety standard certificates in respect of a vehicle. On November 28, 2008 the Corporate Applicant was convicted of 8 counts of violating the same section of the same Act. Again in November 2008, the Corporate Applicant was convicted of 9 additional counts of the same.

6. On November 27, 2008 and again on November 28, 2008, the Corporate Applicant was convicted of one count on each date of violating section 11(2) of the HTA, which relates to the obligation to transfer vehicles purchased within 6 days. These convictions also constituted a breach of paragraph 11 of the terms and conditions of registration.

7. On July 26, 1996, August 11, 2003, March 1, 2004 and June 7, 2004, the Applicant was convicted of violating section 99(2) of the HTA which relate to making false statements in safety standard certificates.

8. The Corporate Applicant also failed to disclose relevant convictions and/or findings of guilt on the original application submitted in July 2005 as well as the renewal application submitted in September 2007.

9. The Applicant failed to disclose relevant convictions and/or findings of guilt on his original application for registration submitted in July 2005 as well as his renewal application submitted in September 2007.

10. On December 13, 2004, the Applicant was convicted of acting as a motor vehicle dealer without the benefit of registration.

11. On February 13, 2009 both the Corporate Applicant and the Applicant had their respective registrations as a Motor Vehicle Inspection Station ("MVIS") and MVIS mechanic refused by Decision and Order of the Licence Appeal Tribunal.

12. The Applicant was the sole registered MVIS mechanic of the Corporate Applicant.

13. Both Applicants have applied to have the Decision and Order of the Licence Appeal Tribunal judicially reviewed by the Divisional Court.

14. The Applicants have failed to comply with the Act, in particular with section 5.

THE LAW

Section 3 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 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;

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.

ISSUE

Does the past conduct of the Applicants afford reasonable grounds for the belief that the Applicants will not carry on business in accordance with law and with integrity and honesty?

EVIDENCE

The Notice of Proposal sets out the allegations against the Applicants. The allegations relate to the Applicants' numerous past and recent convictions. As well, other allegations were the Applicants' failure to disclose convictions and other information to the Registrar during the application for registration as a motor vehicle dealer and as a motor vehicle salesperson.

The issue of acting with financial responsibility was not a matter for this hearing.

The first witness for the Registrar was Carey Smith who was sworn and testified he is the Director of Investigations with OMVIC, a not for profit organization established to administer the Act, which is a public statute. He stated prior to joining OMVIC he was a member of the Halton Police Services for twenty six years, many of which were spent in the Commercial Crime and Fraud Unit dealing with motor vehicle issues.

Mr. Smith reviewed the Book of Documents from the Registrar drawing the attention of the Tribunal to the numerous convictions that both Applicants had acquired in the past and many convictions that were more recent.

He stated these convictions are industry related and include false information on safety standard certificates, not registering vehicle purchases within the six day time frame as required by law, and selling vehicles without being registered as a dealer/salesperson.

He explained the necessity to be honest when completing documents for the Registrar, as these are considered the first test of honesty and integrity of the aspiring applicant.

Mr. Smith testified that the Applicant, in this case, was issued his registration with terms and conditions. Mr. Smith reviewed the terms and conditions and how they reflect the Act. He testified that the Applicant was late and missed the expiry date, of his previous registration, with his request for renewal of his registration and thus this matter is treated as a refusal to register rather than a revocation of registration.

Mr. Smith testified that the business registration shows the Applicant as the sole mind/director of the dealership. He reviewed the convictions on the Station Record retained by the Registrar which demonstrated warning letters were sent on two occasions in 2001, one conviction in 2005 and eleven in 2008. Despite all of these convictions Mr.

Smith testified that, in his 2005 application, when asked in Section A if there were any charges pending or any convictions under any law, the Applicant answered “no”, but the honest answer should be “yes”.

He testified the Applicant in the Business Application in 2005 answered “no” to the question #4 when asked about convictions but the Applicant did disclose a charge of causing a disturbance that had been withdrawn. He stated the honest answer should have been “yes” and the explanation of the circumstances should have been included.

During his testimony he reviewed the 2007application for registration as a business, and Mr. Smith testified again that the Applicant did not answer the question regarding convictions honestly.

Mr. Smith testified that on the Applicant’s Business Short Form completed in October 2008 the Applicant again checked off the “no” box which asked if there were any pending charges or convictions under any law. He stated the Applicant should have remembered he had numerous convictions for industry related matters in February 2008. Thus, he believes the Applicant was not acting with honesty and integrity while completing the application for business registration.

Mr. Smith testified that in a letter to OMVIC from the Corporate Applicant, dated October 25, 2009 the Applicant blamed the Ministry of Transportation for his problems, instead of accepting responsibility for his actions. The Applicant stated he was going to apply for a judicial review. The position of the Registrar remains that the failure to disclose the accurate information regarding convictions as well as the numerous convictions shows that the Applicant is not governable and will not conduct business with honesty and integrity.

With regard to the Applicant’s application to be registered as a motor vehicle salesperson, Mr. Smith testified that, similar to the Business Applications, the Applicant was not acting with honesty and integrity while he completed the form with respect to any pending charges or convictions. He stated the Applicant checked off the “no” box except in 2005 he checked the “yes” box and wrote he was “curbsiding” cars at his garage. However, he stated the Applicant checked the “no” box in 2007 and 2009 when the honest answer was “yes” with a covering letter explaining the convictions and the circumstances.

Mr. Smith testified that the Applicant’s past conduct includes industry related conduct leading to convictions covering a period of several years. He stated that the Applicant lacks honesty and integrity and there is no contrition shown for placing the public safety at risk. Thus, he has no faith the Applicant will abide by the law in any future business transactions.

On cross-examination, Mr. Smith was questioned regarding the failure to transfer a vehicle within six days and whether this was a serious offence. He responded stating it was not the most serious but it is the law and this shows that the Applicant did not respect authority. Mr. Smith stated the Registrar found the number of convictions disturbing, as it shows the

Applicant is not contrite or accepting responsibility. He pointed to the Applicant blaming of MTO as an excuse for his own conduct and convictions. When asked about rehabilitation in this case, Mr. Smith responded that, given the numerous convictions in this case, he does not see rehabilitation possibilities. He stated the Registrar has to rely on honest disclosure of facts from an applicant and if that is not forthcoming then the customer at the dealership will not likely be given all the facts. Thus, the unsuspecting public is at risk.

The Applicant was sworn and testified that he had been in the automotive business for 18 years and had his own garage for 14 years. He stated he was licensed as a mechanic to repair cars, big trucks and coaches.

The Applicant testified he was married and they had two children. He stated his father had passed away but his mother was still living.

The Applicant testified that he knew non-disclosure was a serious matter because it relates to honesty and integrity. He stated he should have been on the up and up but he made some mistakes and he only did some disclosure.

He stated in 2006 he got his licence and he had checked the “no” box as having no convictions but he did not expect the MTO matters to be an offence and considered it not a big factor. He stated he continued with the same disclosure in 2006, not believing 2005 information was incorrect.

The Applicant testified he should have checked the “yes” box in 2005.

The Applicant stated that he should have called OMVIC but he did not. He stated he was aware of why the Registrar was upset because of all the convictions for issuing false safety certificates. He testified he cut corners to make a quick dollar. He knows it was wrong and now he is paying for it and he is sorry.

The Applicant testified that he now cannot write safety certificates and has to farm them out. This means his business is down about 30%. This has affected him financially, emotionally and mentally.

The Applicant testified he had sold 150 cars and there were no complaints. This means he dealt with people with honesty and integrity.

He stated he understood why there were concerns about his honesty as 17 charges would alarm anybody. However, several of the charges occurred due to him issuing certificates for an unlicensed location. He had not notified MTO he had changed locations. He testified he accepts responsibility and has learned his lesson.

The Applicant testified he has paid his taxes, debts and judgements and he is trying to be straight.

He concluded his testimony stating he was sorry for what he did but he cannot reverse it and it is now time to move ahead.

During cross-examination the Applicant stated he was the sole officer and director of the business. He stated he had an MVIS business and also did general repairs. He stated while he was a registered dealer he completed the Georgian College Course for dealers and salespersons, studied the Act and was made aware of the importance and requirement of acting with honesty and integrity and within the law. He stated he was registered with conditions which he understood and signed.

On further questioning, the Applicant stated he did not figure the Registrar were going to pick up on his convictions on his 2009 applications as they had not noted them before. He stated he agreed 100% that he should have checked the “yes” box regarding convictions when completing his applications. He stated he did not think he was finally convicted if he had requested a judicial review but now he knows differently.

Upon review of his convictions, the Applicant stated they were all his and he agreed the record was accurate. The Applicant agreed he had seen the warning on each application form advising that it was an offence to knowingly provide false information on this application. Provision of false information may result in revocation of his registration and/or in charges being laid. Again the Applicant stated he should have put “yes” in the box requesting his previous conviction record but he checked off the “no” box because he didn’t think the HTA convictions would be on the record. He continued stating he was sure OMVIC would have records but he chose to check the “no” box.

When questioned about his MVIS being revoked, he agreed that he again had checked the “no” box but it should have been the “yes” box he checked to state his MVIS licence had been refused.

On the Applicant’s individual application in 2005 on question #9, when asked about conviction under any law, the Applicant checked the “yes” box which was correct as he had been charged with selling cars without being licensed. When questioned about why he did not declare this conviction in the future the Applicant responded “I didn’t and I am sorry”.

The Applicant’s final statement regarding non-disclosure was that he thought when he sent in the Licence Appeal Tribunal Decision dated February 2009; he thought that was all he needed to send to the Registrar as disclosure of his convictions.

FACTS FOUND PROVEN

1. The Applicants in this appeal have been in the motor vehicle dealer and sales business for many years.

2. The Corporate Applicant registration was subject to terms and conditions.

3. The Applicant applied for registration as a motor vehicle salesperson in October 2009. He was registered as a salesperson until September 2009 when he neglected to apply for a renewal of his registration before his previous registration expired. Thus, the refusal notice was issued instead of a revocation notice.

4. The Applicant is the sole officer and director of the dealership.

5. In 2005 and 2008 the Applicant and the Corporate Applicant were convicted of eleven counts in total of violating section 90(3) of the HTA.

6. In 1996, 2003 and 2004 the Applicant was convicted of violating section 99(2) of the HTA.

7. In November 2008 the Applicant was convicted of two violations of section 11(2) of the HTA. This conviction was also a violation of his registration's terms and condition.

8. On the Corporate Applicant's Short Form application for Business Registration and on his Short Form for individual registration the Applicant, when asked in section A if there were any pending charges or convictions under any law, checked off the "no" box when it should have been the "yes" box and then included an explanation of the convictions and circumstances. By doing so, the Applicant knowingly either withheld information or provided false information to the Registrar.

9. On the Applicant's Short Form for Business Registration and on the Applicant's Short Form application for individual registration in 2009, when asked "has the applicant had a licence of any kind revoked, refused, suspended or cancelled", the Applicant answered "no" but the honest answer would be "yes" as he had his MVIS licence refused within the previous ten months.

10. In December 2004 the Applicant was convicted of acting as a motor vehicle dealer without the benefit or registration. He declared this on one application but withheld this information on other applications.

11. The Parties agreed that the financial standard of the Act was not an issue in this hearing.

12. The Applicant had completed the Georgian College Course that is required in order to be a licensed dealer and as a salesperson in the automotive industry.

APPLICATION OF LAW TO FACTS

The Tribunal must determine whether or not the past conduct of the Applicants affords reasonable grounds for the belief that such Applicants will not carry on business in accordance with the law, with honesty and integrity.

The onus falls upon the Registrar to prove his case. The Tribunal is required to make an independent assessment as to whether the criteria for depriving the Applicants of registration has been proven, showing no deference to the Proposal of the Registrar. The governing legislation has, as its primary purpose, consumer protection.

The legislature to that end has decided that in the area of the retail sales of motor vehicles a regulatory scheme is required. The scheme mandates that persons involved in that industry become and remain registrants under the Act. While the Act allows for a prima facie right to registration, it also allows the Registrar to intervene in the registration process if he feels there are grounds for such intervention. Those grounds are set forth in section 5 of the Act and the registrant or the applicant is informed of that intervention by the issuance of a Notice of Proposal. An appeal from the Registrar's Proposal lies to the Tribunal by way of a hearing de novo.

In the present case the Applicants' registration as a dealership and as a salesperson are proposed to be refused due to conduct that is not in keeping with the Act.

The Applicant in his own testimony clearly indicated he knew he had convictions to declare but chose not to disclose them to the Registrar during the application process. Instead he testified he thought the Registrar would not check or did not have access to records that would reflect his MTO convictions. This was partially due to the fact that he had neglected to answer similar questions on the past applications with honesty and integrity and had got away with it.

The Applicant acknowledged that the conviction record presented by the Registrar was accurate but he believed after five years the convictions no longer were important. Although the Applicant stated he was sorry many times, when asked about his convictions and his lack of disclosure of the same to the Registrar, he never provided any convincing evidence to the Tribunal to mitigate his lack of honesty and integrity. Instead he repeatedly stated he knows better now and he is sorry. Yet in his own testimony the Applicant stated the convictions resulted from his short cuts and his desire to make a quick dollar. He stated if someone needed a safety certificate he was known in town to get it done quickly and without any problems. The Tribunal believes the Applicant's short cuts and quick dollar philosophy were more important to the Applicant than the safety of the public. There was no evidence presented to the Tribunal that this pattern of conduct would change if the Applicants were registered as a dealer or as a salesperson.

With regard to his lack of disclosure the Applicant testified he did disclose a charge that had been dismissed and did disclose he had sold vehicles without the benefit of registration. This evidence convinces the Tribunal that the Applicant was well aware he

ought to disclose all relevant information to the Registrar at time of completion of the applications. However, he chose not to disclose on either his application for business registration or on his individual registration application form.

There is no credible explanation for failing to disclose the Decision from the Licence Appeal Tribunal which ordered the Director to refuse the Registration of the Dealer and the Applicant as an MVIS and an MVIS mechanic.

The Applicant acknowledged during cross-examination that he had completed the Georgian College Course required before being registered and during this course he was made aware of the importance of disclosure and its relation to honesty and integrity.

Every aspiring applicant is informed of the fact of a criminal background check being done and of the consequences of concealment right in the application form. Past Tribunal decisions indicate clearly the seriousness with which the Tribunal regards instances of concealment. The application form is the first contact between the hopeful registrant and the regulator and as such should be completed honestly.

The Tribunal is concerned not only about the lengthy history and number of convictions for serious industry related offences (that could endanger the public) including falsifying documents, but also the Applicants' non-disclosure by deliberately concealing information from the Registrar. This conduct would indicate the Applicant is ungovernable. To register an individual with the past conduct of the Applicant would send the wrong message to the industry and to the public.

On the basis of the facts as found and the application of the law to those facts, the Tribunal finds that the past conduct of the Applicants, taken as a whole, affords reasonable grounds to believe that the Applicants will not carry on business as a dealer or as a motor vehicle salesperson with integrity, honesty and in accordance with the law.

DECISION

Therefore by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal dated December 3, 2009 to refuse the registration of Classy Auto Service Ltd as a motor vehicle dealer and to refuse Mario Donny Farenga registration as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

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Don Benninger, Member

Released: June 23, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

FIND-A-CAR AUTO SALES & BROKERING INC. AND MICHAEL RYAN O'CONNOR- Motion

APPEAL FROM A PROPOSAL BY THE REGISTRAR, *MOTOR VEHICLE DEALERS ACT* R.S.O. 1990, c. M.42

TO REVOKE REGISTRATION

TRIBUNAL: CHANTAL PROULX, Vice-Chair

APPEARANCES: KEITH A. MACLAREN, Counsel representing the Applicants

BERNARD LEBLANC, Counsel representing the Registrar, *Motor Vehicle Dealers Act*

PAUL BATTIN, Counsel representing the Attorney General (on behalf of the RCMP)

DATE OF MOTION: November 4, 5 and 8, 2010 Ottawa

REASONS FOR DECISION AND ORDER

This motion arises in the course of an appeal by the Applicants to the Licence Appeal Tribunal (the "Tribunal") from a proposal by the Registrar, *Motor Vehicle Dealers Act* to revoke registration.

The Applicants bring this motion for an order:

> a) Staying the proceeding concerning the proposal to revoke of the Applicants' licences;
> b) Preventing the Registrar from relying on any evidence obtained from the police which formed part of the Crown disclosure; and
> c) Prohibiting the Registrar from relying on the transcripts of Mr. O'Connor's guilty plea in the criminal proceedings and the sentencing hearing.

Counsel for the Registrar is asking the Tribunal to dismiss the motion in its entirety. In the alternative, counsel is asking the Tribunal to render a decision on this motion only after the hearing on the merits of the appeal.

Counsel for the Attorney General is asking the Tribunal to dismiss the motion in its entirety, with costs.

OVERVIEW

Find-A-Car Auto Sales & Brokering Inc. ("FAC") is presently registered as a motor vehicle dealer under the *Motor Vehicle Dealers Act*[1] (the "Act") and has been registered since on or about February 16, 2001. FAC is in the used car business.

Mr. Michael Ryan O'Connor (" Mr. O'Connor") is presently registered as a motor vehicle salesperson under the Act and has been registered since on or about March 12, 2001. Mr. O'Connor is a director and officer of FAC.

The Ontario Motor Vehicle Industry Council ("OMVIC") is a regulator that regulates the motor vehicle industry in Ontario.

On or about November 6, 2009, Mr. O'Connor pled guilty to two counts of fraud over $5000 for conduct related to the financing of motor vehicles.

On December 3, 2009 the Registrar issued a notice of proposal to revoke the registrations of FAC and Mr. O'Connor (the "Applicants") pursuant to the Act. The notice stated that the intention and objective of the Act is to protect the public interest and therefore the Registrants must be "financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty". According to the Registrar, the Applicants' "past conduct and financial position are inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act".

The Applicants filed a notice of appeal with the Tribunal which was received on December 11, 2009. Among the reasons for appealing, the Applicants submitted that "the Appellant O'Connor has not been found guilty of any criminal or other offence which would justify the revocation of his registration". The Applicants also challenged the allegation that FAC and Mr. O'Connor "are not financially responsible in the conduct of their business, or that they have failed to carry on business in accordance with the law, with integrity and/or with honesty". In reference to the Agreed Statement of Facts, Mr. O'Connor maintained that he "did not personally engage in any fraud in connection with any customer or financial institution, simply that employees working for the corporation were guilty of such fraud".

STATUTORY FRAMEWORK

Pursuant to paragraph 4(1)(a) of the Act, no person shall act as a motor vehicle dealer unless the person is registered as a motor vehicle dealer. Pursuant to paragraph 4(1)(b) of the Act, no person shall act as a salesperson unless he or she is registered as a salesperson.

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[1] *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Sch. B

Sections 5.1 and 6 of the Act deal with the entitlement to registration and read as follows:

> 5.1 (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.
>
> 6. (1) An applicant that meets the prescribed requirement is entitled to registration or renewal of registration by the registrar unless,
>
> (a) having regard to the applicant's financial position or the financial position of an interested person is respect of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business;
> (b) 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;
> (c) the applicant or employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration.

The Registrar may also suspend or revoke a registration if a registrant no longer meets the eligibility requirements set out in section 6. Section 8 of the Act reads as follows:

> 8. (1) Subject to section 9, 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 eligible for registration under section 6 of if the registrant is in breach of a condition of the registration.

EVIDENCE

History of FAC and Mr. O'Connor

Mr. O'Connor is 34 years old and holds a College diploma in business. In 1998 he founded FAC. Mr. O'Connor indicated that his business grew quickly between 2001 and 2005. By 2007 FAC had approximately one hundred and twenty employees, with stores in Ottawa (Richmond), North Bay, Kingston, Trenton, and Montreal. Mr. O'Connor is the President of FAC and spends most of his time at the Ottawa location since each location is operated under the supervision of a manager.

Mr. O'Connor's affidavit indicates that in 2004 FAC sold approximately twenty-six hundred cars, thirty-two hundred in 2005 and 2006 and between January and May 2007, FAC had sold fifteen hundred cars. About half of all FAC customers required financing for the purchase of their vehicle.

FAC customers could obtain financing with the Royal Bank of Canada (the "RBC"), the Bank of Nova Scotia (the "BNS"), VFC, Wells Fargo, Amercredit and TD Canada Trust (the "TD").

In June 2006, Mr. O'Connor heard rumours that FAC was under police investigation. Shortly thereafter, the BNS, the RBC and the TD withdrew their financing. Mr. O'Connor

met with the Head of Security at RBC and the bank decided to continue business as usual with FAC; however, Mr. O'Connor advanced $200,000.00 in the form of a personal GIC. Mr. O'Connor and RBC agreed that the bank could take money from the GIC to cover any FAC customer claims and Mr. O'Connor would replenish the funds to ensure the GIC remained at $200,000.00.

In July and August of 2006, the manager of the North Bay FAC location advised Mr. O'Connor that OMVIC was conducting an inspection. However, because the investigators removed several customer files and sent questionnaires to FAC customers, Mr. O'Connor believed it was more likely that OMVIC was conducting an investigation rather than an inspection.

Mr. O'Connor indicated that between 2006 and 2009 he worked with OMVIC to resolve customer complaints. He refunded money to individuals who indicated that they bought "packages" because they were forced to do so by FAC staff. Mr. O'Connor indicated that on numerous occasions he spoke to someone by the name of Jessica at OMVIC and she told him that it was good for him to settle the claims. Mr. O'Connor testified that over the years he paid off about $100,000.00 in car loans relating to RBC customers.

Mr. O'Connor stated in his affidavit that in light of the rumours of a police investigation, he met with the managers of the various FAC locations and asked them about the allegations of irregularities; however, they all claimed that their activities were not contrary to the Act.

In an attempt to clarify the situation regarding the rumours of a police investigation, Mr. O'Connor testified that he contacted Detective Douglas of the Kingston Police Force (the "KPF") and he was told that he was not under investigation. Mr. Douglas apparently declined to meet Mr. O'Connor.

Similarly, Mr. O'Connor testified that he called Mr. Carey Smith, the Director of Investigations for OMVIC, but did not receive a confirmation that an investigation was taking place.

On July 28, 2006 Detective Douglas obtained a Production Order and Sealing Order requiring the RBC and TD to release all accounts held by or associated with FAC locations. Detective Douglas obtained a Production Order and Sealing Order for the BNS on January 4, 2007.

Mr. O'Connor testified that following the issuance of search warrants, the banks called all the mortgages and the lines of credit for FAC. Mr. O'Connor had to close down FAC and lay off the one hundred and twenty employees. He also indicated that he settled with the banks.

Mr. O'Connor stated that an article published in the summer of 2007 in the Kingston Whig Standard mentioned that OMVIC was in the process of revoking the Applicants'

licences. He believes the author of the article relied on information contained in public records.

Investigation of FAC and Mr. O'Connor

Constable Daoust works with the Commercial Crime Section of the Kingston detachment of the Royal Canadian Mounted Police (the "RCMP"). In May 2006 he was approached by an informant regarding alleged illegal activity taking place at the Kingston location of FAC. The informant also indicated that fraudulent activities were likely taking place at other FAC locations; however the informant was only able to give specific evidence in relation to the Kingston FAC location.

Joint investigation

Constable Daoust approached the KPF to discuss who was best suited to investigate these allegations. It was determined that a joint investigation would be appropriate in this case because the activities at other FAC locations may also need to be investigated. Detective Douglas, a criminal fraud investigator, was assigned to the investigation to represent the KPF. In late May 2006, Constable Daoust and Detective Douglas met the informant who provided the name of three FAC customers that were willing to share information relating to their dealings with the Kingston location of FAC.

Mr. Carey Smith has held the position of Director of Investigations with OMVIC since 2002. Mr. Smith testified that OMVIC often works with other law enforcement agencies such as the RCMP and the Police.

In June 2006, Constable Daoust and Detective Douglas met Mr. Smith to discuss the allegations that FAC was involved in fraudulent transactions. During the meeting, Mr. Smith explained OMVIC's role as the regulatory body responsible for the enforcement of the Act. At the time, Mr. Smith tried to convince Constable Daoust and Detective Douglas not to investigate because he believed many of the allegations were matters for OMVIC. Mr. Smith testified that he offered to assign an OMVIC investigator to the joint investigation; however, his offer was never really accepted. Mr. Smith and Constable Daoust both confirmed that OMVIC played a supportive role in the investigation and from time to time provided specific information related to the industry practices.

Discussions with banks

Sometime in early June 2006, Detective Douglas and Constable Daoust met the three individuals named by the informant. The fraud allegations related to the financing the individuals received for the car they purchased from FAC (Kingston). The three people in question authorized their respective banks (BNS and RBC) to disclose financial and personal information in relation to the joint investigation. In his affidavit, Constable Daoust indicated that it was routine practice to obtain information from financial

institutions when investigating financial fraud allegations. This is done to ensure the information provided by the individuals is consistent with the financial information at the bank.

On June 29, 2006, in the course of the investigation, Detective Douglas and Constable Daoust met with representatives of the RBC and the BNS. On July 28, 2006, Detective Douglas obtained a Production Order and Sealing Order for the RBC and TD. The Production Order and Sealing Order for the BNS was issued on January 4, 2007.

Constable Daoust testified that at no time did he instruct the financial institutions to stop their business relationship with FAC or Mr. O'Connor.

Delay

Constable Daoust confirmed that during the joint investigation, he, Detective Douglas and Mr. Smith had ongoing discussions regarding OMVIC's statutory powers to revoke the Applicants' licences. He believes the first discussion of the revocation of the licence was late in 2006. Constable Daoust confirmed discussions took place between the KPF, the RCMP and OMVIC regarding the best approach to take in light of the parallel investigations - one criminal and one administrative. Constable Daoust also mentioned that from the RCMP's perspective, in situations of parallel criminal and regulatory investigations, most regulators let the police pursue the criminal investigation unless the regulatory body is required to meet timelines. There was a concern that the criminal proceedings could be derailed or complicated if OMVIC issued a notice of revocation of the Applicant's licence. There was also a possibility that the criminal proceedings could be delayed. Constable Daoust clarified that at no time did he ask OMVIC to shut down the Applicants.

Mr. Smith indicated in his affidavit that OMVIC considers a proposal to revoke a registrant's licence regardless of whether or not they are charged and convicted. Every case must be assessed based on its own facts and OMVIC must decide whether or not to wait for the results of the criminal investigation or proceed simultaneously. In this case, OMVIC ultimately agreed that the police investigation would proceed first, a standard practice in such matters.

Mr. Smith confirmed that the topic of revoking the Applicants' licence came up during almost every discussion relating to the joint investigation. While OMVIC does not have to wait for the results of the criminal investigation, in April 2007 it was decided that it would be best to wait for the results of the criminal investigation.

Mr. Smith explained that OMVIC has two main objectives: 1) public protection, and 2) safe market place. Mr. Smith believes there was sufficient information in 2007 to revoke the Applicants' licences; however, decided to wait for the results of the criminal investigation.

November 2006 meeting

Mr. Smith acknowledged that he attended a meeting in November 2006. The participants included Detective Douglas, Constable Daoust, two bankers and himself. In his affidavit, Mr. Smith indicated that the meeting in November 2006 focused mainly on the process and procedures involved in determining how a car loan is approved. Mr. Smith summarized the results of the inspection that took place at the FAC North Bay location; however, the inspection files were not shared with the police until they executed a Production Order for OMVIC's files on December 15, 2006. Mr. Smith also noted in his affidavit that all registrants consent to OMVIC sharing and exchanging information with others. Mr. Smith testified that while the meeting may well have lasted 4 1/2 hours, he arrived late at the meeting and believes he was there for approximately one hour.

Mr. Smith also indicated in his affidavit that FAC lenders did not provide any financial or other information to OMVIC.

Obstruction of Justice - Witness Tampering

On June 2, 2010, Witness H was the area manager with a bank in Ottawa. Between 2001 and the present, Witness H has held the position of area manager with several financial institutions. During this period, Witness H facilitated loans between the various lending companies and FAC customers.

In his supplementary affidavit, Mr. O'Connor indicated that Witness H had been summoned to testify in the proceedings before the Tribunal. Following a pre-hearing conference, the Applicants' counsel provided a will say statement for Witness H to the Registrar' counsel at the time, Mr. Rothe. Since Witness H was not available to testify on the date of the hearing, the Applicants decided to proceed by way of affidavit. The draft affidavit for Witness H was sent to Mr. Rothe on June 3, 2010. The Applicants' counsel attempted to contact Witness H to have him sign the affidavit; however, Witness H did not return the phone calls. As a result, Witness H's affidavit is not signed. The Applicants decided not to call him as a witness for this motion.

The owner of another dealer hired Mr. O'Connor as a consultant. Witness H is presently a sales representative for the same bank that provides financing to that other dealer. Mr. O'Connor indicated in his supplementary affidavit that a sales manager at the other dealer advised him that Witness H had called to say that Mr. O'Connor had gotten him in trouble with his bosses and that the other dealer could be cut off. Witness H apparently also made reference to the fact "that he was in danger of losing his job".

Mr. Smith's affidavit states that neither he nor Mr. Rothe provided any information to the bank in question or communicated with any of the staff. However, they did investigate the statements made by the Applicants to prepare for the proceedings. Mr. Smith confirmed that he forwarded a number of will say statements and two affidavits to

Constable Daoust and asked him if he had any comments since he was the lead investigator in the criminal matter.

Constable Daoust also testified that in 2010 Mr. Smith sent him a copy of a will say statement and asked him to review it and provide any comments he may have. With Mr. Smith's permission, Constable Daoust shared Witness H's unsworn affidavit with Detective Douglas. To the best of Constable Daoust's knowledge, Detective Douglas spoke to the head of security at the Toronto office of Witness H's employer and was told that the banks vice-president had a different opinion of the Applicants than Witness H. Constable Daoust confirmed that at no time did he speak to Witness H.

Disclosure of Crown Brief to OMVIC

Constable Daoust disclosed the Crown Brief to OMVIC on April 28, 2009, a fact admitted in Mr. Smith's affidavit. In his affidavit, Constable Daoust indicated that the Crown Brief was disclosed to OMIVC because OMVIC was part of the joint investigation, it was his understanding that OMVIC investigators were considered "special constables" under the *Police Services Act*[2] and because the RCMP did not have the jurisdiction to address the regulatory issues. Constable Daoust testified that it was his understanding that disclosing the Crown Brief to OMVIC was permitted according to the *Privacy Act*[3]. He also believed the RCMP can share information with a regulatory body if it relates to an investigation. He confirmed that it was an ongoing standard practice to share information with regulatory bodies. Constable Daoust confirmed that his superiors and the lawyers involved in the criminal proceedings were aware that the information would be shared with OMVIC and no one had any objection.

Reasons

For ease of reference, the Tribunal will address each item of the motion separately.

a) Order staying the revocation of the Applicants' licences

Counsel for the Applicants submitted that the Tribunal has jurisdiction to stay or dismiss the proceeding concerning the proposal to revoke the Applicants' licences if to proceed would amount to an abuse of process. There is no dispute that the Tribunal has such powers pursuant to subsection 23 (1) of the SPPA which states:

> 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.

Counsel suggested that in this case, the argument of abuse of process is comprised of two subcategories, namely delay and prejudice.

i) Delay

[2] *Police Services Act*, R.S.O. 1990, c. P 15
[3] *Privacy Act*, R.S.C. 1985, c. P-21

The Applicants submit that the delay in this case was approximately 42 months - which represents the time between June 2006, the month the RCMP and the KPF informed OMVIC of the joint investigation, and the notice of proposal to revoke the licence in December 2009. It was further submitted that if the Applicant had contributed to the delay, the period could be reduced to reflect the delay caused by the Applicants. However, in this case, it was suggested that the Applicants were not responsible for any delay; therefore it was not necessary to take this into consideration.

Counsel for the Applicants also referenced the two year time limit for the Registrar to refer a complaint to the Discipline Committee pursuant to section 13 of OMVIC's *Code of Ethics and Operation of Committees*[4] and suggested that the Tribunal should take this into consideration when determining what constitutes a reasonable delay.

Counsel for the Registrar argued that the delay in this case should be calculated as being one month, the time between the guilty plea (November 2009) and the proposal to revoke the licence (December 2009) because it was reasonable for OMVIC to wait for the results of the criminal investigation.

Counsel for the Registrar also submitted that the delay of two years referred to in OMVIC's *Code of Ethics and Operation of Committees*[5] has no relevance in this context because the limitation period deals with complaints rather than discipline issues. Counsel further highlighted that there is no prescribed period in the Act for matters dealing with the revocation of a licence.

Section 13 of OMVIC's *Code of Ethics and Operation of Committees* reads as follows:

> The Registrar shall not refer a complaint to the discipline committee under paragraph 4 of subsection 14(4) of the Act after the second anniversary of the day on which the facts upon which the complaint is based first came to the knowledge of the Registrar.

The Tribunal finds the limitation period of two years for the Registrar to refer a complaint to the Discipline Committee is not relevant in this case since the issue before the Tribunal is the revocation of a licence, not a discipline matter where the remedies are quite different. The allegations in this case are much more serious.

The leading case on the issue of abuse of process in relation to delay and prejudice is the Supreme Court of Canada decision in *Blencoe v. British Columbia (Human Rights Commission)*[6]*.* The Court stated:

> "... delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing

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[4] *Code of Ethics and Operation of Committees*, O. Reg. 332/08
[5] Ibid
[6] *Blencoe v. British Columbia (Human Rights Commission*), [2000] 2 S.C.R. 307 (S.C.C.) at par. 101

> a judicially created limitation period. In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay".[7]

The Applicants calculated a 42 month delay, while the Respondent believes it was one month. Since the Tribunal finds that delay on its own would not warrant a stay of proceedings, even if the proper calculation was 42 months, it is necessary to consider whether or not in this case there is evidence of significant prejudice.

ii) Prejudice

Applicants' position

Counsel submitted that the delay caused real and serious prejudicial harm to the Applicants. First, the delay caused harm in the form of stigma to the reputations of Mr. O'Connor and FAC because OMVIC shared information with FAC banks and lenders. Second, there is a prejudice to the hearing because of the delay. The third prejudice stems from the RCMP's disclosure of the Crown Brief to OMVIC. The Applicants also alleged that OMVIC attempted to obstruct justice by dissuading Witness H from testifying. Finally, the Tribunal was asked to consider the cumulative effect of the prejudices.

Counsel relied on paragraph 115 of the *Blencoe*[8] decision for the proposition that actual prejudice can be found even where the fairness of the hearing has not been compromised. The Supreme Court stated:

> Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. [9]

It was argued that the delay caused real and serious prejudicial harm in the form of stigma to the reputation of the Applicants. Counsel indicated that OMVIC's discussion of the charges against the Applicants with the public led to widespread media coverage. Sharing information with the banks resulted in the primary lenders cutting off all business with FAC (in 2006). FAC's reputation was also ruined and was therefore unable to carry on business. Lastly, Mr. O'Connor's reputation in the automotive industry was tarnished.

Another factor to consider according to counsel for the Applicants is whether the actual prejudice and unfairness can affect the hearing. Again, in *Blencoe*[10], the Court addressed the prejudice for the fairness of the hearing in these terms:

> There is no doubt that the principle of natural justice and the duty of fairness are part of every administrative proceeding, where delay impairs a party's ability to answer the complaint against

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[7] *Blencoe*, Ibid, at par. 101
[8] *Blencoe*, Supra note 6 at paragraph 115
[9] *Blencoe*, Supra note 6 at paragraph 115
[10] *Blencoe,* Supra note 6

> him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy.[11]

Counsel for the Applicants submits that the fairness of the hearing has been compromised because the investigation concerned incidents that occurred more than four years ago and memories of Applicants, those involved at OMVIC, the RCMP and the KPF, the banks and lenders have faded.

Counsel also suggested that the Applicants were prejudiced by the fact that the RCMP shared the Crown Brief with the OMVIC. It was submitted that the disclosure was contrary to the *Privacy Act*[12] and section 4 of the Umbrella Agreement, and therefore it amounts to an abuse of process.

The Applicants' counsel argued there was an obstruction of justice. It was submitted that to facilitate the administration of justice, counsel for the Applicants disclosed Witness H's unsworn affidavit to Mr. Rothe, then counsel for the Registrar. Counsel suggested that the affidavit was confidential and therefore could not be shared. The Applicants' position is that by disclosing Witness H's affidavit to his employer, OMVIC attempted to obstruct justice by directly attempting to dissuade Witness H from testifying before this Tribunal.

It was suggested that Witness H's testimony would have painted a very positive picture of Mr. O'Connor. Furthermore, the Applicants took the position that in his affidavit Witness H was not speaking on behalf of his employer, but rather sharing his insight on the professional relationship he had with the Applicants while working for various lenders in the Ottawa area. It was suggested that Witness H was not summoned to attend the hearing because Mr. O'Connor did not want him to lose his job.

Finally, counsel brought forward the argument that the Tribunal should consider the cumulative effect of the prejudices to conclude that there has been an abuse of process and therefore the Tribunal should stay the revocations of the Applicants' licence.

Registrar's position

The Registrar takes the position that Mr. O'Connor has not been prejudiced because he has retained his licence throughout the investigation as well as during the proceedings before the Tribunal, and therefore has been able to work. Counsel also submits that OMVIC is not responsible for the fact that the various banks and lenders decided to cut their ties with the Applicants.

Counsel for the Registrar argued that the Applicants' main concerns during the investigation must have been related to the criminal investigation since many of the events at that time, such as the search warrants, the challenge relating to the search

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[11] *Blencoe,* Supra note 6 at paragraph 102
[12] *Privacy Act,* Supra note 3

warrants, and the negotiations with the Provincial Crown, related to the criminal investigation. Counsel also suggested that OMVIC cannot be held responsible for the fact that the media in Kingston alluded to the fact that the Applicants' licences would be revoked.

It was also submitted that while prejudice can take different forms, most frequently the issue is whether a fair hearing is possible. Counsel argued that in this case there is no evidence that the hearing process itself would be unfair because the evidence the Registrar intends to rely on still exists - namely the transcript of the guilty plea in the criminal proceedings and the transcript of the sentencing hearing. It was further suggested that while memories may have faded, the key witnesses are still available.

The Registrar takes the position that there is nothing in the Act to prevent OMVIC from conducting joint investigations with a police force such as the KPF and the RCMP. In fact, according to Mr. Smith, these types of investigations are routine. It was suggested that paragraph 36(1)(a) of the Act or paragraph 14(1)(a) of the *Motor Vehicle Dealers Act*[13] permit such sharing of information. Paragraph 36(1)(d) of the Act provides another exception to the duty of confidentiality which allows OMIVC to share information with law enforcement agencies, which should encompass the Kingston Police and the RCMP.

Counsel argued that OMVIC had no role to play in Witness H not signing the affidavit. It was also suggested that it was the Applicants' decision not to issue a summon. Counsel submits that Witness H's affidavit would lead one to believe that he was speaking on behalf of his employer. Furthermore, it was argued that Mr. Smith or OMVIC cannot be said to have obstructed justice when there was no communication or contact with Witness H's superiors.

It was also argued by counsel that there is no evidence before the Tribunal to support the allegation that OMVIC is proposing to revoke the Applicants' licences based on pressure from competitors in the industry.

Added Party's position

Counsel for the Attorney General argued that the RCMP acted honourably and reasonably during the course of the joint investigation. It was submitted that courts have recognized that joint investigations between a regulator and the police are appropriate and necessary.

It was further submitted that it is a common practice for the police to share information with a regulatory body with investigation powers such as OMVIC. In the case of *Children's Aid Society of Algoma v. C.L.*[14], the Ontario court stated:

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[13] *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M. 42

[14] *Children's Aid Society of Algoma v. C.L.*, 2003 CanLII 47869 (On. C.J.) at par. 85

> In addition, it is evidently a common practice for a police service and a society to conduct joint investigations from time to time, particularly when the possibility of criminal conduct that gives rise to child protection concerns is conduct that may also lead to criminal or quasi-criminal charges. It would be a queer investigation indeed if the joint investigators were constrained from sharing information that was relevant to whatever was being investigated. This, or course, is subject to any statutory restrictions that might apply to such sharing.

Counsel submits that the RCMP shared the Crown Brief with OMVIC in accordance with the *Privacy Act*. Paragraph 8(2)(f) of the *Privacy Act*, stipulates that information from a government institution can be shared with a provincial organisation, if there is an arrangement in place between the parties. In this case, the federal government and the government of Ontario have had an agreement relating to the sharing of information since July 1, 1983, which is known as the Umbrella Agreement.

It was also argued that the Crown Brief should be admissible by applying the admissibility factors set out in the *Ault*[15] case.

Counsel for the Attorney General rejects the allegations that the RCMP attempted to influence Witness H in any way. It was submitted that it was an internal matter for the banks to decide if Witness H should or could speak on behalf of his employer in this proceeding. It was further suggested that the Applicants could have called Witness H as a witness in these proceedings. As it stands, one can only speculate why Witness H did not sign the affidavit.

TRIBUNAL'S DECISION

a) Motion to Stay Proceedings

In *Canam Enterprises Inc. v. Coles*[16], the Ontario Court of Appeal stated that the doctrine of abuse of process

> "...is a discretionary principle that is not limited by any set of number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy".

Similarly, the Federal Court in *Sauve v. Canada*[17] considered the factors relating of the doctrine of abuse of process. The Court indicated:

> 1) it is a flexible doctrine, not limited to any set number of categories;
> 2) its purpose is a public policy purpose used to bar proceedings that are inconsistent with that purpose;
> 3) its application depends on the circumstances and is fact and context driven;
> 4) its aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice;

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[15] *Ault et al. v. Attorney General of Canada et al.*, 88 O.R. (3d) 541
[16] *Canam Enterprises Inc. v. Coles*, (2000) 51 O.R. (3d) 481 (Ont. CA) at par. 31
[17] *Sauve v. Canada*, 2002 FCT 821 (CanLII) at par. 19

The Tribunal finds that OMVIC did not issue a proposal to revoke the Applicants' licences as soon as it had sufficient information to proceed. The Tribunal accepts that in this case it was reasonable for OMVIC to assess its position as the situation changed and ultimately to decide for the criminal investigation to be finalized before issuing the notice of revocation.

Nevertheless, the Tribunal finds that delaying the process, in itself, does not give rise to an argument of abuse of process. In *Blencoe*[18], the Supreme Court of Canada, when referring to the doctrine of abuse of process, stated:

> The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances, bring the human rights system into disrepute.

The Applicants' counsel argued that Applicants were prejudiced by the delay. For example, it was argued that the Applicants were negatively affected when FAC's lenders cut off all business with FAC within a period of one week because it affected FAC's ability to carry on business and Mr. O'Connor's reputation in the industry was tarnished.

While it may be true that these events occurred, the Tribunal finds that the evidence fell short of demonstrating that either OMVIC or the RCMP inappropriately disclosed information to FAC banks. The evidence before the Tribunal was that Constable Daoust and Detective Douglas met with representatives of RBC and BNS to investigate the fraud allegations. This was done with the authorization of the three individuals involved. Furthermore, Mr. Smith testified that he, Detective Douglas and Constable Daoust met two bankers in November 2006; however, the meeting focused mainly on the process and procedures involved to approve a car loan. The Tribunal is also mindful that Mr. O'Connor testified that the banks withdrew their financing shortly after June 2006, when he heard rumours of a police investigation. Therefore, the Tribunal concludes that the Applicants were not prejudiced by the delay in issuing the proposal to revoke the licences.

Counsel for the Applicants also argued that the hearing before the Tribunal was compromised because memories of those involved had faded because of the delay of more than four years. It was suggested that Constable Daoust and Mr. Smith did not recall specifics dates and events. Counsel for the Respondent indicated that the documents relevant to the proceedings were available, as were the main witnesses. In light of the issue before the Tribunal, the reasons OMVIC issued a notice of proposal to revoke registrations and the Applicants' reasons for the appeal; the Tribunal finds that the relevant documents, such as the transcripts of the guilty plea and the transcripts of the sentencing hearing, are still available. The issue of the admissibility of the

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[18] *Blencoe*, Supra note 6 at paragraph 115

transcripts is discussed further. Furthermore, the Tribunal did not hear any evidence to suggest that key witnesses had passed away or are no longer available to testify.

Another allegation of prejudice stems from the fact that the RCMP, the KPF and OMVIC participated in a joint investigation and shared information. The Tribunal heard from Mr. Smith and Constable Daoust that joint investigations are common between the police and regulators and nothing in the Act prevents them from participating in these investigations. The evidence before the Tribunal was that Mr. Smith, given OMVIC's role as the regulator of the motor vehicle industry, acted more as a consultant in the investigation. In light of the complexity of the case, the number of FAC locations, and OMVIC's specialized role, the Tribunal finds that it was reasonable for the RCMP, the KPF and OMVIC to set up a joint investigation. The Tribunal was not presented with any information to establish that such practices are prohibited. Furthermore, in the case of *R. v. Edwards*[19], the Court reiterated that there are practical reasons to have joint investigations.

Counsel for the Applicants also argued that the RCMP prejudiced the Applicants by sharing the Crown Brief with OMVIC. Having found that a joint investigation was appropriate, the Tribunal finds the comment of the Court in *Children's Aid Society of Algoma v. C.L.*[20] quite appropriate when it said:

> It would be a queer investigation indeed if the joint investigators were constrained from sharing information that was relevant to whatever was being investigated. This, of course, is subject to any statutory restrictions that might apply to such sharing.

It is therefore necessary to consider whether or not the members of the joint investigation were restricted from sharing information.

The Tribunal concludes that OMVIC was entitled to share information with the RCMP and the KPF pursuant to paragraphs 36(1)(a) and (d) of the Act which states:

> 36. (1) A person who obtains information in the course of exercising a power or carrying out a duty related to the administration of this Act or the regulations shall preserve secrecy with respect to the information and shall not communicate the information to any person except,
>
> (a) as may be required in connection with a proceeding under this Act or in connection with the administration of this Act or the regulations;
>
> (d) to a law enforcement agency.

There is no doubt that the KPF and the RCMP are law enforcement agencies.

The Tribunal also considered whether the RCMP was entitled to share the Crown Brief with OMVIC. The purpose of the *Privacy Act*[21] is to protect the privacy of personal information held by a government institution. The term "government institution" is

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[19] *R. v. Edwards*, 2009 CanLII 76563 (ON S.C.) at paragraph 182
[20] Supra, note 14 at paragraph 85
[21] *Privacy Act*, Supra note 3

defined in section 3 as any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule. The RCMP is listed in the schedule and therefore satisfies the definition of "government institution".

Section 7 of the *Privacy Act* stipulates that information under the control of a government institution can only be used for the purpose for which the information was obtained or for a reasons listed in section 8 of the Act. Counsel for the Respondent submits that the RCMP was permitted to share information with OMVIC pursuant to paragraph 8(2)(f) of the *Privacy Act*. It reads as follows:

> 8.(1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> Where personal information may be disclosed
> 8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed [...]
> (f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, ... or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation.

As pointed out by counsel for the Attorney General, the Tribunal accepts that an Umbrella Agreement, in place since July 1, 1983, allows the RCMP to share information with OMVIC under paragraph 8(2)(f) of the *Privacy Act*. Counsel for the Applicants argued that according to section 4 of the Umbrella Agreement, the provincial institution must make a request for access to disclosure and in this case it was not done, therefore there was a breach of the agreement and a breach of the *Privacy Act*.

The Tribunal finds that even if the provincial institution did not make a formal request for the RCMP for the disclosure of the documents, there was an implied intent based on the joint investigation. In the alternative, the Tribunal finds that the lack of a specific request would not constitute in and of itself a prejudice that would amount to a significant prejudice. The Tribunal addresses the specific issue of the Crown Brief later in its reasons.

The Tribunal finds that there is no merit to the allegation that OMVIC or anyone on their behalf engaged in the obstruction of justice by attempting to dissuade Witness H from signing an affidavit or testifying during these proceedings. In light of the fact that Witness H's affidavit is incomplete (missing dates), it is not signed, and he was not summoned to testify before the Tribunal, very little weight is given to the information contained in his affidavit. In any event, the issue before the Tribunal is not the content of the draft affidavit, but whether or not OMVIC's actions constitute an obstruction of justice.

The Tribunal heard evidence that Mr. Smith gave a copy of Witness H's unsigned affidavit to Constable Daoust and asked him to provide any comments he may have. Constable Daoust, with permission from Mr. Smith, gave a copy of the affidavit to

Detective Douglas. It was Detective Douglas who spoke to the head of security at the bank and was advised that the vice-president had a different opinion than the one expressed in Witness H's affidavit. Based on the evidence presented, the Tribunal cannot infer that OMVIC attempted to dissuade Witness H from testifying. It is also unclear whether or not Witness H wanted to provide information to the Tribunal in his current role for his employer or in his role as manager for other financial institutions. In any event, the Tribunal finds that if this information was relevant to the Applicants' case, it was well within their power to summon Witness H to testify before the Tribunal.

The Tribunal concludes that there has been no prejudice to the Applicants; therefore the Tribunal will not address the argument of the cumulative effect of the prejudices as argued by counsel for the Applicants.

Having found that the Applicants were not prejudiced by the delay, the Tribunal finds that it is not necessary to made a finding on the number of months relating to the delay or the many cases cited by counsel for the Applicants and counsel for the Respondent.

The Tribunal finds that based on the circumstances of this case, the evidence does not support a finding of abuse of process which would result in a stay of the proceeding with respect to the proposal to revoke the Applicants' licences.

b) Order Preventing the Registrar from relying on any evidence obtained from the police which formed part of the Crown disclosure (also referred to as the "Crown Brief")

Counsel for Registrar suggested that it was premature at this time for the Tribunal to render a decision on the admissibility of the information contained in the Crown Brief. He submitted that if the Tribunal proceeds with a hearing on the merits, it would then be in a better position to address the relevance of the various documents at that time. It was also suggested that the Registrar may not need to refer to all the information contained in the Crown Brief because the Registrar is relying on the transcripts of the guilty plea and the sentencing hearing.

Initially, Counsel for the Applicants argued that the Crown Brief was not admissible pursuant to section 15 (1.1) of the *Statutory Powers Procedures Act*[22] because Mr. O'Connor did not consent to it. He also argued that the disclosure of the Crown Brief was contrary to the section 8 of the *Privacy Act*[23]. However, in reply, counsel for the Applicants agreed that it would be in the best interest of all concerned if the Tribunal only addressed the issue of admissibility of the evidence in the Crown Brief if a hearing on the merits was necessary.

[22] *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22.
[23] *Privacy Act*, Supra note 3

Counsel for the Attorney General submitted that the Crown Brief should be admissible because there was no breach of the *Privacy Act*. He also argued that the test in *Ault*[24] was met; therefore the RCMP was entitled to disclose the Crown Brief to OMVIC.

The Tribunal agrees with the submissions from counsel for the Applicants and counsel for the Registrar that it is premature and possibly unnecessary to decide this particular issue. Therefore, at this time, the Tribunal will not decide the admissibility of the evidence in the Crown Brief.

c) Order Prohibiting the Registrar from relying on the transcripts of Mr. O'Connor's guilty plea in the criminal proceedings and the sentencing hearing

Counsel for the Applicant argued that the use of previously admitted evidence is governed by subsections 15.1(1) and (2) of the SPPA which read as follows:

> 15.1(1) The Tribunal may treat previously admitted evidence as if it had been admitted in a proceeding before the tribunal, if the parties to the proceeding consent.
>
> 15.1 (2) "previously admitted evidence" means evidence that was admitted, before the hearing of the proceeding referred to in that subsection, in any other proceeding before a court or tribunal, whether in or outside Ontario.

Counsel submitted that the transcripts of Mr. O'Connor's guilty plea in the criminal proceedings and the transcript of the sentencing hearing are inadmissible in accordance with the SPPA because the Applicants do not consent. Counsel also relied on the case of *F.(D.) v. Wawanesa Mutual Insurance Co*.[25] where one party attempted to rely on a transcript from an arbitration in a subsequent arbitration before the Financial Services Commission of Ontario. In this case, the member stated:

> I find no jurisdiction to admit the transcripts into evidence for the purpose that Ms. F proposes. For that reason, Ms. F's request is denied. I find nothing in the Dispute Resolution Practice Code, the Insurance Act, or in the Schedule that erodes the specific restriction in section 15.1(1) of the *Statutory Powers Procedures Act* on the use of previously admitted evidence.

Counsel for the Registrar submits that both transcripts are admissible because the Applicants have already consented, in fact or at least impliedly, to the admission of the transcripts when they filed their notice of appeal. Counsel highlighted certain paragraphs of the Applicants' notice of appeal which read as follows:

> 4) The Appellant O'Connor has not been found guilty of any criminal or other offence which would justify revocation of his registration…
>
> 6) The Appellant O'Connor did plead guilty to two counts of fraud; however, the Agreed Statement of Facts indicates that the Appellant O'Connor did not personally engage in any fraud in connection with any customers or financial institution, simply that employees working for the corporation were guilty of such fraud…

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[24] *Ault*, Supra note 15

[25] *F.(D.) v. Wawanesa Mutual Insurance Co*., (2007) CarswellOnt 6069 (Financial Services Commission of Ontario)

> 7) No facts were put before the Court, or were proven, that either the Appellant O'Connor or the Appellant FAC lacked integrity or honesty.

Counsel for the Registrar argued that the Tribunal must be entitled to consider the offences to which Mr. O'Connor pled guilty and this information is available through the transcripts of the criminal proceedings.

Counsel for the Registrar also relied on case law to support his argument that the Registrar and ultimately the Tribunal can consider the transcripts when dealing with the merit of the case.

In the case of *Re Foreign Capital Corp.*[26], the Ontario Securities Commission had to decide if an individual's registration under the Ontario securities law should be terminated. The individual pleaded guilty to defrauding 128 investors contrary to section 380 (1)(a) of the *Criminal Code of Canada*[27] and to having stolen that amount of money from the same 128 investors. The Commission concluded that the staff was entitled to rely on the Transcript of the guilty plea according to section 15.1 of the SPPA.

In *Re Gatrall*[28], the Applicant applied to the Registrar for registration as a salesperson under the *Real Estate and Business Brokers Act*[29]. The Registrar proposed to refuse registration to the Applicant because his certificate of registration as a family physician was revoked by the College of Physicians and Surgeons of Ontario (the "College") because of professional misconduct. As a preliminary issue, the Applicant submitted that the Decision and Reasons for Decision of the Discipline Committee of the College should not be admitted because the facts were not proven before the Discipline Committee hearing and they were not given under oath. The Tribunal concluded that the Decision and Reasons were admissible because the decision was a public document under section 29 of the *Evidence Act* and therefore admissible under section 15 of the SPPA which reads as follows:

> 15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the Tribunal may exclude anything unduly repetitious.

In the matter of *Re Goselin*[30] the Registrar issued a Notice of Proposal to Refuse Registration to the Applicant as a Motor Vehicle Salesperson because of the Applicant's past conduct. The Applicant was previously registered with the Ontario Securities Commission and the Commission started proceedings against him in which it was alleged that he engaged in conduct contrary to the public interest. The Applicant entered into a settlement with the Ontario Securities Commission whereby he was

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[26] *Re Foreign Capital Corp*. (2005), 28 O.S.C.B. 4221 (Ontario Securities Commission)
[27] *Criminal Code of Canada*, R.S. 1985, c. C-46
[28] *Re Gatrall*, [2005] O.L.A.T.D. No. 3 (Licence Appeal Tribunal)
[29] *Real Estate and Business Brokers Act*, R.S.O. 1990, c. R.4
[30] *Re Goselin*, [2008] O.L.A.T.D. No. 269 (Licence Appeal Tribunal)

prohibited from trading in any securities for 20 years. The Tribunal relied on the Agreed Statement of Fact to conclude that the Applicant's past conduct provided reasonable grounds to believe he would not carry on his business in accordance with law, and with integrity and honesty. The Tribunal found that it was clear based on the Agreed Statement of Facts that the Applicant, as a mutual funds salesperson, had violated the *Securities Act*[31].

The Divisional Court in *Goselin v. Ontario (Motor Vehicle Dealers Act, Registrar)*[32] confirmed that the Tribunal could consider the Agreed Statement of Facts before the Ontario Securities Commission.

Counsel for the Applicants indicated that there was a signed agreement of the statement of facts, and therefore the transcript may not be necessary. While the parties may wish to rely on the signed agreement of the statement of facts rather than the transcript, the Tribunal finds that the transcripts of Mr. O'Connor's guilty plea and the sentencing hearing are admissible before the Tribunal in light of subsection 15(1) of the SPPA.

Although section 15.1(1) of the SPPA stipulates that the parties to the proceedings must consent for the Tribunal to consider previously admitted evidence, the Applicants cannot on the one hand allege that their past conduct would not contravene the Act, and then attempt to prohibit the Registrar and ultimately the Tribunal from reviewing and considering that evidence. The Tribunal finds that the Appellants impliedly consented to the transcripts being before the Tribunal in light of their notice of appeal.

Furthermore, the case law supports the use of information from other realms such as criminal proceedings or other self governed bodies such as the College of Physicians and Surgeons to assess an individual's past conduct which is ultimately relevant to determine whether or not that person is entitled to registration.

Costs

Counsel for the Attorney General asked the Tribunal to award costs against the Applicants. Counsel argued that the Attorney General was added as a party in this matter because of the serious allegations the Applicants made pertaining to the conduct of the RCMP; however, these allegations were not founded.

Counsel for the Applicants did not make any submissions on this issue.

The Tribunal's power to order the Applicants to pay costs to the Added Party and the appropriate factors to consider are found in Rule 14 of the *Licence Appeal Tribunal Rules of Practice*. This Rule provides as follows:

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[31] *Securities Act*, R.S.O. 1990, c. S.5

[32] *Goselin v. Ontario (Motor Vehicle Dealers Act, Registrar*), [2009] O.J. No. 1433 (Div. Ct.)

> 14.1 Where a party believes that another party in the proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.
>
> 14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:
>
> (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
> (b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
> (c) failing to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
> (d) knowingly presenting false or misleading evidence.

The amount is subject to Rule 14.4 which places a ceiling on the costs that can be awarded ($800 per day of hearing).

While the Tribunal finds that the Attorney General has incurred considerable costs and has been inconvenienced by the Applicants' allegations of misconduct pertaining to the RCMP, having regard to all the factors in determining costs, the Tribunal will not award costs to the Attorney General in these circumstances. The Applicants did not delay the proceedings by failing to attend the hearing or to send a representative, they did not fail to comply with a procedural order from the Tribunal and they did not fail to disclose documents as required by the Tribunal's Rules of Practice. The Tribunal did not accept the allegations the Applicants made regarding the RCMP - they appeared to have been based more on speculation rather than facts. However, the Tribunal does not find that the evidence leads it to conclude that the Applicants acted unreasonably, frivolously, vexatiously or in bad faith.

The motion for costs is denied.

Decision

The Applicants' motion is dismissed.

> a) The Tribunal will not stay the proceeding concerning the proposal to revoke the Applicants' licences.
> b) The Tribunal finds it is premature to decide if the Registrar can rely on any of the evidence contained in the Crown Brief. If necessary, this issue will be addressed during the hearing in January 2011.
> c) The Tribunal finds that the Registrar is entitled to rely on the transcripts of Mr. O'Connor's guilty plea in the criminal proceedings and the sentencing hearing.

The Tribunal does not award costs against the Applicants as requested by the Added Party.

As noted in the September 3, 2010 order, the hearing will resume on January 10, 2011 at the offices of Gillespie Reporting Services, 130 Slater Street, Suite 200, in Ottawa at 9:30 and will continue, if necessary, on January 11, 12 and 13.

To ensure the hearing proceeds on January 10, 2011, the Tribunal directs counsel for the Applicants and counsel for the Registrar to communicate with the office staff of the Licence Appeal Tribunal within 5 days of receiving this order. Counsel must advise the staff of their availability to participate in a teleconference call on a day between December 7 and December 10, 2010 during which teleconference the parties and the Vice-Chair will decide timelines for disclosure of documents pertaining to the January 2011 hearing.

The Attorney General is no longer a party to the proceedings, and therefore will not attend the hearing scheduled to commence on January 10, 2011.

LICENCE APPEAL TRIBUNAL

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Chantal Proulx, Vice Chair

RELEASED: November 24, 2010

This decision may also be available on Quicklaw.

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

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

PENEX BRIGHTON LTD.-Pre-hearing

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c.O.31

TO REFUSE TO RENEW

TRIBUNAL: KEN SELBY, Member

APPEARANCES: DAVID MERNER, Counsel representing the Applicant

GREGORY BANKS, Counsel representing the Registrar under the *Ontario New Home Warranties Plan Act*

DATE OF HEARING: April 1, 2010 Toronto

ORDER

The Applicant has requested a 60 day adjournment of the hearing scheduled for April 1, 2010, and the Registrar has agreed to the adjournment, subject to certain terms.

The concern of the Registrar in this case, and the basis for the Notice of Proposal, is that the Applicant has been unable to satisfy the Registrar of its financial viability and thus its ability to honour the warranty provided under the *Ontario New Home Warranties Plan Act*. Specifically, the financial information provided by the Applicant discloses that it has insufficient equity to be financially responsible in the conduct of its undertakings in the opinion of the Registrar. The Applicant has also failed to provide an indemnity or a detailed breakdown of its financial situation that is satisfactory to the Registrar. The above issues have been outstanding for approximately a year.

The Applicant's basis for appeal is that it needs additional time to satisfy the financial requirements of the Registrar. The Applicant does not dispute on any substantive

grounds the Registrar's ability to refuse to renew the Applicant's registration under the Act. The Applicant's registration is in real jeopardy as a result of its apparent inability to satisfy the Registrar's financial requirements.

The difficulty faced by the Applicant and the Registrar is that the Applicant has an ongoing project, where homes have been sold and are under construction. If the Applicant's registration is revoked, it cannot complete the homes and the home buyers will suffer the deleterious effects of the revocation. On the other hand, the Registrar also has to consider the risks inherent to future home buyers if the Applicant continues to represent a potential liability - which brings us to the reason for the adjournment.

The Applicant seeks an adjournment to allow time for an application before the courts, to allow a motion to appoint an interim receiver in an application for a bankruptcy order with respect to PenEquity Management Corporation (Court File No 31-OR-207715-T), the Applicant's managing partner. Once a receiver is in place, it is anticipated that that the Applicant's limited partner will be able to provide the necessary financial assurances to the Registrar. This is an outcome that will best serve and protect the current and future new home buyers.

For that reason, the Registrar and the Applicant are prepared to consent to the adjournment on the understanding that all deposits collected by the applicant in regard to new home sales during the adjournment period will be paid by the Applicant to Tarion Warranty Corporation ("Tarion") forthwith upon collection.

The Registrar and the Applicant have also agreed that Tarion will hold the deposits in accordance with the terms of the security it currently holds with respect to the Applicant and this enrollment.

Therefore, it is hereby ordered that:

1. The hearing is adjourned on consent to **June 16, 2010**, commencing at 9:30 a.m. at the Tribunal's Chambers at 1 St. Clair Avenue West, Toronto, Ontario.

2. All deposits for new home sales by the Applicant made between now and the hearing date will be paid to Black Sutherland LLP in trust, who will in turn transfer the funds to Tarion forthwith.

3. Tarion will hold the deposits in accordance with the terms of the security it currently holds with respect to the Applicant and this enrollment.

4. In the event this matter is not resolved by the hearing date, and subject to any ruling of this Tribunal, the requirement for the collection of deposits, as described in paragraph 2 of this Order, will continue to be in effect.

5. If the appeal is resolved before the date scheduled for the hearing in this matter, all parties shall advise the Tribunal in writing immediately and the hearing, which will no longer be required, will be cancelled. If the Applicant is withdrawing the appeal, the Applicant's written notice will state that the appeal is being withdrawn and a copy of that notice will be sent to the other parties as well as to the Tribunal.

LICENCE APPEAL TRIBUNAL

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Ken Selby, Member

RELEASED: April 15, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ALL SEASON HOMES LTD.-Settlement

APPEAL FROM A PROPOSAL OF THE REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: RICHARD HAMMOND, Counsel, representing All Season Homes Ltd., the Applicant

R. MATTHEW BARTEAUX, Counsel, representing the Registrar, *Ontario New Home Warranties Plan Act*, the Respondent

DATES OF HEARING: April 12 and 13, 2010 Toronto

ORDER

This is an appeal by All Season Homes Ltd. (the "Applicant") to the Licence Appeal Tribunal (the "Tribunal"), from the Notice of Proposal of the Registrar, *Ontario New Home Warranties Plan Act* (the "Registrar"), dated March 18, 2009, to revoke the registration of the Applicant.

At the outset of the hearing, Counsel for both the Registrar and the Applicant advised that a settlement agreement had been executed, the terms of which the parties wished to keep confidential. Counsel for the Applicant confirmed on the record that the Applicant's appeal was withdrawn. The proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Elizabeth Sproule, Vice-Chair

RELEASED: April 19, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5937-ONHWPA-CLAIM-Pre-hearing-withdrawal

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Member

APPEARANCES: THE APPLICANTS, unrepresented

JENNIFER ROOK, Counsel, representing Tarion Warranty Corporation ("Tarion")

DATE OF PRE-HEARING: May 25, 2010 Toronto

ORDER

A pre-hearing was held in this matter on May 25, 2010, in Toronto, Ontario, before this Tribunal, in the presence of the Applicants and Jennifer Rook, Counsel for Tarion. No one appeared for the Added Party.

Following a discussion of the issue, the Applicants withdrew their appeal on the basis of having reached a settlement agreement. Accordingly, the hearing scheduled for July 9, 2010, is hereby cancelled, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Member

RELEASED: May 26*, 2010*

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5912-ONHWPA-CLAIM-Pre-hearing-withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O 31

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: THE APPLICANTS, unrepresented

JILLIAN SISKIND, Counsel representing Tarion Warranty Corporation

DATE OF PRE-HEARING: May 17, 2010 Toronto

ORDER

A pre-hearing was held in this matter on May 17, 2010, in the presence of the Applicants and Jillian Siskind, Counsel representing Tarion Warranty Corporation (the "Respondent").

The Tribunal makes the following order:

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

2. The item appealed is set out as Claim 1 in the Respondent's decision letter dated February 2, 2010, and relates to the garage stairwell area of the Applicants' home.

3. The item appealed was resolved on terms and conditions the parties wish to keep confidential.

4. The Applicants have withdrawn their appeal. The hearing scheduled to take place on June 21, 2010, no longer being necessary, is therefore cancelled and this matter is concluded.

LICENCE APPEAL TRIBUNAL

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Mary Ann Spencer, Member

RELEASED: May 20, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5882-ONHWPA-CLAIM-Pre-hearing-withdrawal

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: THE APPLICANTS, self-represented

GREGORY BANKS, Counsel representing Tarion Warranty Corporation ("Tarion")

DATE OF PRE-HEARING: April 16, 2010 Toronto

ORDER

A pre-hearing was held in this matter on April 16, 2010, in Toronto, Ontario, before this Tribunal, in the presence of the Applicants and Gregory Banks, Counsel for Tarion. No one appeared for the Added Party.

After a brief discussion of the issue, the parties reached an agreement to settle the claim. Counsel for Tarion advised the Tribunal that the signed withdrawal form would be forwarded to the Tribunal as soon as an original form was received from the Applicant to confirm the withdrawal.

Subsequently, on May 5, 2010, the Tribunal received the Applicants' formal withdrawal form from Counsel for Tarion. Accordingly, the hearing scheduled for May 18, 2010, is hereby cancelled, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Member

Released: May 7, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5868-ONHWPA-CLAIM-Pre-hearing-withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O 31

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: THE APPLICANT, unrepresented

JILLIAN SISKIND, Counsel representing Tarion Warranty Corporation

ROSA DEFILIPPIS, Counsel representing Willowfield Winchester Inc.

DATE OF PRE-HEARING: May 5, 2010 Toronto

ORDER

A pre-hearing was held in this matter on May 5, 2010, in the presence of the Applicant; Jillian Siskind, Counsel representing Tarion Warranty Corporation (the "Respondent"); and Rosa DeFilippis, Counsel representing Willowfield Winchester Inc. (the "Added Party").

The Tribunal makes the following order:

1. The Parties to the hearing are the Applicant, the Respondent and the Added Party.

2. The item appealed is set out in the Respondent's decision letter dated December 16, 2009, and relates to the amount of compensation to be paid for a missing second showerhead in the master bathroom.

3. The item appealed was resolved on terms and conditions the parties wish to keep confidential.

4. The Applicant has withdrawn his appeal. The hearing scheduled to take place on June 14, 2010, no longer being necessary, is therefore cancelled and this matter is concluded.

LICENCE APPEAL TRIBUNAL

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Mary Ann Spencer, Member

RELEASED: May 11, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5841– ONHWPA - CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE ONTA*RIO NEW HOME WARRANTIES PLAN ACT* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: TERRANCE SWEENEY, Vice - Chair

APPEARANCES:

CHERRY E. ISSACS-REYNOLDS, Counsel, representing the Applicants

ELLIE CHOI, Counsel, representing Tarion Warranty Corporation

SAM BALSAMO, Agent, representing Country Wide Homes at Cornell Inc., the Added Party

DATE OF HEARING: May 11, 2010 Toronto

REASONS FOR DECISION AND ORDER

The Applicants appealed from a Decision Letter of Tarion Warranty Corporation (“Tarion"), dated December 8, 2009, denying the Applicants’ claim for $32,599.00 in deposits.

In order to protect the privacy of the Applicants their names will not be used.

PRELIMINARY MATTER

The Vice-Chair participated, to a limited degree, in a discussion about settlement prior to the opening of the hearing.

When the hearing began, Counsel informed the Tribunal that there would be no settlement. The Vice-Chair offered to recuse himself and have another person conduct the hearing if any party felt that they could have been prejudiced by the actions of the Vice-Chair. All parties consented to the Vice-Chair conducting the hearing.

The Case for the Applicants

The female Applicant was sworn and testified. She admitted the following:

- She and her husband entered into an agreement of purchase and sale with the Applicants on November 13, 2007, to buy a home for $ 609,990.00.

- The agreement was modified, on March 6, 2008, through upgrades so that the price became $620,386.00

- The Applicants were $90,000.00 short at the time of closing so the Added Party (the "AP") refused to close and would not provide vendor-take back financing.

- The Applicants entered into another agreement of purchase and sale, dated March 7, 2009, with the AP for a smaller house, $327,989.00. The AP applied their deposit of $32,599.00 to the purchase of the second house.

- The Applicants were about $30,000.00 short when it came time to close this house deal and it failed to close.

- The Applicants were represented by legal counsel throughout although the witness dealt directly with officials of the AP and called at the office on numerous occasions.

The witness said that, in or about March 2009, she called at the AP's office because she thought that the chief operating officer of the AP had lied to her when she told her the second house the Applicants were to buy had been sold. The witness was told to get off the AP's premises, not come back, telephone or even check the AP's website. She then decided to try and get her money back.

On cross-examination by Ms. Choi, she admitted the following:

- She understood that the agreements, referred to above, were legal documents.

- She knew that she had to deliver all of the moneys at closing and that as she had no savings, she would have to raise all of the moneys by way of mortgage financing.

- She did not think that if the house deal failed to close that the Applicants would lose their deposit.

- The AP gave a number of extensions of the closing date.

- The witness thought that as the recession was on, the AP ultimately would provide some of the financing.

- She never told the AP that she would not be able to close either transaction.

Mr. Balsamo cross-examined the female Applicant. She acknowledged that each agreement of purchase and sale was conditional for a period to allow the Applicants to check with a lawyer and to arrange financing. She thought that she could get a mortgage but was not successful in obtaining all of the money required.

The Case for Tarion

Ms. Choi elected to call no evidence.

The Case for the AP

Michelle Andradi

She was sworn and testified that she is the accounting supervisor at the AP. Her task includes processing all agreements of purchase and sale. Usually, a prospective buyer gives the AP one cheque and a number of post-dated cheques. In this case the Applicants issued nine NSF cheques. She said that they tried to accommodate the Applicants and in December 2008, at the request of the female Applicant, she "held" a cheque. She recalled the incident in 2009, when the Applicant showed up at the AP's office and asked to speak to the chief operating officer or, her failing, the owner of the AP. She said that she told the female Applicant that neither was in that day, took her telephone number and said someone would call her back the next day and a call was made.

Antoinette Bonsignori

She was sworn. She was the assistant to the chief operating officer of the AP with whom the female Applicant dealt. That person is no longer with the AP. She testified as to what the chief operating officer might or might not have done. In the circumstances, and as she tendered opinion evidence, the Tribunal gives it no weight.

THE LAW

Paragraph 14(1)(b)(ii) of the *Ontario New Home Warranties Plan Act* ("*Act*") provides, in part, as follows:

> ... a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

> ... the vendor has fundamentally breached the contract.

The onus is on the Applicants to prove their case on a balance of probabilities.

APPLICATION OF LAW TO THE FACTS

The Applicants failed to adduce any evidence that the AP had breached either of the two contracts that it signed with the Applicants. The breaches were those of the Applicants who were unable to close the purchase of either home due to their inability to obtain the requisite financing. Counsel for the Applicants, in argument, said that they were unsophisticated and the economic advantage was very much in favour of the AP. The Tribunal notes, however, that the Applicants were legally represented throughout.

This is a sad case and the Tribunal is sympathetic to the Applicants who contracted for houses that they simply could not afford. Nevertheless, the Tribunal is limited in its jurisdiction and the statute does not give the Tribunal power to grant the appeal on the facts of this case.

ORDER

By virtue of the power of the Tribunal under section 16 of the *Act*, the Tribunal orders Tarion Warranty Corporation to carry out its Decision.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: May 27, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5825-ONHWPA-CLAIM-Pre-hearing-withdrawl

APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Member

APPEARANCES: THE APPLICANT, representing himself and the other Applicant

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation ("Tarion")

DATE OF PRE-HEARING: May 10, 2010 Toronto

ORDER

A pre-hearing was held in this matter on May 10, 2010, in Toronto, Ontario, before this Tribunal, in the presence of one of the Applicants and Danielle Peck, Counsel for Tarion. No one appeared for the Added Party.

After a brief discussion of the issue, the parties reached an agreement to settle the claim. Counsel for Tarion advised the Tribunal that the signed withdrawal form would be forwarded to the Tribunal as soon as an original executed form was received from the Applicants to confirm the withdrawal.

Subsequently, on May 12, 2010, the Tribunal received the Applicants' withdrawal form from Counsel for Tarion. Accordingly, a hearing, the date of which had not been scheduled, is no longer required, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Member

RELEASED: May 13, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5747-ONHWPA-CLAIM-Pre-hearing-settled

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: THE APPLICANTS, self-represented

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation

RAY MARCHAND, Agent, representing Maxson Building Corp., the Added Party

DATE OF PRE-HEARING: May 4, 2010 Toronto

ORDER

This is the second pre-hearing in this matter and it was held in the course of an appeal by the Applicants to the Tribunal from a decision of Tarion Warranty Corporation dated October 21, 2009, disallowing some items of their 30 Day claim. The names of the Applicants will not be used in this Order to preserve their privacy.

The parties settled the issues between them relating to the 30 Day claim. The Applicants have withdrawn this appeal and this matter is concluded.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice-Chair

RELEASED: May 5, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

5738 – ONHWPA - CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE ONTA*RIO NEW HOME WARRANTIES PLAN ACT* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: THE APPLICANTS, self represented

MARSHALL REINHART, Counsel, representing Tarion Warranty Corporation

JOHN SPINA, Agent, representing Medi-Terra Properties Corp., the Added Party

DATE OF HEARING: April 15 &16, 2010 Toronto

ORDER

This is an appeal by the Applicants to the Licence Appeal Tribunal (the "Tribunal") from a decision of Tarion Warranty Corporation ("Tarion") under the *Ontario New Home Warranties Plan Act* (the "Act") denying certain of the Applicants' warranty claims. The Decision Letter that gives rise to this appeal is dated October 21, 2009. The hearing took place in the presence of the Applicants, who are self-represented. To preserve their privacy, the Applicants will not be referred to by name but will be referred to as Mr. and Mrs. D. Also appearing at the hearing were Mr. Reinhart, Counsel, representing Tarion and Mr. Spina, Agent, representing Medi-Terra Properties Corp. ("Medi-Terra"), the vendor/builder and added party.

Facts

Mr. and Mrs. D. took possession of their home on April 15, 2008. Shortly after moving in, they noticed dents and cracks in the hardwood floor they have on their first floor,

including in the kitchen, dining, living and family rooms as well as on the landing and the stairs to the second floor.

These dents and cracks occurred in about 15% of the boards. It is not clear whether Mr. and Mrs. D. were offered the option of replacing the affected boards. Mr. D. testified that the dents and cracks were caused by faulty installation and he was concerned that the problem would become more widespread. Medi-Terra offered to sand down and re-finish the first floor hardwood, except on the landing and stairs, which Mr. and Mrs. D. did not want repaired. Both Mr. and Mrs. D. heard the representative of Medi-Terra, a certain Mr. M., tell them that if the sanding and refinishing of the floor did not satisfy them, then Medi-Terra would replace the floor. Mrs. D. understood that the sanding and re-finishing was a first step which, if unsatisfactory, would be followed by a full floor replacement. Mr. M. no longer works for Medi-Terra and was not called as a witness. Mr. and Mrs. D. feel they had no control over the method of repair that was chosen and Medi-Terra called no evidence to dispute that assertion. Mrs. D. testified that it was not made clear to her what changes the sanding and re-finishing would make to her floor.

Mrs. D. testified that she had chosen and particularly liked the deep burgundy stain and the smooth, factory finish used on her floor originally. Both Mr. and Mrs. D. liked the micro-bevels that existed on either end of each board. Mr. D. testified that had he been told that he would lose the micro-bevelling as a result of the work, they would have reconsidered their decision to proceed with the repair. It is not clear whether either Mr. or Mrs. D. understood that their floor had been upgraded to an exotic wood or what this might mean. Mrs. D. testified, in response to a question about the type of wood she had on the floor that she had “hardwood”. Mr. D. testified that they had been told they had Brazilian Oak but he did not say when they learned this.

A flooring expert called by Tarion confirmed that the floor is Brazilian Oak and testified that it is a characteristic of this type of oak that there are wide variations in colour. The wood, because it is harvested from the rain forest and is rare, is not graded with the same degree of specificity as a North American oak might be. The dark burgundy stain applied in the factory masked this characteristic of the wood. When the stain was re-applied on site, it was a dark red but was not as opaque as the factory stain; it revealed the natural variation in the wood, including some boards which have an orange cast which the Tarion expert said is characteristic. Mrs. D. particularly dislikes this orange colour. The work also revealed the texture of the wood, which had similarly been masked by the smooth factory finish. Mr. D. is particularly unhappy about this. The finish has a duller sheen than the factory finish. As well, when the floor was sanded, the micro bevels were removed. While the parties agree that the repair resolved the issue of the cracks and dents, both Mr. and Mrs. D were unhappy with the result. Mrs. D. in particular was dismayed that the floor she had bought was no longer recognizable to her. The Tarion expert testified that the resulting floor is typical of an in-home finished Brazilian Oak floor and that in his experience 80% of homeowners prefer this type of custom finish to the factory pre-finished floor that Mr. and Mrs. D. find desirable.

In addition to the colour variation, the texture and the loss of the micro bevels, Mr. and Mrs. D. are concerned about several other issues. First, they believe the colour is fading in the high traffic areas. Neither of the two Tarion witnesses called observed this fading despite their inspection of the floor. Second, Mr. D. in particular is concerned that some of the stain was applied to the shoe moulding and that, despite a repainting of the moulding, a thin line of the stain remains. The Tarion representative who wrote the Decision Letter in question inspected the shoe moulding and found one area with very minor staining. Mr. D. is concerned that when the flooring people were in to sand and re-finish the floor they did not dust carefully and that some white dust has penetrated the cracks between the boards and is visible. The Tarion flooring expert testified that if dust had been left on the floor, it would be immediately apparent. In his opinion, the white lines between some boards are a result of the floors contracting in some weather. He suggests the solution is better humidity control in the house to avoid the degree of gapping that would reveal the unfinished, white wood. The Applicants' believe this is a red herring and that humidity is not the issue. Mr. D. complains of cracks in some boards. The Tarion representative only discovered one minor crack in the kitchen and one gap between two boards which he characterized as within Tarion's guidelines.

Finally, there is an issue of the kitchen island. While this is movable, it is heavy. Mr. and Mrs. D. elected not to have the island moved prior to the work being done. However, when they returned, they found the island had been shifted slightly off centre. When they re-centered it, there was a strip of wood, about 36 inches by about 1 inch, visible on one edge that had not been sanded and re-finished. The Tarion representative testified that one reason he denied warranty coverage for this is because of the arrangement that the homeowners made not to move the island out of the way. However, he also testified that he was not satisfied that he knew who had shifted the island and when it had been moved. He confirmed that, in the absence of those two considerations, the resulting strip of un-re-finished wood would be a warranted defect. His proposed remedy is to increase the trim at the base of the island to conceal the strip. The cost of this repair is approximately $300.

Decision

It is unfortunate that Mr. and Mrs. D. did not understand the essential nature and characteristics of the exotic floor they acquired. It is also unfortunate that Medi-Terra did not explain this to them. It is very much to be regretted that no one at Medi-Terra apparently saw fit to sit down with Mr. and Mrs. D. and inform them of the consequences of the repair method that Medi-Terra used. The question of what Mr. M. told Mr. and Mrs. D. and the extent to which they relied on his representation that Medi-Terra would replace the floor if they were not satisfied is obviously a matter of utmost importance to Mr. and Mrs. D. However, it is an issue that is beyond the jurisdiction of this Tribunal. Any remedy sought as a result of these representations would have to be pursued in another forum.

The narrow question before the Tribunal is whether the sanding and re-finishing of the floor was done in such a matter that it breaches the warranties contained in the Act.

Included in those warranties is a warranty that the home is constructed in a workmanlike manner and is free from defects in material. This warranty applies to repairs.

The Tribunal finds that the fact that the essential nature of the wood has been revealed by the sanding and re-finishing of the wood is not, in itself, a breach of warranty. There is no evidence of poor workmanship or defects in material. It is important to note that the fact that the Tarion expert testified that 80% of homeowners prefer the type of in-home finish that the Applicants now have would not be a defense if there were a breach of warranty. It is also important to note that in some cases questions of aesthetics are so fundamental to the resulting floor that they may give rise to a warrantable claim. That is not the case here. The Tribunal accepts the evidence of the Tarion witnesses that the floor is a typical Brazilian Oak floor without defect. As well, the pictures produced by the homeowners in support of their claim did not show the degree of colour variation that would give rise to a warranted claim.

The Tribunal accepts Tarion's evidence that there is no evidence of colour fading or dust between some boards. The Tribunal also accepts that the only cracking observed is typical of normal shrinkage. One small area of stain left on the shoe moulding likewise does not give rise to a warrantable claim. However, the Tribunal accepts the evidence of Mr. and Mrs. D. that they first observed the kitchen island off centre when they returned to the house after the floor had been sanded and re-finished. The Tribunal finds, on a balance of probabilities, that the floor finishers were the most likely people to have shifted the island. The Tribunal does not accept the argument of the Tarion Representative that because the homeowners elected not to move the island prior to the repair, then the resulting off-centre re-finishing should not be warranted under the Act. By not moving the island, Mr. and Mrs. D. accept the fact that the floor under the island has not been re-finished. They should not have to accept a skewed island or a strip of un-re-finished flooring. Either of these alternatives would constitute a defect in workmanship. The Tribunal will award Mr. and Mrs. D. $300 to install deeper trim on the base of the island to conceal the strip of wood that has not been re-finished and that is visible when the island is centred.

Accordingly, the Tribunal orders that the Applicants be awarded the sum of $300 in full satisfaction of their appeal from the Tarion Decision Letter dated October 21, 2009.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice Chair

RELEASED: May 3, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5699-ONHWPA-CLAIM-Pre-hearing-withdrawal

AN APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: THE APPLICANT, self-represented

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation, the Respondent

MAXINE ANDREWS, Agent, representing Stafford Homes Ltd., the Added Party

DATE OF PRE-HEARING: May 26, 2010 Toronto

ORDER

A second pre-hearing was held in this matter on May 26, 2010, in Toronto before this Tribunal in the presence of the Applicant, Danielle Peck, Counsel for Tarion Warranty Corporation and Maxine Andrews, Agent for Stafford Homes Ltd.

The parties were able to settle the matter on terms and conditions, which the parties wish to keep confidential, resulting in the Applicant withdrawing her appeal. The matter is thus concluded without a hearing.

LICENCE APPEAL TRIBUNAL

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Elizabeth Sproule, Vice-Chair

RELEASED: May 31, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5684–ONHWPA–CLAIM-Pre-hearing-withdrawl

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: CAROL DIRKS, Counsel, representing the Applicant

ELLIE CHOI, Counsel, representing Tarion Warranty Corporation

JOHN A. HOWLETT, Counsel, representing FRAM Builders (Durham) Corp., the Added Party

DATE OF PRE-HEARING: May 19, 2010 Toronto

ORDER

A pre-hearing was held in this matter on May 19, 2010, in Toronto, before this Tribunal in the presence of the Applicants, Carol Dirks, Counsel for the Applicants, Ellie Choi, Counsel for Tarion Warranty Corporation and John A. Howlett, Counsel for the Added Party, FRAM Builders (Durham) Corp.

The Tribunal makes the following Order:

1. The parties advised that the matter has settled on terms and conditions which the parties wish to keep confidential, resulting in the Applicant withdrawing his appeal.

2. The matter is thus concluded without a hearing.

LICENCE APPEAL TRIBUNAL

_____
Terrance Sweeney
Vice Chair

Released: May 19, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5610 – 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: CHRISTINA BUDWETH-MINGAY, Vice Chair

APPEARANCES: MARK WIFFEN, Counsel, appeared on behalf of the Applicants

SCOTT B. KIRKPATRICK, representing the Tarion Home Warranty Corporation under the Ontario New Home Warranty Program

D. DI MEO, appeared representing the Added Party, Tanis Woods Development Inc.

DATES OF HEARING: March 22, 23, 25, 26, 29, 30, 31, 2010

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by the Applicants (the "Applicants") from a Decision Letter dated July 30, 2009 by Tarion Warranty Corporation ("Tarion") under the *Ontario New Home Warranties Plan Act,* R.S.O. 1990 c. O.31 (the "Act") to deny a portion of the Applicants First Year Statutory Warranty claim as well as items from the Second Year Statutory Warranty claim. Both Applicants appeared at the hearing and gave evidence. To preserve their privacy, the names of the Applicants will not be used and they will be referred to as the male and female Applicant respectively.

Under the Act, Tanis Woods Development Inc. ("Tanis Woods" or the "Builder" or "Added Party") warrants to the Applicants that their home is constructed in a workmanlike manner and is free from defects in material. These warranties are subject to certain exclusions and procedural requirements as set out in the Act. Tarion is empowered under the Act to determine whether these warranties have been breached and, if so, to pay to the Applicants the cost of repair, among other remedies open to it.

Mr. D. Di Meo, the brother of the principal of Tanis Woods, testified on behalf of the Builder and acted as its representative throughout.

Tarion called several witnesses in support of its position. Kate Harvie is a Field Claims Manager with Tarion and Rika Tokue is a Field Claim Representative. Ms. Tokue is a licensed architect.

The Applicants took possession of the home ("the Home") on September 12, 2006. The Applicants noted and reported a number of deficiencies in the Home on their 30-Day Form, their Year-End Form and their Second-Year Form. Discussions and conciliations between the Applicants, Tarion and the Added Party resulted in the resolution of a number of complaints. On the first day of the hearing, eleven (11) items remained outstanding between the parties. Following further negotiations, three (3) additional items were resolved.

Of the items that remained at issue, three (3) were warranted but the parties could not agree on the manner or extent of the appropriate repair. In regard to the remaining items, Tarion denies that these items are warranted and took the position that Tanis Woods has attended to any defects to the satisfaction of Tarion.

It was the position of Tanis Woods that the Builder has done all it can to address any defects in the Home complained of by the Applicants and that no further work is required.

To allow for a clearer understanding of the evidence, the outstanding items are set out below, both by item number and brief description:

Item #1: Front Door Replacement (Warranted);
Item #2: Kitchen Cabinets (Warranted);
Item #3: Man Door from Garage to House;
Item #4: Chipping of Bricks;
Item #5: Cracking of Bricks and Mortar;
Item #6: Eaves Trough Repairs (Warranted);
Item #7: Bathroom Vents;
Item #8: Wheelchair Accessible Toilet.
Item #9 Foundation Repair (Resolved at Pre-Hearing but the Subject of some Evidence)

THE LAW:

Section 13 of the Act provides a homeowner with certain warranties as follows:

Warranties

13. (1) Every vendor of a home warrants to the owner,
(a) that the home,
(i) is constructed in a workmanlike manner and is free from defects in material,
(ii) is fit for habitation, and
(iii)is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and
(c) such other warranties as are prescribed by the regulations.

Exclusions

13. (2) A warranty under subsection (1) does not apply in respect of,
(a) defects in materials, design and work supplied by the owner;
(b) secondary damage caused by defects, such as property damage and personal injury;
(c) normal wear and tear;
(d) normal shrinkage of materials caused by drying after construction;
(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
(f) damage resulting from improper maintenance;
(g) alterations, deletions or additions made by the owner;

ISSUES:

At the outset, it is helpful to the understanding of the evidence to clarify the positions of each of the Parties.

Item #1: The Applicants are of the view that Tarion should reimburse them for the majority of monies spent to replace the front door which, admittedly, suffered a squeaking problem from time to time. In the view of Tarion, changes to the door by the Applicants resulted in/or exacerbated the squeaking problem; however, they are prepared to accept it as a warranted item because of the Builder's efforts to repair it. Tarion has made an offer to off-set some of the Applicant's costs.

Item #2: The entirety of the cabinets in this kitchen were replaced shortly after the Applicants took possession of the Home as a result of a manufacturing defect. The Applicants are of the view that the kitchen cabinets currently exhibit areas of wear on the sharp edges to such an extent that a further replacement or re-finishing of the cabinets in the entire kitchen is required. Tarion has taken the position that the areas of wear indicated by the Applicants are few in number and that the current condition of the cabinets is due to ordinary wear and tear. This refused as a warranted item.

Item #3, the Applicants are concerned with the functioning of the automatic closure which operates the man door between the garage and the Home. Their position is that it is malfunctioning and should be replaced or adjusted by the Added Party. Tarion has taken the position that any problem with the door can be rectified by the Applicants through regular homeowner maintenance. This is refused as a warranted item.

Item #4, the Applicants are of the view that the rough brick which covers three (3) sides of their home has been the subject of excessive chipping on the edges. Tarion relies on the Construction Performance Guidelines to refuse this claim as a warranted item.

Item #5, the Applicants allege that the mortar and bricks of the home show evidence of excessive cracking. Again, Tarion relies on the Construction Performance Guidelines as a basis for denying this claim.

Item #6, the eaves troughs at the front of the home have been repaired as a warranted item. The Applicants are concerned that the eaves *may* still be leaking and seek an assurance or "permanent solution" to the eaves issue. Tarion takes the position that the area of repair is still under warranty and that no further warranty or intervention by Tarion is appropriate.

Item #7, the Applicants are seeking an extended warranty for work conducted on the bathroom vents. The original problem involved snow blowing in through the vents both into a washroom and into the attic space. The problem was resolved by a replacement of several vents by the Builder. The Applicants seek an extension of the warranty for that work on the basis that the winter of 2009/2010 saw a lower than average snowfall. They claim that while there was no problem with the vents this year, a problem might arise in a year with a greater snowfall. Tarion takes the position that the original complaint was remedied to the Applicants' satisfaction, that the warranty has run its course and that any further problems regarding this item are the responsibility of the Applicants.

Item #8, the Applicants maintain that their building contract specifies a wheelchair accessible washroom in their home. Their complaint is that while the washroom itself is accessible, the particular toilet installed in the room is difficult to access for a person with a disability of the magnitude that is suffered by their family member. Tarion takes the position that the Builder supplied a wheelchair accessible washroom and that the Applicants failed to provide the Builder with specifics regarding fixtures. Tarion takes the position that under Ontario law there is no particular fixture specified for residential use in wheelchair accessible washroom facilities and that this is not a warranted item.

Item #9, a repair has been made by the Builder to the foundation in an area where some leaking occurred. As a result of a consent Pre-Trial Order, the Builder attended to perform a water test of this area in December 2009. The Applicants refused to allow the water test to be performed, stating that the temperatures were too low and that to allow the test would expose the foundation to possible further damage.

EVIDENCE:

The male Applicant. He testified that while the couple were happy in the home they had occupied for almost 25 years, they contemplated a move in 2004 as a result of his father-in-law's stroke because it was their intention to have his in-laws live with them to facilitate the caretaking of his father-in-law.

The male Applicant testified that he did a lot of research regarding builders and was particularly concerned to find a builder who had experience in building handicapped accessible homes. He also stated that the fact that Tanis Woods used a higher grade

fixture for its standard fixtures was a factor that was taken into consideration when choosing the Builder.

His evidence was that he had a negative impression of Tanis Woods and the Home even before moving in because there was a five (5) month delay in taking possession. During discussions regarding the delay, he maintains that he told the Builder that he would rather wait a little longer rather than face deficiencies. He stated that this made the problems in the Home even more pronounced in his mind.

The male Applicant testified that there were a number of substantial problems with the Home on possession. This evidence was not challenged. There were issues with: condensation; the heating system; dry wall imperfections; and the original kitchen which was replaced in December 2006. The evidence was that the Applicant and Tanis Woods were not able to resolve the issue of the furnace and a third party was retained to prepare a report, paid for by Tarion, to assess the problem. The report contained conclusions that supported the Applicant's complaints and the heating system was repaired.

In assessing the evidence and the credibility of the parties, their state of mind and the interaction between the parties prior to attending before the Tribunal is useful. The male Applicant testified that during the course of attempting to resolve deficiencies they interacted with eight (8) different employees of Tarion. While the evidence of Tarion went some way to providing an explanation for the involvement of the various employees, clearly the involvement of so many individuals gave the Applicants the impression that no one was ever really focused on their complaints. This view cannot help but have informed their level of dissatisfaction with the decisions made by Tarion and its representatives.

The male Applicant also testified that while the lines of communication between the Builder and themselves remain open, the relationship has become strained. He particularly noted a serious breakdown in confidence when it was necessary for Tarion to retain an expert regarding the HVAC system and its eventual replacement.

Item #1

Much evidence was led regarding the numerous attendances at the home to attend to the squeaking and binding front door.

The Applicants testified that the squeaking of the doors began before the inserts went into the doors in late October 2006. The Builder attempted to fix the squeak on many occasions. In January 2009, the Builder's door supplier, Brown's Windows and Doors ("Brown's") replaced the hinges on the front doors but this solution only temporarily fixed the problem. They testified that on June 21, 2009 the door was loose on its hinges and almost fell off. The evidence was that this final problem prompted them to begin the inquiry process for purchasing new front doors.

Only after all of the evidence on this point was received, did it become clear that the real issue about this item was not whether it should be warranted or whether the changes made to the doors by the Applicants somehow voided the warranty. Rather, the issue is whether Tarion should be required to pay for the entirely new front doors or whether their offer to contribute the amount of money they say would have been required to repair the doors is sufficient.

Tarion's position is that this should never have been a warranted item because of the change in the inserts. However, it became warranted because of the Builder's intervention in attempting to adjust the doors to relieve the squeak. They refuse to pay for the new doors.

The Applicants testified that they bought the new doors from Home Décor, a company they were referred to by Pinnacle Door, a supplier to the Builder. They testified that Home Décor refused to attempt to fix the existing doors because the frame was not level and the threshold was incorrect. They maintain they only purchased the new doors because of this.

Exhibit 4, Tab 2 Page 33 contains a quotation for new doors in the exact configuration as the existing doors. The quotation is dated June 17, 2009 which is four (4) days prior to the date on which the Applicants each testified that the door almost fell off its hinges onto them upon their return from a family wedding. A deposit on the doors was paid by the Applicants on June 17. The quote for replacing the doors includes free garage door caps and new upgraded hardware. Exhibit 6, Tab 2, page 34 is a quotation dated July 15, 2009 to replace the existing doors with substantially different front doors. The transom has been removed to make the doors bigger in height. Upgraded hardware is also included but the garage door caps are not referred to. The evidence of the Applicants was that the individual from Home Décor told them that the taller doors would look better and cost exactly the same as replicating the old doors.

The Applicants failed to provide a letter from Home Décor stating that it was necessary to replace the front doors in order to rectify the problems that they were experiencing.

Mr. Di Meo testified that because of the height change in the doors from a standard height to custom height an increased price of approximately $800 to $900 would result. He also testified that the raised panels on the bottom portion of the door were an extra which would increase the cost of the door. He stated that the same would hold true for the custom paint colour which is seen in the photographs of the door.

Ms Harvie attended at the Home on or about June 22. During that attendance, despite complaints about the front door by the Applicants, Ms. Harvie stated that she could see no evidence that the door had fallen off its hinges. The door system appeared to her to be completely intact and functioning. Ms. Harvie testified that Tarion stands by its settlement offer of May 8, 2009 found at Exhibit 7, Tab 4, that it will contribute $985.00 towards the new doors which is the amount they determined it would cost to fix the old doors.

Item #2

Only the female Applicant testified about the deficiencies in the kitchen cabinetry. The current complaint about the kitchen cabinets is that the paint or finish comes off of the sharp edges very quickly. After the replacement of the kitchen cabinets in the fall of 2006, the Applicants reported a problem with the cabinets in 2007. The kitchen supplier, Frendell Kitchens ("Frendell") attended in November 2007. The solution to the perceived problem of wearing at that time was to offer a wax crayon and spray lacquer to touch up the problem areas. This led to a further problem in that spots could be seen where the lacquer was applied. In November of 2008, Tarion warranted this item and in January of 2009, Frendell again suggested that touch ups with a wax crayon was the appropriate treatment for the condition of the cabinets.

A kitchen cabinet door was entered into evidence. The Applicant testified that this door represented "the worst example of wear" of the cabinets. The cabinet shows the most minor wear of stain/paint at the sharp edges. Similarly configured sharp edges on the reverse of the door, where human contact is not regularly made show, no wear. The female Applicant categorically refused to acknowledge that any wear and tear in a kitchen 3 ¼ years of age is acceptable.

In support of their claim that the kitchen cabinets need to be replaced or completely re-stained, the Applicants presented a letter from The Furniture Solution, entered into evidence as Exhibit 4, Tab 4. The author of the letter did not attend to give evidence; accordingly, there was no opportunity for the parties adverse in interest to cross-examination the author on his opinions.

Ms. Harvie testified about the issue of the kitchen cabinets. She stated that Frendell Kitchens are a local and reputable kitchen manufacturer. She testified that in her experience the settlement offer of May 8, 2009, Exhibit 7, Tab 4, Page 3 provides a complete and acceptable remedy for what she notes a minor issue with the Applicant's kitchen cabinets. She testified that she has seen the kitchen and also looked at the kitchen cabinet marked as Exhibit 20. She noted the slight wearing at the sharp edges and confirmed her evidence that this was not a manufacturing defect. She based her opinion on the fact that manufacturing defects usually present themselves as stain peeling rather than slight wearing. In her view, the letter from Furniture Solutions outlining a price of $10,080.00 for cabinet re-staining would be enough to buy all new cabinet doors for this kitchen and was excessive.

Ms. Harvie testified in cross-examination that kitchen cabinetry can be damaged within hours of installation because kitchen cabinets are wood and lacquer. She testified that even sunlight can change the look of a cabinet finish within the first year of its life. As well, things such as humidity and the amount of use have an impact on the life of a kitchen. She stated that wear and tear is inevitable and is not indicative of defects.

In testifying about the kitchen doors, Ms. Tokue noted that the door entered into evidence as Exhibit 20 was not one of the warranted doors, nor is it in her opinion one that should be. She stated that re-finishing of the cabinets is not required. She also stated that when the kitchen cabinets are viewed at a normal arms length distance no wear is evident.

Item #3

There was extensive evidence about the history of troubles with the man door from the garage. Initially, the frame was cracked and it was replaced and the frame painted. Later there was a problem with the door not opening correctly which was recorded on the Year-End Form. This problem was also rectified. In November of 2007 an individual in the employ of the Builder attended to replace the weather stripping around this door. When the Applicants complained of the failure of the door to operate properly in the winter of 2008, Brown's attended to fix the problem but declined to do so once it was evident that the Builder's employee had previously touched the door. The Applicants take the position that the automatic door closer does not operate properly and that it is necessary to physically pull the door closed to get an airtight seal from the garage. They say that this is a health hazard, possibly exposing them to garage fumes.

The male Applicant testified that he has never done any sort of maintenance on the door closure mechanism since its installation. During cross-examination, the male Applicant denied that the door closure only requires adjustment. He maintains that it needs replacing. However, he did not provide any expert or corroborating evidence that this was the case. Tarion's position is that the door closure mechanism only requires routine servicing and that this is a homeowner maintenance issue, not a warranty issue.

The photographs of the door closing mechanism, Exhibit 16, show clearly that at some point in time the mechanism was moved. It was in fact the Builder, both in cross-examination of the Applicants and in his own evidence, who raised the possibility that the door closer had been moved. The female Applicant testified in cross-examination that she believes that the door closer mechanism may have been moved either when the door frame was originally fixed or when the Builder's handyman replaced the weather stripping. This was the only evidence offered as to how or when this mechanism was moved.

Items #4 and 5

These items were dealt with together as they both deal with the cladding of the Home. The front of the Home is stone while the remaining three (3) sides are bricked. Exhibit 4, Tab 10 contains a number of photographs of the exterior of the home. The Applicants take the position that the chipping or spalling of the brick is beyond a weathered patina and falls into the area of defect. The Applicants also say that there are cracks in the mortar which began to show in 2007. They claim that the cracks are expanding from surface cracks to something deeper.

The male Applicant testified that when he chose the bricks for the cladding of the home, no one in the employ of the Builder told him that any chipping at the edges of the brick would occur.

The Applicants have asked that the remedy for what they allege is a defect in the bricks and mortar is to re-brick the home. They further took the position that, as part of the remedy for this defect, Tarion be ordered to commission an expert to prepare a report making recommendations regarding the condition of the bricks and mortar. The male Applicant further stated on several occasions during examination in chief and cross-examination that he believes an award of $100,000 by the Tribunal would be appropriate to compensate the Applicants for the diminution in value of their home arising from the appearance of the bricks and mortar.

The Builder testified that the Applicants had the opportunity to see samples of the brick which clads their home. A sample of the brick was entered into evidence as Exhibit 19. The Builder conceded that the sample shows less chipping than the bricks on the Applicants home because it has been mounted on the wall of the sales office. His evidence was that he retained the supplier of the brick, Brampton Brick, to attend to do some touch up tinting on some bricks that the Applicants were not happy with and that any other chipping is within acceptable industry standards.

Tarion's position regarding the brick issue is that the condition of the bricks falls well within the parameters of the Construction Performance Guidelines. In addition, Tarion takes the position that the Applicants have failed to discharge their burden of proof regarding these claims and rejects the contention that Tarion is responsible for providing an expert report to support the Applicant's claim.

Ms. Tokue testified extensively about the Construction Performance Guidelines ("CPG") that are applicable to Bricks and Mortar (Article 4.20). She testified that she measured a crack shown to her by the Applicants and noted that homeowners normally show her the worst examples of defects. She recorded that the mortar crack was only 0.15 mm wide and stated that this is absolutely normal for our climate.

Ms. Tokue referred to CPG Appendix 6 regarding Chipped Clay Bricks and noted that, for a Rough Brick finish such as the Applicants have, 85 to 100 % of the bricks can have chips up to ½ inch in from the corner. As well, 85 to 100% of them can have chips up to 5/16 inches in from an edge. There was no evidence before the Tribunal that the chipping of the bricks came anywhere near this degree of allowable chipping; it was much less according to the photographs.

In regard to cracks, she testified that she was directed by the Applicants to cracks and she determined that they did not permeate the veneer. She saw no falling mortar or cracks that would concern her.

Item #6

The problem with the eaves troughs began in 2007. Originally, Tarion ordered the Builder to fix the problem and the Builder did so in April 2009. The Applicants maintain that the problem has re-surfaced and in support of their position provided photographs from January 2010, Exhibit 4, Tab 12. The photograph shows a small icicle on the lower portion of the eaves. Also shown is some water on the concrete of the front porch: However, it is not possible to determine from the photographs whether that water is as a result of melted snow on the porch or water from above. The Applicants stated that they told the Builder of their concern about the eaves trough not being properly repaired in May 2009 and gave evidence that the Builder refused to attend to fix the problem. The female Applicant did concede that during a water test conducted by Tarion on or about June 22, 2009 there was no evidence of water penetration through the eaves.

It was the Builder's evidence that the Applicants did not just complain about a deficient repair, but rather they demanded he install heating cables around the roof, something which he is not prepared to do. He further testified that it is his opinion that the small icicle apparent in the photograph of the eave is a result of snow melting on the roof causing a small ice dam which cascades over the eaves rather than a penetration of water through the eaves.

The parties are all in agreement that there is an existing warranty on the eaves trough repair of April 2009 and in cross-examination the female Applicant stated that she would be satisfied for the Builder to attend at the Home under the terms of the existing eaves trough warranty to assess the eaves and to make any further repair that appears to be necessary.

Item #7

The male Applicant testified that during the winter of 2008 his son drew his attention to the fact that it was snowing in his bathroom. In fact, snow was entering the room through a bathroom vent. Upon inspection, he determined that the attic crawl space had a swath of snow four (4) inches wide and ten (10) feet long as well. The Applicant testified that the Builder did attend to fix the problem on Christmas Eve but that solution was not satisfactory; accordingly, in January 2009, the roofing company installed new vents which are substantially taller and bulkier. The male Applicant maintains that he has seen some condensation in the crawl space on the vent stacks and has asked for new and more appropriate roof vents. The male Applicant agreed in cross-examination that the attic space is heated and that the warm air in the vent stack must pass through the cold air of the attic in order to escape to the outside. He also agreed that the few water droplets that he has seen vary in character from the problem previously experienced.

Item #8

The reference to a wheelchair accessible washroom is found in the Agreement of Purchase and Sale between the parties, Exhibit 4, Tab 1, page 8. The contract specifies:

Bed 4 to be wheelchair acces. With large flush shower stall
Complete with grab bars in shower & at w/c

There is no reference in the contract to a toilet of a particular height or other specifications. The Applicant does not allege that the washroom is not wheelchair accessible. She also admitted in cross-examination that she did not discuss any details of the fixtures in this room with the Builder.

The female Applicant testified that the toilet in the wheelchair accessible washroom is too low for easy use by her father. The toilet is 14 inches high. She testified that in order to use the toilet she must slide her father down a board from his wheelchair which is 17 inches high. She stated that moving him up to the wheelchair again is difficult because of the height difference. The Applicant agreed that even if the toilet was higher it would be impossible for her father to manoeuvre himself to use it without assistance. Her position is that the use of the toilet would be easier for her if it was taller. The Applicants want to have the current toilet replaced with one that is mandated for wheelchair accessible toilets in commercial applications. The evidence was that this toilet would cost $580.44.

The evidence of the Builder was that the Applicants specified various upgrades to the Home and visited regularly. Examples of items in which they had input were faucets and bathroom tile. The Builder testified that there was no discussion of the fixtures in the wheelchair accessible washroom. The Builder also testified that he has only built two other wheelchair accessible bathrooms, one in Markham and one for the Applicants' neighbours. Each of these washrooms has a standard toilet.

The evidence of Ms. Harvie was that there is no Building Code standard for residential wheelchair accessible washrooms. In her view, the parties to a building contract should refer to an architect for assistance with items necessary to meet the needs of the end user of a residential wheelchair accessible washroom.

Item #9

This issue was dealt with in a Pre-Trial Consent Order in which the parties agreed that a water test would be performed in non-freezing temperatures.

The Builder testified that he attempted to perform a water test to ensure the efficacy of the foundation repair. The female Applicant admitted that she refused the water test but stated it was because of cold temperatures. She also testified that there has been no evidence of water penetration in the foundation.

The Builder provided documentary evidence regarding the temperatures on the days before and after his attendance (Exhibit 18), which showed that the temperature was at least several degrees above freezing.

FINDINGS:

Item #1

The doors purchased by the Applicants in the summer of 2009 from Home Décor differ in a number of significant regards from the front doors which they replaced. The replacement doors are significantly higher as a result of the removal of the transom. The Tribunal accepts the evidence of the Builder that the difference in height would result in a increased cost. The Applicants were provided with the benefit of free garage door caps in conjunction with the door replacement. The Tribunal accepts the Builder's evidence that this has the value of approximately $200 per garage door. In addition, it is clear from the photographs that the Applicants also received the benefit of substantially upgraded paint.

In addition, the Tribunal finds the evidence of the Applicants regarding the condition of the door on June 21st to be exaggerated. One of the quotations for the new doors was dated June 17, clearly the Applicants were intending to purchase a door at least as at that date.

The Applicants are not entitled to choose a substantially upgraded door and expect Tarion to pay for it under the auspices of a warranty claim. The Tribunal accepts the evidence of Tarion that that door squeaking issue could have been remedied by further adjustments. The Tribunal awards to the Applicants the $985.00 which has previously been offered by Tarion in full settlement of the claim for this item.

Item #2

The Tribunal is satisfied on the basis of the physical evidence before it, that the almost imperceptible wearing of the edges of the kitchen cabinets is a result of ordinary wear and tear of a kitchen that was installed in the Applicants' home in December of 2006. The Applicants have failed to adduce any evidence of or to prove defects in the material or workmanship of the cabinetry. This claim is denied.

Item #3

The photographs supplied by the Builder clearly show that the automatic closing mechanism of the garage man door has been moved from its original position. The Tribunal has no difficulty whatsoever in reaching the conclusion that the Applicants did not have any part in moving the mechanism. The closing mechanism of this door has proven to be troublesome from the date on which the Applicants took possession of the Home. They are entitled to a door that is properly functioning. This claim is upheld.

Items #4 & #5

After a careful review of all of the photographic evidence taken together with a reading of the Construction Performance Guidelines for rough brick cladding of homes, the Tribunal

finds that the chipping and cracking of the bricks is not significant and falls well within the allowable limits set out in the Guideline. This claim is denied.

Item #6

There is no evidence of current water penetration of the eaves. At the date of the conclusion of the hearing there existed a valid warranty regarding repair to the eaves trough. Accordingly, the Applicants should pursue the valid and existing remedy of warranty that is open to them.

Item #7

While there was previously a clear penetration of the Home by precipitation through the roof vents near a washroom on the Home, there is no evidence of water penetration at this time. This claim is denied.

Item #8

The washroom supplied by the Builder in the basement of the Home is a wheelchair accessible one. There are no Ontario Building Code specifications regarding toilets in such a washroom; nor did the Applicants turn their mind to the issue of the toilet until they moved into the Home and discovered that it was more difficult to assist their father with his intimate habits than they had initially thought. There is no defect in the material provided by the Builder; nor is there a breach of contract which would attract a remedy. This claim is denied.

Item #9

This item was previously dealt with by way of a Consent Order between the parties.

DECISION:

It is the Applicants' onus to prove their allegations of warranty breach by the Builder and their resulting financial losses. For the reasons set out above and pursuant to the authority vested in it by Section 16(3) of the Act, the Tribunal upholds the decision of Tarion to disallow the Applicants' claims except in so far as the specific items noted above, being the front doors and the garage man door closure.

LICENCE APPEAL TRIBUNAL

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Christina Budweth-Mingay
Vice Chair

Released: May 19, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5505-ONHWPA-CLAIM-Consent regarding stay

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O. 31

TO DISALLOW A CLAIM

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: ONE APPLICANT, on his own behalf and as Counsel for the other Applicant

ERICA MAIDMENT, Agent for Tarion Warranty Corporation

D. RUSS MAKEPEACE, Counsel for the Added Party, Abbotsford Group Inc.

DATE OF HEARING: May 20, 2010 Toronto

CONSENT ORDER

Following a motion heard on May 20, 2010, on consent of the Applicants and the Added Party, Tarion taking no position in the motion, the Tribunal orders:

1. The Added Party undertakes to abandon, forthwith, its application for judicial review of the Tribunal's order released on November 20, 2009;

2. The Applicants withdraw their requests for summons requiring the attendance of bank personnel from the Added Party's banks and shall not summons any witnesses or require disclosure of documents from any source prior to or during the hearing. Nothing in this paragraph prohibits the Applicants from relying on documents currently in their possession at the hearing.

3. The Tribunal hereby lifts the stay of the proceedings set out in its order released on February 24, 2010.

4. The hearing is adjourned and shall now commence at 9:30 a.m. on **November 23, 2010**, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto.

5. The Parties undertake to notify the Tribunal as soon as practical if a settlement is reached prior to the hearing.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude,
Vice-Chair

RELEASED: May 26, 2010

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

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

Ontario

5297 – ONHWPA – CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT, R.S.O. 1990, c.O.31*

TO DISALLOW A CLAIM

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: APPLICANTS, self-represented

SCOTT KIRKPATRICK, Counsel, representing Tarion Warranty Corporation

ADELINO RIBEIRO, Agent, representing Lancaster Homes, the Added Party

DATES OF HEARING: October 20, 21, 22, 24, 26, 27, 28, 29, 2009 and February 3, 4, 5, 8, 9, 10 and 12, 2010 *Toronto*

DECISION AND ORDER

This is an appeal by the Applicants from the Decision Letter of Tarion Warranty Corporation (TWC) dated December 16, 2008 respecting claims of breach of warranty in the construction of their home by Lancaster Homes, (Added Party), pursuant to Section 14(3) of the *Ontario New Home Warranty Plan Act* R.S.O. 1990, c.O.31, (ONHWPA or Act). The Applicants' names are not referred to in this decision. They are referred to as "male Applicant" and "female Applicant" and jointly as "Applicants".

BACKGROUND:

Initially the Applicants were very pleased with the purchase of their new bungalow from the Added Party in November 2006. On more than one occasion they expressed appreciation to the Added Party's staff for their efforts and attention, particularly concerning specifications the Applicants requested both prior to and during the construction.

From the beginning the Applicants had been involved in the building process. They frequently attended at the site where, amongst other forms of engagement, they installed soundproofing to certain walls during construction. Further, they were cognizant of both consumer and builder protections, rights and obligations, having participated in a course offered to new home buyers by TWC. They had also researched the Added Party's business reputation by discussing with prior purchasers consumer satisfaction with the finished product and service. Apparently well-educated, clearly articulate and well-informed, they ensured that their sales contract was reviewed by a lawyer, resulting in a number of amendments, including additions to the standard features offered.

The Added Party is an experienced new home builder. It has operated for approximately 16 years in the Toronto environs. Recently it has built over 600 homes in three major developments, including the area north of Toronto where the Applicants' home is located. It is owned and run by Mr. Adelino Ribeiro.

Problems commenced soon after the Applicants moved in and they began to complain of flooring and furnace issues. The flooring manufacturer reviewed the complaints. The parties were unable to agree as to the extent of the problem and thus the extent of any repair required under warranty. The Applicants' complaints escalated. In time TWC became involved.

At the same time, furnace and expert climate control companies were consulted, building plans and specifications were reviewed, and the municipal Building Department and the furnace manufacturer were called in to review the Applicants' complaint that the initial furnace was too small for the floor space; the Added Party disagreed. Heating consultants retained by TWC in November 2007 sided with the homeowners. On that basis, TWC warranted the complaint and, prior to the commencement of a new heating season in the fall of 2008, funded the purchase of a new furnace by the Applicants. Throughout the above, relations between the Added Party and the Applicants deteriorated significantly. With TWC's involvement, the tension escalated.

ISSUES:

This is a hearing into the Applicants' appeal from TWC's initial rejection of 189 out of 204 Warranty claims on their year-end list as filed with TWC in November 2007. While a large number of these claims were either withdrawn or resolved by the pre-hearing, six primary areas of complaint remained comprising 20 separate items claimed in the Appeal. The items included the flooring, the outside trim and molding, window/pillar sills slope, window condensation (in the master bedroom) and window air leakage (generally), floor joist inadequacies and basement rim joist moisture. As the evidence progressed, the flooring complaint was settled and, on February 10th, the rim joist complaint was withdrawn by the Applicants. This Decision and Order is thus determinative of only the remaining five elements in dispute.

The Tribunal must determine:

(a) whether the Added Party has breached a warranty under subsection 13(1) of the Act in that:

(1) the home has defects in workmanship or material,

(2) the home is not fit for habitation: or

(3) the home was not constructed in accordance with the Ontario Building Code ("OBC"); and, if so,

(b) whether the Applicants have a cause of action for damages against the builder under section 14 of the Act; and, if so

(c) the amount of the damage.

Because of the length of the hearing and the history of the relationships, costs were sought by both TWC and the Added Party, and will be dealt with later in this Order.

WITNESSES:

The hearing lasted 15 days. Numerous exhibits were filed and ten witnesses testified. Of these, three were presented as experts on various aspects of home construction; two others were the design architect of the home and the professional engineer responsible for joists. The remaining witnesses consisted of the two Applicants, the Added Party, the TWC Field Representative who denied the claimed Warranties, and the window manufacturer's technician.

EVIDENCE

The evidence will be discussed under the headings of the claims made and referred to by the numbering in the TWC Decision letter.

(a) Outside Trim and Molding (items 3, 4 and 5):

The Applicants relied on their photographs[1] taken in the fall of 2007, prior to submitting their Year End Warranty Claim with TWC. These photographs show a number of gaps between the surface of the exterior stonework and the soffits. The Applicants called a pest control company in order to verify and assist in the removal of rodents and insects which the Applicants believed had entered the attic from these gaps. The female Applicant testified to at least four wasp nests in the attic at that time and to evidence of mice. The pest company removed the wasp nests and left poison for the mice. Despite advising the Added Party of the concern, the Applicants stated nothing has been done to ameliorate the problem.

To support their claim of Warranty breach the Applicants relied on the following sections of Part 9 of the Regulations under the *Building Code Act, 1992*[2]("OBC"):

> 9.19.1.2. (5) Vents shall be designed to prevent the entry of rain, snow and insects.
> 9.27.2.1. (1) Exterior walls shall be protected with cladding…..to restrict the entry of rain and snow into the wall assembly.
> 9.32.2.2(1) Openings for natural ventilation other than windows shall be constructed to provide protection from weather and insects.

The female Applicant testified that the addition of frieze board trim would solve the issue and provide the aesthetic design she expected and desired. She pointed to what appeared to be such trim on the sales brochure for the particular model home selected by the Applicants[3], as well as to the drawing found in Schedule "P" to their Agreement of Purchase and Sale ("APS") entered into by the Added Party and the Applicants in May of 2006. The fact that this frieze board was not on the home was, in her view, an omission by the Added Party, and not a minor change. The APS contained a clause providing that "minor" changes, as deemed by the Added Party's architect, could occur without purchaser approval. She did acknowledge receipt of the Added Party's architect letter advising that the frieze board was only a minor design issue[4].

The Applicants provided evidence that placing the frieze board on the home now would require either removal and replacement of the exterior stone cladding, or its grinding and re-surfacing in order for the trim to adhere to the surface area. Either would be costly. The Applicants filed cost quotes for removing and either reworking or replacing the stone of $3,700.00 and for removing and replacing the soffit and adding frieze board of close to $2,000.00. The Applicants were of the view that application of sealant to the J-mold would not be an acceptable repair as it would be unsightly. A double J-mold was also rejected as a repair option on

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[1] Exhibit 4, Tab 4
[2] O. Reg. 403/97 repealed December 2006, after the construction of the Applicants' home
[3] Exhibit 11
[4] Exhibit 10, Tab 2

the ground that it could not completely fill the gaps, given the uneven surface area presented by the stonework. Nor would either of these alternatives answer the issue of the alleged missing frieze board.

Stephen Hunt was the design architect retained by the Added Party for this development. Over the past twenty-five years he has designed over 100 different model homes annually and is involved in municipal permit applications for over 1000 homes each year. He is the past director of the Greater Toronto Home Builders' Association, and has previously been qualified as an expert in Ontario Municipal Board hearings. His client base includes owners of private million dollar homes as well as builders and developers.

Mr. Hunt explained that the rough stone surface on areas of the Applicants' home was a design feature. The provision of frieze board trim is purely decorative and he personally is aware of other homes where such trim appears in some of the design drawings but is not placed on the finished product as a consequence of builder and/or purchaser choice. As concerns this development, Mr. Hunt recollected discussions with the Added Party culminating in their decision to leave the issue of frieze board to Mr. Ribeiro's discretion. It was Mr. Hunt's opinion that the existence of frieze board on this home would have no effect on its value in the marketplace.

On reviewing the photographs in evidence, he observed that the installer of the molding had clearly made every effort to meet the stone surface as closely as possible. He also noted that the stone cladding does reach behind the soffit thereby providing the requisite protection to prevent the entry of rain and/or snow. There is no need for any frieze board where such surface material abuts the soffit edge. Any vents within the soffit itself seem to be properly meeting the legislative requirement. It was Mr. Hunt's belief the existing stone could not be ground flat without significant damage to its integrity.

He testified that deviations from his design drawings as filed with and approved by the municipality typically occur during construction without any requirement for either his, or Building Department, approval. Such deviations include minor design issues such as this, or other modifications deemed needed due to site conditions. Only where such changes result in a "material" effect, is approval required.

Mr. Adelino Ribeiro is the President of the Added Party. He testified that the gaps and frieze board were not raised as a concern by the Applicants when they first took possession; nor was it raised on their 30 day deficiency form as filed with TWC. It first appeared on the Year End Warranty Claim and was, in his opinion, only added as a consequence of the Applicants' decision to pursue every possible warranty deficiency they could discover against the Added Party in reaction to the Added Party's dispute of their alleged furnace defect during the first winter of possession.

Mr. Ribeiro stated that the frieze board was never a part of the home's design as he had determined that it was unattractive on the model elevation chosen by the Applicants. As a consequence there was no such trim on any of the homes in the development of a similar elevation, including the model home. He acknowledged that it did appear on the sales brochure sketches (which include a waiver as to exact replication), as well as Schedule "P" to the APS, itself a copy of the brochure sketch. The Added Party relied on the APS disclaimer set out in Schedule "B" which reads:

> The Vendor further reserves the right to make minor changes or modifications in the plans and specifications at its sole discretion. The determination of whether or not same are minor shall be made by the Vendor's Architect….Actual elevations will be similar to Artist's conception but may not be exactly the same. [5]

Mr. Ribeiro also disputed the Applicants' reliance on the OBC sections quoted above. He noted that the frieze board was neither a vent nor a unit for ventilation. There was no suggestion that the soffits, which do include vents, were not properly attached and manufactured. As to the issue of cladding, he reiterated Mr. Hunt's testimony that the stone cladding did meet the intention of the legislation. Nonetheless, in an effort to satisfy the Applicants he had offered to have additional sealant placed on areas where the gaps were noted. This offer had been refused. The Applicants had advised that they wanted the frieze board for aesthetic reasons and would not accept a sealant remedy.

Mr. Ribeiro testified that, given the home's location abutting open fields, there was a high likelihood that rodents and insects can and will gain entry whatever action is taken, as homes have many openings necessary for ventilation.

Mr. Dave Cecatini inspected the Applicants' complaints of warranty deficiencies and drafted the Decision Letter from which this Appeal is taken. Although now Manager of Field Claims for TWC, he was the Field Claims Inspector responsible for review and determination of their Claim. Since 2006, he has inspected roughly 18 to 20 homes monthly for compliance issues. Unlike many of his colleagues in TWC, he is certified in Part IX of the OBC dealing with residential construction. He has built his own home and was raised in a family involved in the construction industry.

Due to the large number of items which the Applicants claimed, his Claim inspection took three days in the spring of 2008. Of the 204 items claimed, 24 were determined warranted. Seventeen others were placed under further investigation. The remainder were deemed not warranted. He did not warrant the missing frieze board and/or the gaps. Mr. Cecatini stated that the mold appeared to him to have been attached in a workmanlike manner as required under the ONHWPA, as it was clear the installer had carefully attempted to follow

[5] Exhibit 10, Tab D3

the stone cladding as tightly as possible given its rough surface. Nor was there anything to suggest it was failing in its purpose which is to support the soffit.

Mr. Cecatini concluded from his review of the APS that the frieze board was a design item and not therefore warrantable. Nonetheless, he suggested the Added Party could add sealant to the area to fill in some of the apparent gaps in order to reassure the homeowners that rodents and insects would not easily penetrate. The male Applicant made it clear, however, that any such effort would be torn down, as the only remedy acceptable to the Applicants was the addition of frieze board.

(b) Window pillar/sills slope (item 17):

The Applicants relied on their photographs[6] of various window sills on the home's exterior - as well as the sill portion of decorative stand-alone pillars on the property - to demonstrate their claim that the Added Party had breached its new home warranty by contravening the OBC. It was their position that s. 9.7.2 of the OBC mandates that windows must comply with CAN/CSA – A440 – M (the "CSA 440 Standard"). The latter in turn requires that sills have a minimum 6% slope to the exterior to ensure no water buildup can seep into the cladding of the home. The photographs illustrate a number of basement windows, and one master bedroom window. On one of the basement windows the photograph shows a level held against the masonry sill with the bubble located toward the exterior of the sill. The male Applicant testified that only one of the windows and none of the pillar sills, were sloped to the required 6%.

When asked whether the homeowners had suffered any damage as a result of the alleged contravention, the Applicants noted one area under the basement window where there was evidence of water staining, although this area was beneath a window, the sill of which did measure the required 6% slope. They had not shown this water staining to the TWC representative who investigated their Claim and had never arranged for a water test to verify leakage. The male Applicant conceded other reasons may have caused the water stain, including his observation that the home had been open to the elements during construction. He further agreed that this item of the Claim had only been raised after their relationship with the Added Party had broken down.

The Applicants provided estimates from two separate contractors they had contacted to reslope the window sills of their home. These estimates provided costs of between $2,100.00 and $1,800.00 plus taxes[7].

The Added Party denied any breach of warranty in the installation of the window sills. Mr. Ribeiro testified that the CSA Standard is not an agreed industry

[6] Exhibit 4, item #17
[7] Exhibit12 and Exhibit 13

standard and thus the 6% slope is not a requirement. Rather, the purpose of the need for a sill slope is reflected in the OBC requirement to ensure moisture can not enter the interior of the living area. Given no living area in decorative pillars, it was his position that there is therefore no requirement that sills on decorative pillars be sloped.

As concerns the sills under the master bedroom, the OBC requirement of a slope is only triggered where there is no "concealed flashing" which would direct any such moisture to the exterior of the home. In the master bedroom, there is no evidence that such flashing is missing. With regard to the basement window sills, Mr. Ribeiro noted these are part of the foundation of the building and, as a consequence, not subject to the requirements of the OBC section.

The Added Party further noted that the measurements relied upon in the Applicants' photographs are taken from the improper location of the upper surface of the sill, in direct contrast to the wording of the OBC.

Mr. Cecatini stated that there had been no evidence of any relevant damage shown to him by the homeowners during his inspection. His measurements of the sills slope led him to conclude it was unlikely any snow or rain would seep into the cladding of the home from the sills. He noted the photographs in evidence demonstrated some snow accumulation on the ground, but no moisture buildup on the sills. He concluded that the claim was only raised following minute scrutiny by the Applicants of possible technical breaches made in the home's construction.

(c) Window seals and adjustments and (d) condensation (items 33 and 56):

The male Applicant claimed there were defects in the home's window seals as supplied by the window manufacturer. The manufacturer had attended at the residence on more than one occasion to perform repairs to the seals; however, the homeowners remained concerned that excessive air infiltration entered the home from the windows in general, but particularly from the large master bedroom windows which, on occasion, had exhibited condensation. The Applicants concluded that improper installation of these windows by the Added Party had exacerbated the original faulty seals resulting in their claim of excessive air leakage.

In part, they relied on the fact that, after complaining to the Added Party that one of the home's windows opened from an awkward side, the Added Party had the window re-installed and, in doing so, had simply drilled new drip holes in what then became the bottom. The homeowners believed this was an unworkmanlike installation which indicated all windows in their home were improperly installed.

The Applicants also relied on the earlier referenced report from the independent heating company retained by TWC to assess their 30 day Claim of a faulty heating system. This report had concluded their original furnace was too small

and that air infiltration tests should be performed on all window, door openings and electrical boxes. As earlier noted, a new furnace was eventually installed at the behest of TWC. When the Applicants continued to complain of air infiltration in the master bedroom, the Added Party requested access to perform the air infiltration test. The Applicants denied this access, claiming TWC should provide the testing in an impartial and independent fashion. TWC did not do so. The Applicants determined the procedure was too costly for them to fund. Instead they relied on their own pencil smoke test, evidenced by video, as well as the Report and testimony of Mr. J. Quackenbush, which is outlined below.

In 2008 warranty repairs to the window seals were performed by the window manufacturer. Photographs taken by the male Applicant demonstrated that these repairs resulted in overlaps to some of the seals. The Applicants believed this repair was improper, but further efforts to have the window manufacturer remedy their complaints proved fruitless. In March, 2009 the window manufacturer reviewed the Applicants' concerns and determined no further action was required as the windows were all performing in accordance with specifications[8].

The Applicants claimed that on the day the manufacturer's employees re-attended to review their complaint in 2009, there was no wind and therefore no evidence of excessive air infiltration. As a consequence they arranged for Mr. Quackenbush to review their windows for suspected inadequacies. He attended their home some weeks later. He and the male Applicant took numerous measurements and removed the casing on one of the bedroom windows.

The Applicants relied on the window manufacturer's sticker placed on the windows stipulating compliance with the installation requirements set out in CSA 440 Standard[9]. It was their conclusion, however, that the installation exhibited numerous contraventions of standards set out in CSA 440 Standard pertaining to the use of shims, screws, and insulation, as well as requirements that measurements be level and square. Their photos of the destructive removal of the window casing demonstrated a failure to meet the requirement in the CSA to provide a "continuous bead of sealant" as well as evidence that insulation in the frame was 1-11/2 inches in a plane depth of over 4 inches. One photo demonstrated a window frame had been nailed as opposed to the requirement in the CSA that it be screwed; another illustrated no shims.

As proof of improper installation, the Applicants gave evidence on condensation occurring on the master bedroom window. They conceded this was the only window in the home which exhibited the condensation. It was the window where the casing was removed during the visit by Mr. Quackenbush. The Applicants produced photos dated November, 2007 they had showed to Mr. Cecatini during his conciliation inspection of 2008. They also produced photos showing condensation taken more recently in January, 2009. They further had

[8] Exhibit 10, Tab 7
[9] Exhibit 6, item 56, p.41

Environment Canada Weather Reports for both dates showing the temperature and relative humidity morning readings at the time.

The female Applicant provided her own video evidence of the alleged air infiltration. It did illustrate air currents and movement around the window seals of various windows on a number of dates in the spring of 2009.

It was conceded that this evidence, being based on the utilization of a smoke pencil at the window frame edges, could not provide evidence as to the quantity of air movement and therefore could not demonstrate whether the amount of air infiltration exceeded the tolerance allowed in the OBC[10].

The female Applicant advised that Mr. Cecatini had re-attended the home with M&O Construction to perform a thermal imaging test following the Applicants' Notice of Appeal in February 2009. The results concluded there was no defect with the windows and no evidence of excessive air infiltration. She believed that this was false information based on bad faith by Mr. Cecatini in administering the test.

The Applicants' position is that the homes' windows were not installed correctly and require replacement. They provided quotes for the cost of this replacement at between $31,956.64 and $55,000.00 [11].

In cross-examination the male Applicant conceded that the CSA A440 Standard is not an industry requirement, but, in this case, was recommended by the manufacturer.[12]

Mr. J. Quackenbush gave evidence. He is a member of the Ontario Association of Home Inspectors, a certified inspector with the Window/Siding Association of Canada and the WindowWise Program. He explained the latter was a voluntary Program available to window manufactures promoting best practice in window design and installation standards which, he acknowledged, went "above and beyond" the current industry standard. He was accepted as an expert witness by the Tribunal on window installation requirements with the noted exception that he was not an expert concerning air infiltration testing performed on the home.

His Report and photographs[13] were entered as exhibits. Mr. Quackenbush stated that his measurements of various windows in the home demonstrated what he concluded were multiple deficiencies involving numbers exceeding the tolerances for plumb and square causing window sash drag. He further found

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[10] OBC s. 9.7.1.7
[11] Exhibits 4 and 5
[12] CSA Standard s.1.2 stipulates its scope as: *This Standard provides minimum requirements that will help to ensure the installation of windows in an effective manner, such that the performance of the window as established by testing to the requirements of CSA Standards A440 and A440-2 is not compromised.*
[13] Exhibit 6, Tab 56 and Exhibit 5, Tab 56 respectively

evidence of inadequate shim placement and inadequate insulation on the bedroom window when he assisted the male Applicant remove the window casing. Finally, he found drainage ports on windows installed at the side rather than the bottom where they are required and improper seal repairs. In his opinion, where installation errors are found on one window, they will occur on others.

He conceded that the smoke test employed by the female Applicant did not pretend to establish whether the air movement which was observed was, in fact, within the OBC tolerance. It was his opinion, however, that the pencil test demonstrated a potential for excessive air infiltration. He conceded that there could be errors in the test results given the effect of normal air convection movement in the home.

In cross-examination Mr. Quackenbush allowed he was not experienced in framing or in weather tightness of windows. He agreed that as long as a window stops air penetration to the measure provided in the OBC, it is considered acceptable.

He admitted that he had not used any tools to measure the square/plumb of the windows other then the level and/or square seen in the photographs. He agreed it was a “rudimentary” inspection. He conceded that the industry tolerance for bowing was ¼ inch over a 2 foot span and acknowledged that not one of his measurements exceeded this tolerance. This tolerance was not, however, acceptable for either the CSA or WindowWise standard, which, he agreed, were more stringent than the OBC. He admitted that what he deemed were cracks in the corner welds of the window units would likely not have occurred at installation, but would rather have occurred at manufacture.

He conceded there was no determination as to whether shims were placed in the master bedroom window where the destructive testing took place. His conclusion they were omitted was only an assumption. It was his evidence such shims are necessary to keep a window level in the frame; however, he also conceded that where the garage window had no shims, there was no evidence of any resulting bowing or distortion.

He acknowledged that his review took place two and a half years after possession by the Applicants and that in all cases the windows operated, although one demonstrated some sash drag. He concluded that in all of the cases where he noted a failure to meet the WindowWise and/or CSA 440 Standard, the appropriate remedy would be adjustment and none of the windows required actual replacement.

He further admitted that on the window where he observed side frame drip holes, he had observed other holes had been drilled on the horizontal edge as required although this observation was not included on the caption for the photograph he

took of the window. He testified that the Applicants must have added the captions to the photographs following his Report. He remained concerned this modification could negatively impact the original manufacturer's product with the result that the CSA rating for the window was no longer being met. He had similar concerns with the weather seals repairs which he had understood had also been performed by the Added Party. When informed the former had been drilled with the approval of the manufacturer and the seals had been repaired by the manufacturer, he acknowledged he could no longer conclude the windows would fail to meet the certification standard.

With reference to the insulation, Mr. Quackenbush conceded it was "next to impossible" to get the pink insulation right through the gap which was the reason why the Window Wise program recommended using foam insulation. He agreed that foam insulation was not required as an industry or OBC standard. He testified that what he considered inadequate insulation would contribute to a cooler window frame temperature, but allowed it was sufficient to stop air infiltration.

Finally, on cross-examination, Mr. Quackenbush acknowledged that the CSA standard requiring screws in the window framing related to the portion of the frame which is vinyl or aluminum whereas the nails illustrated in the his photos of the Applicants' windows appeared on the wooden portion of the casing.

Mr. Gordon Cooke was called by the Added Party as its expert for the window issue. Qualified as a professional engineer by the University of Toronto in 1980, Mr. Cooke is President of Air Solutions Inc. and Building Knowledge Canada. He has operated his own business for 22 years in residential heating and air quality. He is a trainer for the Canada Housing and Mortgage Corporation (CHMC) Indoor Air Quality Program and currently teaches courses for the organization on mould remediation. He is also chair of the CSA Standard Housing committee currently reviewing the CSA requirements. He is one of only 20 qualified individuals performing energy star program testing on homes for compliance with the standard. He was accepted by the Tribunal as an Expert in air leakage and air movement issues within the home.

Mr. Cooke advised that the single most common cause of heat loss in a home is the surface area of the room. The second most common contributor is air leakage which is largely reflective of the amount of glass in the room, the direction the glass is facing and its R value. While new home walls generally have an R value of R20; new windows are usually only R2.

The geographic distance of the room from the heat source is also a factor impacting on room temperature. In the Applicants' floor plan he measured the master bedroom as the furthest room from the furnace, a distance of some 52 feet. It is also the room with the most surface area of glass in the home. The

master bedroom windows exhibiting condensation have a northern exposure which is where most Canadian winter weather originates. They also look out over open exposed fields. All of these factors would contribute to the room being cooler in temperature than are others.

To determine excess air leakage in a room, Mr. Cooke advised that the ASTM E283 referenced in s. 9.7.1.7 of the OBC is the only test which differentiates air leaking from outside with that of normal air movement within. As window surfaces are cooler than the ambient air, warm air inside the home will rise and move along the surface of the window when it makes contact. The pencil or smoke test can not distinguish whether the air movement which it tracks is the result of leakage or interior convection currents.

Mr. Cooke testified that consumer concerns of condensation are frequent. He has, however, never observed condensation as a consequence of poor window installation. Rather his opinion is that condensation occurs more frequently in today's construction as a consequence of better weather tightness in buildings, as well as a tendency to oversize furnaces, both of which, in his opinion, are the case in the Applicants' home.

The Added Party contracted Mr. Cooke in January 2008 requesting he review the basis for TWC's decision to install a larger furnace in the Applicants' home. He concluded the information upon which TWC had proceeded was based on out-dated formulas for heat loss calculations now being reviewed "..because research by CHMC, Natural Resources Canada and HRAI (Heating Refrigeration and Air Conditioning Institute of Canada) shows they all result in significantly oversized heating system designs."[14] He recommended the ASTM air leakage test be performed before the furnace was replaced and was later hired by the Added Party to attempt to perform the ASTM test on the Applicants' home in order to verify the allegation of excessive air infiltration. As has been noted, access to do so was denied. He did, however, perform the test on the Added Party's model home which revealed that the model was tighter than the average new home construction

In his opinion the condensation on the Applicants' window reflected in the two photos dated November 2008 and January 2009 is not attributable to dry outside air entering the home but rather to moist and humid interior air meeting the window surface. When advised that earlier testimony had demonstrated the Applicants' home has interior humidity levels maintained at between 42% to 58% to properly acclimatize their hardwood, Mr. Cooke advised that such interior humidity will necessarily lead to condensation[15]. On average, Canadian windows

[14] See Air Solutions Inc. Report dated January 16, 2008, Exhibit 10, Tab B2
[15] See Construction Performance Guidelines, Appendix A3 *"Moisture and Windows"*

can not withstand relative humidity higher than 30-35% without exhibiting some condensation. He listed numerous factors which trigger condensation, including that the Applicants did not set back their thermostat at night, that the window was a bay window and not flush with the wall, and that the master bedroom had an adjoining ensuite. He noted the complaint concerned the only window in the home which was both deep-set and exposed to northern weather.

Mr. Cooke testified that the CSA 440 Standard is a requirement for window manufacturers in producing windows for construction. It is a requirement of the OBC that windows meet its standards for weather tightness, etc for certain window classifications specified. The evidence revealed the Applicants' window classification was not so specified.

He testified that installation requirements set out in the Standard are not OBC mandated, but may be recommended by a window manufacturer in an effort to maintain adherence to their performance rating. Mr. Cooke advised that the CSA Standard is further a factory standard and windows are not expected to perform to the same level in the field. WindowWise is an independent member organization with its own standards for window installation including a reduced tolerance for measurements and foam insulation. Neither it nor the CSA standards, in his opinion, are necessarily recommended. For example, his ten years of study of the foam insulation recommended by WindowWise has led him to conclude it causes bowing of windows and should not be recommended. A similar controversy exists in the industry with respect to the use of shims specified in the Standard. Many manufacturers don't promote their use because they have the effect of preventing the window from moving with the natural settling of the home.

In cross-examination Mr. Cooke stated that all doors and windows leak air to some extent. Recognizing this, the OBC allows for a tolerance that is quantifiable[16]. Further, there is movement in a home as it settles and windows/doors must be installed to allow for some flexibility of movement. That flexibility has been determined in the industry at a tolerance of ¼ inch over a 2 foot span. If a window measures outside this perimeter, then there may be an issue.

Mr. Cooke found that insulation at a depth of ½ inch was sufficient. He concluded that stuffing greater insulation into the air pocket (itself necessary for air movement) would be more problematic.

Tajinder Singh has worked for the window manufacturer for more than eight years. For five of those he was a service technician dealing in consumer complaints. For the last one and a half years he has been the lead hand in this

[16] Supra, note 11

service department. He attended the Applicants' home as part of his employer's effort to respond to their concerns.

Mr. Singh first worked on the Applicants' windows in August 2008, following complaints of improper weather seals on the window units allowing air infiltration. Given that the seals are welded at the factory, the only repair available on site after installation is to overlap replacement stripping. He and a colleague performed this repair on all offending windows by overlapping the stripping, which he stated was a standard repair and does not void the manufacturer's warranty coverage. Mr. Singh reviewed the photographs of the overlapped seals, as produced by the Applicants and referenced by Mr. Quackenbush, identifying them as illustrating the repairs performed by himself and his colleague. They had completed the repairs, checked to ensure no sash drag existed on any window, and concluded all windows were properly operational. If any window had been defective or required replacement, they were authorized to perform the replacement there and then and did not require pre-approval to do so. The female Applicant had signed off on the Work Order that all "work was completed fully". She was granted a further year warranty extension[17].

Mr. Singh testified that drill holes can be placed on additional portions of a window unit in the event installation requirements involve a change in the manner of installation by the builder on site. This is not uncommon and only requires a capping of the original holes. He could not recollect the Applicants ever complaining to him that one of their windows had not been properly drilled or capped.

Mr. Singh re-attended with his manager in March 2009 in response to the Applicants' continued complaints of air leakage. They were taken to the windows in the kitchen and master bedroom where they verified the weather-stripping on the units were making the appropriate contact and that the windows fit tight. Every window identified by the Applicants was reviewed. All operated as designed without any abnormality, although Mr. Singh agreed there was not much wind.

In cross-examination Mr. Singh stated he never thought he would be called back to the home after the first repairs in August 2008, given the original corrections performed. He remembered this particular home because it was unusual to have an extended conversation with homeowners over possible air leakage concerns. He also remembered putting his hand against the master bedroom window seal and feeling nothing unusual. He acknowledged that he had worked on the building exterior while his colleague was on the interior - stating that this was the normal procedure when checking seals and weather-stripping to ensure contact is verified from both angles. Various photos taken by the Applicants were put to him, which he agreed might demonstrate minor and normal settlement best

[17] Exhibit 10, Tab 8

remedied by simple adjustment if required. Cracks in corner seals were, he stated, best remedied with sealant. Any drag on a sash, if it now does exist, would also most properly be remedied by adjustment, as this too is a normal condition arising as the house settles. Nothing shown to him by the Applicants during either of his attendances at the home led him to conclude a replacement or readjustment might be necessary.

Mr. Ribeiro corroborated Mr. Cooke's evidence that the CSA 440 standard is not a requirement for builders on installation. He acknowledged that the manufacturer's labels on the Applicants' windows did recommend installation in accordance with this standard, but re-iterated that the builder's obligation under the Act is to OBC and industry requirements, not CSA standards.

Were the CSA in fact the appropriate standard, it was Mr. Ribeiro's position that the Applicants' photographs failed to demonstrate that the installation did not meet CSA requirements. For example, photos attempting to demonstrate windows out of square illustrated a level placed against the window sash, which Mr. Singh testified is adjustable, and not against the frame where the measurement should be taken. Further, the measurements are taken from the exterior. As windows are installed from the interior, any plumb/square measurement should properly be taken from the interior. Finally, window units are rigid when received from the manufacturer. To have significant bowing of the window, there would need to be some severe bend in the frame on installation. In fact, as Mr. Cooke testified, manufacturers anticipate some reasonable settling and movement and therefore do not want a window unit to be installed too tightly since that would cause pressure which, in turn, can lead to cracked window panes.

All the photographs on which the Applicants relied, as well as the measurements of the windows taken by the male Applicant, were taken in the summer of 2009, almost three years after possession. If in fact some windows are out of square, it would not be abnormal nor an indication of poor workmanship or building deficiency. Were either of these the cause, this would have been apparent at possession and certainly by the time of Mr. Singh's inspection in the summer of 2008.

As regards the Applicants' evidence of condensation, Mr. Ribeiro advised that of the approximate 1600 homes he has built over the last 6 years, condensation is often an issue. He noted the complaint is so widespread that TWC, CHMC and other industry players have all issued consumer publications addressing the issue. All conclude the number one cause is humidity levels in the home especially for the first few years after construction while building materials dry out. The CHMC publication recommends interior humidity levels of less than 30% during colder weather[18].

[18] Exhibit 10, Tab 12. See also CPG 8.5

Unique factors of each homeowner's living conditions must also be considered in reviewing probable causes for condensation. As noted by Mr. Cooke, the Applicants' windows which show condensation are those furthest from the furnace. Ninety feet of ductwork is in place between the location of the bungalow's furnace and these windows. The distance was due, in part, to the homeowners not wanting the furnace located in the centre of the basement. The windows are in the master bedroom which faces north and the closest adjacent home is over 400 feet away. The windows are exposed to the prevailing winds. There are three large windows in the room, one with three panels. Given all these factors, there is no doubt that the room is cooler than others in the home. Further, there is an ensuite tub and shower and Mr. Ribeiro continues to believe that the new furnace is over-sized based on three separate reports he commissioned concluding the original sized furnace was appropriate. The evidence demonstrates further that the Applicants do not set back the thermostat at night and do maintain high humidity levels throughout the home, the lowest in evidence being 41%.

If condensation was a result of poor window installation, as alleged, then it should be apparent on more of the 30 plus windows in the home. It is not. The evidence of condensation is restricted to only the one window in the master bedroom and only on two cold weather occasions.

Nonetheless, in response to ongoing complaints, TWC arranged to conduct thermal imaging tests of the bedroom surfaces in February 2009. The results of this independent review established some cold air spots in room walls but not around the windows. All of the affected areas were repaired by the Added Party. The Applicants remained dissatisfied and, in June of 2009, conducted the destructive testing on the master bedroom window and brought in Mr. Quackenbush as part of their ongoing efforts to establish builder deficiency.

Mr. Cecatini testified his first inspection in May/June of 2008 revealed no evidence of the condensation alleged by the Applicants. However, given that homeowners often complain about condensation, he checked the window operation and seals observing no evidence of any operational deficiency. He was aware that the manufacturer had performed repair service to the seals and concluded there was no warranty issue. He also checked for excessive air infiltration, finding it non-existent. He determined there was no need to arrange for an air infiltration test. Mr. Cecatini advised the homeowners that some air infiltration is expected, particularly on windy days with exposure such as theirs. The Applicants showed him the video of their pencil smoke test. He noted the pencil against the window seal, the heat registers beneath the windows and the large panes on the windows. He concluded the movement as illustrated was most likely convection currents, was not alarming and did not cause him to be

concerned that the tolerance of air allowed in the OBC was in any way breached or exceeded.

He was also shown photos taken by the Applicants of the condensation they found on their master bedroom window in the morning of January 24 2009. He noted it was early morning on a cold winter day. He was aware of the heat registers under the windows and the ensuite shower and bath. He advised the homeowners about the effect of relative humidity and that condensation is a normal condition which must be controlled through the environment as explained in the CPG[19]. He was not concerned enough to take temperature or humidity readings. He concluded the Applicants' windows were properly installed and were fulfilling their purpose and denied their claim.

In response to continued complaints by the Applicants, he re-attended after issuing the Decision Letter in the winter of 2009 to conduct thermal imaging on the bedroom walls. TWC concluded this was the appropriate test to conduct since the Applicants' claim was of excessive cold in the bedroom from numerous areas including walls and outlets as well as windows. Only thermal imaging could pin point areas to determine whether there was a temperature differential suggesting a problem. The results of the test concluded there was no abnormal or unusual air leakage from the window areas. Mr. Cecatini noted that the wall in question is comprised of 90% window which results in little insulation and explains the 10 degree difference in the imaging test temperature readings moving from top to bottom of the window pane.

Mr. Cecatini denied the female Applicant's suggestion that he instructed the M&O employee conducting the test to exclude any areas – and testified that the fact that the images did not encompass window corners was not intentional.

Mr. Cecatini was not present for the later destructive testing undertaken by the Applicants and Mr. Quackenbush, but nothing in evidence at the hearing led him to alter his earlier conclusion there was no warranty breach by the Added Party in installing the windows. He was never advised by the Applicants of any complaint concerning measurements, and therefore did not check whether the frames were square, plumb and level. Nonetheless, the OBC intention is to ensure windows operate without drag or friction and his own observations, supported by the window manufacturer, demonstrated the Applicants' windows did so.

In cross-examination Mr. Cecatini denied ever refusing to conduct a blower test. It was his conclusion it was not necessary and would not have been helpful as it does not isolate windows but rather rates the room as a whole for air infiltration. He noted the Applicants had never raised this as an issue during his inspection of their claims.

[19] CPG 8.5

(e) Floor joist inadequacies (items 48, 57, 58, 59 and 60):

After possession the Applicants noticed a floor vibration. Their subsequent investigation revealed the following concerns with the floor joists installed by the Added Party:

(i) not in accordance with contract, unauthorized substitution and inferior (items 48 and 60):

In contrast to the architectural drawings they had reviewed prior to signing the APS, the Applicants discovered that the joists installed in their home were not AJS 15s. Part of the Applicants' investigation included their requesting the permit approved architectural plans of their home from the municipality building office. On receipt, they found the plans were not of their elevation design. The municipality issued a Compliance Order to the Added Party in March of 2007 for the correct plans. These were provided[20] and reviewed by the municipality in June 2007. They show AJS 15 joists are contemplated. However the joists installed in the home are rather AJS 20 and QFS B310. The Applicants claim both have reduced strength characteristics from the AJS 15 as indicated in reports from the National Research Council and Minister Rulings[21].

The female Applicant testified she requested additional plans from the lumber company responsible for the joists[22]. These plans were also provided to the municipality by the Added Party by fax in May 2007[23]. They do reference both the AJS 20 and the QFS B310 joists. The Applicants submit these plans are also improper, however, as they do not include the engineer's stamp.

(ii) Insufficient number of joists (item 58):

The original plans submitted to the municipality did not truly reflect the joists installed. While the architectural plans illustrated joists in certain areas installed at 12 inches off centre, the male Applicant stated his measurements demonstrated that joists were actually placed 16 inches off centre. The Applicants concluded this had resulted in weaker support to the flooring than that contemplated by the architect.

(iii) Insufficient blocking/bridging (Item 57):

A further issue was that the architectural plans called for blocking which was not provided. In one area it has since been added in response to TWC finding of a warranty breach. However the Applicants allege that this work was improperly performed. The Applicants rely on the fact that they can place a sheet of paper

[20] Exhibit 7
[21] Exhibit 4 and Exhibit 6, Tab 2, respectively
[22] Exhibit 4, Tab 48
[23] Exhibit 10, see also Exhibit 16

between one of the added blocks and the subfloor[24]. They also allege the blocking in another area fails to actually abut the joists, thereby failing to prevent the joists shifting[25].

The Applicants also claim that blocking as mandated under the OBC in Part IX, section 9.23.9.9 has been breached with respect to non-load bearing walls running perpendicular to joists. They rely on their photographs illustrating nails protruding adjacent to the joists under the foyer/ living room and foyer/library walls. It is their position that the nails indicate the walls are perpendicular to, and not resting on, the joists.[26]

The Applicants also contend that the bridging envisioned by the architect under the ceramic kitchen floor has been omitted in the construction in contravention of the OBC[27].

(iv) Dropped header/warp (item 59):

A header joist illustrated above a window in the architectural plans in reality consists of two 2x4 pieces nailed together.[28] Another joist appears warped and the Applicants claim it should be reinforced.

The Applicants also rely on a photograph of a basement window to illustrate a further complaint that a cross joist has dropped. The Applicants believe this drop may explain problems in the master bedroom flooring above. In cross-examination they admitted there was no sign of any distress in the wood, no pulled nail or splintered material, and that it was possible the header had been installed at a slight height difference from one end to the other. The cross joist was measured during the TWC inspection and a difference in height at one end was noted at 3/8 inch. Nevertheless TWC denied any Warranty coverage.

Other than allegations of a vibration felt when walking over areas of the flooring and a dip in the master bedroom hardwood, the Applicants had no evidence of any damage resulting from the alleged deficiencies. In cross-examination, the female Applicant suggested she had also noted some vibration when a neighbouring community centre held dances. She conceded that, despite their having inspected the ceramic tile application on the main floor in some detail, there appeared no indication of cracks or grouting issues; she had, however, heard the ceramic mortar cracking.

The Applicants provided an estimate for $1,869.00 to add joists every 4 linear feet in order to compensate for the inadequate joist strength installed. A further

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[24] Exhibit 6, items 57/458/59 pgs 17 and 19
[25] *Ibid*, p. 7
[26] *Ibid*, pgs 3,4 and 5
[27] OBC s. 9.30.6.4(7)
[28] *Ibid*, p. 5

cost of $488.00 was estimated to add a joist under the library. Since the Added Party had provided blocking to the west wall, no claim was included for that area. Blocking under the non-load bearing wall was estimated at a price of $414.00 and replacement of the warped joist under the master bedroom was priced at $210.00. There was no estimate for the repair of the alleged deficient header.

The architect Mr. Hunt explained that the plans he created for the design of the Applicants' home were initially drafted in 2005 and last updated in the spring of 2006 before the Applicants' home was constructed. These plans were filed with the municipality prior to the APS between the Applicants and the Added Party.

Mr. Hunt noted the specific disclaimer on his plans as filed with the municipality that structural elements are set out in separate engineering plans. Mr. Hunt is not an engineer and therefore his design comprises the lay-out/elevation only. While he acknowledged that he had referenced AJS 15s on his drawings, choice of joist is always subject to final approval by the structural engineer, hence the disclaimer on the plan. Often a builder will change suppliers of joist material or, based on site conditions, alter numerous design elements. It is only where such an alteration impacts the integrity of the design or has OBC implications, that the engineer's or architect's approval is required. Mr. Hunt and his company no longer specify a type of engineered joist on plans because of the frequent changes in these products by builders.

Edwin Fok received his professional engineering qualifications from the University of Toronto in 1982. He is registered to provide engineering services in Alberta and Manitoba as well as Ontario. Since 1990 his primary work has been in timber design. His engineering company was responsible for the engineered joists in issue as provided to the Added Party by the lumber company. The lumber supplier is itself a major player in the provincial field having supplied material to over 10,000 new homes.

Mr. Fok stated that the Applicants' reliance on Part IX of the OBC was not appropriate in this instance as the engineered joists in their home were instead subject to Part IV of the OBC. Part IX OBC protection, written for conventional wood products, is not the relevant standard when this product is used.

He recollected being telephoned by a lady concerning the Applicants' home who had questioned him about the need for blocking under ceramics and the kitchen area. His opinion was that the blocking requirements set out in Part IX of the OBC are not required because the engineered joist product used in the home is built to withstand greater weight than the joists envisioned in the OBC. In response to the homeowner's concern, he had written a letter to the lumber producer expressing the above opinion in March of 2009[29].

[29] Exhibit 10, letter of E.Fok dated March 23, 2009

He had never been advised there was an allegation of an interior non-load bearing wall not supported by a joist. If such a wall was not properly supported, then blocking as set out in Part IX would be required.

Mr. Fok corroborated Mr. Hunt's evidence that architectural plans initially provided to the municipality are subject to the professional engineer's approval for structural elements. He opined that his structural plans in evidence did not bear his professional stamp because not all the package appeared to have been reproduced by the Applicants. Nevertheless, he identified the 2007 filed engineering plans[30] as his own approved Plans noting they reference both AJS 20 joists and QFS B310 joists. He testified that the engineered joist products had been altered from the architectural sketch due to the fact that the AJS 15 as called for in Mr. Hunt's 2005 drawings were no longer being produced when this home was being constructed in late 2006.

Mr. Fok advised that AJS 20 and QFS B310 are appropriate alternatives to the defunct AJS 15s. Mixing of joists is normal in construction and even conventional and engineered joists can be used in the same building structure. While the QFS B310 does not share the same strength characteristic as the AJS 20 at the same span, it is equivalent at spans of 14 feet or less. The engineer stressed that support strengths of a joist are only determinable based on the joists' span or length. The Applicants' drawings demonstrate that the QSF B310 only exists where the original design called for joist spans shorter than 14 feet. Those installed are consequently appropriate and he is satisfied meet all structural requirements. In fact, Mr. Fok believed that the Applicants' suggested remedy of adding of extra joists would be of no benefit and might trigger future problems.

Mr. Fok compared the Applicants' drawing of the actual joists in the home with his own approved plans concluding that the only change was that the installer had apparently added extra joists on either side of the cold cellar, as they had been placed at 12 inches off centre as opposed to his design which had called for placement at 16 inches off centre. Mr. Fok's opinion was that this would have the effect of strengthening the floor. He queried whether the consumers had perhaps paid extra for the upgrade.

As early as 2007 the lumber company advised Mr. Fok of the Applicants' concern that different joists were used in the home than appeared on the architectural plans. Mr. Fok had responded in writing to confirm the above information[31].

Mr. Fok testified that the perception of floor vibration is subjective. Some vibration is to be expected as, in fact, some tolerance and movement is necessary. It is therefore necessary to look to other evidence to determine whether a vibration complaint actually indicates a deficiency. His view of the

[30] Exhibit 16
[31] Exhibit 10, letter of Mr. Fok dated March 23, 2007

Applicants' photographic evidence was that the allegedly warped header apparently continued to make direct contact with the subfloor and would consequently not be the cause of any increased floor vibration.

Mr. Ribeiro denied that the architect plans and/or engineer floor plans were part of the APS contract of the Applicants and the Added Party. He referred to Schedule A[32] of the APS which in the first clause limits the builder's obligation to construction built in accordance with those plans "already examined". He noted that Mr. Fok's structural floor plan was never examined in advance of the APS by the Applicants.

Mr. Ribeiro further relied on Schedule B of the APS which only referenced "engineered" joists with no model code or number particularized. The Applicants had received such engineered joists.

According to Mr. Ribeiro, municipal Orders to Comply are not uncommon in the construction of a new home. It is therefore important to consider the substance of the Order issued and not merely the fact that one was issued. Here the evidence demonstrated an oversight in the filing of certain documentation with the municipality which was immediately rectified once the Added Party was informed of the error in the spring of 2007. It was the Added Party's evidence that this omission was a paper oversight only and did not indicate was any structural error or omission in the construction. Indeed, the home had been subject to all the normal municipal inspections and permits throughout the building process and no issues had arisen as a consequence. Further, once made aware of the paper omission the municipality had been satisfied with the late filing of the engineer's floor plans and Mr. Fok's letter of March 2007, with the result that no further Orders to Comply were issued.

Mr. Ribeiro denied any deficiency in the header which was alleged to have dropped, noting that there was no evidence of any material distress which would be a factor if there was a failure in the support.

He also denied the Applicants' allegation of repair failure as demonstrated by the paper fitting between the blocking and the subfloor and joist ends. He explained that the blocking was intended to provide additional support for lateral movement between joists and was not meant to add support to the subfloor. He also noted that of the dozens of blocks which the Added Party had added in order to appease the Applicants, this was the only one the Applicants had photographed.

Finally, as concerns the allegation that the Added Party had failed to provide blocking under a non-load bearing wall which was not placed directly over a joist, Mr. Ribeiro's evidence was that this was improbable. He concluded that in the Applicants' photographs of the nails on the side of the joist, the nails were not

[32] Exhibit 15

established as being used to support the non-load bearing wall. Rather, the staples seen in the same evidence support the more likely case that the nails indicate the placing of the hardwood flooring. Even if the nails were indicative of the wall as alleged, it was Mr. Ribeiro's testimony that the blocking which is in place provides sufficient support. Following the pre-hearing in the spring of 2009 the Added Party had expressly instructed its trades to carefully go through the basement and add blocking wherever there was even a possibility it was needed. They had done so in cases where it was not needed and yet had not done so in this location. Mr. Ribeiro added that the Applicants had never expressly advised him, his trades or TWC that they had a concern with this area of the construction.

Mr. Cecatini corroborated Mr. Ribeiro's testimony on this point. At no time had he ever been made aware that the Applicants were concerned a non-load bearing wall was improperly supported and further blocking was thus required. In fact, he also noted that the reason the municipality had ordered engineering plans be provided in March 2007 was because the building inspector had been at the home at the Applicants' request to inspect what they believed were inadequate and improper joist supports. No issue of non-load bearing walls had been raised.

When Mr. Cecatini completed his inspection of the home in 2008, he was aware that the municipality had already reviewed this aspect of the claim in some detail. From his review of building plans proffered by the Applicants as well as the APS, he concluded there was no warranty breach, given that the contract specifically limited the joists to "engineered floor joists" only. In order to satisfy himself that the engineered joists provided were structurally sound he asked the Applicants to provide a sketch of what they actually received. When he compared this sketch to that of the engineer's floor plan, he believed there was only one area of missing blocking on the west wall which he ordered the Added Party to install. They did so and he concluded that they did so properly.

Mr. Cecatini advised he had assessed the claim of the dropped basement header. He observed no evidence of any drop in the manner of splintered wood or other failure. His measurements revealed a 3mm difference in the height of one of the headers over the other, which he concluded was minimal and posed no threat to the integrity of the unit. He concluded that there was no failure and that, assuming the header had been installed at the slight variance exhibited, there was no reason to assume this should be warranted.

THE LAW:

The Act includes the following provisions:

Warranties

s.13(1) Every vendor of a home warrants to the owner,
(a) that the home,.
(i) is constructed in a workmanlike manner and is free from defects in material,
(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;
(b) that the home is free of major structural defects as defined by the regulations; and
(c) such other warranties as are prescribed by the regulations. R.S.O. 1990,c.0.31, s. 13(1).

14(3) Subject to the Regulations an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty. 1998, c. 19, s.185 (1); 2000, c. 26, Sched. B, s. 15 (3, 4).

Powers of Tribunal

16(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation. R.S.O. 1990, c. 0.31, s. 16 (3).

O. Reg 892

s.18 (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser. R.R.O. 1990, Reg. 892, s.18 (1).

s.19. Every vendor of a new home warrants the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement. R.R.O. 1990, Reg. 892, s. 19.

DECISION ANALYSIS:

The Tribunal's jurisdiction is set out in s.16 of the ONHWPA which provides the homeowner with a right to appeal to the Tribunal from a TWC decision denying a warranty claim under section 13.

The onus is on the Applicants to prove their claim to a civil standard – being the balance of probabilities – see *F.H. v. McDougall*, 2008 SCC 53. If a breach of warranty is proved, subsection 14(3) provides that the Applicants are entitled to damages arising from the breach where the homeowners have a cause of action against the builder for that breach.

The Tribunal has authority under s. 16(3) to order TWC to take such action as the Tribunal considers it ought to have taken.

The Act is consumer protection legislation and is to be given a broad and liberal interpretation: *Markey v. Tarion Warranty Corporation* (2006) OJ No 2929 (On SCDC).

The Tribunal has carefully reviewed the exhibits and the testimony of the witnesses and has reached the following conclusions:

(a) Outside trim and molding:
The Applicants have failed to establish that the Added Party has breached the warranties set out in the legislation on this item.

Contractual claims are not ordinarily within the jurisdiction of the Tribunal whose authority is limited to consideration of the issues in appeal from the TWC decision letter denying warranty coverage to the Applicants. Nor is the Tribunal persuaded that the Applicants were contractually entitled to frieze board. The photograph at the back of the sales brochure, the same brochure containing the artist's sketches on which they rely, does not include frieze board. Neither does the model home nor other similar elevation homes in the development. Further, the APS contains specific disclaimers providing notice that artistic representations in the brochure and sketches are not to be imported into any contractual term.

The Tribunal finds that the gaps in evidence and/or lack of frieze board do not breach OBC requirements as alleged. Section, s. 9.19.1.2(5) of the OBC speaks to the vents or holes for air circulation. There is no allegation that the soffit vents or any other vents are failing or improperly constructed. More importantly, the Applicants' claim is not a failure of these venting holes, but rather that the installation of the soffit itself is not completely flush, resulting in the gaps.

The evidence demonstrated that such gaps were a consequence of the uneven stone surface- a design item specifically selected by the Applicants - and not the result of any failure of material or workmanship. Mr. Cecatini found that the soffit and the molding were performing as intended and the exterior wall cladding of textured stone extended behind the molding achieving the restriction of precipitation as required. Nor did any of the vents show a breach of the relevant sections requiring restriction of weather and insects. He concluded that the installer had made every effort to adhere the molding to the stone as closely as possible given its rough texture. The Applicants' photographs support his conclusion.

Further, although not conclusive of the matter, the fact is that the municipality did indeed pass the home's exterior inspection in November of 2008, within weeks of the Applicants' submitting their claim, with no concern or reference to inadequate trim or molding, gaps or potential breaches of the Building Code.

The Applicants rejected the offer made by both TWC and the Added Party to provide additional molding or sealant to reduce the gaps, options that would have the desired effect of minimizing the gaps. It is thus apparent that what they truly desire is installation of frieze board, itself an additional rigid material which could

not reasonably be expected to adhere any more closely to the stone than what is currently in place, without extensive and costly destruction of the textured stone surface design they chose when selecting their elevation design. The Tribunal concludes that it is not so much a breach of a requirement of the OBC which motivates their claim, but rather their desire for an item of design which is not a warrantable item.

For all these reasons the Tribunal denies the claim.

(a) window/sill slope:

In considering whether the Added Party has breached a warranty under the Act with regard to the window sills the following sections of the OBC are relied upon by the Applicants:

> **9.7.2.1. Window Standard**
>
> **(1)** Windows shall conform with CAN/CSA-A440-M, "Windows", but need not meet air tightness, water tightness and wind load resistance requirements more stringent than those for classifications A1, B1 and C1 in CAN/CSA-A440-M.
>
> **9.20.11.5. Cornices, Sills and Trim**
>
> **(1)** Cornices, sills or other trim of masonry material which project beyond the wall face shall have not less than 65% of their mass, but not less than 90 mm, within the wall or shall be adequately anchored to the wall with corrosion-resistant anchors.
>
> **9.20.13.12. Drips Beneath Window Sills**
>
> **(1)** Except for wall openings located less than 150 mm above ground level, where a concealed flashing is not installed beneath window and door sills, such sills shall be provided with an outward slope and a drip located not less than 25 mm from the wall surface.

The Tribunal does not accept the Applicants' position that the CSA requirement as to the sill slope is in fact the appropriate standard. It prefers the testimony of both Mr. Cooke and Mr. Quackenbush, both of whom have extensive experience in residential window construction, who agreed that the purpose of the CSA Standard is to assist window manufactures meet laboratory test design. This is what is specified in the Standard in s.1 as to scope[33]. Moreover, the Tribunal finds that the Applicants' contention that the Added Party is bound to comply with the Standard would result in the Added Party having to comply with conflicting standards: one requiring a 6% slope (CSA); and the other only requiring an undetermined slope in the event there is no flashing (OBC). This is not a reasonable interpretation and is rejected.

[33] *Supra*, note 12

The Act requires that the Added Party constructs a home in accordance with the OBC. Given there was no evidence of a failed flashing under the main floor windows, the Tribunal concludes that the OBC requirement of s. 9.20.13.12 has not been breached in these areas.

The Construction Performance Guidelines ("CPG"), written in consultation with various Trade and industry groups[34], reflects accepted industry standards and has often been considered in determining quality of workmanship under s. 13(1). The CPG sets no specific requirements for window sills, but rather stipulates that no window shall allow for water penetration[35]. A water test, as described, is referenced to determine the issue of whether the window or other opening is responsible for water leakage[36]. The Applicants noted water stains, but admitted some were below window wells conforming to the CSA 6% slope standard. They also agreed that water exposure during construction may have caused the staining. They had never complained of water penetration to the Added Party or to TWC and had never performed a water test or requested one be undertaken.

Indeed, despite the on-going refusal of both TWC and the Added Party to recognize this aspect of the claim, the Applicants made no effort to provide independent verification of the alleged deficiency despite attendance at their home by at least two independent professionals with extensive window installation experience - Mr. Quackenbush and Mr. Singh.

Much was made of the manner of measurement undertaken by the Applicants in their conclusion that the sills were not sloped to the exterior. Mr. Cecatini preformed the same measurement method – from the top side. Given the wording of OBC s.9.20.13.12, the Tribunal is not persuaded the measurements were proper. It notes in this respect the photographic evidence of a hand holding the 4 foot level against the 3 inch sill and agrees with Mr. Ribeiro such manual pressure would likely skew the result. Moreover, the male Applicant admitted that only one of the basement sills in fact failed to meet the OBC requirement for outward slope[37].

Based on the above review of suspect measurements, no independent verification of claim, admission that only one window allegedly was in breach and no attempt to demonstrate damage, the Tribunal cannot conclude on a balance of probabilities that there exists the improper slope as claimed, nor can it conclude that damages have resulted. If the Tribunal is mistaken, the evidence as to cost of remediation demonstrates *de minimus* damage, that is, damage that is too minimal to be considered by the Tribunal[38]

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[34] See p. 9 CPG
[35] CPG 4.19
[36] CPG - Appendix A5
[37] Exhibit 56, items 56/33, p. 40, top right photograph
[38] In the realm of $70.00 for the one basement window based on Exhibit 12 quote by B,J, Brickwork Constr. Ltd of $135 for re-sloping and smoothing two basement sills

The Applicants' Claim that an improper slope was built into the decorative pillars, is rejected. There is clearly no window or opening in the pillars. Thus neither the CSA standard of a 6% slope, nor the OBC requirement of outward slope is triggered. If the Applicants intended to base their claim on OBC section, 9.20.11.5, they failed to provide evidence that the Added Party failed to meet those requirements.

(b) window seals/condensation:

The Tribunal is not persuaded by the Applicants' evidence that the Added Party has breached s.13 warranties in their home's windows. For the reasons given above, it accepts the testimony of Mr. Cooke and concludes that the CSA Standard is the applicable standard whereby manufactures can expect adherence in the field to laboratory results. It does not follow, however that it is the appropriate standard on which building contractors' workmanship is to be judged. Even Mr. Quackenbush, the Applicants' own witness, acknowledged that the appropriate standard for builders is an industry acknowledged one reflected in the requirements of the OBC and the CPG.

Further, section 9.7.2.1 of the OBC references window classifications A1, B1 and C1, thus excluding their windows which the male Applicant advised are classified as A3. On this basis alone, they fall outside the purview of the OBC.

The evidence established that, like the WindowWise program, the CSA Standard sets out a more stringent process than that generally followed in the construction industry. The testimony of Mr. Cooke was very persuasive in this regard, given his current position as Chair of a committee reviewing the CSA Standards for housing. The Tribunal accepts his evidence of there being some significant controversy in the industry regarding a number of the CSA requirements, shims and insulation products being but two examples.

The CPGs sole reference to window installation states that the acceptable performance requires that: *windows shall be installed to operate with reasonable ease*[39]. This standard was also the standard used by both Mr. Cook and Mr. Singh who both testified to their testing windows for smooth operation as the indication of whether there existed an installation deficiency.

The Applicants' evidence as to inadequate shims/insulation rested on their contention that the CSA 440 Standard sets out the builder's obligations for installation practice. The Tribunal however, has already determined that they are incorrect in this contention.

[39] CPG 3.3

Mr. Cooke referenced s. 9.25.2 of the OBC which speaks broadly of various forms of insulation and their properties, none of which has been breached in the Applicants' windows from any evidence presented. It also speaks in s.9.25.3.3 to vapour barrier requirements, specifying that these can be sealed or lapped. The evidence from the photographs was that the vapour barrier in the deconstructed window frame had been lapped and is therefore found by this Tribunal to be compliant.

There is no articulated standard for shims in either the OBC or the CPG. Mr. Cooke's evidence was that these are to be used where required. Mr. Ribeiro's evidence was similar; that, where the frame is tight to the installed window unit, such shims are not necessary.

Mr. Singh's testimony was also persuasive given his years of practical experience in windows, window insulation and their characteristics, having worked for the same manufacturer for a considerable time in customer service. Further, he was independent and had no interest in either party's position. Most importantly perhaps, he had personally attended the homeowner's residence mere months before this hearing, to view and inspect the windows. It was his evidence that, notwithstanding the continued complaints, he found nothing wrong in the operation of any of the windows. He found no evidence of excessive air infiltration and no evidence of improper installation. All windows operated as they were designed to operate and continued to do so two and a half years after possession. His view of the photographic evidence tendered by the Applicants was that there was nothing wrong in the windows which could not be rectified by minor adjustment, although he himself had not seen anything requiring such adjustment, despite his authorization to provide it at his own discretion.

Even Mr. Quackenbush conceded that none of his May 2009 measurements indicated any window was out of square or plumb to a degree which could not be rectified by adjustment. Mr. Singh also testified that he was never asked to measure plumb or square nor advised that the Applicants' had any concerns with the windows installation, notwithstanding his attendance at the home in March of 2009, as the manufacturer's lead service technician, and his clear finding that the windows operated as designed. Likewise, Mr. Cecatini had never been informed by the Applicants of their concerns with window measurements. Consequently he had never taken measurements or inspected the windows to verify whether they conformed to OBC demands.

Although significant time was taken in evidence purporting to establish that workmanship deficiency caused condensation inside the Applicants' window, the Tribunal is not persuaded this is the case. Industry publications including CHMC guidelines[40]and the CPG[41], as well as all professional witnesses, spoke to the

[40] Exhibit 10, Tab 12
[41] Appendix A3

fact that condensation is a common occurrence when certain factors are present. These factors include several that were established as existing in the Applicants' home including the size of the windows, the ratio of window to wall in a room, the distance of the window from the furnace, the exposure of the windows, the weather, the interior humidity levels, and indoor temperature settings. Mr. Cook advised that, in his experience, improper installation is never the cause of condensation. Mr. Quackenbush opined that, since other windows in the home did not exhibit condensation, the cause in the bedroom was "most likely window fault". In cross-examination however, he acknowledged that there were indeed a "whole host" of factors which affect the possibility of condensation.

The Tribunal finds that some air infiltration is not only usual, it is desirable. The OBC clearly provides for it[42] , as does the CPG[43]. The latter specifically notes tolerances provided in the OBC are designed for normal wind conditions. In such conditions, there was no evidence of excessive air infiltration as was evidenced by the Applicants request to Mr. Singh that he return on a "windy day". Hence, the pencil test video evidence upon which they rely, even if it were the appropriate test, is not persuasive evidence of any deficiency since the videos were filmed on days of high winds. The Tribunal agrees with Mr. Ribeiro that a fair assessment of the condition would be to conduct testing on normal weather days to determine whether the air leakage surpassed the tolerances provided in the OBC. This testing was never done.

The pencil test is, however, not considered a proper test so its findings are not sufficient to prove the Applicants' claim of excessive air infiltration. The video did not even purport to establish either the amount or the velocity of the air movement. In the video, the pencil is directed to the sash areas of the windows, thereby revealing air movement where the seals, described by the Applicants as inadequate, are located.

Based on all the above, the Tribunal rejects their claim of a s. 13(1) breach of warranty under the Act in the installation of the windows.

(c) <u>improper joists</u>:

The Applicants' claim raised numerous concerns with the floor joists in their home. The Tribunal will consider them in turn to determine whether the Applicants' claims of warranty breach under s. 13 of the Act are adequately supported by the evidence.

[42] S. 9,7,1,7, sets out a maximum amount of air infiltration of .775dm/s for each meter of sash
[43] See 2nd edition, published 2003, article 8.2

(i) *not as contracted and inferior*:

The allegation was that the APS was breached by the Added Party in that the joists received by them were AJS 20 and QBSF310, while the architect's plans which they had reviewed and which were filed with the municipality noted the joists were to be AJS 15. The Applicants say this was an unapproved substitution which thereby contravened the builder's contractual obligation to provide them a construction as designated in "plans already reviewed" by them.

As noted earlier, the Tribunal's mandate does not extend to authority over contractual claims outside of what the Act specifies. Under the Act's regulations Ontario Regulation 892, sections 18 and 19, make provision for substitution of a contracted item **of selection** (emphasis added) with the requirement that such a substitution by the builder be of "equal or greater value". The Applicants argue that their evidence of the National Research Council and the Ministers Ruling demonstrates that the substituted joists they received breached this requirement as they are of an inferior quality.

The evidence was that the contract referenced "engineered wood joists" generically which were not an item of selection in the contract. The Tribunal thus finds that Regulation 892 is not relevant to this issue.

While the Applicants submit that the one type of joist is capable of carrying less weight than the other, the testimony of Mr. Fok, the engineer responsible for the design of these joists and the design of the Applicant's home floor plan, was not contradicted. He advised that the strength of any joist is dependent on its span. In this case, the spans of the substituted joists were entirely appropriate for their use as employed in the support of the Applicant's home flooring. His letter to this effect had been provided to the Applicants as early as March 2007 in an effort by the joist manufacturer, the Added Party and the municipality to reassure the Applicants their concerns in this area were unfounded.

The Tribunal therefore finds that the change in joist product was not of an inferior item and therefore the Applicants' claim is not warranted.

(ii) *missing blocking/strapping between joists*

The claim here was that where the original plans properly required blocking (along the west wall and under the front entrance area) such blocking was missing. This deficiency was warranted by TWC in Mr. Cecatini's conciliation and the remedial work was provided by the Added Party prior to the pre-hearing. The allegation that this blocking was inadequate was based on a photograph illustrating a paper placed between one block and the subfloor. Another photo showed a gap between the end of the blocking and the floor joist.

The Tribunal prefers the evidence of Mr. Ribeiro supported by that of Mr. Fok in this instance. Both individuals are professionally experienced in building and have significant knowledge of the OBC and the construction requirements. There was no evidence of any relevant background or training by the Applicants who relied for this aspect of their claim on their own reading of the legislated requirements and their own observations. Their evidence was self-serving and unsupported. Both Mr. Fok and Mr. Ribeiro testified that the photos were not illustrative of any deficiency. They explained the purpose of the blocking is not to dampen vibration but rather to ensure the lateral movement of the home from earth pressing along the sides does not impact on the joists' integrity. It was Mr. Fok's opinion that the added blocking was achieving this function.

When Mr. Fok was contacted by the female Applicant with further concerns he provided a further letter in March of 2009 prior to the pre-hearing and made available to the Applicants, stating that it was his opinion that additional blocking under ceramics as called for in Part IX of the OBC was not required in this case because the engineered joists as installed in the home, unlike conventional joists, were capable of carrying the loads without blocking. In testimony he went further stating that adding blocking under the ceramics as called for in Part IX s. 9.30.6.4 was not required given that Part IX dealt with conventional joists. It was his opinion that adding the cross-bridging stipulated in the section would actually be detrimental, given the use of engineered joists in the home.

The Tribunal concludes that the blocking which the Applicants contend is wrongly installed and/or omitted is in fact installed appropriately. It finds that Part IX of the OBC clearly requires blocking under ceramics such that the Applicants cannot be faulted in assuming a deficiency when their joists revealed no such blocking. However, having heard and accepted the evidence of Mr. Fok regarding the structural reality of the home, having reflected on Part IX and Part IV of the OBC and considering the evidence that there was no indication of any cracking or failure in the mortar application of the ceramics, the Tribunal concludes that the lack of blocking under the ceramics is indicative of proper workmanship and construction, albeit not in technical compliance with the section. It notes in this respect Mr. Fok's conclusion that adding blocking to the area would in fact be detrimental.

The evidence concerning the Applicants' allegation of missing blocking under the non-load bearing wall of the library/foyer was never raised prior to the hearing. Thus neither Mr. Cecatini nor Mr. Ribeiro ever had an opportunity to view and assess the allegation. It is not included in the Applicants' Appeal and is, therefore, outside the Tribunal's jurisdiction. However, the Tribunal notes that the evidence established that the floor joists in this home had in fact been subject to investigation and inspection by the original installers, the builder's contractors on two separate follow up occasions to remedy outstanding issues, two TWC field representatives and the municipal building inspector. At no time did any one of these experienced and professional individuals ever raise any concern about

the support of a non-load bearing wall. The Tribunal consequently finds it highly unlikely that the nails photographed by the Applicants which show through the floor indicate the location of the library/foyer wall. The Tribunal accepts the explanation of the Tarion witness that these are flooring nails only.

(iii) *missing floor joists*:

The only evidence supporting this allegation was that the Applicants' claimed that some of the joists marked on the architect's plans were designed to be 12" off centre while the installed joists in these areas are, in fact, 16 inches off centre. However, the male Applicant conceded no measurements had been taken. He just "knew" the gaps were wider than the 12 inches off centre.

According to the layout as actually installed presented by the Applicants[44], the only area where the joists are alleged to be 16 inches off centre is where Mr. Fok advised he had called for 16 inches off centre. His evidence was that if the Applicants had in fact received 12inches off centre then this was over and above what he had called for. Therefore they received something better than what engineering specifications required. While this might result in a situation where the product received is not identical to that in the plan, this is no evidence of any breach of the Code or failure of a warranty under the Act.

The Tribunal concludes that there are no joists missing as alleged in the claim.

(v) *warped/dropped wood*:

Again, the Applicants' evidence on these allegations is not sufficient to persuade the Tribunal of any breach of warranty by the Added Party. The evidence is more consistent with a finding the header was installed with one end lower – a phenomenon not indicative of any failing. There is no evidence that the beam allegedly warped – if it is –presents any structural concern. Mr. Fok noted that the photograph relied upon by the Applicants also demonstrated direct contact with the sub-floor, thereby proving that the joist is meeting its purpose to minimize normal deflection and vibration from the flooring.

The Tribunal rejects this item of the Claim.

DECISION:

Accordingly, based on the evidence, and by virtue of s. 16(3) of the Act, the Tribunal confirms the decision of TWC to disallow the Applicants' claims.

[44] Exhibit 4

SUBMISSIONS ON COSTS:

The Tribunal Rules set out the following provision as to the availability of a cost award:

14 COSTS

14.1 Where a party believes that another party in the proceeding before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.

14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:

(a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;

(b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;

(c) failing to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or

(d) knowingly presenting false or misleading evidence.

14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party to pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.

The Added Party sought its costs for what it claimed was an unnecessarily long hearing. It argued that the Applicants' refusal to reasonably seek settlement derived from their determination to attribute fault to the Added Party. This had led to over three years of ongoing acrimony culminating in this hearing – itself prolonged by at least ten days due to the Applicants' approach – all of which has caused the Added Party significant expenditure.

In Mr. Ribeiro's submission, a part of this excessive hearing time was directly attributable to the Applicants' unreasonable refusal to provide reasonable access to the Added Party's employees to (1) perform remedial work already warranted, and/or (2) to conduct testing to determine what, if any, further repair or reconstruction might be required. In this respect, he noted the Applicants' denial of access to Mr. Cooke to perform the air leakage test.

Mr. Ribeiro also noted that the issue with the alleged rim mold (finally withdrawn by the Applicants on the second to last day of the hearing) could have been laid

to rest had the Applicants accepted the results of testing undertaken following the pre-hearing Order of Vice-Chair Cassidy which concluded that there was no abnormal water penetration. Rather, as shown by their reaction to (a) the results of TWC's imaging for the bedroom temperature complaint, and (b) the window manufacturer's review of the same complaints, the Applicants consistently rejected independently produced test conclusions.

Their refusal to accept these results led, in turn, to their destructive testing vis-à-vis both the basement rim mold and the windows. It was also Mr. Ribeiro's contention that both actions were motivated by their desire to uncover grounds upon which to impose liability on the Added Party. This desire had first been ignited during the dispute in 2007 over the size of the home's furnace when the female Applicant had stated she would "get" the Added Party.

Mr. Ribeiro argued that in the Applicants' on-going determination to assign blame led them to act unreasonably and thereby prolonged the hearing process. Examples included their refusal to accept delivery of a new garden door in December 2009 despite their advising Counsel for TWC in the fall of 2009 that the remedy they sought for their continued rim mold claim was replacement of the door. When TWC again offered them installation of a replacement at re-commencement of the hearing in 2010, the Applicants again refused.

Likewise, their on-going refusal to acknowledge that the soffit gaps could be best remedied by additional sealant or molding revealed their real agenda acknowledged by the male Applicant in cross-examination when he stated that, if such were ordered by the Tribunal, he would rip it down as all he would accept was installation of the frieze board. This demonstrated the unreasonable and vexatious character of the Applicant's approach in Mr. Ribeiro's view and was also obvious from their continued unrealistic demand for replacement of all their windows in the face of even their own expert's admission as early as October 28th that simple re-adjustment would solve any possible deficiency.

Mr. Ribeiro also submitted that the Applicants' testimony contained numerous false and misleading elements indicating bad faith. He pointed to the relative sophistication of the Applicants which resulted in their request for, and review of, the architect's drawings prior to completing the sale – an unusual occurrence in new home sales. This sophistication is also evidenced in their bringing in municipal building officials as well as their home's structural engineer to review their concerns. They had also carefully reviewed the relevant legislation, regulations, CSA publications at some cost, as well as Minister's Rulings on joist engineering specifications. Such careful and detailed research revealed savvy consumers. Notwithstanding such resourcefulness, Mr. Ribeiro pointed to their having misled Mr. Quackenbush, their expert, as to the existence of drill holes in one window. They also mislead Mr. Quackenbush into believing that it was the Added Party and not the window manufacturer, who replaced and repaired weather seals.

So too the male Applicant, on realizing partway through the hearing that a number of their joist claims were not supported by the evidence, attempted to emphasize a hitherto uncanvassed claim of inadequate support of a non load bearing wall over the library. This deficiency had never been pointed out to the Added Party or its trades, nor was it included on the Applicants' own drawing of the "as is" floor plan of the home illustrating all the alleged deficiencies[45]. It therefore represented new evidence of allegations not in the appeal.

Mr. Ribeiro acknowledged that the Act's mandate is protection of consumers from unscrupulous builders who exist in the industry. His concern was that there existed no corresponding protection from unethical consumers seeking to unjustly enrich themselves or to damage a builder unfairly by engaging in such a lengthy and costly appeal at a filing fee to them of a mere $100.00.

Mr. Ribeiro argued that the Applicants had engaged in a meticulous and exhaustive effort to find fault with the home. Such efforts included measuring basement joists, observing hardwood floor surfaces on hands and knees, listening for mortar cracks, recording measurements for each window, tearing open the framing of windows in the master bedroom and threading papers under blocking added by the Added Party. Mr. Ribeiro concluded such efforts were malicious and vexatious and brought the Applicants within the purview of section 14 of the Tribunal Rules concerning costs.

Mr. Kirkpatrick advised the Tribunal that TWC also sought costs from the Applicants. He submitted the Applicants had flouted rules created to protect consumers by making their unreasonable and, as regards the soffit frieze board and window sills, frivolous claims. In most cases, he argued consumers seek TWC's assistance when they discover damage in their new home and believe it attributable to improper construction. In this case, however, the Applicants meticulously went through a detailed review of every aspect of their home, including municipal filings and destructive testing, in a clear effort to find fault, although no particular damage was apparent.

Counsel also claimed that, where generally a conciliation inspection by TWC will take one day, in this case it took three days and required repeat visits. In most appeals, one pre-hearing is sufficient; in this case three pre-hearings were required; and, in most cases, hearings are no longer than 4 or 5 days while in this situation 15 days were taken up in the matter. TWC advised it was seeking costs for 10 days of the hearing as it believed the matter had been unnecessarily prolonged to this extent. Despite having legal representation at the start of the process and consulting with lawyers as the matter progressed, generous leeway was given to the Applicants as self-represented litigants. Nonetheless, it was TWC's position that excessive time had been required as the consumers

[45] Exhibit 4

engaged in a self-education process at the province's cost. He noted that there is a civil suit in place between the parties.

He too argued that the Applicants were dishonest in their portrayal of the evidence on numerous occasions and cited in particular their captions under photos of the replaced window as "missing holes". He also referenced the male Applicant's initial denial of contacting the engineer. He also noted the testimony of Mr. Singh that he had never seen defects in bubble seals to the extent demonstrated in the Applicants' photos and suggested that the bubble seals were actually "ripped".

It is rare that this Tribunal would order costs against a party. Subject to the limitations in Rule 14, the Tribunal's authority to award costs are limited to the precondition that the Tribunal must find the offending party's conduct to have been" frivolous, vexatious or unreasonable". The Rules make no pretence of attempting to fully compensate a party: the award, if made, is capped at $800.00 per day – a figure which bears scant relation to the actual expenses of undertaking a vigorous and meaningful litigation - even at the tribunal level.

Parties often appear before the Tribunal as a consequence of a severe deterioration in their relations due to bad faith and suspicion on one or both sides. They are entitled to pursue their claims, or denials, vigorously with whatever evidence is at their disposal. No party can be judged remiss in doing so.

The question for the Tribunal is whether these Applicants exhibited the misconduct particularized in Rule 14. While there is certainly undisputed evidence that there had been utterances made that they intended to "get" the Added Party, these statements were made sometime in the past in frustration over what they perceived as unreasonable refusals by the Added Party to remedy its failure to provide a proper furnace. Much water has passed under the bridge since that time and the Applicants, in their efforts to find fault, truly believed by the time of this hearing that their claims of building deficiencies were valid based on their evidence.

The Tribunal can not conclude from this that they acted frivolously, vexatiously or in bad faith.

The male Applicant appeared at times to be evasive and disingenuous in responding to questions. Examples include his responses to questions put to him concerning measurements of windows, attempts to contact the engineer, and his responses to offers to repair the garden door by the Added Party. There were also the suggestions that the Applicants mis-informed their own expert Mr. Quackenbush on important issues, including who was responsible for the repair of their window seals and the existence of proper drain holes on certain windows. This may have been the result of mis-communication as opposed to evidence of

intentional bad faith or vexatiousness. It is equally possible and plausible that the male Applicant's mistrust of both TWC and the Added Party triggered evasive responses which he might other wise characterize as effective and appropriately terse responses to cross-examination. In the end, these were effectively dealt with by cross-examination and did not unduly prolong the hearing to the extent that cost sanctions are appropriate.

The Tribunal does find that the Applicants were certainly entrenched in their positions on both the windows and the joists, the two items which took up most of the time of the hearing. In the face of consistently overwhelming evidence against their position, their inflexible approach worked to extend this hearing beyond, what might in another instance, have been the case. Despite evidence provided to them as early as 2007 from the lumber company, corroborated by the architect and the engineer upholding the position of TWC and the municipality, the Applicants maintained their lone voice that there was inferior and improper joist support in the home.

Similarly they continued to assert allegations of deficient windows in the face of overwhelming documentation and testimony from industry publications and witnesses otherwise. They continued their claim even after their only witness, Mr. Quackenbush, conceded in October that alleged deficiencies were not breaches of either the OBC or the CPG and their claim for window replacement was excessive.

The question is whether this is unreasonable conduct sufficient to base a cost award against the Applicants. In *Baker v. Ontario (Director, Ministry of the Environment)* 2009 CarswellOnt 3421 (On Env Rev Bd) the Environmental Tribunal concluded the following is the standard to determine whether conduct is unreasonable:

> For conduct to be unreasonable, a party must make an improper decision to act, or fail to act during the course of a proceeding. A decision can only be improper if the impropriety was clear in the circumstances at the time the decision was made[46].

The Tribunal cannot conclude from the testimony and demeanor of the Applicants that they believed their on-going insistence on the correctness of their position was unreasonable. Rather, they approached the Tribunal to make that determination. The fact they refused the results of testing undertaken by parties opposed in interest to them is not conclusive of unreasonableness, but is equally consistent with any party's right to put the other side to proof of their position. It is common knowledge that much civil litigation ends with the poorer party accepting defeat due to the costs of maintaining the action. In this case, the province has seen fit to level the playing field for consumers in disputes with new home builders resulting in a situation which can be expensive for the builder. This is not a consequence of any failing or fault of the consumer.

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[46] Para 35

The Tribunal is not persuaded that the refusal of these Applicants to settle or simply accept what, at the end of the day, proved to be preferred evidence, was so unreasonable as to trigger the cost award sought against them.

In *Greenspace Alliance of Canada's Capital v. Ontario,* the environmental review Tribunal again had occasion to consider the issue of costs and enumerated a list of possible conducts which might trigger the award[47]. This list supports the above finding in its enumeration of improper actions taken "knowingly". Of those listed, only the introduction of "an issue or evidence not previously mentioned" has been determined to exist in these proceedings. The Tribunal is not convinced that the Applicants' attempts to found liability for the non-load bearing wall support was improperly or unreasonably motivated. Rather, the evidence suggests they believed the alleged deficiency was properly part of their appeal given the broad nature of their claim of "missing blocking".

ORDER

The Tribunal dismisses the request of the Added Party and TWC for costs against the Applicants.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

RELEASED: May 4, 2010

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

[47] 2009 CarswellOnt 4533

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5951-ONHWPA-CLAIM-Prehearing-withdrawal

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: ANDREW DIAMOND, Vice-Chair

APPEARANCES: THE APPLICANT, representing himself and the other Applicant

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation ("Tarion")

SAUL ANISFELD, Agent, representing 777410 Ontario Inc. (the "Added Party")

DATE OF PRE-HEARING: June 7, 2010 Toronto

ORDER

A pre-hearing was held in this matter on June 7, 2010, in Toronto, Ontario, before this Tribunal, in the presence of one of the Applicants, Danielle Peck, Counsel for Tarion and Saul Anisfeld, Agent for the Added Party.

After a brief discussion of the issue, the Applicants withdrew their appeal on the basis of a settlement agreement reached with Tarion and the Added Party. Accordingly, the hearing scheduled for July 14, 2010, is hereby cancelled, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

_____

Andrew Diamond, Vice-Chair

RELEASED: June 15, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5808-ONHWPA-CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: KEN SELBY, Presiding Member

APPEARANCES: APPLICANT, unrepresented

NEIL ABBOTT, Counsel representing Tarion Warranty Corporation

SHADI NASSERI, Counsel representing Master Custom Homes Inc. and Amirali Nasseri, Added Party

DATES OF HEARING: May 10, 11 and 19, 2010 Toronto

DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal"), from a written decision letter of Tarion Warranty Corporation ("Tarion") dated November 30, 2009, wherein the claim of the Applicant was denied Exhibit 2 (Ex. 2).

This appeal is with respect to a Second-Year Warranty period. The issues to be addressed are items 1 to 10 as outlined in the Tarion decision letter (Ex. 1). In addition, item 7 from the Warranty Assessment Report is also to be considered.

The Warranties covered under the *Ontario New Home Warranties Plan Act* are defined and described in Tarion's Assessment Results (Ex. 4 Tab 11 pages 3 and 4). The Second-Year Warranty coverage is outlined on page 4 of that Tab.

On the Notice of Appeal Form, the Applicant indicated that he would require two days to present his case and he expected to call three expert witnesses. The Tribunal commenced the hearing on May 10, 2010. The Applicant had no expert witnesses available on the first day so the hearing lasted approximately one-half day. He agreed

that he would attempt to have two expert witnesses present the following day. On May 11, 2010, the Applicant was only able to bring one expert witness. At the end of day two it was agreed that the Applicant would bring his second, and final, expert witness for the next scheduled day (May 19, 2010).

Motion:

At the start of the third hearing day the Applicant did not bring his expert witness as had been agreed. Rather he brought a Motion (Ex. 20). In essence the Applicant argued that the Tribunal was not properly controlling Tarion's Counsel and it was always ruling in favour of Tarion's counsel on matters of procedure. Furthermore the Applicant expressed the following concern

> "about the ability of the Tribunal to render a fair and impartial decision…"

The Applicant expanded on these concerns with 16 numbered paragraphs (Ex. 20 Tab 2). The Tribunal ruled orally to dismiss the motion for reasons given that day. Below the Tribunal provides further and more detailed response to the grounds, using the numbering of the motion.

Ground 5. The hearing record will show that the Tribunal stated that some of the items seemed inappropriate for a Second-Year Warranty. The example mentioned by the Tribunal was some cracked plaster next to the crown moulding. The *Ontario New Home Warranties Plan Act* ("ONHWPA") in Section 13 (1) indicates what is warranted and in Section 13 (2) lists 12 exclusions one of which follows:

> (d) "normal shrinkage of materials caused by drying after construction"

Not even in the first-year does Tarion warrant such shrinkage cracks.

Ground 6. It is not clear how this paragraph relates to the testimony. The Tribunal was not made aware of any agreements made at the pre-hearing. Homes are warranted to be free from violations of the Ontario Building Code (OBC), if properly reported, in the first two years.

Ground 7. The Tribunal is well aware that the ONHWPA, in Section 13 (1) warrants to the owner that:

> "the home is (iii) constructed in accordance with the Ontario Building Code;"

The record will show that the Applicant has attempted to frame several of his concerns as building code and/or health and safety matters.

Ground 8. The Applicant argues that Tarion's counsel was controlling the process and the Tribunal was failing to adequately control the hearing. The Applicant complained when he was asked to stop assisting/prompting his expert witness during the testimony of the witness and to return to the position generally occupied by Applicants and counsel at the counsel table.

Ground 9. The Tribunal believes the number of 2 1/2 hours to qualify the Applicant's first witness is a significant exaggeration. Later that day about an hour was lost while the Applicant labelled a few photographs.

Ground 10. The Respondent's cross-examination was not particularly unusual.

Ground 11. While testifying the expert witness started to refer to a file folder, which contained papers other than his expert report. Tarion's Counsel asked to examine these papers (not his entire briefcase as stated). The Tribunal ruled that a short break would occur while the Respondent and the Added Party could examine these papers which had not been previously disclosed as required by the Licence Appeal Tribunal ("LAT") Rules. The Applicant was extremely upset with this ruling.

Ground 12. The expert witness wished to offer opinion evidence regarding violations of the OBC and allegedly had some related documents on the witness stand. While qualifying this witness, he was asked by the Respondent's Counsel what Section 9 of the OBC concerned. It was clear that the witness had no idea. He was also asked about Section 4 of the OBC. Again he had no response. This expert's report made no mention of the OBC and the Licence Appeal Tribunal requires that expert evidence be shared with the other parties 30 days in advance of the hearing (LAT Rule of Practice 6.4.3 (a)). There is no sub-clause Article 9.30.6.1.2.3.4 in the OBC, however article 9.30.6.1 deals with ceramic tile. This hearing is dealing with marble tiles, a natural stone product, not ceramic tiles. The expert was not considered to be qualified as an expert on the OBC.

Ground 13. The expert report made no mention of any health and safety concerns so the request by Tarion's Counsel to exclude testimony of the witness on such matters was granted.

Again, if this issue was to be addressed, information had to be disclosed a month in advance according to the LAT Rules of Practice. The Applicant was very upset with this restriction.

The Respondent and the Added Party, who had their witnesses present, were opposed to this Motion of the Applicant.

According to the LAT Rules the Tribunal had two choices.

(a) the hearing could be adjourned and a new member assigned, as requested by the Applicant, or
(b) the hearing could continue.

The remaining witness for the Applicant had disclosed his report (Ex. 4 Tab 15) which dealt exclusively with estimated costs to make the various repairs associated with the claims of the Applicant. This information could be useful only in the event that some of the items were warranted. The Tribunal dismissed the Motion. Two days of the Applicant's hearings were complete and the other parties were ready to continue. The Tribunal ruled that the hearing should continue.

The Applicant had been advised (Ex. 20, Tab 2D) by the Chief Administrative Officer and Registrar

> "However, if the panel does not agree to your requests, the hearing will proceed and the parties are to prepare themselves, accordingly."

At this point the Applicant who did not have his remaining expert witness present chose to leave the hearing. Tarion called two witnesses to testify, and the hearing was completed by the end of the third hearing day (May 19, 2010).

Evidence of the Applicant

1. Claim "From 21h floor to 11th floor (sic) through the bathroom – water penetration." See Ex. 4 Tab 13 for first 10 claims.

   Water had come from 2nd floor bathroom to 1st floor. There were two glass panels to contain shower water for the second floor tub (two photos Ex. 5 Tab 7). The one which acted as a door was at the end of the tub with the shower head. The Applicant had been advised that these panels should have been installed with the door remote from the shower head. There was no evidence presented that water had flowed under the glass door.

2. Claim "The marble flooring from the front door inside into the foyer/vestibule all the way to the kitchen area is loosen (sic) and moves when walked on. It will beed to be repair" (sic).

   The Applicant provided a number of photographs showing cracked marble tiles, missing or cracked grouting (Ex. 5, Tab7). He copied many provisions of the 1997 OBC in Ex. 6. The Applicant suggested that the underlying floor framing was inadequate and not providing the sub-flooring strength required by the OBC (see Ex. 6, Tab 3, article 9.23.14.1). The Applicant more specifically referred to article 9.30.6.3 which provides in clause (1) (b) that the sheathing thickness must confirm to Table 9.23.14.5. A or B.

There was evidence presented of several loose or cracked tiles and the Applicant claimed this was a safety issue. An expert witness was to testify on this marble tile installation.

3. Claim “There are cracks in the front of the building around the windows”.

   The Applicant noted a number of small cracks around the building adjacent to the windows. He expressed concern that water could enter these cracks and damage the inside of the house.

4. Claim “There are cracks in the rear of the building around the windows”

   This is similar to the previous Claim but it refers to the rear of the home.

5. Again this claim is similar to the two previous claims; however an effort to caulk these joints has been made by the builder. The concern expressed was mainly that the colour of the caulking was inappropriate. There was minor evidence of some cracks remaining after the repair (Ex. 5, Tab 7). There was no evidence of water damage.

6. Claim “The bricks in front of the outside door from the basement are not level and are retaining and accumulating water”.

   The evidence was that this area had pavers which were generally sloped toward a drain. It appears that the drain was connected to the weeping tile system of the house which was a short distance below. The Applicant claimed that this area did not drain properly and it became dangerous in winter (two photographs Ex. 5, Tab 7).

7. Claim “The frame door of Den from the Outside is cracked and damaged and the paint has worn off”.

   The Applicant indicated that the exterior door jamb was damaged.

8. Claim “Crown moulding is cracked in master bedroom a few places”

   The Applicant indicated that a crack adjacent to the crown moulding occurred on the west wall of the master bedroom (Ex. 5, Tab 7).

9. Claim “The lenses of two lights in the kitchen are has (sic) been crooked and broken”

   A photograph of one such broken lens is shown in Ex. 7.

10. Claim “There was no screen door on the kitchen garden door, therefore insects entering inside the house and causing health issues to my family members, especially two minor kids”

The Applicant was relying upon the OBC article 6.2.3.12 “Supply, Return, Intake and Exhaust Air Openings” (see Ex. 6, Tab 4 sentence 6.2.3.12 (3) which is highlighted). This calls for screens on all such air openings. The Applicant was applying this OBC clause to a French door at the rear of the home. See also the highlighted sentences 9.32.3.12 (8) and 6.2.3.12 (3) in Ex. 6, Tab 4.

11. Claim “There is severe discoloration on the front door”.

Photographs marked Exs. 8, 9 and 11 show the front door in question. The Applicant claims the colour shown in Ex. 9 is distinctly different from the colour shown in the other photographs.

Expert Witness - Domenik Zavarella

Mr. Zavarella has 28 years of experience in the tile industry. Most of his experience has been in various sales capacities. For the past two years he has had a contract as a Technical Consultant with Terrazzo, Tile & Marble Association of Canada (“TTMAC”). In this role Mr. Zavarella conducts field inspections and writes reports addressing technical questions. About 70 percent of his assignments relate to commercial projects and 30 percent to homes.

On December 19, 2009, Mr. Zavarella visited the subject home for several hours. He observed slate tile on the porch and the marble tile on the interior as well as in the first and second floor bathrooms. He wrote a report which can be found in Ex. 5, Tab 4. It is common practice to share such reports with other TTMAC consultants. Exhibits 15, 16 & 17 are replies from other consultants indicating that Mr. Zavarella's report is well written.

The first paragraph of Mr. Zavarella’s report, which is entitled Reason for Inspection, indicates the homeowner’s main concerns.

> “The homeowner is specifically concerned about the suitability of the exterior “slate” stone tile to withstand freeze thaw cycling and whether the installation method of the interior natural stone has been done in accordance with industry and TTMAC standards.”

At the hearing there was no evidence presented regarding the slate on the front porch.

Mr. Zavarella observed the tiles in the kitchen and front hall area. He said these marble tiles were class C marble and they were polished and bevelled. As well the beam and joist system was observable in a small portion of the basement. He observed the joists were on 16 inch centres. In addition, he removed a heating duct register, as seen in Ex. 5, Tab 7, in order to observe the support system.

With the aid of photographs (Ex. 5, Tab 7), Mr. Zavarella noted: cracked tiles, broken tiles, fissures, as well as missing, excessive and cracked grout. In addition, one tile was formed with two pieces while a single tile should have been used. He estimated that 20 to 30 percent of the tiles had deficiencies. It was also stated that it was extremely

difficult to match the marble colour if one was intending to replace only those tiles having deficiencies.

The thickness of the plywood support was measured as 5/8 of an inch and he stated that TTMAC standards would require two sheets of such plywood to support these marble tiles. Mr. Zavarella suggested that the joist spacing of 16 inches on centre was not adequate to meet the OBC. He said that 12 inches on centre would be the required joist spacing to meet the Building Code.

On cross examination, Mr. Zavarella agreed that ideally at least one tile should have been removed to better understand the typical marble tile installation. He said that he was not allowed to remove a tile.

The Respondent presented the two witnesses who were present.

Witness - Roger Boyd

Mr. Boyd has been a Field Claims Representative for Tarion for the past five years during which time he has examined over 200 homes. He wrote the Warranty Assessment Report which was in response to the issues of concern presented by the Applicant.

Mr. Boyd briefly outlined the one-year, two-year and major structural defect warranties. His Assessment Report indicated that none of the items were deemed to be eligible for the Second-Year Warranty. Mr. Boyd explained how he arrived at his conclusions as expressed in his decision letter (Ex. 3, Tab 17).

1. Claim Water Leakage **-** This was not a water penetration matter as intended by the Second-Year Warranty which speaks of water penetration through the building envelope. Some water had flowed from the second floor bathroom to the first floor room which was immediately below. The evidence was that the Applicant had the damaged ceiling repaired by another contractor.

2. Claim That many of the marble tiles were loose or broken and in need of repair. Mr. Boyd's evidence was that there were some cracked tiles (perhaps 2 percent or 10 -12 tiles) and some loose grout. Again Mr. Boyd stated this was not a Second-Year item and clearly the few tiles with excessive grout were obvious when the home was first occupied.

Mr. Boyd pointed out that the pattern of the few cracks that exist is not consistent with the joists being too far apart. Furthermore Ex. 19 had been stamped by the City of Toronto, Building Department as:

> "reviewed for compliance with the Ontario Building Code".

This document also notes that the sub-floor which was 5/8" plywood which was both nailed and glued.

3, 4 & 5 Claim All three items relate to cracks around doors and windows.
Mr. Boyd pointed out that it is common to have minor cracks around masonry units. The design allows for some water to penetrate the masonry walls and flow down to the weep holes where it exits the building. Water penetration through the building envelope, including the basement, is warranted as a Second-Year item. The Applicant provided no evidence of external water entering his home.

6. Claim Pavers at the basement level seemed not to be draining properly.
Mr. Boyd conducted two separate water tests (one in the presence of Mr. Robillard). A hose was used to flood this area for 10 minutes and then the area was allowed to drain. The draining took about 7 minutes for the water to leave mostly by way of the drain. The drain appeared to be connected to the nearby weeping tiles system and it was working properly.

7. Claim The door to the den is cracked, damaged and in need of some paint.
Mr. Boyd examined this door from 3 metres away and could see no defects in workmanship or materials. This did not amount to deterioration consistent with a breach of the Second-Year Warranty.

8. Claim Crown moulding is cracked in master bedroom in a few places.
Mr. Boyd stated that these cracks were normal shrinkage cracks which are never warranted by Tarion.

9. Claim The plastic lenses of two fluorescent fixtures used for under cupboard lighting are broken (Ex. 7). Mr. Boyd noted that source of the damage could not be determined. Again this is not a Second-Year Warranty item in any case.

10. Claim There is no screen on the back door.
Mr. Boyd indicated that there was no provision for a screen on this door. The Applicant used OBC article 6.2.3.12 which deals with intake and exhaust air openings to justify this claim.

11. Claim There is severe discolouration on the front door.
Exs. 8, 10 and 11 show photographs of this front door. Ex. 11 shows the steel door as a uniform brown colour. Photographs 8 and 9 show a significant colour difference.

Mr. Boyd stated that there was clear evidence that part of the door had been sanded. Indeed there was still evidence of some tape on the door. Again this was not a Second-Year Warranty item.

<u>Witness - Khristian Robillard</u>

Mr. Robillard offered evidence of the cost of addressing the above 11 claims with no comment as to whether the claims should be warranted (Ex. 6 Tab 5).

THE LAW

Regulation 892 under the Act defines the Second-Year Warranty as covering the following five areas:

1. Water penetration through the basement or foundation walls;
2. Defects in materials, including windows, doors and caulking, or defects in work that result in water penetration into the building envelope;
3. Defects in work or materials in the electric, plumbing and heating delivery and distribution systems;
4. Defects in work or materials which result in the detachment, displacement or deterioration of exterior cladding (such as brickwork, aluminums or vinyl siding); and
5. Violations of the Ontario Building Code affecting health and safety (indluding, but not limited to, violations relating to fire safety and the structural adequacy of the home).

APPLICATION OF THE LAW TO THE FACTS:

The onus rests on the home owner to prove that the vendor/builder has breached its warranties under the Act. Since this is a Second-Year Warranty any breach must involve one of the five areas noted above.

1. There was no evidence of any water penetration through the basement or foundation walls.

2. Minor cracks appeared in some of the masonry. This is common and the masonry design using the rain screen approach causes any water entering the wall to exit by way of the weep holes at the bottom of the masonry units. Interior water spillage from the bathroom is never part of this warranty program.

3. The pavers appeared to be draining properly based on two water tests. Shrinkage cracks in moulding are not uncommon and are never warranted. A defect in the door must be visible from 3 metres and the evidence was that it was not. The OBC article 6.2.3.12 was never intended to apply to screens on a back door. Rather it deals with intake and exhaust air openings such as vents.

4. Cracked lenses for under counter florescent lights could have occurred any time during the two year period. Some caulking around the door had been replaced and the concern seemed to be the choice of colour. There was some evidence that the homeowner was involved in the colour choice. The evidence of the discolouration of part of the front door related to some home owner activity according to two witnesses.

5. The tiles had a few cracks, some loose grout and some poor workmanship. Article 9.23.14.5 which was referred to by the owner was not relevant as clause (3) causes that article not to apply as this involves tiles attached to a concrete topping. The engineered joist system were 9-1/2" AJS20 on 16" o/c so the clear span was even less than normal as the flanges were 2" x 3". The City of Toronto, Building Department had indicated that the design was consistent with the OBC. This engineered system would have less deflection, both longitudinally and laterally, than a conventional floor. This should reduce possible movement of these

marble tiles. There was no indication that the design had to meet the TTMAC standards referred to by the expert witness.

The Tribunal concludes that the Applicant has not proved any of the claims on the balance of probabilities. The Tribunal therefore, orders Tarion Warranty Corporation to deny the claim.

DECISION

The Tribunal finds that none of the Applicant's claims is warranted within the Second-Year Warranty provisions of Regulation 892 of the Act. Therefore, by virtue of the authority vested in it under section 16(3) of the Act, the Tribunal directs Tarion to deny the Applicant's claim on the eleven matters associated with the Applicant's claim in this appeal.

LICENCE APPEAL TRIBUNAL

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Ken Selby
Presiding Member

Released: June 21, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5314-ONHWPA-CLAIM-Interim Order

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

APPEARANCES: APPLICANT and GABE MARTEL, Agent representing the Applicant

JOSHUA CHAMBERS, Counsel representing Tarion Warranty Corporation, the Respondent

JOSHUA SPRAGUE, Counsel representing Mikac Construction Ltd., the Added Party

DATES OF HEARING: May 17, 2010; June 8 and 9, 2010 Ottawa

INTERIM ORDER

The Applicant has made a request to submit an expert report after the commencement of the hearing on May 17, 2010. This request was made by way of letter dated May 25, 2010. The Respondent has objected to the Applicant's request with lengthy written submissions dated May 27, 2010. The Applicant made further submissions by letter of May 29, 2010. Although the Respondent asked for a decision on this issue to be made prior to the next hearing date of June 8, this Tribunal wanted the opportunity to ask the parties some questions and then decide the issue while the parties were assembled on June 8.

The Tribunal's questions were answered and the parties were given an opportunity to make oral submissions.

For the sake of clarity, the Applicant's request is summarized below:

1. to be allowed to adduce expert evidence (and file an expert report) to support the Applicant's case;

2. specifically, to be allowed to file the expert report of Mr. Chrenowski; or

3. in the alternative, to be allowed to file an expert report of Mr. Houle and/or Mr. Hill, with a request to adjourn the hearing to dates when everyone would be available to attend (Mr. Houle being unavailable on June 8 and 9).

The Respondent and Added Party both objected to each aspect of the Applicant's requests.

DECISION AND ORDER

The new expert report of Mr. Chrenowski will not be allowed into evidence. The Tribunal shares the Respondent's concerns about procedural fairness, if Mr. Chrenowski's report is allowed at this stage.

As I understand it, Mr. Chrenowski's report was requested by the Applicant because Mr. Houle was scheduled to be out of the country on the return dates of this hearing. Mr. Houle asked for an adjournment to be able to attend, both through the Applicant and by way of letter brought to the hearing on June 8. In any event, the Applicant's Agent has also requested an adjournment so that Mr. Houle may be present to give evidence.

There is some progress since May 17, when it appeared that Mr. Houle would not agree to appear because he believed himself to be in a conflict of interest. None of the parties in this hearing see a conflict; and it appears that Mr. Houle is no longer of this view either. A summons was requested by the Applicant and served on Mr. Houle; he has indicated a willingness to appear but could not change his schedule to be present on June 8 and 9.

This Tribunal will grant an adjournment of this hearing in order to give Mr. Houle the opportunity to appear and give evidence. Prior to this, Mr. Houle will need to visit the home and prepare a report stating his conclusions and the basis for his conclusions on all the issues to which he will testify before this Tribunal.

Mr. Houle is known in this proceeding. His possible involvement can come as no surprise to the Respondent or the Added Party. That testimony given by him would be in the nature of expert testimony is also no surprise.

The prejudice that will be suffered if the adjournment is refused is greater than the prejudice that will be suffered if the adjournment is granted. And the prejudice to the Respondent can be answered by giving it the time necessary to respond to Mr. Houle's expert report with a report of its own expert, if it wishes, or by challenging Mr. Houle's qualifications or report in a manner that is contemplated by Rule 6.

While the timelines may need to be adjusted, the Tribunal will set a schedule with the view to giving everyone a fair amount of time to do what is necessary. The schedule will take into consideration the reality that the availability of the parties, counsel, experts and witnesses will be affected by summer holiday time.

As to the evidence of Mr. Hill, my ruling is the same as for Mr. Houle. Mr. Hill's estimate of the cost of repair was disclosed long ago to all the parties; it comes as no surprise to the other parties. The Applicant may decide to have Mr. Hill testify or not; the Applicant may request that Mr. Hill be accepted as an expert or not. This will be for the Applicant to decide and to accept the consequences of that decision. The Tribunal has been advised by the Applicant that Mr. Houle has been retained as an expert. As of June 9, the Applicant did not intend to have Mr. Hill appear as an expert but did have Mr. Hill on her witness list.

The Tribunal is cognizant of the Respondent's and Added Party's strenuous objections. However, having taken into consideration all the submissions, in writing and oral, of each of the parties, this Tribunal has concluded that the Applicant, either directly or through her Agent, has not understood the nature of expert evidence or its place in these proceedings, and that this has happened at more than one point in the proceedings.

For all of the foregoing reasons, this Tribunal orders as follows:

1. The Applicant will be allowed to adduce expert evidence and the Respondent and Added Party will be given ample time to review any experts' reports and retain their own experts, if they so choose;

2. The experts' reports of the Applicant are to be made available to the other parties and filed with the Tribunal on or before **June 25**;

3. The Respondent's counsel has undertaken to advise whether it intends to retain its own expert on or prior to **July 9**;

4. The Added Party's counsel has undertaken same by **July 12** (as he is out of the country at the end of June and early July);

5. If neither the Respondent nor the Added Party retain its own expert, then the hearing in this matter will continue on **July 20, 22 and 23, 2010** at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa;

6. If either the Respondent or the Added Party retain its own expert, then any expert's report is to be made available to the other parties and filed with the Tribunal on or before **August 20, 2010**, and the hearing will continue on **October 20, 21 and 22, 2010** at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa and the July dates will be cancelled; and

7. If there are any issues relating to either the Respondent or the Added Party having difficulty with access to the Applicant's property in order to have its expert(s) conduct their own investigations, this will be brought to the Tribunal's attention in a timely manner so that it can be addressed before the return dates and without delaying the hearing of this matter; and

8. The above hearing dates are peremptory on all the parties.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

RELEASED: June 22, 2010

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

Decisions under the Ontario New Home Warranties Plan Act

Fiscal Year 2010 - 2011, July - September

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

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- 6032-ONHWPA-Claim-Pre-hearing-Withdrawal <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/jul/6032%20onhwpa.claim.pre-hrg.order.pdf>
- 5972–ONHWPA–Claim–Pre-hearing-Withdrawal <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/jul/5972.onhwpa.claim.pre-hearing.order.pdf>
- 5905-ONHWPA-Claim <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/jul/5905.onhwpa.claim.pdf>
- 5793-ONHWPA-Claim <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/jul/5793.onhwpa.claim.pdf>
- 5482-ONHWPA-Claim <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/jul/5482.onhwpa.claim.pdf>
- 6118-ONHWPA-Claim-pre-hearing-withdrawal <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/aug/6118.onhwpa.claim.withdrawal%20preh.pdf>
- 6045–ONHWPA–Claim-pre-hearing-withdrawal <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/aug/6045.onhwpa.claim.pre-hrg.withdrawal.pdf>
- 6011-ONHWPA-Claim-pre-hearing-withdrawal <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/aug/6011.onhwpa.claim.%20prehrg.withdrawal.pdf>
- 5188-5457-ONHWPA-Claim <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/aug/5188-5457.onhwpa.claima.pdf>
- English Lane Homes Inc. <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/sep/English%20Lane%20Homes-Motion.pdf>
- 6049-ONHWPA-Claim-Settlement <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/sep/6049-ONHWPA-Claim-Settlement.pdf>
- 5851-ONHWPA-Claim <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/sep/5851-onhwpa-Claim.pdf>
- 5812-ONHWPA-Claim <http://www.ontario.ca/lat/english/Documents/Decisions/2010/onhwpa/sep/5812-ONHWPA-Claim.pdf>

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6032-ONHWPA-CLAIM-Pre-hearing-Withdrawal

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: DAVID B. CARYLL, Member

APPEARANCES: APPLICANT, self represented

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation ("Tarion")

JACK WINBERG, representing the Added Party.

DATE OF PRE-HEARING: July 13, 2010 Toronto

ORDER

A pre-hearing was held in this matter on July 13, 2010, in Toronto before this Tribunal in the presence of the Applicant; Danielle Peck, Counsel for Tarion; and Jack Winberg, Agent for the Added Party.

Following the resolution of all the issues in this matter, and with the agreement of the parties attending:

1. The Tribunal orders that the proceedings in this matter are hereby concluded on the basis of the withdrawal of the Applicant's' appeal.

2. The terms of the settlement are not filed with the Tribunal.

3. The scheduled date for the hearing is cancelled.

LICENCE APPEAL TRIBUNAL

_____
David B. Caryll, Member

RELEASED: July 13, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

5972–ONHWPA–CLAIM–Pre-hearing– Withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: JIM KENNELLY, Presiding Member

APPEARANCES: APPLICANTS, unrepresented

ANDREW MCKENNA, Counsel representing Tarion Warranty Corporation

FRANK DE CARIA, Agent representing Rideau Lake Homes Ltd., the Added Party

DATE OF PRE-HEARING: June 30, 2010 Ottawa

ORDER

A pre-hearing was held in this matter on June 30, 2010, in Ottawa before this Tribunal in the presence of the Applicants, Andrew McKenna, Counsel for Tarion and Frank De Caria, Agent for the Added Party, Rideau Lake Homes Ltd.

At the end of the pre-hearing the Parties advised that the matter has settled on terms and conditions which the parties wish to keep confidential, resulting in the Applicants withdrawing their appeal.

The matter is thus concluded without a hearing, and the hearing scheduled for August 4, 2010 is cancelled.

LICENCE APPEAL TRIBUNAL

Jim Kennelly, Member

Released: July 12, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

5905-ONHWPA-CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: THE APPLICANTS, unrepresented

JILLIAN SISKIND, Counsel representing Tarion Warranty Corporation

COREY LIBFELD, Agent representing the Added Party

DATE OF HEARING: June 29, 2010 Toronto

ORDER

This is an appeal by the Applicants from the decision letter of Tarion Warranty Corporation (the "Respondent") dated January 26, 2010, to disallow the claim of the Applicants made pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended, (the "Act") with respect to their home built by the Added Party.

BACKGROUND

This matter arises from correspondence received by the Ontario New Home Warranty Program (the "Program"), the predecessor of the Respondent, on June 10, 2004, setting forth an extensive list of alleged defects with respect to their house at [address deleted] (the "Residence").

The Program responded on June 30, 2004, by requesting in writing a copy of the agreement of purchase and sale, a completed request for conciliation and a cheque for $50.00 for the conciliation fee.

It was acknowledged during the hearing that the Applicants did not provide the requested documentation and, therefore, no conciliation investigation was conducted at that time.

The Tribunal was advised that, as the Applicants' claims were made under a previous policy, there was no limitation on the length of time between the making of a claim and the conciliation investigation with the result that when the Applicants raised one of the claims again in 2009, a conciliation investigation was still available to the Applicants.

The Applicants' reasons for postponing the conciliation investigation was that they did not wish to be placed in a confrontational situation with the builder.

ISSUES

The issue for consideration in this hearing is whether or not the sewer smell in the sink in the main bathroom of the Residence constitutes a warrantable claim.

The Tribunal must determine:

(a) whether the Added Party has breached a warranty under subsection 13(1) of the Act in that:

  (1) the home has defects in workmanship or material;

  (2) the home is not fit for habitation; or

  (3) the home was not constructed in accordance with the Ontario Building Code ("OBC"); and, if so,

(b) whether the Applicants have a cause of action for damages against the builder under section 14 of the Act; and, if so

(c) the amount of the damage.

For reasons which will be discussed later in this decision, the Respondent sought costs against the Applicants.

EVIDENCE

At the commencement of the hearing the Respondent's Book of Documents was admitted as Exhibit 3 in this hearing.

The male Applicant, who was the only one of the Applicants in attendance at the hearing, testified that the sewer smell was first noticed by the Applicants two or three weeks after they took possession of the Residence in June 2003. When the Added Party was contacted about this problem the Applicants were advised to put chemicals down the drain and overflow to clean these areas. The male Applicant stated that he tried this but that the smell remained.

During his cross examination the male Applicant acknowledged that the Applicants had not provided the documentation requested by the Program in the letter dated June 30, 2004. He testified that the Applicants chose not to utilize the conciliation process until late 2009.

The male Applicant acknowledged that a plumber had attended at the time of the conciliation inspection which was conducted on January 22, 2010. The witness confirmed that the plumber had explained that the collection of debris in the U joint or trap was not unusual and that water should be flushed through the drain and overflow regularly to avoid smells coming from the sink.

Gail Risk, a field representative for the Respondent, testified that it is her responsibility to work with clients to resolve issues and to go out and investigate claims where required. It is her role to maintain a neutral position and to assess the claims of a homeowner.

Ms. Risk testified that the letter that was sent by the Program to the Applicants on June 30, 2004 (Exhibit 3, Tab 2) was a standard form which the Program required in order to assist in properly assessing the claim of the homeowner. The witness further stated that at the time the Program was operating under a customer service standard which did not establish a deadline by which a conciliation inspection had to be conducted with the result that a conciliation could take place years later.

With respect to the present matter, the witness stated that the Applicants never provided a copy of their agreement of purchase and sale nor a conciliation request form. However, in an e-mail sent in 2009, the Applicants did request a conciliation. Attached to the Applicants' notice of appeal (Exhibit 3, Tab 8) there are copies of several e-mails, the first of which is dated November 22, 2009, in which the male Applicant contacted the Respondent to advise that the sewer problem was now a matter of "grave concern".

The witness testified that the conciliation inspection took place on January 22, 2010, in the presence of the Added Party and a plumber provided by the Added Party. The witness stated that she did detect a smell coming from the sink in the main bathroom and that the plumber was instructed to remove the trap, which contained noticeable

debris and was “quite smelly”. The witness referred to the photographs appearing at Tab 5 of Exhibit 3 which she identified and which show that there was hair and soap in the trap. The witness stated that when she checked the lower portion of the pipe coming up towards the sink she could not detected any smell.

The witness also testified that there appeared to be residue in the overflow and suggested that at times the overflow needed cleaning, perhaps using pipe cleaner.

The witness stated that smells in bathroom sinks were a common problem, each house was different, and the prevalence of smells coming from plumbing depended on the soaps and cleaners used by the occupants of the home.

The witness checked the plumbing in the basement of the Residence and confirmed that the plumbing in all respects appeared to be satisfactory. The witness noted that there was no smell in the basement. The witness testified that the claim was denied as not being warranted as it was a homeowner maintenance issue.

Under cross examination, the witness confirmed that it was not uncommon to find the amount of material in a drain as disclosed in the photographs when the drain in the Residence was opened. The witness confirmed that she was familiar with this sort of problem.

The witness acknowledged that there was a powerful smell when the trap was removed and stated that when the plumbing was reassembled there was no noticeable smell.

Antonio Tomasone, a plumber with 21 years experience, who works for Vitullo Brothers Plumbing was called and qualified as an expert witness. A copy of the witness’ certificate of qualification was entered as Exhibit 4 in these proceedings and his report together with a summary of his qualifications was entered as Exhibit 5.

Mr. Tomasone testified that he was requested to attend at the Residence to investigate an odour in the main bathroom. Upon arriving he did not detect an odour in the bathroom until he put his head in the sink where he detected a slight odour. When asked what could have been causing the smell, Mr. Tomasone immediately suggested that it could be residue in the plumbing.

The witness stated that he was asked to dismantle the plumbing under the sink in the main bathroom, which he did, and showed the contents of the trap to those gathered at the conciliation inspection.

Mr. Tomasone testified that he discussed with the male Applicant the need to clean the overflow which is part of the sink itself and cannot be dismantled and, therefore, needs cleaning if there is concern about odours coming from the sink.

It was the witness' opinion that there was nothing unusual with the debris or residue in the trap or overflow and recommended to the male Applicant that the overflow be cleaned.

The witness also expressed the opinion that the sink and plumbing were in proper condition and the prevalence of smells from plumbing depended on the usage and the build up of cosmetics, shampoo, toothpaste, soaps etc.

DECISION

The Applicants' position that there is a defect in the sink which permits debris or residue to gather in the trap and overflow which creates smells is a defect in materials is unsubstantiated. There is no evidence that the proposed solution of having to clean the drain and the overflow regularly after use is unreasonable. The Applicants did not produce any evidence to support their position.

The Respondent's position that it is not a defect in workmanship or material is supported by the expert witness who testified that there were no defects and that the smell being experienced by the Applicants is not unusual and can be solved by regular homeowner maintenance.

The Applicants failed to meet the onus placed upon them to establish that their claim falls within those warranted items within the Act and, therefore, the Tribunal must find in favour of the Respondent with respect to this appeal.

ORDER

Accordingly, for the reasons stated above and pursuant to the authority vested in the Tribunal by Section 16.3, the Tribunal confirms the decision of the Respondent to disallow the Applicants' claim.

REQUEST FOR COSTS

It is the Respondent's position that the Applicants have been unreasonable in that they have failed to respond as they agreed to at the pre-hearing, that they failed to attend the hearing originally scheduled for June 8, 2010 and failed to provide a medical note supporting the male Applicant's inability to attend for medical reasons.

There may have been some confusion as to what was requested by the staff member of the Tribunal who contacted the male Applicant at the time of the earlier scheduled hearing as to what the note should contain. The male Applicant did explain during the course of the hearing that he suffered from certain physical conditions which would have made it very difficult for him to attend on the June 8, 2010 date.

With respect to the matter of costs, the Respondent refers to the Rules of Practice of the Tribunal, specifically Section 14 which reads as follows:

> "14.1 Where a party believes that another party in proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.
>
> 14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:
>
> 1. failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
>
> 2. failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
>
> 3. failure to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
>
> 4. knowingly presenting false or misleading evidence.
>
> 14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.
>
> 14.4 Where the Tribunal determines that an order for costs may be made under Rule 14.3,
>
> 1. the Tribunal when determining the appropriate award of costs shall consider all the circumstances, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of costs incurred by the party requesting costs, or the conduct of the party requesting costs; and
>
> 2. the amount of costs shall not exceed,
>
> a. where the Tribunal has not commenced a hearing, the sum of $400.00; or
>
> b. where the Tribunal has commenced a hearing, the sum of $800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part

> day being considered a full day for the purpose of this calculation of costs."

ORDER FOR COSTS

The Tribunal does not find that the conduct of the Applicants in this matter is of such a degree that an award of costs would be appropriate. Therefore, the Tribunal dismisses the Respondent's request for costs against the Applicants.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

Released: July 16, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5793-ONHWPA-CLAIM

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: THE APPLICANT, representing himself and the female Applicant

ELLIE CHOI, Counsel, representing Tarion Warranty Corporation

JOE DI MEO, Agent, representing Thickson Building Corp. (Riverfield), the Added Party

DATES OF HEARING: June 14, 15 and 18, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal brought by the Applicants from a decision of Tarion Warranty Corporation (the "Respondent" or "Tarion") set out in a Decision Letter dated November 17, 2009 (the "Decision Letter"), denying the Applicants' first year warranty claims.

Tarion is the corporation that administers the *Ontario New Home Warranties Plan Act* (the "Act"). Through prescribed processes, Tarion investigates, conciliates, and, where necessary, provides compensation to a homeowner for breaches of the Act's construction warranties by the builder.

The Applicants took possession of their new home from Thickson Building Corp. (Riverfield) (the "Added Party" or the "Builder") in April 2008. While they complained of numerous warranty deficiencies, their appeal is limited to eight warranty claims denied by Tarion.

ISSUES

The Applicants claim that the following items should receive the warranty protection offered by the Act and dispute the reasons provided by Tarion for its decision to deny them such coverage as set out in its Decision Letter:

1. cracks in exterior door frames:
   (a) garage door (Item #13 Decision Letter)
   (b) front door (Item #20 Decision Letter)
2. staircase – side veneer cracking (Item #31 Decision Letter)
3. basement landing/stairs (Item #32 Decision Letter)
4. kitchen ceiling/master ensuite leak (Items #35 and #54 Decision Letter)
5. upper hallway east wall not straight (Item #44 Decision Letter)
6. basement window missing (Item #72 Decision Letter)
7. foyer transom window missing (Item #74 Decision Letter)
8. kitchen tiles uneven (Item #77 Decision Letter)

The issue for the Tribunal to determine is whether the evidence establishes that all, or any, of these claims are/is in fact warranted under the Act and, if so, to what damages are the Applicants therefore entitled.

EVIDENCE

The Applicant testified that he and his wife had submitted their first year claim in April 2009. Tarion responded with a conciliation inspection in October 2009. Its consequent Warranty Assessment Report (Exhibit #4, "Tarion Reports") concluded that the items in dispute were not breaches of the Builder's warranty obligations as set out in the Act.

One year earlier, in November 2008, Tarion had performed a 30-Day Claim inspection of the Applicants' alleged breaches concluding that a significant number of items were warranted. Some, the Builder had repaired within the timeframe provided to it. In other instances, the warranted claims resulted in a Settlement Agreement whereby the Applicants were paid a specific sum of money - based on estimated repair costs for each warranted item - on the basis of waiving any further rights to make claims for the specified items (Exhibit #4, Settlement Agreement of March 6, 2009; see also Exhibit #10(a), Tab 5).

1. Cracks in door frames (Items #13 and #20)

The Applicant acknowledged that exterior frame/trim damage on both the exterior front door and garage doors had been part of his 30-Day Claim, as had the exterior paint on the garage doors (Items #146 and #164 on the 30-Day Claim Form).

He further acknowledged that both were warranted by Tarion. Since the Builder failed to correct these deficiencies within the repair period provided under the Act, the repair of these areas and primer and paint funding were included in the March 2009 Settlement Agreement (Items #55 and #58 – Exhibit #10(a), Tab 5).

It was the Applicant's evidence that a short time after signing the Settlement Agreement and before receiving the settlement funds, he telephoned Tarion to advise that he had now noted cracking in both trim/frame areas. Mr. Conte, Tarion's Field Claim Representative responsible for the Applicants' home, advised the Applicant to include the additional concern on the Year-End Claim Form and cautioned that any work performed on the area in the interim might void future warranty coverage. Such advice was consistent with Articles 14.15 (concerning exterior railings) and 9.12 (concerning peeling wall coverings) of the Construction Performance Guidelines ("CPG") published by Tarion for homeowner guidance, which warns against homeowner alterations or repairs as potentially voiding further warranty coverage.

Given such advice, the Applicants did not perform the repairs to either door frame areas as specified in the Settlement Agreement. They also included cracking damage to both door frames on their Year-End Claim Form, filed with Tarion one month later on April 16, 2009 (Items #13 and #20).

A new Field Claim Representative, Sedin Heric, attended to inspect Year-End claims in October 2009. Mr. Heric denied both claims based on his conclusion that these areas had already been subject to warranty remedy in the form of the Settlement Agreement, which included priming and painting, neither of which had occurred, resulting in a further protracted period of unprotected weathering, which he concluded had contributed to the cracks.

The Applicants allege that the additional cracking is caused by the originally warranted insufficient primer/paint workmanship of the Builder and should therefore be warranted. Photographs taken by the Applicant at the Year-End inspection demonstrate painted frame surfaces of both areas. The garage trim demonstrates nail dents as well as a vertical crack running some inches from the bottom of the frame; the exterior trim demonstrates some cracks of an inch or so from the bottom of the trim.

The Applicant provided cost estimates for the crack damages from Colin Shaw Contracting Inc., dated June 13, 2010 – Exhibit #10(b). The Applicant was unable to comment on the contractor's experience, skills or credentials. The estimate quoted replacement of the front door frames as a consequence of them being one manufactured piece, at a cost of $2,300.00. The cost quoted for removal and replacement of one garage door frame was $850.00.

Mr. Conte testified that he has worked for Tarion for over four years as a Field Claim Representative, and is responsible for inspecting consumer warranty claims against new home builders, attempting to conciliate disputes concerning such claims, and deciding when such claims are legitimate.

Prior to his employment with Tarion, he worked in construction for almost 20 years, during over twelve of which he owned his own general contracting company, building new homes and renovating others. As part of his training with Tarion, he completed a course in repair estimation and another course on the relevant provisions of the Ontario Building Code ("OBC"). He also holds a three year diploma in Construction Engineering Technology from George Brown College.

Mr. Conte advised that he conducted the 30-Day inspection, which involved over 100 claim items, and of which he determined a "high percentage" were warranted.

Of these warranted items, he recalled that the frame/trim on both the garage door area as well as the front door area, demonstrated inadequate finishing and nail holes and hammer dents. The resulting Settlement Agreement, signed by the Applicants, specified a sum of $534.66 for detailed work which was to be performed to these areas, including wood fill for areas of wood gaps/damage and primer and paint over top as both aesthetic and protective measures (Exhibit #10(a), Tab 5, Items #55 and #58). Mr. Conte noted that such would be spot work as the doors and frames/trim in both cases had been originally painted by the Builder. The primer and paint function is required to protect exterior wood work from the elements, and wear and tear caused by such exposure.

Given natural weathering/shrinkage, Mr. Conte testified that typically Tarion denies warranty coverage for such wear areas, as exterior wood chips and cracks by Year-End Claim inspections.

Mr. Conte denied any recollection of the Applicant having called post-signing of the Settlement Agreement, in order to claim additional cracks and concerns. He stated that had that occurred, the natural and usual response would be for Tarion to request the homeowner to provide estimates for the additional work required. He had no record of any such request or conversation. Mr. Conte further stated that, should a homeowner call in after a Settlement Agreement has been drafted, as the Applicant claimed he had, it is a simple matter to retract and amend the Settlement Agreement.

Finally, it was Mr. Conte's position that wood cracks, as demonstrated in the Applicants' photographic evidence, could easily be repaired in accordance with the settlement monies and processes already agreed to. Replacement of the trim or the framing, as requested by the Applicant, was not necessary.

Mr. Sedin Heric has been a Tarion Field Claim Representative for close to two years. His prior employment includes four years in residential home renovation/restoration and as a project designer in construction. He, too, has completed a George Brown College Diploma as an Architectural Technician, and a Tarion certification course in Part IX of the OBC, dealing with residential home construction as well as cost estimation.

Mr. Heric had been assigned to complete the Applicants' Year-End warranty inspection. He provided photographs of the door frames taken by him at the time (October 2009)[1], some six months after the Settlement Agreement. Mr. Heric testified that the cracks he observed were "give or take" 1mm wide and 10cm long. He would not usually warrant such minimal sized cracks at a Year-End inspection, due to natural causes of weathering. He would, however, warrant the inadequate paint and nail holes, but had not done so here as these areas had been warranted previously, and formed part of the earlier Settlement Agreement payout to the homeowners.

In cross-examination, Mr. Heric did not agree that the cracking of the garage door trim, as demonstrated in his photograph, was of a different door than that demonstrated in the Applicants' photograph evidence. Mr. Heric advised that his photographs were of areas pointed out as subject to claim by the homeowner at the time of the inspection.

The Builder's representative, Joe Di Meo, has held the position of Construction Manager for the Builder for ten years. Before that, he had been in the construction business for five years as a builder of new homes with his father. He was responsible for overseeing the construction of this home and dealing with arising customer service issues.

Mr. Di Meo testified that he had been surprised when the door trim/frames had reappeared in the Applicants' Year-End Claim in April 2009. The paint provided by the Builder had already been assessed as inadequate, and the nail holes and damage had been found warranted in November 2008, following the 30-Day Claim. Repairs undertaken by the Builder in response to that claim had taken longer than anticipated. Since these two areas were left to the end (as paint jobs were the last to be performed), they remained incomplete as of December 15, 2008, the expiry date of the 30-day repair period. Given that the Applicants refused to provide the Builder with an extension to the repair period, these two areas had been part of the consequent Settlement Agreement, which was signed in March 2009.

Mr. Di Meo noted that the Applicants had refused the Builder access to complete the repairs, following the Applicants being advised that any repairs not completed by the Builder would be subject to a monetary payout by Tarion.

While the Applicant consented to the Builder performing any repairs, which the Tribunal might determine warranted, the Builder also gave evidence that its repair costs for replacing the two door frames would be approximately $450.00.

2. Staircase – side veneer cracking (Item #31)

Numerous items of complaint on the homeowners' 30-Day Form dealt with the condition of the stairs – all of which were warranted by Mr. Conte (see Exhibit #4, 30-Day Warranty Assessment Report, Items #57 – #64).

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[1] Exhibit #5, Tab 15

Although the evidence established that the Builder's subcontractor, Alpa Stairs and Railings Inc., did perform re-veneering sometime at the end of November 2008, and, despite the Applicant having signed off that the work was completed on December 12, 2008 (Exhibit #13(b)), numerous other items concerning the stairs remained outstanding at the completion of the builder repair period. These items were thus part of the Settlement Agreement, which specifies removing and replacing the oak trim at the stringer from the stair to the wall and providing two coats of stain and varnish for a total payout of $1,316.32.

The Applicants' concerns were raised when, following signing the Settlement and Release in March 2009, they became aware that the side veneer was not properly glued down. The Applicant claimed that he immediately advised Mr. Conte of his new concern, before receiving the Settlement Agreement funds, and also provided Mr. Conte with the contractor quote he had received for the repair of the veneer at $850.00, which he also undertook to provide to the Tribunal[2]. Again, it was his evidence that Mr. Conte told him to add the complaint to the Year-End Claim and confirmed that Mr. Conte warned him that work he undertook beforehand might compromise that claim.

The condition was apparent in the DVD video evidence filmed by the Applicant preceding the Tribunal Pre-Hearing in March of 2010. The Applicant testified that he had been present when the Builder's contractor installed this replacement veneer in late 2008, and had questioned then why there was no smell of glue. The contractor informed him it was a new product. The Applicant claimed that the premature failure of the adhesive indicated the non-workmanlike quality of the product or labour, and was warrantable given the Builder's warranty of one year post-repair.

While he acknowledged that varnishing the area, as specified in the Settlement Agreement, would assist in protecting the wood product from wear, the Applicant disputed such protection would have prevented the failure of the glue to adhere. Again, the Applicant had not done the repairs specified in the Settlement Agreement due to his belief that doing so would negate any future warranty coverage, which he believed the new evidence of detached veneer established.

In cross-examination, the Applicant maintained his position that, by the Spring of this year, he and his wife had told the Builder that access to the home would be allowed to its trades to photograph the new complaints for the purposes of the hearing process, but the Applicants would not allow further repairs, as the Tribunal process had commenced, nor would access to the home be provided to either the Builder or Mr. Di Meo, given past hostility between them.

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[2] No such documentation was in fact provided. The only written estimate made available by the Applicants was the Colin Shaw Contracting Inc. quote of June 13, 2010, Exhibit #10(b) – which estimates the repair cost at $1,050.00.

Mr. Conte testified that there had been no claim of damage to the veneer at the time of his 30-Day inspection in the Fall of 2008. He had closely examined the stairs in every way, given the numerous complaints and consequent warranted conclusions, but at no time could he recollect any cracks or displacement in the veneer.

The Settlement Agreement funds allocated ($8,106.00) were calculated based on the Applicants' own hardwood specialist estimate of $8,106.00, as well as Mr. Conte's estimate of $7,900.00. The Settlement Agreement was generated based on allocations made for the number of warranted claims, which culminated in the final settlement amount. The hardwood/stair deficiencies were therefore all included, but no reference was made to any allegation of veneer lift or cracking at that time.

It was Mr. Conte's position that the cracks in the veneer, as observed by Mr. Heric and demonstrated in his photos, could be spot repaired or spot replaced and did not require removal and replacement of the veneer. He speculated that the lifting of glue might be attributable to the Applicants' failure to repair the warranted deficiencies as set out in the Settlement Agreement.

In cross-examination, Mr. Conte acknowledged that aesthetics claims are warrantable where workmanship is clearly deficient from a normal viewing perspective. He admitted that the veneer was readily visible and its stain should ideally properly match any staining of the treads. He also acknowledged that the veneer could not be re-glued in parts, but would need to be adhered as one entire piece at an approximate cost of $750.00.

This estimate is close to the original amount of $693.00 charged to the Builder by its subcontractor for replacing the veneer in November 2008 – Exhibit 13(b). The amount does not include varnish and staining, which the Applicant acknowledges is not being claimed, given that the Settlement Agreement specifically provided funds for that purpose.

Mr. Heric testified he concluded that the cracks in the veneer pointed out to him by the Applicant during the Year-End inspection in the Fall of 2009 were minor, and not apparent from a "normal viewing perspective". At that time, some eighteen months post initial possession, there was no complaint of a failure of the veneer adhesive or any evidence of such. He only observed one or two such cracks at the bottom of the veneer stringer (see photographs at Exhibit #5, Tab 15 - pages 7, 8 and 9). He described these as "slight" and noted that the stair stringer remained unfinished, contrary to the Settlement Agreement. He advised that such cracking is not unusual where wood material is not properly finished. He concluded that the cracks could therefore be as easily attributable to the Applicant's decision not to complete the repairs envisioned in the Settlement Agreement, thereby leaving the state of the wood veneer unfinished, and hence vulnerable to humidity, as to any Builder failure.

He therefore denied the Year-End Claim.

3. Basement landing/stairs (Item #32)

The Applicant testified that his original complaint on the 30-Day Claim of improper finishing to this item had been warranted. The appropriate Builder repairs were not performed by the repair deadline, and costs for the work required had been included in the Settlement Agreement of March 2009[3]. The complaint concerned a nosing which the Builder had replaced, but had done so poorly such that, viewed from the basement, there appeared to be gaps on either side. The Applicant relied on his video evidence, which demonstrated a rough and poorly finished construction of the nosing area on the basement landing.

The homeowner requested that the nosing be removed and replaced properly, after which the stain and varnish repairs provided in the Settlement Agreement could properly be undertaken. The Colin Shaw Contracting Inc. estimate for the cost of the replacement of the nosing was $250.00. The Builder's response was that it could be done for $120.00 (Exhibit #13(a)).

Mr. Conte acknowledged that he had warranted the original nosing claim, as there had been insufficient varnish applied by the Builder initially. When he returned to inspect the resulting Builder repairs, he agreed that this area had not been repaired, and hence, it was included in the Settlement Agreement. In cross-examination, he explained that, as the nosing is also part of the landing, it was a warrantable item given that it is viewed from the finished area of the home.

Tarion denied the Applicants' Year-End Claim of improper repair. This denial was based on Mr. Heric's conclusion that the repairs performed to the area of the nosing, readily visible from the landing, were proper and sufficient. The complaint of the Applicants concerned the repair finishes to the basement perspective of the landing area. As an unfinished area of the home, the basement view is not a valid basis for determining whether a construction unit is so aesthetically displeasing so as to afford warranty protection. It was Mr. Heric's evidence that this angle of the home is only covered by the Act's warranty provisions where functionality is impacted.

The Builder did not give evidence on this item, other than its notations on the Colin Shaw Contracting Inc. estimate.

4. Kitchen ceiling/master ensuite leak (Items #35 and #54)

The Applicant advised that there had been issues with the kitchen ceiling since he and his wife had first taken possession. He claimed that the Builder had attended numerous times, perhaps a total of four separate visits, to re-plaster the ceiling prior to their Year-End in March 2009.

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[3] Approximately $239 - Exhibit #10(a), Tab 5

The Applicant believed that the repeated need for re-plastering and re-painting was caused by a leak in the master ensuite directly above the ceiling area in question. He complained that the Builder had never opened up the area to confirm this suspicion. He stated that the Applicants had not done so, for fear such would be used against him by Tarion to deny their claim.

The Applicants' home inspector had reviewed this area in his March 2009 inspection, and took thermal imaging photographs, which demonstrated slightly elevated moisture areas (12% versus 8% of surrounding area), and of which he opined might suggest a "possible leak". The inspector was not called as a witness and the Applicant admitted that he had refused to allow the Builder to cut a hole in order to determine whether there was any leak, as he did not want to have to pay for restoration, should no leak be found.

The Applicant further agreed that he had no independent witness to verify his allegation that the ceiling area in question was "mushy", and acknowledged that his photos did not show any damage.

Mr. Conte's evidence on this issue was that the complaint he had reviewed at the 30-Day inspection of November 2008, concerned the Applicants' claim that the ceiling paint touch-up provided after the Builder repair, to two separate areas of the kitchen, did not match the original paint colour. At no time was he asked by the Applicants to touch the area(s), nor was he informed that there was a leak or possible issue of moisture. Their claim was deemed warranted, and, again, due to the painter not performing the necessary repair, was included in the settlement funds advanced to the Applicants pursuant to the Settlement Agreement[4] (for paint touch-ups on both areas) at a cost of $241.13.

Mr. Heric's inspection of the following October included the Applicants' claim of a possible bathroom leak into the kitchen area. The Applicants had provided their inspector's thermal image photograph of the area, which Mr. Heric believed was consistent with the location of drain pipes and could simply be indicative of normal plumbing. The Applicants told him that the last ceiling repair had occurred the previous summer. Mr. Heric noted no staining or discolouration, which would be a natural result of a leak occurring over a number of months (summer through to October). He denied the warranty claim, as there was no evidence of any leak.

Mr. Heric testified that, were there in fact a leak, then the ensuing months since last October would demonstrate some damage/discolouration, none of which had been presented by the Applicant, despite his reliance on DVD video and other photographic documents to support his allegations of Builder deficiencies.

Mr. Di Meo testified that he had not heard of any allegation of a leak until the Year-End Claim of April 2009. The Builder's contractor who had attended the home the following August for general Year-End repairs reported no evidence of any possible leak damage.

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[4] Exhibit #10(a), Tab 5, #23 and #24

Colin Shaw Contracting Inc. estimated that the opening and closing of the ceiling would cost $1,100.00. Depending on the extent of the leak, repair would cost in the realm of $2,500.00. The Builder believed that the whole repair could be dealt with for under $450.00.

5. Upper hallway east wall not straight (Item #44)

Although the claim was originally that the wall was not straight, the Applicant conceded that Mr. Heric took the appropriate measurements during his inspection of the claim in October 2009, which demonstrated the wall was in fact straight. The Applicants' concern was thus amended to allege misalignment of the bathroom tiles on the other side of the wall. The Applicants relied on photographs of measurements that the male Applicant had taken, which purported to demonstrate a difference of 11 and 3/8" to 10 and 4/8", measured along the inner wall (Exhibit #4, Tab 44, photograph 1). The thinner tile has an air vent. The Applicant stated that the result was a displeasing effect and an amateurish look.

The Applicant therefore requested that the tiles be re-laid. Colin Shaw Contracting Inc.'s estimated cost for the work required was $1,800.00. The Builder's response was that its sub-contractor, M and A Flooring Ltd., would replace both the kitchen and the bathroom tile for a total of $1,585.00. The removal of the existing tiles and taxes would be extra.[5]

Article 12.16 of the CPG stipulates an "acceptable condition" as follows:

> Resilient floor tiles shall be installed with tight joints to provide a generally uniform appearance throughout the room or defined area when viewed under *normal* lighting conditions from a *normal* viewing position.

The Applicant's position is that this condition has not been met.

Mr. Heric measured the walls during his Year-End inspection in October 2009. He concluded that the wall was within the tolerances allowed under the industry guidelines and legislation. He noted that the tiles are aligned slightly off-centre in the bathroom, which causes the illusion of the wall being angled. He concluded that this was an aesthetic issue only, and therefore, not warrantable.

6. Basement window missing (Item #72)

The Builder omitted construction of a basement window. At some point soon after they took possession, the Applicants and the Builder agreed that the Builder would provide side insert windows to the front door of the home. This agreement was never put into writing and there later arose a dispute as to the intention of the two parties in forming the agreement.

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[5] Exhibit #13(b)

The Applicant's evidence was that the intention was to compensate the homeowners for the brickwork distortion, which the Builder's required basement window insertion would cause to the outer brickwork of the home. The Builder's position was that the inserts were intended as compensation for the missing basement window.

In the Fall of 2008, during the 30-Day inspection, Mr. Conte concluded that the item was not warranted, noting the existence of the negotiated agreement between the parties.[6]

In 2009, during Mr. Heric's Year-End inspection, the issue was again raised. Mr. Heric's conclusion was that the window was never part of the Agreement of Purchase and Sale ("APS"), and, as a result, fell outside the Act's warranties.

The evidence established that the window was indeed a part of the Schedule drawings and sketches provided with the APS[7].

Mr. Heric agreed that he had mistakenly failed to note the reference to the window in the APS, but testified that he would not have warranted the claimed item in any event, given the written waiver on each sketch included with the APS, as well as the negotiated settlement between the parties on the issue referenced by Mr. Conte at the 30-Day inspection.

The Applicant conceded the waiver and also acknowledged that the fine print on Schedule FP provides the Builder the option to make modifications or revisions. He asserted, however, that the Builder had not met requirements under the OBC to notify the municipality providing the building permit of any such changes. He later conceded that there is no requirement of notification to the homeowner.

Mr. Di Meo testified that the Builder's impression was always that the inserts, which it had installed on the Applicants' front door at a cost to the builder of $665.00, was to make up for its failure to install the basement window. The insertion of a replacement was not wanted by the homeowners post-construction (although such could be done given that the framing for the window was in place), as the Applicants were concerned that such would compromise the exterior brickwork. Mr. Di Meo noted that, had the Applicant made it clear that he wanted a window installed, this could have been done at a cost of $73.00 for material.

The Applicant provided a written quote for the insertion of a basement window of $1,013.25[8]. The Builder's evidence included a copy of a price list from its supplier, showing a price for the window material of $80.48.

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6 Exhibit #10(a), Tab 2
7 Exhibit #5, Tab 1 - Schedule "FP"
8 Exhibit #8(b)

7. Foyer transom window missing (Item #72)

This claim arises again from the documentation included in the APS. Sketches of the home initially provided by the Builder during purchase negotiations were later initialled by the parties and form part of their APS. These illustrate a transom window over the front doors. This same item is included on all elevations of the model home constructed by the Builder, and filed with the municipality. Nonetheless, the Applicants' home does not have a window.

When the Applicant raised the fact of the omission with the Builder prior to possession, he was advised that the transom window was not part of the design construction for the 8' ceiling elevation model he had chosen, but was only available on the 9' ceiling model designs. He accepted this explanation, despite the fact that the "Extras Sheet", as provided to the Applicants at the time of selecting their model elevation, did not mention the transom window was only part of the package when the 9' ceiling is selected[9]. Some time later, however, the Applicant noticed a new 8' ceiling design home being constructed by the Builder in the development, which included the transom window. After taking photos and making relevant inquiries to the Builder, the framing of that home was revised and the transom window removed.

With his suspicions aroused, the Applicant contacted the Municipality for copies of the design permits filed for his home. On each copy, the transom window was included. All Plans referenced elevations with 9' ceilings and made no reference to any modification for elevations with 8' ceilings. The Applicant testified that municipal building officials had advised him that amendments to the original design drawings must be submitted for approval by the city.

Despite the Builder telling him on numerous occasions it was not possible to add a transom window due to the 8' ceiling, the Applicant's contractor, Colin Shaw, had provided an estimate of cost at $14,750.00[10], for the extensive work such an insert would require, involving amongst other things, raising the roof line.

The Applicant testified that the transom window was required as it would let the necessary light into the dark foyer area. The decorative glass in the inserts he had negotiated for with the Builder were required for privacy and protection, but had the unforeseen effect of further darkening the entranceway.

Since the Applicant had accepted the Builder's reasons for the omitted transom window in the Fall of 2008, this was not an area investigated by Mr. Conte. Mr. Heric did consider the issue the following Fall, as it was part of the Applicants' Year-End Claim. It was Mr. Heric's conclusion that the waiver in the APS, confirming that all design drawings may be modified unilaterally by the Builder, covered the issue and there was no warranty breach. He therefore denied the claim.

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[9] Exhibit #4
[10] Exhibit #10(b)

Mr. Heric testified that design changes required for the insertion, as contemplated by the Applicant, would necessitate other violations of the OBC given that it would reduce the flashing and change the slope of the overhead porch roof. Mr. Heric did not agree that adding the transom window would have a significant impact on the amount of light entering the entranceway given its location under the porch roof, its dimension and the angle of the entranceway on the street.

Mr. Nick Damino is a realtor who acts as Sales Manager for the Builder. He worked on the particular development project involving the Applicants' home. He had no recollection of any dealings with the Applicants in particular, but stated that the transom window is never specifically mentioned in sales documents such as the APS. The only time the transom window option is disclosed is on Extra Upgrade Sheets, published by the Builder[11], where 9' ceiling models are selected by a purchaser. The Extra Upgrade Sheet provided by the witness did not, however, reference the transom window.

Mr. Damino testified that not one of the model homes with 8' ceilings constructed included a transom window, despite the fact that the majority of the homes in the project were 8' ceiling elevations. As well, all of the 9' ceiling models in the development included the transom window. Further, not one other purchaser had ever complained that the transom window, as appears on the sketch designs, was not part of their 8' ceiling home.

Mr. Di Meo testified that the Builder initially intended for the development to consist of 9' ceiling designed homes, however, after some time, it became apparent that these were not selling and so the decision was taken to offer 8' ceiling homes at a cheaper price. One of the effects of this modification was removal of the transom window.

As early as the 30-Day Claim, problems had arisen between the Applicants and the Builder. The Builder heard that the Applicants were attempting to involve other purchasers with a petition against the Builder. It attempted to placate the Applicants, but, soon after, the issue of the transom window arose. The Builder advised the Applicants of a number of potential structural problems should amendments be attempted in order to install the transom window, including the fact that there was no beam to support the front door area and the porch roof slope could not accommodate such an addition. Nonetheless, the Applicants' position remained that, according to the APS, they were entitled to the window, and they therefore were insisting on it.

In cross-examination, Mr. Di Meo advised that no amendments had been submitted to the Municipality for the 8' ceiling model, as the relevant changes to the architectural and structural design were minor, and thus, such notification was not required.

He further commented on the fact that the neighbouring home originally included framing for a transom window, arose as an error with a new framing crew and poor communication between the framer and door/window people who were at cross-purposes for a time period.

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[11] Exhibit #6

8. Kitchen tiles rough (Item #77)

The Applicant claimed that between 10 and 20 uneven floor tiles in the kitchen had been subject to a Builder repair before the 30-Day Claim. He advised that this repair had been improper in that only these various tiles had been removed. In his opinion, the better form of repair would have been to re-tile the entire floor, as the spot repair performed could lead to premature cracking.

The Applicant relied on CPG Article 12.30, which provides, in part, that:

> Ceramic/porcelain tile, marble or stone flooring shall be installed to prevent it from cracking or coming loose from the substrate.

He did acknowledge that, as of the Year-End inspection, there was no evidence of any grout cracking or tile loosening, although he believed that there was some cracking now and the floor felt squishy. He provided no photographs of any cracks in the kitchen floor since the Year-End inspection.

Mr. Heric's evidence was that he viewed no evidence of any damage or failure during his inspection in the Fall of 2009. At that time, over one year had passed since the tiles had been replaced, and he was unable to find any of the common shrinkage cracks. He denied the claim.

THE LAW

Section 13(1) of the Act prescribes:

> Every vendor of a home warrants to the owner,
>
> (a) that the home,
>
> (i) is constructed in a workmanlike manner and is free from defects in material,
>
> (ii) is fit for habitation, and
>
> (iii) is constructed in accordance with the Ontario Building Code;
>
> (b) that the home is free of major structural defects as defined by the regulations; and
>
> (c) such other warranties as are prescribed by the regulations.

Section 13 (2) of the Act prescribes:

> A warranty under subsection (1) does not apply in respect of,
>
> (a) defects in materials, design and work supplied by the owner;
> …
> (c) normal wear and tear;
> …

(f) damage resulting from improper maintenance

Section 14 (3) prescribes:

> Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
>
> …
>
> (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Section 14 (7) prescribes:

> The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

DECISION AND ANALYSIS

The onus of proof rests on the Applicants to satisfy the Tribunal, on a balance of probabilities, that the Builder has breached one of the warranties set out in the Act and that they have suffered damages as a result of that breach.

1. Door cracks

The evidence establishes that the cracks of which the Applicants complain are likely a result of the lack of adequate protective finish applied to the areas by the Builder, and are therefore warrantable defects. The evidence also establishes to the Tribunal's satisfaction that the Applicants have been compensated for this inadequacy by a monetary amount in the Settlement Agreement, which they entered into with Tarion in March 2009.

Contradictions in the evidence between the Applicant and Mr. Conte as to communications between the two concerning what the Applicants perceived to be additional damages are resolved in favour of the Applicant. The Tribunal has no reason to doubt the Applicant's sincerity and believes it more reasonable for him to retain a clear memory of such an occurrence than Mr. Conte. Mr. Conte is no less credible, but he is also responsible for numerous homeowner warranty claims, and thus less likely to recall a specific incident.

However, the advice, allegedly provided by Mr. Conte, was that any work performed by the Applicants could affect future warranty coverage. This is correct and appropriate advice in keeping with the legislative provision of section 13(2) (a) and (f). The effect of that subsection is to predicate a homeowner's valid warranty claims on his providing the home with *proper* maintenance and *non-defective* work, design and materials.

After having received funds to correct the Builder's identified deficiency in improper stain and varnish protection to the doors, the Applicant opted to maintain the deficiency by not performing the corrective action. Exterior doors, as is the case, will naturally weather and wear if not so protected. The Applicant made the choice to risk this further wear over risking his providing some form of defective repair work. This was an unfortunate choice but can not be laid at the fault of the Builder; nor can it be added to the Builder's original warranty failure. Rather, it has taken the role of the causation of the current additional damage claimed.

The Applicants' estimate for repair from Colin Shaw Contracting Inc. does not establish that replacement is necessary to correct the problems. Repair, as originally envisioned by Tarion, is found by this Tribunal to be appropriate and more reasonable based on the testimony of Mr. Heric, who most recently viewed the alleged damage and concluded it was repairable. The Applicants should be content in knowing that they have received appropriate funds to correct the problems on both doors.

2. Side veneer

The Tribunal accepts the Applicants' evidence that this issue revolves around the Applicants' allegation that the glue has failed, although only applied by the Builder at a repair performed in the Fall of 2008. Unfortunately, this was not the claim as identified at the Year-End. Nor was any allegation of glue failure relied on during Mr. Heric's Year-End inspection, who denied the warranty deficiency in fact claimed of further veneer cracks. In evidence, the Applicant conceded that the Settlement Agreement payout included stain and varnish, which would be the appropriate maintenance to correct any crack deficiency. The Applicant's real concern was a newly identified inadequate adherence of the side veneer, which he claimed was under the protection of the Act at the time of Mr. Heric's Year-End inspection in the Fall of 2009, due to the effect of the Builder's one year warranty for such repair.

The facts establish, however, that the one year Builder repair warranty had expired before the issue was identified by the Applicants. While the video evidence presented by the Applicant clearly demonstrated some significant loosening of the veneer, the Applicant admitted that this was filmed in March 2010, some sixteen months post its installation. The Applicant further acknowledged that the glue issue was only pointed out to him by Colin Shaw Contracting Inc. at some date after the inspection by Mr. Heric, itself a whole year after the Builder's installation of the veneer in 2008.

The Tribunal's jurisdiction is predicated on the warranty coverage made available in the Act. By virtue of subsection 13(4), those warranties are limited to one year post possession. Given the time period when the glue deficiency was made apparent, the Applicants' effort for remedial compensation under this legislation is not available. This claim too is therefore denied.

3. Basement Landing

The Tribunal accepts the Applicants' position on this item of claim. It finds from the evidence that the nosing installed by the Builder was done poorly and is unacceptable. Mr. Heric's justification for denying the warranty – that the nosing is only noticed when viewed from the unfinished basement – is rejected. The warranties establish standards required of builders in providing new home construction and do not distinguish between finished and unfinished areas of the home. This area of the staircase is not an area where aesthetics become irrelevant because it is an area not normally viewed. This was made clear by Mr. Conte's initial warranting of the nosing at the 30-Day Claim inspection.

The Tribunal has reviewed the unreported decision of Vice-Chair Israel of this Tribunal in 2008 of *4185-ONHWPA*, relied upon by the Respondent. In this instance on the facts of this case, the Tribunal concludes that the nosing provided to the Applicant was not installed in a workmanlike manner.

The only repair cost evidence provided by the homeowner was that of Colin Shaw Contracting Inc. for $250.00. The Builder's response was that it could be done for $120.00. Given the clear antagonism between the Builder and the Applicants, the Tribunal concludes that a monetary payment is the preferred way to provide the warranty remedy and further concludes that the repair can likely be performed for $200.00.

4. Kitchen ceiling/master ensuite leak

Despite the Applicants' claim that the Builder had performed numerous kitchen ceiling repairs, the evidence at the time of Mr. Conte's initial inspection, six months following possession, was simply that the Builder had once attended for ceiling paint touch-ups. These were found to have been inadequate and the Applicants were provided with settlement funds to complete the painting.

Mr. Heric's conclusion the following year, that there was no evidence of any leakage in the ceiling is accepted by the Tribunal. The Tribunal is also persuaded by his evidence that, were there indeed any leakage, as alleged, evidence of such would certainly be apparent now, over two years post-possession. Nor does the Applicants' evidence establish any improper abnormal moisture in the ceiling areas. The evidence of the thermal imaging photographs is as consistent with the conclusion of normal pipe activity in the upper bathroom area as it is of any abnormal activity. Despite the photographs tendered by the Applicant, no observation is apparent, from either these photographs or any independent witness, that there is moisture on the area.

It is further noteworthy that the Applicant himself was not willing to take the chance that there was no leakage, when he denied the Builder's offer to engage in destructive testing to verify the allegation because he was unwilling to pay the costs in the event that no abnormality was found.

This claim is denied.

5. Wall not straight/Bathroom tiles

The Tribunal finds that the bathroom tiles are close to one inch off alignment in the area of the room where the floor vent is situated between the door entrance and the sink cabinetry.

There is no allegation that the tiles are not properly installed nor is there any indication that functionality is impaired. Therefore, the issue for the Tribunal to determine is whether the misalignment is so significant as to result in an aesthetically disturbing situation, which would be unpleasing to the normal viewer in normal viewing circumstances. A review of all the evidence leads the Tribunal to conclude that this is not the case.

It was clear that even the Applicant did not view the tiles as off-centre or deficiently installed until the misalignment option was brought forward by the second Tarion Field Claim Representative, Mr. Heric, who found the visual effect so minimal as to not warrant his taking measurements.

Given the fact that the Applicants were not even aware there was any misalignment until such was drawn to their attention, the Tribunal cannot conclude that the aesthetic is so unappealing as to contravene the CPG or otherwise lead to warranty coverage.

This item of claim is therefore denied.

6. Basement window missing

Despite the evidence of an oral agreement between the parties as to their intentions of dealing with this item outside of the warranty protection offered by the Act, there is no evidence of any written agreement whereby the Applicants released the Builder from its warranty obligations established under the legislation. As a result, the warranty, if it is found to exist, remains a protection available to the homeowners.

Here the evidence demonstrated that the basement window was a part of the APS by virtue of the design drawings initialled by both parties during the contract negotiations. It was not provided. The waiver, which Mr. Heric chose to rely upon to deny the Applicants' warranty, provides that these plans may be altered "…as necessitated by architectural controls and the construction process". No evidence was led of either the controls or the process playing a part in the reasoning for the omission of the basement window.

The Tribunal concludes that the provision of the basement window was therefore warranted. In accordance with the evidence as to the cost of installing such a window other than by the Builder, the Applicants will be provided with compensation of $1,013.25.

7. Transom window

The *Building Code Act, 1992*, S.O. 1992, c.23 (the "BCA") does require a home to be constructed in accordance with the municipal building permit, itself predicated on the filing of the architectural plans – see section 8 of the BCA. However, there is a recognition in the BCA that the plans' design may be altered and/or modified during the construction process based on a myriad of practical and/or consumer choice factors. The BCA only requires re-filed amendments to the plans, where such changes are "material" – see section 8(12) of the BCA. What is "material" is not a defined concept.

The evidence of the Added Party in this proceeding was that the modification of the construction from 9' ceilings to 8' ceilings was not a "material" change. The homeowner provided no evidence to the contrary. Thus, despite the fact that the transom window as it appears on the municipal plans was not provided, the Tribunal is unable to conclude that the Added Party thereby has breached the OBC.

There is the added evidence presented by the Builder that it is not possible to modify the changed construction - as proffered by Colin Shaw - to reflect the original Plans filed, due to potential violations of the OBC that such alterations would likely cause in other respects. While this does raise the possibility that the change to the 8' ceiling was indeed "material", the Tribunal is unable to conclude that is so as a fact.

The situation of the transom window is unlike the situation with the basement window. There was evidence led by both the Builder and its realtor that the amendment of the construction design, whereby consumers were offered 8' ceilings (as selected and chosen by these Applicants), required the removal of the transom window feature. Thus the waiver Mr. Heric relied upon to deny the claim is applicable in this instance.

Finally, there was no evidence that the doors at the front of the home were in any sense defective or deficient or otherwise in violation of a warranty. Their functionality is apparently sound. Therefore, even if there were a technical contravention of the OBC in terms of the Builder's requirement to construct in accordance with the plans filed, the Tribunal is not able to conclude that there has been a violation of the OBC, which contravenes any construction standard or otherwise negatively affects the quality or integrity of the consumers' home.

Relevant here, is the notation made by this Tribunal in *(4796-ONHWPA-Claim) (Re)* [2008] O.L.A.T.D. No. 403:

> The Act is consumer protection legislation and, as such, must be liberally construed. However, its warranties are specifically enumerated in section 13. They are intended to provide new home purchasers with protection against incompetent and unscrupulous builders. They require workmanship, which is free from defects, in homes that are fit for habitation and built within the requirements of the Ontario Building Code (OBC). The Act does not aim to encompass contractual rights and obligations between the parties to a construction agreement arising from marketing or sales representations. Unfortunately homeowners often have the misconception that the Act will offer them protection from all disappointments they suffer in their new home. This is not the case.

If the Tribunal is incorrect in concluding that there has not been a breach of warranty, it still concludes that the Applicants are not entitled to damages on this item of their claim. The facts establish that the home is built identically to other similar model elevations in the development, that whether or not a transom window exists does not impact on the attractiveness of the home in order for re-sale, and that the ability of the transom window to provide any additional light into the living space is minimal. For all these reasons, the Tribunal concludes that there has been no damage suffered by the Applicants in the omission of the window, and therefore, their claim is denied on that basis as well.

8. Kitchen tiles

The evidence establishes that there is currently no evidence of any deficiency on the installation of the kitchen tiles. The Applicants' concern is for what might occur in the future and is speculative. This Tribunal has often stated that unsubstantiated future and uncertain situations are not within the purview of this Tribunal.[12]

This claim is also denied.

ORDER

Accordingly, pursuant to the authority vested in it under section 16(3) of the Act, the Tribunal directs Tarion to pay to the Applicants the sum of $1,213.25, for damage compensation concerning Items #32 and #72 from the Decision Letter. In all other respects, the Tribunal directs Tarion to deny the Applicants' claim.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

RELEASED: July 23, 2010

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

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[12] See [2006] O.L.A.T.D. No. 313

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5482-ONHWPA-CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: THE APPLICANT, unrepresented

DANIELLE PECK, Counsel representing Tarion Warranty Corporation

RONALD PUGH, Agent representing Southpointe Homes Inc., the Added Party

DATE OF HEARING: June 8, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

The Applicant appealed from a Decision Letter of Tarion Warranty Corporation ("Tarion") dated May 5, 2009[1], denying the Applicant's claim in respect of cracks in the floor of each of the basement and garage of a new home purchased by her on August 10, 2007.

In order to protect the privacy of the Applicant, her name will not be used.

[1] Exhibit 1

The Case for the Applicant

The Applicant solemnly affirmed and testified that as soon as she took possession of her home she noticed cracks in the floors of the basement and garage which got worse over time. She complained to Tarion which, in due course, inspected her home and denied her claim by the aforementioned Decision Letter.

She produced 22 colour photographs taken by her daughter[2], which she said show the cracks clearly. She took the Tribunal through most of the photographs emphasizing the nature of her complaint. She said that the Added Party had its contractors come to her home on February 25, 2010. They sanded, repaired and painted her basement floor. She said that "it looks a lot better now", but expressed her concern that the cracks would reappear. She also maintained that the cracks in the garage floor remained and that the contractor had not repaired them.

Ms. Peck cross-examined the Applicant. The Applicant admitted that she has no formal training in house construction and, significantly, had no estimates as to the cost of repairing the floors in the basement and garage.

The Case for Tarion

Crystal Gardiner

She solemnly affirmed and testified that she is a Field Claims Representative for Tarion. It was she who inspected the Applicant's house on March 2, 2009, and issued the Decision Letter.

She has taken courses on the Ontario Building Code for residential homes and has been employed by Tarion since May of 2004.

She referred to her Decision Letter and dealt with each of the garage and basement floors.

Garage Floor

There were small cracks but the widest were only 2mm wide, which is well below the 6mm mandated by the Construction Performance Guidelines as unacceptable. She detected no defect in the concrete slab which cracks are typical when the slab moves and pulls away from the wall. She found no evidence of water penetration or "heaving" of the concrete.

[2] Exhibit 3

Basement Floor

She noted that there were cracks but the widest was only 1mm. She saw no "lifting" of the concrete, no flaking or any other evidence of poor workmanship.

In summary, she denied the claim of the Applicant, as the cracks were well within the limits of the Construction Performance Guidelines and, in her opinion, were the result of normal "shrinkage" of concrete.

The Case for the Added Party

Mr. Ronald Pugh solemnly affirmed and said that he is the secretary of the Added Party. He attended at the Applicant's home a number of times. There were "more cracks than I would have liked but they were not that bad". There was no settling or lifting of the concrete slab in the basement. The Applicant had contacted him about three weeks previously and he inspected the garage. There were minor cracks but no lifting or settling of the concrete slab.

THE LAW AND ADMINISTRATIVE PRACTICE

The onus is on the Applicant to prove her case on a balance of probabilities. The *Ontario New Home Warranties Plan Act*[3] (the "Act") is the governing statute.

Subsection 13(1) of the Act gives a warranty to the buyer of a new home that, among other things,

> "the home is constructed in a workmanlike manner …".

Subsection 13(2) of the Act excludes certain items from the warranty: paragraph 13(2)(d) excludes

> "normal shrinkage of materials caused by drying after construction".

Paragraph 14(3)(b) of the Act provides, in part, as follows:

> "…. an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if the person has a cause of action against the vendor or builder, as the case may be, for damages resulting from the breach of warranty".

The Ontario New Home Warranty Program issued its Construction Performance Guidelines in 2003. They are used, as guidelines to assess whether or not a condition is covered by the statutory warranty.

[3] R.S.O. 1990, c. O.31

Clause 1.5

> "CONCRETE BASEMENT FLOOR IS CRACKED … cracks resulting from normal shrinkage are acceptable; cracks in excess of 6mm in width are not acceptable".

Clause 14.2

> "CONCRETE GARAGE FLOOR IS CRACKED … cracks resulting from normal shrinkage are acceptable; crack width in excess of 6mm is not acceptable".

APPLICATION OF THE LAW TO THE FACTS

The Applicant adduced no evidence to establish a breach of warranty or estimates as to the cost of repairs. She did not retain or call an expert to assist her. Her case was based solely on her observations as a lay person with no experience in house construction.

The Tribunal and all parties agree that there were cracks in the floor of each of the basement and garage. The Tribunal, however, accepts the evidence of Ms. Gardiner and Mr. Pugh that this was "normal shrinkage" for which no statutory warranty is available.

Accordingly, the Applicant has failed to meet the onus on her, and her appeal is hereby dismissed.

ORDER

B y virtue of the authority vested in it under section 16(3) of the Act, the Tribunal directs Tarion to deny the Applicant's claim.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: July 13, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6118-ONHWPA-CLAIM-pre-hearing-withdrawal

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: THE APPLICANTS, self-represented

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation ("Tarion")

STEVEN MACKEL, Agent, representing Medallion Developments (Castlestone) Limited (the "Added Party")

DATE OF PRE-HEARING: August 24, 2010 Toronto

ORDER

A pre-hearing was held in this matter on August 24, 2010, in Toronto, Ontario, before this Tribunal, in the presence of the Applicants, Danielle Peck, Counsel for Tarion and Steven Mackel, Agent for the Added Party.

After a brief discussion of the issue, the Applicants withdrew their appeal on the basis of a settlement agreement reached with Tarion and the Added Party. Accordingly, the hearing scheduled for September 29, 2010, is hereby cancelled, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: August 26, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6045–ONHWPA–CLAIM-pre-hearing-withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Presiding Member

PARTIES: THE APPLICANTS, unrepresented

MARSHALL I. REINHART, Counsel representing Tarion Warranty Corporation

DAVID EWALD, Agent representing Ewald Homes Ltd.

DATE OF PRE-HEARING: August 12, 2010 Toronto

ORDER

A pre-hearing was held in this matter by teleconference on August 12, 2010 in Toronto before this Tribunal in the presence of the Applicants, Marshall I. Reinhart, Counsel representing Tarion Warranty Corporation (the "Respondent"), and David Ewald, Agent representing Ewald Homes Ltd. (the "Added Party").

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicants, the Respondent and the Added Party.

2. The issues between the parties were resolved on the following basis:

(i) With respect to the issue relating to frozen water pipes, the Added Party agrees to investigate and, if necessary, insulate the cavity at the shower in the upper west wall; from the interior, to insulate the area at the lower west wall where the kitchen sink pipes run; from the garage side, to insulate the area where the powder room pipes run, including any pipes that run up the exterior wall to the bathroom above and the pipes running to the second floor toilet. The Applicants will be responsible for the associated drywall repairs.

(ii) With respect to the efflorescence issue, the builder will resolve the flashing Issues at the top of the sill and at the roofline. The Applicants will take responsibility for flashing under the sill.

3. On the basis of the Applicants' representation that they are withdrawing their appeal, the hearing scheduled to take place on October 12 and 13, 2010, is cancelled and this matter is concluded.

LICENCE APPEAL TRIBUNAL

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Mary Ann Spencer, Member

Released: August 20, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6011-ONHWPA-CLAIM-pre-hearing-withdrawal

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION PURSUANT TO THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: THE APPLICANTS, self-represented.

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation.

ERIC HART, Agent, appeared for the Added Party, Maplegrove Estates Inc.

DATE OF PRE-HEARING: August 3, 2010 Toronto

ORDER

A second pre-hearing on this matter was held on August 3, 2010, regarding the Applicant's claims as listed in the Tarion Warranty Corporation ("Tarion") Decision Letter, dated February 26, 2010. In attendance were the Applicants, Danielle Peck, Counsel representing Tarion Warranty Corporation ("Tarion") and Eric Hart, Agent, representing Maplegrove Estates Inc., (the "Added Party").

At the outset of the prehearing, the parties advised the Tribunal that the issues between them relating to their claim had been settled. The Applicants have withdrawn this appeal and therefore this matter is concluded.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

Released: August 4, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

5188-5457-ONHWPA-Claim

APPEAL OF A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990 c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS R. WALLACE, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

SOPHIE VLAHAKIS, Counsel for the Respondent, Tarion Warranty Corporation

SHADI NASSERI, Counsel for the Added Parties, Master Custom Homes Inc. and Amirili Nasseri.

DATES OF HEARING: October 8, 9, 15, 16, 2009
January 18, 19, 20, 21, March 2, 3, 4, 5, 12,
April 9, 20, 21, 2010 Toronto

AMENDED REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal under S.16 of the *Ontario New Home Warranties Plan Act* (the "Act").

Amirili Nasseri (the “Vendor”), one of the Added Parties, sold a home built by Master Custom Homes Inc. (the Builder) to the Applicant (the Homeowner) with a date for possession of October 1, 2007, as stated in the Warranty Certificate issued by Tarion Warranty Corporation(Tarion). The home had many deficiencies that were brought to the attention of Tarion and the Builder in a 30-Day Claim Form and a Year-End Claim Form.

Thirty of the 54 claims eventually found their way into three Decision letters dated November 18, 2008, December 16, 2008 and April 30, 2009. Of the remaining 24 claims, many were resolved by the Builder prior to the issuance of Decision Letters, four were not resolved in the conciliation process but inexplicably failed to be included in

a Decision Letter, and a number that the Homeowner intended to appeal, were not identified in his Notice of Appeal.

Of the 30 Claims in the three Decision letters under appeal, 12 were resolved by agreement between the parties or reassessed as "warranted" before the end of the hearing, leaving the Tribunal with only 18 items to decide. Evidence on these 18 items was heard from 13 witnesses over 16 days of hearings. The oral evidence was supplemented by five books of exhibits, a video tape, many photographs and 35 individual exhibits.

A summary of the items under appeal in the three Decision Letters is as follows:

DECISION LETTERS

	Nov.18/08 (Exhibit .A.15)	**Dec.16/08 (Supplementary) Exhibit A26**		**April 30/09 (Exhibit B.37) (Year-End)**
1	Iron railing	Slate tiles **		Gap between walls & brick in driveway ● [2]
2	Fencing	Flooring on driveway ●[1]		Walkway step ●
3	Deck	Driveway too steep ●[1]	10	Walkway on W/S
4	Edge of hardwood	Walkway on E/S	11	Walkway on E/S
			12	Run-off pipes
5	Ceramic tile in bathroom			Stucco uneven ● [2]
6	GFSI			Missing stones near driveway [2] *
				Uneven bricks in driveway *
7	Wires in furnace room		13	Missing light in backyard
8	Countertop			Alarm fell off ceiling *
9	Cold room[3]		14	Lock on main door
				Fireplace*
			15	Exit door frames in den
			16	Window frames (1) dent
				(2) west corner sill-crack
				(3) east corner sill crack
				Fireplace *
				Door btn basement & garage ● [2]
			17	Colour of hdwd floor

* Withdrawn prior to Decision	[1] Reassessed byTarion (Boyd) Nov.5/09
** Resolved during Hearing	[2] Reassessed byTarion (Boyd) Nov.6/09
● Reassessed Cct.7/09	[3] Partially reassessed Oct.7.09, Nov.5.09

As indicated, all items were found to be “unwarranted” in the Decision letters except for the five items in the April 30, 2009 Decision which are shown as having been withdrawn prior to the Decision letter.

PRELIMINARY MATTERS

During the course of the Hearing, the Tribunal heard and ruled upon a number of procedural motions.

Motion by John Kirec (witness)

Mr. Kirec brought a motion at the opening of the hearing requesting that a summons requiring him to attend the Hearing, issued at the request of the Homeowner, be quashed. The grounds for the motion were that Mr. Kirec had received payment for an inspection of the Homeowner’s floor and the statutory witness fee with the Summons, but had no agreement with the Homeowner with respect to professional fees for his attendance before the Tribunal. The Tribunal ruled that a failure to reach agreement on fees for attendance to give evidence was not a sufficient reason to quash a summons properly served on a witness with relevant evidence but the Tribunal would nevertheless, with the parties’ consent, accommodate the witness by hearing his evidence as the first witness at the hearing.

Motion by the Respondent

The Respondent moved to quash a Summons issued at the Homeowner’s request to secure the attendance of two inspectors who had been retained by the Respondent to inspect the Homeowner’s property, but whom the Respondent did not intend to call as witnesses. Having heard the submissions of all Parties, the Tribunal ruled that it had jurisdiction under S. 11 of the Tribunal’s Rules of Practice and S. 25.0.1 of the *Statutory Powers Procedure Act* to quash the summons issued in this matter and that it should do so on the basis that any evidence the witnesses might give would be covered by the recognized principle of litigation privilege as recently defined in *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39. The Tribunal also relied on subsection 15 (2) of the *Statutory Powers Procedure Act*.

Motion by the Respondent

During his evidence in chief, the Homeowner often referred to items included in his two Claim forms but not included in any one of the three Decision Letters. Much of this evidence was adduced prior to the admission into evidence of the Decision Letters. That evidence was often helpful in shedding light on the history of relations which existed between the parties over the course of the two years preceding this hearing and was admitted for some time without objection from the Respondent or Added Parties. When the Respondent did object to the evidence being given of this nature, the Tribunal sustained the objection on the grounds that the Tribunal’s jurisdiction is found in s.16 of the Act. This section limits the Tribunal’s jurisdiction to cases where Tarion has issued a Decision under section 14 of the Act. While other matters may be in dispute, and

possibly in the conciliation process, the appeal process is limited to making a ruling on those matters which have actually been the subject of a final decision by the Tarion. The Tribunal further limited evidence to items judged "unwarranted" in the Decision letters and which Tarion still judged "unwarranted" at the beginning of the Hearing. Evidence on items judged "warranted" at the time of the Hearing or indicated by all parties as being "no longer in dispute" was excluded. In one case, involving the quality of slate used on the landing of the entrance porch, the status was only changed from "unwarranted" to "warranted" once evidence had been obtained during the course of the hearing. When that evidence was obtained and the item judged "warranted", no further evidence was heard on this major item.

Motion by the Respondent

The Respondent brought a motion at the opening of the Hearing on January 18, 2010 asking that a Summons issued and served at the request of the Homeowner to Mario Vella of M.& O. Renovations & Contracting, be quashed on the basis that he had been retained by the Respondent to give evidence in this matter. The Respondent advised that it was still its intention to call Mr. Vella as its witness. In light of this undertaking by the Respondent, the Tribunal ordered that the Summons to Mr. Vella to appear and remain in attendance until called, be quashed.

Motion by the Respondent

Counsel for the Respondent advised at the opening of the Hearing on January 18, 2010 that she had been served within the past several days with a copy of a new expert witness report prepared on behalf of the Homeowner. She requested a ruling on its admissibility and advised that she would require an adjournment to consider the impact of the report on her case if the report were to be ruled admissible. The report dealt with the important issue of the quality of the slate at the entrance to the Homeowner's home—an issue on which, the Tribunal had already heard considerable evidence. A further investigation and report appeared likely to either substantiate or refute the previous evidence heard on the subject. Its admission at this time would be a serious breach of both section 6.4.3 of the Tribunal's Rules of Practice requiring service of expert witness reports a minimum of 30 days prior to the commencement of a hearing, and also contravene the express ruling by Vice-Chair Macklin at a pre-hearing conference directing that all reports be served no later than March 16, 2009. Further, no satisfactory explanation was offered for the delay in producing the report.

Submissions by the Parties satisfied the Tribunal that the report, although in clear violation of the Tribunal's Rules, must be admitted as it would establish the validity of a previous expert's conclusions regarding an important issue at the hearing. The Tribunal was also satisfied that the report could be admitted into evidence without serious prejudice to the Respondent or Added Parties, if sufficient time were allowed for these parties to reassess their position on this issue prior to the resumption of the hearing in March. In the circumstances, the Tribunal exercised its discretion under section 5.4 of the *Statutory Powers Procedure Act* to allow the Homeowner to call this witness as part of his case on the resumption of the hearing in March. The break in the hearing dates would allow the Respondent and the Added Parties an adequate opportunity to review

the report and obtain their own expert advice, should they deem it necessary. On resuming in March, the Parties advised that the evidence of the expert witness had, indeed, been determinative of the issue and that the item of the slate tile was now admitted to be warranted.

Motion by the Homeowner

The Homeowner moved at the opening of the Hearing on January 18, 2010 for an order excluding counsel for the Added Parties on the grounds that the representative was not a member in good standing of the Law Society of Upper Canada. The Tribunal dismissed the motion on reading the Representation Declaration signed by Ms. Nasseri indicating that she was a member of the Bar.

Motion by the Homeowner

The Homeowner moved on April 9, 2010, to introduce as evidence a series of invoices respecting costs he incurred as a result of the alleged defects in his home. Tarion objected to the introduction of this evidence at this time on the grounds that (1) it had not been disclosed in accordance with the Tribunal's Rules of Practice or the order at the Pre-Hearing Conference and, (2) much of the content dealt with indirect damages not within the Tribunal's jurisdiction. The Tribunal upheld the objection on these grounds and on the ground that to admit these documents well after the close of both the Homeowner's case and Tarion's case would seriously prejudice Tarion.

ISSUES

The issues in this case may be simply stated as follows:

1. Do the conditions which were found to exist with respect to each of the items listed in the Decisions above constitute a breach of the warranty provided in the Act?
2. If so, what is the appropriate remedy?
3. Should costs be awarded?

THE LAW

The relevant warranties and exclusions from warranty coverage are set out in section 13 of the Act, as follows:

Warranties

13. (1) Every vendor of a home warrants to the owner,
    (a) that the home,
        (i) is constructed in a workmanlike manner and is free from defects in material,
        (ii) is fit for habitation, and
        (iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and
(c) such other warranties as are prescribed by the regulations. R.S.O. 1990, c. O.31,s. 13 (1).

Exclusions

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design and work supplied by the owner;
(b) secondary damage caused by defects, such as property damage and personal injury;
(c) normal wear and tear;
(d) normal shrinkage of materials caused by drying after construction;
(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
(f) damage resulting from improper maintenance;
(g) alterations, deletions or additions made by the owner;
(h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
(i) damage resulting from an act of God;
(j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
(k) damage caused by municipal services or other utilities;
(l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession. R.S.O. 1990, c. O.31, s. 13 (2).

WITNESSES

The witnesses who testified at the Hearing were as follows:

The Homeowner

The Homeowner's evidence with respect to each item in the Decision Letters is set out in the discussion of each item which follows. In many cases there is no direct conflict between his evidence and the evidence of the other parties or their experts. The parties generally agreed as to the existence of a condition which gave rise to a claim. They seldom agreed on the seriousness of the condition or the important question of whether a deficiency was covered by a warranty. The Homeowner professed no specialized knowledge in the field of construction.

John Kirec

Mr. Kirecis certified as a flooring installer and inspector by the National Wood Flooring Association (NWFA) and has worked in the flooring industry inspecting, installing, teaching and running his own flooring company for close to 20 years. His qualifications were not disputed and he was accepted byte Tribunal as an expert in flooring installation practices and standards

Nader Tadros

Mr.Tadros graduated from the University of Toronto as an engineer in 1991. He has been working as a professional engineer since his graduation and is currently employed as Manager of Engineering at Pyramids Engineering Inc., a major consulting

engineering firm. He has extensive experience in industrial, commercial and residential construction. He was called by the Homeowner to give evidence on three items, two of which ("flooring of driveway" and "driveway too steep") had been warranted by Tarion by letter dated October 7, 2009 and one, the slate tile issue, which was withdrawn by Tarion during the hearing.

Dan Timothy

Mr. Timothy is a general contractor with seven years experience as a construction manager and then as owner of his own company, Rhino Home Improvement. He listed the items pointed out to him by the Homeowner and indicated a lump sum cost to correct each item. He had no knowledge of the condition of the premises at any time prior to his visit, and did not know whether the items listed in his report constituted a breach of any warranty under the Act.

Michael Fournier

Mr. Fournier has five years experience as a residential home inspector. He is a member of the National Association of Home Inspectors and is currently employed by City Wide Home Inspectors. He visited the home once, on September 5, 2007, for two to three hours and performed a Pre-Delivery Home Inspection. He is not certified under the Ontario Building Code (OBC) but is familiar with matters which should be reported under the Act. He compiled the Building Deficiency List of 54 items which later acted as a basis for the Homeowner's 30-Day Claim. Mr. Fournier did not indicate, either in the Deficiency List or in his testimony, that any of the deficiencies noted in his report were breaches of either the OBC or the warranties provided under the Act. Under cross-examination, he agreed that there were a number of matters he either had not seen on his inspection or may have seen but did not view as defects. These items include any problem with the slate tile (subsequently warranted), the fence at the rear of the Homeowner's property (not part of his inspection), the space below the deck, the hardwood floor, the absence of a light fixture on the rear exterior wall, ceramic tile in the master bedroom ensuite bath, wires in the furnace room, down spouts, the kitchen counter in the basement, and the bricks on the side walkways. His report included nine pages of photographs.

Marc Roy

Mr. Roy is a third generation stone mason. He is Guild Certified and has completed over 100 houses. He owns his own company and employs four other stone masons and three full-time labourers. He has worked both as a general contractor and sub-contractor. He attended the Homeowner's house on three occasions; twice in early 2009 and once, two weeks prior to testifying.

Duane Grady

Mr. Grady is the president and owner of Contigo Living Interior Concepts Ltd., a corporation engaged in the business of general renovation and construction. He has over 25years of experience as a contractor in all areas of residential home renovations

and construction. He has had training in the OBC and is familiar with Tarion's procedures and guidelines. He spent approximately six hours at the Homeowner's premises, spread over three visits in 2009.

The Respondent called the following witnesses:

William Romasanta

Mr.Romasanta has been a Field Claims Representative with Tarion for four years. At the time of joining Tarion he had 15 years experience as a general contractor. He is naturally familiar with Tarion's claims handling procedures and has received on the job training in Part IX of the OBC. In his four years with Tarion he has probably inspected close to 1,000 homes. He conducted the first conciliation or Warranty Assessment of the home in question on September 23, 2008.

Roger Boyd

Mr. Boyd was a Field Claims Representative for 5 years prior to being promoted to Senior Field Claims Representative in 2009. Prior to joining Tarion, he owned a building construction company where he built two houses. He has received training in both Part IX (small buildings) and Part XII (health and safety) of the OBC, and has a certificate in estimating the cost of housing repairs. He conducted a warranty reassessment of this property on November 21, 2008. The re-inspection report consisted for the most part of a repetition of the earlier inspection by Mr.Romasanta.

Steven Vasconcelos

Mr. Vasconcelos is certified as an inspector with the National Wood Flooring Association. (NWFA) and has received his Advanced Installation Certification through NWFA. He is President of The Floor Studio Inc. and co-owner of Madeira Hardwood Floors Ltd. He has 14 years experience in the hardwood flooring industry involving installation, refinishing, sales, service and inspection and is very familiar with Tarion's procedures, including the application of the Construction Performance Guidelines. He attended the premises for the first time in August, 2009.

Mario Joseph Vella

Mr. Vella has been the owner, operator and manager of his own business, M & O Renovations & Contracting since 1988. He has over 20 years experience as a superintendent, construction manger and construction business owner. He is familiar with Tarion's operations and is certified under Parts IX and X of the OBC.

The Added Party Amirili Nasseri (Vendor) also appeared on his own behalf. He has a number of years experience in the construction industry, having built 11 homes for himself and another 20 for others.

FINDINGS OF FACTS AND ANALYSIS

1. Rust on iron railing
   Rusting on rod iron railing in front of house. (30 Day Claim Form)

A rod iron railing borders the landing and stairs at the front of the Homeowner's home. It had been installed by the manufacturer three months prior to the Homeowner taking possession in October 2007.

Photographs taken by the a building inspector conducting a Pre-Delivery-Inspection, in the Fall of 2007, show a few spots of rust on the top railing approximately three to four feet above the surface of the landing. On the first visit by Tarion's Field Claims Representative in September 2008,the Homeowner advised that the spots mentioned in his 30-Day Claim had been repainted by the Vendor, but the bottom rung and footings of the railing were now showing clear signs of rusting on exposed surfaces.

Counsel for both the Respondent and the Added Parties submitted that the Homeowner's own witness, Mr. Timothy, admitted that it was normal to see some rust on surfaces such as this after only two years, especially where there was ponding and salt. They also adduced a great deal of evidence to support their position that the reason the paint job did not last was a failure by the Homeowner to properly maintain the railing. In particular, they alleged that he applied too much salt to melt snow on the landing or that he hit the railing and chipped the paint while shovelling snow. In the alternative, they submitted that potted plants hanging from the railing had some detrimental effect on the paint job.

The Tribunal notes that the Vendor, a witness for the Homeowner (Marc Roy), and a witness for Tarion (Mario Vella) were all of the opinion that a proper exterior paint should last for between three and five years, whereas one witness for the Homeowner, Dan Timothy, stated that you might see rusting earlier than that. The Tribunal has considered all the evidence on this question and is unable to say with any precision when rust might first be observed on a properly painted surface such as this. It is confident, however, in finding that a good quality exterior rust paint applied to a properly prepared surface should last for a minimum of a year even in these conditions, and that this railing was showing obvious signs of rusting well within this period. The fact that the paint job did not last even for this minimum length of time leads the Tribunal to conclude that, either the paint was of poor quality, it was applied on a poorly prepared surface, or both.

In short, the Tribunal finds that the Homeowner has satisfied the onus resting on him of showing that the Vendor was in breach of the warranty provided under clause 13(1) (a) (i) of the Act, in selling a home that was not "constructed in a workmanlike manner and free from defects in material". The Homeowner's witness, Marc Roy, estimated the cost to repaint the railing at $500.00.

2. Fencing
   Fencing in the north and east sides of the backyard is not completed. (30-Day Form)

The Homeowner gave evidence that at the time of sale there was a chain link fence at the rear of his property. This fact is verified by the video tape taken by the Homeowner on March 18, 2008, and filed as an exhibit. The Homeowner found that there was a one to two foot gap in the fence on each side of a hydro pole on the rear property line. He was worried that children could not play safely in the yard which contained this gap. He accordingly decided to correct the situation by adding a wooden fence just inside the existing chain link fence at the rear of his property and along one side.

The Vendor testified that the gap in the fence was left intentionally so that "the cable guy" could service a pole located on the rear lot line. Counsel for Tarion submitted that the lack of any mention of a gap in the fence in the List of Deficiencies prepared by Mr. Fournier prior to possession was evidence that this inspector did not consider this item to constitute a warrantable defect. She also noted that the new fence was constructed without prior notice to Tarion or an opportunity to inspect the original fence.

The Tribunal does not consider it to be poor workmanship to leave a gap in a fence for what would appear to be sound reasons. It is further concerned that the steps taken by the Homeowner to rectify what he considered to be a defect went far beyond the scope of work required to correct this minor defect. In the circumstances, the Tribunal does not find that the Homeowner has established any breach of the warranties provided under the Act

3. Unenclosed space below deck
   The deck has not been properly secured to prevent wild animals from living underneath it, resulting in damage to the building and trauma to children. (30-Day Form)

The Homeowner gave evidence that he was very concerned that the omission of an enclosure between the ground and the bottom of the deck at the rear of his home constitutes a danger to his children as it allows wild animals to gain access to the crawl space under the deck. The existence of a gap is clearly seen in his video. In light of his concern, and the Vendor's failure to rectify the situation, he constructed at his own expense, a lattice wall around the opening under the deck.

The Respondent's Field Claims Representative, Mr. Romasanta, testified that there was no requirement in the OBC that the area under decks be enclosed. The Homeowner's Pre-Delivery Inspector, Mr. Fournier, also testified that there was no such requirement, and that he personally thought that an enclosure would do more to encourage animals to go under the deck than to keep them out.

The Tribunal accepts the evidence of Tarion's inspector and the Homeowner's inspector and finds that this item does not constitute evidence of poor workmanship or any breach of the OBC. It is accordingly not a breach of the warranties provided in the Act.

4. Edge of hardwood
   Edge of the hardwood and the ceramics in the kitchen area are chipped, cracked, and broken (30-Day Form).

The Homeowner gave evidence that the edge of the tile in the kitchen adjoining the hardwood floor was chipped, cracked and broken. His video confirms that some damage existed in this area on March 18, 2008. Furthermore, the existence of some damage in this area may be assumed from the comments made by Mr. Romasanta under the heading "Observations" in his Warranty Assessment Report of October 7, 2008, when he says: "This item is considered an item of damage that must be previously documented on the Pre-Delivery Inspection form".

Tarion's submission is that the absence of any mention of this item in the Pre-Delivery Inspection, report coupled with Mr. Fournier's oral testimony that he would have noted any such damage if it had existed, is conclusive proof that no such damage existed prior to delivery of possession.

The Tribunal accepts the Respondent's position that the tile was only damaged after the Homeowner took possession. This however, does not conclusively determine the matter. The question is not whether damage existed and was recorded prior to the Homeowner taking possession; rather it is how, and more importantly, why, did this damage arise? This involves a consideration of the extent of the damage and expert opinion on whether the damage could arise without any defect in workmanship or material.

It is difficult for the Tribunal to determine the extent of the damage. No oral evidence was given by the Homeowner to describe the damage shown in his video. In particular, the Tribunal does not know to what extent the zoom feature on the video camera used by the Homeowner exaggerated the appearance of the damage. Similarly, we do not know from Mr. Romasanta's oral evidence whether his photographs accurately depict what could be seen with the naked eye. In spite of extensive testimony from flooring experts, we also do not know whether reasonable quality tile would chip in this manner under normal wear and tear, or whether a transition strip would have prevented this chipping. If the chipping was the result of normal wear and tear and could have been prevented by the use of a better quality tile or a transition strip, perhaps good quality workmanship would require their use. But this is all hypothetical. It is up to the Homeowner to prove that the damage that arose was the result of poor quality tile or the failure to use a transition strip, if this is the case. Without some evidence to support such a theory it would be dangerous for the Tribunal to make this assumption. There are just too many other possible causes of the damage.

In the absence of some evidence by the Homeowner as to the extent of the damage or how it could have been avoided, the Tribunal finds that this item is not warranted.

5. Ceramic floor tile in master bedroom bath
   The ceramic floor of the bathroom has been damaged and has marks (30-Day Form)

There is little disagreement on the facts with respect to this item. The surface of one tile in the bathroom attached to the master bedroom contains a swirl mark, in all probability placed there by the marble supplier while using a power polisher or saw. There is no doubt that it is a manufacturer's defect. The only issue is whether the defect is sufficiently visible to constitute evidence that the floor was not constructed "in a workmanlike manner" and "without defects in material".

A number of prior decisions of this Tribunal and its predecessor have pointed out that the standard to be applied in interpreting the warranty provisions of the Act is not one of perfection. Indeed, no home, old or new, would ever meet such a standard. As said in the case of *Teitelmann* (1987) 16 CRAT 178.

> Floors and stairs will squeak, wood will shrink and warp, cracks will appear and paint will peal. All that can be done is to keep these imperfections at reasonable levels. The limited warranty provided by the *Ontario New Home Warranties Plan Act* recognizes these facts, and this Tribunal is obliged to make findings in accordance with the statutory provisions and not otherwise.

Whether slight defects, occasionally referred to as "cosmetic", meet the test of warrantability or not has sometimes been referred to as "keeping defects to a reasonably acceptable level".

In this case no one testified that the swirl mark in question spoiled the appearance of the bathroom floor. Indeed, the defect is not visible in a series of large scale photographs taken by Mr. Romasanta on September 23, 2008. Mr. Romasanta testified that even the Homeowner had to get down on his hands and knees for three to four minutes in order to locate the defect and point it out to him. It certainly was not visible from a normal standing position anywhere in the bathroom, the test suggested by the CPG.

On this evidence, the Tribunal finds that this defect, standing alone, does not indicate that the bathroom floor was not constructed in a workmanlike manner, free of defects in material.

6. GFCI
   No operating GFSI in the laundry room (30-Day Form)

In an amendment to the Agreement for Purchase and Sale the Vendor agreed to install an electrical outlet for a washer and dryer in a small space in the basement the Homeowner decided to use for this purpose. There was no room in the small space for a sink, and none was provided. It was the position of the Homeowner that the electric outlet the Vendor provided was defective as it did not contain a Ground Fault Circuit Interrupter (GFCI).

There was no evidence that a GFCI was called for in the agreement between the parties. Nor is there a requirement in the OBC or CPG that electrical outlets have a

GFCI unless they are within reach of a sink. The electrical outlet provided was not within reach of a sink. In the absence of any requirement in law or good practice that this outlet contain a GFCI, the Tribunal finds that the Homeowner has not shown a warranted defect under the Act.

7. Wires in furnace room
   All the wires in the furnace room have loosened. They are supposed to be in their boxes. (30-Day Form).

The evidence was uncontested that there were a good many loose wires hanging down from the ceiling in the furnace room. The evidence was also clear that most, if not all, of these wires were installed by service providers at the Homeowner's request following the date of possession. Both Mr. Romansanta and the Homeowner's own inspector, Mr. Fournier, testified that there was no legal requirement in the OBC for these wires to be enclosed. Section 3.1.4.3 of the OBC does not apply to residential properties.

In the absence of a contractual requirement to provide boxes for the wires, and in the absence of any evidence of a breach of the OBC or generally accepted standards of good workmanship, the Tribunal finds that there is no breach of a statutory warranty in the Act.

8. Basement Countertop
   Countertop is too think [sic] and flimsy and is broken. It needs to be removed and replaced with a proper one. (30-Day Form)

The Homeowner gave evidence that he made an agreement with the Vendor prior to closing the purchase of his home, whereby the Vendor was to do certain work in the basement of the home after the Homeowner had taken possession. To ensure completion of this work, the parties to the agreement agreed that the Homeowner would withhold $10,000 from the purchase price. The general nature of the work to be done was set out in the written agreement amending the Agreement for Purchase and Sale. There were, however no details as to the size, location or quality of the additional improvements to be made and no express clause to indicate that release of the holdback would constitute acceptance of the work. One item of work to be performed pursuant to this agreement consisted of the construction of a countertop in the kitchen being built in the basement.

The countertop provided by the Vendor was not as thick or as sturdy as the Homeowner considered normal in a kitchen and he alleged that a corner broke or cracked some time during the first six months following possession. The Homeowner attributes the break or crack to the poor quality of the material used in the countertop. Tarion and the Vendor submit that Homeowner's allegation that the countertop broke or cracked is unsubstantiated by the evidence of any witnesses other than the Homeowner and cannot be detected in the only photograph of the countertop entered as an exhibit. They point out that even the Homeowner, who was the only one to testify as to the alleged damage, did not clearly describe the nature of the alleged damage in his testimony or describe how the damage occurred.

Counsel for Tarion and the Vendor also submit that the release by the Homeowner of the final $10,000 of the purchase price to the Homeowner constitutes evidence that the Homeowner agreed that the Vendor had satisfactorily completed his obligations under the Amendment to the Agreement of Purchase and Sale. Not surprisingly, the Homeowner has a different interpretation of the reason for releasing the holdback. He says that the $10,000 was only released to the Vendor on compassionate grounds and to secure the Vendor's promise to quickly complete all the remaining work covered by the Agreement.

The Tribunal has considered which of the two conflicting version of the facts surrounding the release of these holdback funds is most probable. In considering the credibility of the parties, the Tribunal finds that the Vendor was extremely evasive and argumentative in his answers to questions from the Home owner during cross-examination. This may be due in part to the Vendor's difficulty with the English language. Unfortunately, the Homeowner did not fare much better in cross-examination, denying for example, on one occasion having received a letter from Tarion until his attention was directed to a reply he had written to the letter. Further, when he was having difficulty answering questions posed by Tarion's counsel, he finally stated that he has a serious memory problem as a result of diabetes and a motor vehicle accident and couldn't remember things unless he had a note to remind him. In summary, the Tribunal does not find the evidence of either the Homeowner or the Vendor entirely reliable and hesitates to place a great deal of weight on this agreement.

The Homeowner has the onus of proving his claim on the balance of probabilities. In the absence of some evidence describing the size, thickness or material used in the construction of this countertop and how the damage to it occurred, the Tribunal finds that he has failed to meet the onus resting on him of proving that the alleged damage resulted from poor workmanship or material.

9. Cold Room Unfinished
   The cold room has not been finished. (30-Day Form)

The Homeowner testified that the amending agreement required the Vendor to convert a space in the basement originally designed to be a cold room to a storage room. He stated that the Vendor failed to install a ceiling, floor covering, drywall or sufficient shelving.

The Vendor denies that he was to do this much. His recollection is that all the Homeowner required was a bit of paint on the walls and a shelf or two. He exceeded this by cleaning the space, painting the walls with concrete paint and installing a number of shelves.

No objective, third party evidence is available to confirm the details of the arrangement between the parties. In the absence of such evidence, the Tribunal finds that the Homeowner has not proven on the balance of probabilities that there has been a breach of warranty with respect to this item.

10. Walkway on west side of house
Uneven brick flooring on driveway leading to back (30-Day Form)

> There is a lot of mud and dirt coming out when it rains or snows at both sides of the sidewalk therefore we were forced to use mulch but there is still mud and dirt making it difficult to walk. (Year-End Form).

The Homeowner indicated the pathway on the west side of the house was muddy when wet. He added mulch to soak up the excessive moisture but the area remains muddy. He attributes the muddiness in the area in large measure to the existence of downspouts at the front and rear of each side of the house.

The Respondent submitted that the condition of the walkway must not have been defective when the pre-delivery inspection was carried out, as Mr. Fournier makes no note of this item in his inspection report or list of deficiencies. Nor was it, as suggested by the Homeowner, in an area excluded from inspection by the scope of Mr. Fournier's review. Mr. Fournier's inspected and reported on many exterior areas such "gutters & downspouts", "window frames" and "caulking".

A number of witnesses, including Mr. Grady, Mr. Boyd and Mr. Romasanta, indicated in their testimony that far from remedying any condition of excessive surface water in this area, the addition of mulch by the Homeowner may have actually exacerbated the condition. In their opinion any problem of excessive surface water can only be cured by addressing the underlying problem of improper grading along the edges of the building.

Having considered the evidence of all witnesses who testified with respect to this item, the Tribunal finds that the most likely cause of the muddy conditions complained of is the failure of the Homeowner to maintain proper grading around the perimeter of his home. Defects arising from such a failure are expressly excluded from warranty coverage by the provisions of clauses 13 (2) (f) and 13 (2) (h) of the Act. (improper maintenance and subsidence of land around a building).

11. Walkway on east side of house
Uneven brick flooring on driveway leading to back (30-Day Form)

> There is a lot of mud and dirt coming out when it rains or snows at both sides of the sidewalk therefore we were forced to use mulch but there is still mud and dirt making it difficult to walk. (Year-End Form)

This item was dealt with in both the Supplementary Decision letter of December 16, 2008 and the April 30, 2009 Decision letter.

The Homeowner's evidence at the Hearing was that the area was uneven to the extent that it was unsafe to walk on.

Tarion's counsel pointed out in cross-examination, that the Homeowner's Pre-Delivery Inspector, Mr. Fournier took a photograph of this area during his inspection in September 2007. No uneven bricks can be detected in this photograph and no deficiency was noted in his report at this time. Counsel for Tarion and the Added Parties

also note that this item was inspected by Mr. Romasanta for Tarion on September 23,2008. Mr. Romasanta's observations, as recorded in the Warranty Assessment report issued two weeks later were as follows

> The inspection of the east side confirms that an (sic) interlocking stone steps were installed, with gravel rocks surrounding the stone steps. The grade was observed to have a positive slope away from the house. Minor settlement was observed on the stone steps but not excessive.

The photographs he took at the time confirmed that the walkway, although not absolutely level, did not pose any danger to pedestrian travel.

Both counsel point out that the Homeowner admitted to installing an irrigation pipe under the walkway in the Spring of 2008 and that some settlement could be expected following the excavation required for this installation

Subsection 13 (2) (h) of the Act provides that the warranties in the Act do not cover defects arising as a result of subsidence of the land around the building.

The Tribunal is not persuaded by the Homeowner's explanation that his Home Inspector, having limited his responsibility to the detection of defects that are "visible and apparent", and having exempted liability for "minute latent defects", may have missed this item in his inspection. The Tribunal finds that the walkway could not have been in a dangerous condition at the time of the Home Inspector's visit without him mentioning it in his report. The relatively good shape of the walkway was confirmed by Mr. Romasanta one year later.

The Tribunal has no hesitation in accepting the evidence of Mr. Romasanta over that of the Homeowner in this matter. It was given in an honest, straightforward fashion without hesitation and without change during cross-examination. In spite of the Homeowner's unsubstantiated allegations of wrongdoing against Mr. Romasanta during the course of his investigation of this matter, Mr. Romasanta preserved a professional and objective manner while giving his evidence. His oral evidence was confirmed by photographs.

Having considered the evidence and the submissions of the parties, the Tribunal finds that the condition of the walkway was not so defective as to indicate a breach of the statutory warranty provided in the Act. It finds, further, that any unevenness that may have existed was the result of (1) a subsidence of the land around the building, (2) improper maintenance by the Homeowner and (3) subsidence following excavation to install a sprinkler system. Clauses 13 (2) (h) and 13 (2) (f) of the Act apply to exclude warranty coverage.

12. Run-off pipes

> The four run-off pipes from the eaves troughs on the roof (on the east and west side of the Property) are attached to a splasher which empties all run-off onto the ground between the Property and the neighbouring homes. I recently found out that the run-off pipes must go into the ground so that the run-off does not go into the other neighbouring properties and cause damage to them. I

have already received a complaint and warning from my neighbour and I don't want to be sued. (Year-End Report)

The Homeowner gave evidence that this run-off made his walkways too muddy for use and that the end of the pipes should be in the ground.

Mr. Boyd and Mr. Vella testified on behalf of Tarion. Their evidence was that not only was it not a breach of the OBC or any by-law, to have down pipes stop at the surface of the ground, the applicable by-law expressly prohibits directing run-off into weeping tiles around the building's perimeter. They also pointed out that if pounding was occurring it was perhaps because the splashers or down pipe extensions provided by the Vendor had been removed by the Homeowner and the fact that the Homeowner failed to maintain a positive grading in the immediate area. Witnesses Grady, Timothy and Fournier were also in general agreement that any problem with run-off could best be handled through landscaping,

The Tribunal finds that any problem of run-off water flowing towards the neighbouring property is largely the result of improper grading, a municipal concern outside the scope of the warranty provisions of the Act. In this regard it accepts and follows the decision of Vice-Chair Flude in the case of *Ontario (3199-ONHWPA-Claim) (Re)*[2006] O.L.A.T.D. No.127.

13. Missing backyard light
In the backyard, there is a space for a light, but the light is missing. (Year-End Form)

The Homeowner testified that there was an area on the exterior of the rear wall of his house where the Builder planned at one time to put a light fixture. He would like a light fixture installed in this area. Without a light fixture in the area intended for it, the wall looks unfinished.

The Vendor testified that he did indeed intend to put an outside light fixture in this location but, upon learning of the requirement for a light over a basement exit, elected to put the fixture in that location instead.

Tarion established through the evidence of Mr. Boyd that it was not a violation of the OBC to have a capped electrical box without a fixture attached.

While accepting Tarion's evidence that the item does not constitute a violation of the OBC, the Tribunal also accepts the Homeowner's evidence that the existence of an electrical box in this location covered by plywood when the surrounding area in finished in brick presents an unfinished look to the back wall. The Tribunal finds that the unfinished appearance of the wall constitutes a breach of the Vendor's warranty in subsection 13(1) to provide a home that "is constructed in a workmanlike manner". Duane Grady estimated the cost of replacing three lights at $300.00.

14. Lock on front door
The lock on the main door of the property recently broke down. On inspection, I discovered that the lock was not working at all when it was installed, but was glued on to the door by the builder. There is a mark on a piece of the lock that shows that it was hastily glued on instead of properly installed. (Year-End Form)

At the time of completing his Year-End Form (September 2008), the Homeowner obviously had a problem with the lock on his front door. In February, 2009, the lock was malfunctioning and the Homeowner was forced to call a locksmith. The locksmith opened the door and carried out certain, unspecified repairs, indicating on his invoice for the cost of his work that the lock had been improperly installed. By the time of Mr. Boyd's visit in March, 2009, the repairs had already been carried out. The Homeowner reported the matter resolved and withdrew his claim. In the circumstances, Mr. Boyd, saw no need to examine the lock to see if there remained any deficiency and reported the matter resolved. No decision was made by Tarion on the warrantability of the item.

In the absence of an opportunity for Tarion to inspect the alleged defect and to make a decision on it the Tribunal finds that it has no jurisdiction with respect to this matter.

5. Exit door frames from den
The exit door frames in the den are chipped and broken. There are holes in the frame (Year-End Form).

A photograph taken by Mr. Boyd at the time of his March 24, 2009 inspection, shows what appears to the Tribunal to be the filling of two small holes in the centre post between the den doors. The evidence of Mr. Fournier was that these holes certainly did not exist at the time of his pre-delivery inspection or he would have noted them in his deficiency list. They probably didn't exist in March 2008 either or the Homeowner would have noted them on his 30-Day Form. So, suddenly they appear between March and September, 2008, and the Homeowner has no explanation what caused them.

The Tribunal finds that the Homeowner has not shown that the damage complained of was due to any defect in workmanship or material supplied by the Vendor.

16. The window frames
The window frames are cracked and chipped.

The Homeowner pointed out three areas on Mr. Boyd's photographs that showed cracks or a dent on window sills. He gave no explanation as to the cause of the apparent damage or the date the damage first appeared.

Mr. Boyd and Mr. Vella were able to provide some information as to the likely cause. Mr. Vella indicated that the damage complained of was not in fact on the window frames but on the window sills. These sills are more decorative than functional. They are constructed out of Styrofoam and come covered with a stucco coating. Although they look fairly solid they are in fact somewhat fragile.

On the first photograph Mr. Vella pointed out a small crack where two rectangular pieces meet. The crack is less than 2mm in width and was caused in his opinion either

by shrinkage or some weight being applied to the sill. The second abnormality noted was described as a pressure dent. Again, he considered two likely causes. The first was that something dropped on it from above, depressing the stucco and compressing the interior Styrofoam. The second possibility was being gripped too tightly at some time prior to or during installation. The third abnormality was a crack running from the window from to the exterior edge of the sill. This crack was in his opinion the result of someone leaning something against the sill or using the sill as a shelf.

The Tribunal finds the first and third abnormality to have been caused by damage following the sale of the house and the third to be within the tolerance for minimal defect, as discussed in relation to the swirl on the ceramic tile above.

17. Colour of hardwood floor

> The color of the hardwood has become discoloured and needs to be removed and replaced and in addition, makes a creaking noise when walked upon (especially in the master bedroom I guess that this is due to the low quality of the materials workmanship. (Year-end Form)

The Homeowner gave evidence that there was a wide variation in the colour of the hardwood floor boards in his home and that there was excessive creaking when the floor was walked on, especially in the master bedroom.

His witness, John D. Kirec, supports the Homeowner's position in certain respects. He first attended the premises on September 21, 2008 and returned the next day to complete his inspection. His comprehensive report, including five pages of photographs, was filed as an exhibit. In his report Mr. Kirec notes the concerns of the Homeowner as being: "floor is not flat, cracks between floor boards, floor squeaks when walked on, floor does not appear to be installed properly, uneven colour of flooring, transition pieces between family room and kitchen and dining room and hallway are not finished properly". It is noted that the Homeowner's complaints to Mr. Kirecgo far beyond the complaint made by the Homeowner in his Year-End Form. Mr. Kirec's findings with respect to the Homeowner's broader statement of concerns are as follows:

a) The floor had a dip in one location in excess of 3/8¨over a 10¨ span and in another of 5/16¨over 42 1/2¨.
b) Cracks existed between the sides of planks from zero mm to .080 mm. and between the ends of planks of between zero and .035 mm.
c) There were some squeaks on the floor when walked on.
d) The spacing between fasteners holding the planks down was up to 13½¨ apart in multiple locations whereas the manufacturers recommendation was a maximum of 8-10¨.
e) Some colour variation existed between different species of wood used in the transition pieces. The colour variation observed …may be the result of the inherent feature of certain species of wood….and may not have been visible at the time of installation.

His conclusion as to the cause of the conditions was that:

> "Without prejudice and based solely on the facts collected at the time of this inspection, the conditions in this floor are due to a combination of improper installation, inherent product characteristics, and site conditions."

In cross-examination, by counsel for Tarion, the witness agreed that he was aware that the Homeowner damaged a few boards while moving in on October 7, 2008 and that he sanded, stained and repaired the damaged planks himself. The Homeowner also had concerns earlier that the floor wasn't as shiny as he would have liked so he purchased some gloss finish and applied two coats to the floor in all areas except the master bedroom in order to make it shinier. The witness did not know whether these actions contributed to the complaints the Homeowner noted in his Year-End Report or the extent they may have contributed. Mr. Kirec was not familiar with the warranty provisions of the Act or the tolerances accepted by the Construction Performance Guide (CPG) for a between floor planking. When told, he agreed that the gaps he found were less than the 2 mm allowed under the CPG.

A number of witnesses gave evidence to support Tarion's position that the floor was constructed of high quality hardwood and installed in accordance with good workmanship principles. These witnesses included the Vendor, both of Tarion's Field Claims Representatives, Messrs. Romasanta and Boyd, and Tarion's expert witness Mr. Vesconcelos. All witnesses found that there was little or no squeakiness evident at the time of their visits. They were also unanimous in their views that:

1. The wood itself was a high end quality product, known for its hardness and beauty.

2. Its beauty was enhanced in the aging process over a lengthy period of time.

Mr. Vesconcelos also gave evidence that:

1. The full colour development of the wood would be adversely affected by the application of any finish such as varnish. This would also void the manufacturer's warranty.

2. The wood, coming from the Brazilian rain forest was subject to increased shrinkage in low humidity.

3. He did not notice any gaps between boards. The gaps reported by in Mr. Kirec's report did not exceed the 2mm tolerance allowed by the CPG used by Tarion.

4. There was no separation of the floor from the sub-floor.

5. A leak onto a hardwood floor for a few days could cause wood to heave and buckle, resulting in the hump observed.

6. Most of the tools and measurements carried out by Mr. Kirec in his inspection were irrelevant to the Homeowner's original complaint of discolouring and creaking.

Finally, Mr. Vesconcelos concluded that there were no warrantable defects in workmanship or material evident from his inspection.

The Homeowner takes the position that as any competent workman will strive to follow the guidelines accepted by the NWFA and the manufacturer's installation instructions, the departures from these standards noted in Mr. Kirec's testimony, is in itself, evidence of poor workmanship within the meaning of the Act. He also submits that Mr. Kirec's testimony is to be preferred over that of Mr. Vasconcelos as Mr. Kirec brought lots of tools and did lots of measurements during his inspection and Mr. Vasconcelos carried few tools. The Homeowner relies on three prior decisions of this Tribunal for support of his positon: *Ontario(2608-ONHWPA-Claim) (Re)*[2006] O.L.A.T.D. No. 216, *Ontario(4256-ONHWPA-Claim) (Re)*[2008] O.L.A.T.D. No. 130, and *Ontario(3951-ONHWPA-Claim) (Re)*[2007] O.L.A.T.D. No. 296.

Tarion's position

Tarion and the Added Parties submit as follows:

1. The decision appealed from relates only to discolouration and squeaky floors. The Homeowner never complained of excessive gaps, dipping or the lack of adequate fasteners.

2. On the issue of discolouration, Mr. Kirec concluded that the colour variation between floor boards could have been the result of inherent differences in the type of wood used for floor boards and transition pieces.

3. On the issue of squeaky floors, Mr. Kirec stopped short of saying the squeaking he heard was excessive. Indeed, evidence from other witnesses indicated that at other times no squeaking was heard whatsoever.

4. On the issue of excessive gaps between boards, Mr. Kirec himself admitted that the size of gap was well within the CPG.

5. Mr. Kirec found no movement between the floor and the sub-floor

6. Guidelines 2.6 and 12.20 of the CPG apply:

   1.6.1 Floor Squeaks

   Acceptable Performance

   Floors shall be free from squeaks caused by movement in the floor system connections under normal loading conditions

Warranty

Squeaks resulting from normal shrinkage of materials caused by drying after construction are excluded from the statutory warranty.

Remarks

Extensive low-humidity indoor environment can cause excessive shrinkage in the wood resulting in loose floor connections. The homeowner must maintain indoor humidity levels to prevent excessive drying of materials. A squeak-free floor may not be attainable.

Acceptable Performance/conditions

Cracks resulting from joints that remain open in excess of 2mm over the length of the strip are not acceptable.

Warranty

Cracks resulting from normal shrinkage of materials due to drying after construction, damage caused by normal wear and tear or improper maintenance is excluded from the statutory warranty.

Remarks

Hardwood and parquet flooring are natural wood products and therefore are highly susceptible to changes in indoor relative humidity, which may cause dimensional changes in the flooring material. To determine the warrantability, the width of the crack should be measured during both the heating and cooling seasons. levels. The homeowner has a responsibility to maintain indoor humidity levels through humidification, ventilation, air conditioning or dehumidification to prevent permanent irreversible damage. A hygrometer can be used to monitor indoor humidity levels. Areas around heat registers and those exposed to concentrated sunlight may be more susceptible. Wood fillers may be used for repairs.

7. Subsections 13 (2) (f) and (g) of the Act apply to exclude damages resulting from improper maintenance or alterations, deletions or additions made by the owner.

Issues

1. Has the Homeowner proven, on the balance of probabilities, a breach of warranty under subsection 13(2) of the Act in respect to the discolouration or squeaking of the floor?

2. Do the complaints concerning the gaps between flooring boards and the distance between fasteners properly form part of this appeal?

3. Does the evidence support a finding of breach of warranty for the two last-mentioned items?

Findings

On the first issue, the Tribunal finds no evidence that the colour of the floor boards departed in any way from the beautiful rich hues for which this wood is justly renowned. The source of this finding is the evidence given by the Homeowner's own flooring

expert, Mr. Kirec, who had nothing worse to say about it than “upon visual inspection some colour variation was found within the installed areas”. He attributed any colour variations to natural colour variations between the two types of wood used in the transition pieces and the flooring boards and to the natural characteristics for which the Jatoba cherry flooring is known. Both Mr. Boyd and Mr. Vasconcelos testified that colour variations between individual pieces of Jatoba cherry flooring is a well known and highly sought after characteristic of this product. The Tribunal also relies on the evidence of Mr. Vasconcelos in particular, who indicated that the application of varnish voids the manufacturer’s product warranty as it is known to adversely affect the colours which develop in the wood throughout the normal aging process. This evidence brings any complaint with respect to discolouration in this case squarely within the exclusion from the warranty coverage set out in subsection 13 (c) (g) of the Act.

The Tribunal also finds that the squeakiness in the floor noted by the Homeowner and Mr. Kirec was not so extensive as to support a finding that the floor was constructed with improper workmanship or material. This finding is based on the evidence of Mr. Kirec who found some squeaks in the floor, but declined to characterize them as “excessive” and stated that he had not found any separation between the hardwood flooring and the sub-floor. Nor did Mr. Kirec note any defect in the sub-floor itself. The Tribunal’s finding of non-warrantability is also based on the evidence of Messrs. Romasanta, Boyd, and Vasconcelos who all found no squeaking of the floor at the time of their various visits.

The Tribunal has considered the two prior cases of this Tribunal relied on by the Homeowner with respect to squeaky floors. *Ontario (2608-ONHWPA-Claim) (Re)* [2006] O.L.A.T.D. No. 216, *Ontario(4256-ONHWPA-Claim) (Re)* [2008] O.L.A.T.D. No. 130. While the Tribunal is in full agreement with the reasoning in these cases, it finds that the facts in both of these cases are distinguishable from the facts in this case in one very important respect. In both of these cases the Tribunal’s decision was predicated upon a finding that there was excessive squeaking in large areas of the floor indicating movement between the floor and the sub-floor. None of the expert witnesses in this case described the squeaks in this floor as excessive, extensive, or the result of movement between the floor and the sub-floor. On the contrary, most witnesses have attributed the squeaks, if any to normal shrinkage in a product that has abnormally high moisture content.

On the second issue, the Tribunal finds that complaints relating to the gaps in the floor and the spacing of fasteners have not been the subject of a decision by Tarion. As section 16 of the Act only gives the Tribunal jurisdiction to hold a hearing and make an order where Tarion has made a decision under section 14 of the Act, the Tribunal does not have jurisdiction to consider these matters.

Should the Tribunal be wrong in narrowly interpreting its jurisdiction under the Act, the Tribunal has considered the third issue of whether a breach of the standards set out in the hardwood floor installation instructions and the NWFA guidelines demonstrates a breach of the Act’s warranty. In considering this question, it finds the approach followed by Vice-Chair Flude in *Ontario (3951-ONHWPA-Claim) (Re)* [2007] O.L.A.T.D. No. 296 to be particularly useful. When faced with a conflict between the requirements of the

NWFA and the CPG, Vice-Chair Flude held that a breach of standards such as those set out in the CPG or the NWFA is only one factor (albeit an important one) that Tarion should take into account in determining whether an item complained of constitutes a breach of the statutory warranty found in section 13 of the Act. In cases such as this, he held that the proper approach is to look at and assess the total effect of any departures from accepted standards in the industry to determine whether the work constitutes a departure from the statutory standard set out in the Act.

The Tribunal finds, adopting this approach that the proven departure from the manufacturer's installation instructions or the NWFA's standards did not seriously affect the overall quality of the work and materials which the Builder was obliged to provide under the Act. It finds, considering the evidence as a whole, that the Homeowner has not shown on the balance of probabilities that his floor was not "constructed in a workmanlike manner, free from defects in material".

18. Uneven back lawn

In the backyard, the soil and grass in uneven in a few spaces due to removal of trees by the builder. My kids can not play in backyard, therefore landscaping will be required to rectify this. (Year-End Report)

The Homeowner stated that there were several holes in his backyard that might cause injury to children playing in the area. He believed the holes were caused by trees which the Vendor had removed prior to construction. He produced no photographs to illustrate the extent of the depression; however, his witness, Mr. Timothy, confirmed his evidence as to the unevenness of the ground. Mr. Timothy's evidence was that there was a sunken area of ground about 6" deep in front of the play structure in which he almost rolled his ankle.

The Vendor denied removing any trees from the property but neither he nor the Respondent denied the fact that the backyard had a number of holes or depressions. Their submission was that the depressions were due to the addition of either a play structure or a shed by the Homeowner. In this regard, they relied on the exclusions from warranty set out in Section 13(2) of the Act, and in particular on clauses (c) normal wear and tear, (f) damage resulting from improper maintenance and (g) alterations, deletions or additions made by the owner,

Having considered all the evidence the Tribunal finds as follows:

1. There were depressions in the yard that could pose a safety hazard to the Homeowner's children or others in the yard.

2. There is insufficient evidence to support the parties' suggestions that the depression was caused either by the removal of tree roots or by the Homeowner's additions to the yard.

3. In the absence of any convincing evidence as to the cause of the depression, the Tribunal finds that the depressions came about as the result of natural settlement

and the failure of the Homeowner to provide proper maintenance. As such, they are excluded from warranty by the provisions of subsection 13 (2) of the Act.

THE APPROPRIATE REMEDY

Payment out of the Guarantee fund

The Homeowner requested in his closing submissions, that should the Tribunal find any or all of the items appealed to be warranted, it make an order for payment out of the guarantee fund rather than the usual order requiring Tarion to carry out repairs.

The power to make such an order is found in subsection 14 (3) of the Act.

> (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
>
> (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and,
>
> (b) the person has a cause of action against the vendor or the builder, as the case may be for damages resulting from the breach of warranty.

The Homeowner bases this request on the fact, which is not disputed, that the relationship between himself and both Tarion and the Added parties is acrimonious to say the least. He refers in his submission to several previous Tribunal decisions which appear to base a decision to make such an order on this ground.

This Tribunal acknowledges that this remedy has often been followed in the past when acrimonious relations between the parties suggest this as a method of avoiding further conflict and accedes to the Homeowner's request. In this regard.

Punitive damages
Damages for personal injuries
Out –of-pocket expenses

The Homeowner has asked that punitive damages be assessed against Tarion and the Added Parties and that he be awarded damages for personal injuries and out of-pocket expenses.

The Tribunal is not a court of law and has no jurisdiction to award damages such as those requested. Its powers are limited to those expressly set out in the Act giving it authority to conduct a hearing. In this case "secondary damage caused by defects such as property damage and personal injury" are expressly excluded by subsection 13 (2) (b) of the Act and subsection 6 (6) of Regulation 892 which specifically limits payments out of the guarantee fund to "damage to the home only".

COSTS

All parties have asked for an order for costs.

The Tribunal's power to make such an order and the appropriate factors to consider can be found in Rule 14 of the Tribunal's Rules of Practice. This Rule provides as follows:

> **14.1** Where a party believes that another party in the proceeding before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.
>
> **14.2** The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:
>
> (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
>
> (b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result there from is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
>
> (c) failing to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
>
> (d) knowingly presenting false or misleading evidence.
>
> **14.3** Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party to pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.
>
> **14.4** Where the Tribunal determines that an order for costs may be made under Rule 14.
>
> (1) the Tribunal when determining the appropriate award of costs shall consider all the circumstances, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of costs incurred by the party requesting costs, and the conduct of the party requesting costs; and
>
> (2) the amount of costs shall not exceed,
>
> (a) where the Tribunal has not commenced a hearing, the sum of 400.00; or
>
> (b) where the Tribunal has commenced a hearing, the sum of $800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part day being considered a full day for the purpose of this calculation of costs.

The Tribunal saw nothing in the conduct of the Respondent or Added Parties that could conceivably be described as unreasonable, frivolous, vexatious or in bad faith. Indeed, counsels are to be commended for their professionalism throughout this lengthy and emotional proceeding.

The grounds advanced for the award of costs against the Homeowner are more compelling. They include an almost total disregard of the Tribunal's Rules and the order of a Vice-Chair of this Tribunal respecting the disclosure of documents, the issuance of summons to compel the attendance not only of his own witnesses but of witnesses for Tarion, an unsubstantiated attempt to have counsel for the Added Parties removed, threats of lawsuits against his own witness prior to him taking the stand, and very serious and unsubstantiated allegations of wrongdoing against Tarion's Field Claims Representatives. Although some acrimony between the parties in these cases has

regrettably become almost the norm, the conduct in this case exceeded anything which should be tolerated and contributed to the length of the hearing.

The hearing took 16 days. A proper, cooperative attitude by the Homeowner with full and open and timely disclosure as required by the Rules would no doubt have resulted in a much shorter hearing. This became impossible due entirely to the vexatious conduct of the Homeowner. The Tribunal accordingly orders the Homeowner to pay costs to both Tarion and the Added Parties (one counsel fee) in the amount of $800 each.

ORDER

Having considered all of the evidence and the submissions of the Parties, pursuant to the authority set out in subsection 16 (3) of the Act, the Tribunal orders that the Homeowner be paid the sum of $800.00 out of the guarantee fund established pursuant to section 14 of the Act on account of the breach of warranty with respect to items **1** and 13 and that Tarion disallow warranty coverage for the balance of the claims asserted in this appeal.

The Tribunal further orders that the Homeowner pay costs to Tarion and the Vendor in the amount of $800 each. Payment of the amount of $1,600 shall fully discharge the Homeowner's obligations under this order.

LICENCE APPEAL TRIBUNAL

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Douglas R. Wallace
Vice-Chair

Released: August 25, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

ENGLISH LANE HOMES INC.

APPEAL FROM A DECISION OF THE REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT,* RSO, 1990, CH. 0.31

TO REFUSE TO RENEW A REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: THEODORE B. ROTENBERG, Counsel, representing the Applicant

CAROL STREET, Counsel, representing the Registrar, *Ontario New Home Warranties Plan Act,* RSO, 1990, c. O.31

DATE OF MOTION: August 24, 2010 Toronto

DECISION AND ORDER

This motion arises in the course of an appeal by the Applicant, English Lane Homes Inc. ("English Lane"), to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal of the Registrar (the "Registrar"), *Ontario New Home Warranties Plan Act,* R.S.O. 1990 c. O.31 (the "Act") refusing English Lane's application for renewal of registration as a builder. English Lane brings this motion requesting an adjournment of the dates set for the hearing of this matter. A further motion by English Lane for particulars was abandoned.

Evidence and Submissions

The Tribunal is grateful to counsel for their submissions and assistance in this matter.

The chronology of events is not in dispute and may be summarised as follows. In January 2007, the Registrar refused to renew English Lane's registration as a Builder under the Act and English Lane appealed that decision to the Tribunal. There were a number of adjournments of the dates set for the pre-hearing and hearing at the request

of each, or on consent of both, of the parties. Prior to the hearing, the Registrar issued a Supplemental Notice of Proposal expanding the grounds on which he based his decision. This in turn led to a number of motions by English Lane which resulted in the Tribunal ordering that portions of the Supplement Notice of Proposal be struck. The Registrar sought judicial review of this Order and the decision of the Divisional Court was released in January 2010. Hearing dates were again set, this time for June 2010. In May 2010, Tarion issued a Second Supplemental Notice of Proposal. English Lane sought an adjournment, which was granted and hearing dates were set for September and November, 2010, peremptory on both sides. In that Order, dates for English Lane to disclose the documents on which it intended to rely at the hearing were also set.

English Lane is now requesting further time in which to retrieve and review the files it will need to adequately respond to the new items raised in the Second Supplemental Notice of Proposal. English Lane also wishes the opportunity to retain an expert to address the new issues raised by the Second Supplemental Notice of Proposal. As well, English Lane has retained new counsel, Mr. Rotenberg, for the hearing and Mr. Rotenberg, while available for the September dates, is not available for the dates set for November. English Lane submits that it will require until mid-September to assemble all the material required from its files. It may then require an expert to review the material and prepare a report. It estimates, based on past experience with retaining an expert in this matter, that the expert could be retained and the report issued by November. Mr. Rotenberg's schedule is such that he would not be available to represent English Lane from November until January, 2011. Therefore the dates for an adjourned hearing are proposed to be January 17 to 21, 2011; January 31 to February 4, 2011, and February 9, 10 and 11, 2011.

Ms. Street, counsel for the Registrar, argues that an adjournment is neither necessary nor appropriate. It is not necessary as English Lane has known the case it would have to meet since January, 2010 when the Divisional Court referred back the matter to the Tribunal. The Second Supplemental Notice of Proposal, Ms. Street submits, merely adds new homeowner complaints to those already recited by the Registrar and is therefore not a new ground for the decision but an enlargement and updating of an existing ground. In any event, Ms. Street submits, adequate time for preparation was given in setting the fall 2010 dates; these dates were set on consent, and are peremptory on both sides.

In addition to being unnecessary, Ms. Street argues that the adjournment is inappropriate for several reasons. Ms. Street cites the Tribunal's Rules of Practice and Practice Direction which advise that no more than one adjournment will be granted to a party in the absence of extraordinary circumstances. Ms. Street cites two decisions of the Tribunal in which the Tribunal's interest in completing proceedings within one year of their commencement is given as a reason not to grant an adjournment. Ms. Street argues that retaining a new lawyer should not in itself form grounds for an adjournment of a peremptory hearing date. Further, in this case, she submits, English Lane has on one previous occasion retained new counsel and as a result obtained an adjournment of a proceeding in another forum. Therefore there is a pattern of using the choice of

counsel as an excuse for delaying these proceedings. Ms. Street also submits that there has been a pattern of English Lane citing the possibility of using expert evidence as a ground for an adjournment request. Ms. Street further submits that English Lane did not comply with the Tribunal's order that specific disclosure occur by specified dates throughout the summer of 2010. While on one occasion counsel for English Lane did request a delay of the dates set out in the Order, on other occasions the dates were not met and no explanation or notice was given to the Registrar or the Tribunal. This too is part of a pattern of non-compliance with Tribunal orders regarding disclosure, in Ms. Street's submission, which renders it inappropriate to grant a further adjournment or make a further order for disclosure.

Mr. Rotenberg submits that the Second Supplemental Notice of Proposal is different not in degree but in kind from the previous homeowner complaints cited by the Registrar. Mr. Rotenberg suggests that these homeowner complaints were not dealt with using the usual conciliation procedure used by the Tarion Warranty Corporation ("Tarion"), which administers the Act. Rather, warranty claims were settled directly with the homeowners by Tarion. This, in Mr. Rotenberg's submission, has several implications. First, Mr. Rotenberg argues that English Lane did not know until the end of May, 2010 what case they had to meet. Second, Mr. Rotenberg has determined that a different strategy is appropriate to deal with the new matters raised in the Second Supplemental Notice of Proposal. This strategy necessitates reviewing all of the building files for each of the six homes that are the subject of these newly raised homeowner complaints. Expert evidence may be necessary to refute the allegations that there were breaches of warranties left un-remedied by English Lane.

A review of the documents disclosed by the Registrar in support of the Second Supplemental Notice of Proposal does not resolve the dispute as to the nature of the new issues raised in it. The documents show that Tarion appears to be following its customary conciliation process. English Lane was, in some cases, explicitly given an opportunity to participate in the process, which is the usual practice. However, in each of the new homeowner complaints, there are letters or e-mails from English Lane to Tarion raising concerns about the process that was used or the result reached or both. These letters and e-mails raise the possibility that there were irregularities in the process or legitimate issues regarding the result in some of the complaints. It is beyond the scope of this motion to determine whether the new items raised by the Registrar in the Second Supplemental Notice of Proposal are of a different kind than those raised earlier. This matter presumably will be canvassed at the hearing. For the purposes of this motion, the Tribunal accepts the oral testimony of an English Lane representative that English Lane was surprised by the content of the Second Supplemental Notice of Proposal and was relying on an expert the company had retained to assist the company in responding. The Tribunal also accepts that Mr. Rotenberg wishes to pursue a different strategy regarding the new complaints raised in the Second Supplemental Notice and that this new strategy would benefit from a detailed examination of the files and might require the use of experts to review the grounds for the homeowner complaints.

English Lane denies any pattern of delay. The witness for English Lane asserts that the delays have been principally caused by the Registrar surprising the company with two Supplemental Notices of Proposal. The company has changed counsel several times during the course of the proceeding but the witness pointed to specific concerns it had with prior counsels' preparation or management of the case. In response to the suggestion that a further delay was in the company's interests, Mr. Rotenberg advises that English Lane is not currently building homes and undertakes to build no further homes until the hearing is concluded and the decision rendered.

Mr. Rotenberg concedes that his clients made mistakes during the summer of 2010 in attempting to prepare for the hearing. They underestimated the time required to prepare. They relied on an expert to address the issues raised in the Second Supplemental Notice of Proposal even after that expert advised in June that he might have a problem doing so. On July 14, 2010, they were advised by the expert that he could not represent the company in this matter. However, English Lane did not act in a timely way on this information. Except for one letter addressing one date, they did not notify either the Registrar or the Tribunal that they would face difficulties in meeting the agreed-to disclosure dates. According to evidence by the English Lane representative, she simply chose not to comply with the Tribunal's Order because she felt the documents she had assembled were incomplete. No steps were taken to retain another expert. English Lane did resolve to retain new counsel for the hearing of this matter. According to the evidence of the English Lane representative, the company felt it required more direction on how to respond to the Registrar's decision and Mr. Rotenberg was retained, presumably in early August. It was only in the week before the hearing of this motion, apparently on direction from Mr. Rotenberg, that concrete action was begun to retrieve the files which English Lane has regarding the new homeowner complaints raised in the Second Supplemental Notice of Proposal.

On the question of the prejudice which might be suffered by each of the parties if an adjournment is granted or not, Ms. Street notes that English Lane remains a registered builder and has taken preliminary steps to request a zoning by-law amendment which would permit the company to proceed to build a condominium. Therefore, there is a prejudice to the public by this delay. There is also a prejudice to the Registrar and to other builders by having this proceeding, which has already lingered before the Tribunal for 3 years and 8 months, delayed further. The issues of fact and law that might be expected to be decided at the hearing remain unresolved, which may be said to create uncertainty. Further, the Registrar has spent time and resources preparing for a hearing which was set to begin in mid-September. Some of that effort and money would be wasted if an adjournment was granted, particularly if the adjournment is of the length proposed by English Lane. Ms. Street notes that Mr. Rotenberg has said he is prepared to proceed on the September dates if this motion is denied and will arrange for alternate counsel for the November dates. She cites this as evidence for the assertion that the prejudice to English Lane of not granting the adjournment will be slight.

Decision

One of the goals that the Tribunal sets for itself is to complete licensing or registration appeals in a timely manner. In furtherance of this goal, the Tribunal has a practice of granting only one adjournment to a party, after which hearing dates are set on a peremptory basis and adjournments will not be granted barring extraordinary circumstances. While the goal of a quick resolution of appeals is a worthy one, the recent Court of Appeal decision in case of *The Law Society of Upper Canada v Igbinosun,* 2009 ONCA 484 reminds us that the denial of an adjournment cannot be a matter of rote even in a peremptorily scheduled matter. In the *Igbinosun* case, a hearing date had been set by the Hearing Panel of the Law Society on a peremptory basis. On the hearing day, newly retained counsel for Mr. Igbinosun requested a short adjournment which was denied. Counsel had earlier requested a longer adjournment of the hearing dates, a motion which was also denied.

The Court of Appeal, in determining that the Hearing Panel had erred in not granting the adjournment on the hearing day, expressed the view that the fact that the hearing date was peremptory did not excuse the Hearing Panel from exercising judicial discretion and weighing the various factors relevant in the case. Mr. Justice Weiler cites a number of cases and concludes:

> A non-exhaustive list of procedural and substantive considerations in deciding whether to grant or refuse an adjournment can be derived from these cases. Factors which may support the denial of an adjournment may include a lack of compliance with prior court orders, previous adjournments that have been granted to the applicant, previous peremptory hearing dates, the desirability of having the matter decided and a finding that the applicant is seeking to manipulate the system by orchestrating delay. Factors which may favour the granting of an adjournment include the fact that the consequences of the hearing are serious, that the applicant would be prejudiced if the request were not granted, and a finding that the applicant was honestly seeking to exercise his right to counsel, and had been represented in the proceedings up until the time of the adjournment request. In weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date and the length of the requested adjournment should also be considered.

Looking at the factors relevant in the case before us, the most obvious feature is that, if the adjournment is granted, the hearing will occur a full four years after the original Notice of Proposal. Both parties seek to hold the other responsible for the delay but an examination of the record shows that the principal cause for the passage of time has been the Registrar's decision to issue the first Supplemental Notice of Proposal, which the Registrar was within his rights to do. The motions that followed and the judicial review sought of the Tribunal's decision has consumed over two years. Much time was also spent in an attempt to settle the case. It is true that the parties now seem unable to agree on even basic procedural matters and that has led to motions which delayed proceedings. However, there is no compelling evidence of a pattern of delay on the part of English Lane as Ms. Street asserts. The Tribunal considers relevant the fact that English Lane is not now building homes, although it is entitled to do so, and further that English Lane will consent not to "enrol" homes until the hearing is concluded and the Tribunal's decision is rendered. English Lane's understanding of the word "enrol" includes the commencement of construction and the sale of homes. This appears to negate any material advantage that English Lane might have obtained by the delay.

Another relevant factor is the question of prejudice. English Lane will be prejudiced if it is forced to proceed without the counsel of its choosing. That fact alone, however, would be insufficient grounds for granting the adjournment, particularly where, as here, the company does have an alternate counsel who is currently representing them in a related matter and who, if this motion is denied, would appear on the company's behalf at the hearing dates in November. Of more weight is the fact that English Lane was surprised by the contents of the Second Supplemental Notice of Proposal and requires more time to prepare to address the issues raised in it. There is evidence that English Lane did make some effort to prepare for the hearing by retaining an expert who, the company assumed, would prepare the technical response to the new issues. In considering the degree of prejudice to be suffered by English Lane by denying its motion, the Tribunal is mindful of what is at stake in this matter for English Lane. If the company loses its registration then it is effectively out of business, certainly out of the business of building homes and condominiums. Mr. Rotenberg acknowledges that he is prepared to proceed in September if ordered to do so. The Tribunal accepts this as an acknowledgement by Mr. Rotenberg of the jurisdiction of the Tribunal rather than, as Ms Street submits, evidence that the prejudice to English Lane would be slight if they are obliged to proceed as originally scheduled.

The company's delay over the course of the summer is a material consideration, as is the company's conduct in ignoring the disclosure order of the Tribunal without notice or explanation. This conduct has caused the Registrar time and expense in preparing for a September hearing. But this prejudice may be slightly offset by the question of costs, which will be dealt with below. The prejudice to the building industry in not knowing the outcome of the case if there is a further delay is materially outweighed by the potential prejudice to English Lane in forcing it to go on before it has adequate time to prepare.

The public also has a stake in this matter. Until the decision is issued by the Tribunal then, notwithstanding the Registrar's decision, a builder at risk of losing its registration can potentially continue to build homes, to the obvious prejudice of prospective purchasers. The prejudice to the public would be a significant concern were it not for the fact that English Lane is prepared to refrain from selling or commencing construction of homes until the Tribunal renders its decision. This undertaking on the part of English Lane is a material factor in weighing the respective prejudice which may accrue to the parties and the public.

Weighing these factors, the Tribunal concludes that the adjournment must be granted. Ms. Street suggests that the dates already set for November should be used as the commencement of the hearing. There are several problems with this. First, English Lane proposes to have its expert report prepared in November. Proceeding to a hearing then might not give Tarion enough time to prepare a reply to the report. Second, Mr. Rotenberg has already indicated that he is not available in November. Having agreed to the adjournment, the Tribunal is prepared to make reasonable efforts to accommodate the schedule of counsel. Therefore the dates for the hearing will be set for January and February. The dates will be peremptory on both parties. Both

parties have in the past sought adjournments and it is important that the matter finally be adjudicated.

The adjournment will be granted on condition that English Lane refrain from selling or commencing construction of homes until the Tribunal renders its decision in this appeal. Following the hearing of this motion, the parties made submissions addressing this condition. English Lane is prepared to agree not to sell or commence construction of homes until the Tribunal renders its decision following the hearing of this matter. The Registrar wishes the condition to read as follows:

> English Lane will not sell or commence construction of any homes until the Tribunal has issued its decision in this matter, and all rights of review or appeal therefore have been exhausted, or the deadlines for pursuing those rights have expired.

Mr. Rotenberg submits that while English Lane should not benefit from the delay, neither should the Registrar gain an advantage from it which would be the case if the condition restricting English Lane's activities be extended until all appeals are exhausted.

The purpose of the condition to be attached to the adjournment order is threefold. First and foremost, it is to protect the public until the question of whether English Lane is qualified to build homes has been determined by the Tribunal. Second, it is to prevent English Lane from benefiting from the delay in the commencement of this hearing beyond the obvious benefit of being able to adequately prepare to meet the Registrar's case. Finally, it is hoped that the condition will encourage both parties to avoid any further delay. It would certainly be a factor in any motion for a further adjournment brought by either party.

What is of greater interest to the Tribunal than the tactical advantage of one party or the other is the correct balance of public protection and English Lane's ability to carry on business. Continuing the condition until the Tribunal renders its decision following the hearing of this matter addresses all three of the purposes of the condition noted above. Extending the condition beyond the Tribunal's final decision does not further the purposes of the condition and risks unduly penalising English Lane if the Tribunal decides in its favour. Further, when the Tribunal has heard the evidence in this matter and rendered its decision, the Tribunal will be better positioned to determine whether the restriction on English Lane's ability to conduct business ought to be extended. It is not appropriate to anticipate that decision in the absence of all the evidence.

Therefore, the condition attached to this adjournment will continue only until the Tribunal has rendered its decision. It should be noted that the Registrar has advised that he is prepared to consent to a condition of this duration. Either party may address the issue of whether the condition should continue after the Tribunal's decision either by motion at the close of the hearing or by a motion to stay proceedings.

In light of the decision to accept the condition of the adjournment in the form that has been substantially agreed to by English Lane, it is not necessary to consider whether the Tribunal has the jurisdiction to impose such a condition in the absence of English Lane's consent. However, both parties submitted argument on this point and several points are noteworthy. First, as Mr. Rothenburg noted, neither party was able to produce a decision of a court or tribunal where such an onerous condition was attached to an order for adjournment. Second, one argument advanced by Ms. Street was that subsection 7(2) of the Act is to be read as a stand alone provision. Section 7(2) reads:

> A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

Ms. Street argues that the Tribunal may impose conditions under this section without reference to section 9 of the Act which prescribes the hearing to be held by the Tribunal. This interpretation would appear to subvert the principal role of the Tribunal which is to conduct a hearing of an appeal and, following such a hearing, to order one or more of the actions set out in section 9. A better interpretation is that section 7(2) is worded in the way that it is to avoid a potential conflict with the provisions of section 9.

Ms. Street makes the argument that section 25 of the *Statutory Powers Procedure Act* R.S.O. 1990, c. S. 22 empowers the Tribunal both to control its own procedures and practices and to make rules of both general and particular application to do so. Section 12.13 of the Tribunal's Rules of Practice provides:

> The Tribunal may impose such conditions as it considers appropriate in granting an adjournment, including an order as to costs pursuant to Rule 14.

Ms. Street is correct in noting that this provision clearly contemplates that adjournment orders may be subject to terms and conditions that extend beyond the imposition of costs. However, this provision does provide that the conditions must be "appropriate". Whether it would ever be appropriate to include conditions restricting the business of an applicant under this provision is debateable. The alternative to imposing such a condition would be to consider the merits of the motion without it. In this case, if English Lane had not consented to the condition that it has, the Tribunal would have had to weigh the prejudice to the public of further delay very differently. As noted above, the fact that English Lane did offer this as a condition of the adjournment was a material factor in the decision to grant it.

Section 12.13 of the Tribunal's Rules of Practice contemplates the granting of costs pursuant to Rule 14. Costs may be awarded where a party has acted "unreasonably, frivolously, vexatiously, or in bad faith". One measure of such behaviour is the failure to comply with procedural orders of the Tribunal and specifically with disclosure orders. In this case, English Lane's failure to meet the dates set for disclosure or to advise that it needed time has put the Registrar to the expense of preparing for the hearing. What would be appropriate in this case would be to award the costs of the day of the motion together with some reasonable costs for the preparation for the hearing to the Registrar.

However, in Rule 14.4(2), the Tribunal has imposed a limit on the quantum of costs it may award when a hearing has not begun. The Tribunal is bound by its own rules and, while under Rule 2.7, it may waive the rules it may not alter them from case to case. Therefore, under Rule 14.4 (2) the Tribunal will award costs of $400 against English Lane, to be paid by October 29, 2010 to the Registrar.

Order

1. The hearing dates currently set for the hearing of this matter are vacated. The hearing will commence on **January 17, 2011** at **9:30** am at the offices of the Tribunal and will continue, if necessary on January 18th through 21st; January 31st through February 4th, and February 9th through 11th, all dates being inclusive. The dates set for this hearing are peremptory against both parties.

2. On consent of the parties and as a condition of this adjournment, English Lane will not sell or commence construction of homes until the decision of the Tribunal in this appeal is rendered.

3. If English Lane should violate the condition of this adjournment, then in addition to any other remedy the Registrar may have, the Registrar may move for an expedited hearing of this matter.

4. Costs in the amount of $400 are awarded against English Lane and are payable to the Registrar by October 29, 2010.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: September 22, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6049-ONHWPA-CLAIM-Settlement

APPEAL FROM A DECISION OF THE TARION WARRANTY CORPORATION PURSUANT TO THE *ONTARIO NEW HOME WARRANTIES PLAN ACT, R.S.O 1990 c.O.31*

TO DISALLOW A CLAIM

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

NEIL ABBOTT, Counsel representing Tarion Warranty Corporation

SHADI NASSERI, Counsel, representing Amirali Nasseri & Master Custom Homes Inc.

DATE OF HEARING: September 21, 2010 Toronto

ORDER

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by the Applicants from a decision of the Ontario New Home Warranty Program (the "Program") now known as Tarion Warranty Corporation. The Hearing commenced at 10:00 a.m on Tuesday September 21, 2010. The Tribunal suggested that the parties discuss settlement and the Hearing was adjourned until 11:30 a.m. at which time, the Parties informed the Tribunal that they had settled the matter on terms which they wish to remain confidential.

The Tribunal makes the following Order:

1. The Parties having settled the matter, the hearing scheduled for Tuesday and Wednesday, September 21 and 22 is hereby concluded and the Tribunal's file shall be closed as a consequence thereof.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice Chair

Released: September 21, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

5851-ONHWPA-CLAIM

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE ONTARIO *NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: KEN SELBY, Presiding Member

APPEARANCES: THE MALE APPLICANT appeared on his own behalf and on behalf of the female Applicant

NEIL ABBOTT, Counsel, appeared on behalf of Tarion Warranty Corporation

DAVID BOYES, Agent, appeared on behalf of Boyes Homes Inc. the Added Party

DATES OF HEARING: April 29 and 30, May 27 and 28, June 14, 15, 17 and 30, 2010, Written closing arguments were to follow on July 14, July 28 and August 11, 2010 Toronto

Amended DECISION AND ORDER

BACKGROUND

This is an appeal by the Applicants to the Licence Appeal Tribunal (the "Tribunal"), from a written decision of Tarion Warranty Corporation ("Tarion") dated December 21, 2009, wherein the claim of the Applicants was denied.[1] This appeal is with respect to the Applicant's claim of a Major Structural Defect ("MSD").[2] The male Applicant, who represented both Applicants and who testified during the hearing, will be referred to as the Applicant.

The issue to be addressed is the adequacy of the hydronic system which is used to heat the Applicant's home during the winter months. It should be noted that the construction

[1] Exhibit 1
[2] Exhibit 2

of the home was started in October of 2002 and completed in May of 2003. Much of the construction work was performed in very cold winter conditions. The home was first occupied on May 27, 2003.

The Added Party placed a lien on the subject home shortly after it was completed alleging that a number of extras remain unpaid. The Applicant disputed that these were extras. This lien expired two years later as it was never perfected. Subsequently the Added Party initiated a lawsuit against the Applicant. This case has not been completed.

EVIDENCE

Evidence of the Applicant

The builder failed to provide the Applicant with the Homeowners' Information Package which outlines the responsibilities of the parties. As well the mandatory Pre-Delivery Inspection never occurred.[3] These appear to be two of the minimum standards required by Builder Bulletin 42. The Applicant's evidence, which was never challenged, was that the builder never advised him of any warranty provisions.

On February 17, 2004, during the first winter, serious concerns relating to the heating system of the home were first made known to Tarion's then Customer Service Representative, Joyce Taylor.[4] Over five years later, on August 17, 2009, an investigation was underway when Tarion first attended the site for an inspection and it is noted that the in-floor heating system:

> "had been disconnected in order to run the test to the system as ordered by the ongoing litigation process between the homeowner and the builder." [5]

The first winter in the house the Applicant found it was difficult to maintain the heat above 60°F. The shower water was often too cold to be used. Washing dishes was also a problem. The home involved a hydronic heating system with hot water circulating through hePEX ("PEX") tubing which is located in the concrete floor. This home was a single storey with a concrete slab-on-grade. Portions of the floor were warm while other parts were much colder. This caused the occupants to wear slippers despite the fact that radiant heat typically produces warm floors. This heating problem became so severe that it caused the Applicant's wife and child, who have health problems, to move in with her parents who lived many miles away.

On 23 December 2003 the Applicant called the heating contractor, David Liles, left a message and did not get a return call. Mr. Liles later testified that he never received any calls. The Applicant, who is now a licenced technician who installs boilers, attempted to understand what was happening to his heating system. He observed in winter that snow melted for a couple of feet around the perimeter of the home. This

[3] Exhibit 6
[4] Exhibit 34
[5] Exhibit 8 Tab 16

melted strip was much wider in front of the garage doors. He also observed that there was no insulation visible at the slab edge in front of the garage doors.

The Applicant was also concerned about the amount of propane which the home was consuming. One possible explanation for excessive heat loss could be a very high water table. He had an excavator dig several trenches totalling about 100 feet in length around the home. These trenches were about six feet deep, several feet wide, and they remained open for a number of days. Despite some rain these trenches revealed that there was not a high water table since they remained dry. While the excavator was on property the Applicant had the slab edge beside a garage door excavated to expose the insulation.[6] The top foot of the slab edge had no insulation despite R10 being specified. Below that there was two inches of Styrofoam (a blue Dow product with R10). Under the footing was one inch of CodeBord (a pink Owens Corning product with R5). There was no evidence of any rFoil exposed under the edge of this garage slab. This seems to be consistent with the photograph of small pieces of CodeBord that appear to have floated up in the garage floor.[7] He concluded that this insulation level of R5 was typical for the entire home while the engineering design called for R12 (as noted on drawing S-1).[8]

The builder suggested that rFoil was placed over the one inch of CodeBord to act as additional insulation and when all of the joints of the rFoil were taped it also acts as vapour retarder. The manufacturer's literature for this product states:

> It is a sheet of aluminum laminated between two layers of ultra strong polyethylene bubbles.[9]

The witness provided a Natural Resources Canada document entitled Frequently Asked Questions.[10] On page 7 it refers to a Canadian Mortgage Housing Corporation investigation on actual homes which found that the insulating value of this rFoil product is only RSI of 0.4 (RSI is the metric equivalent designation which converts to an R value of 2.27).

The radiant heat layout involved 16 loops which had been designed by Uponor Wirsbo ("Uponor") a firm specializing in designing such systems as well as the manufacturing the PEX tubing. The tube layout and associated specifications are seen on this Uponor drawing which is dated 14 November 2002, a short time before the concrete floor was to be placed.[11] The Applicant noted that three separate manifolds are shown on this diagram but do not exist in these three locations in his home. Rather two manifolds were located side by side each with eight loops attached to each.[12] The builder stated that the Applicant requested this change. The Applicant said that he did not request or approve any change in this design layout. This change would cause some of the loop

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[6] Exhibit 52
[7] Exhibit 41
[8] Exhibit 22
[9] Exhibit 24A
[10] Exhibit 32
[11] Exhibit 7
[12] Exhibit 36

lengths to grow in length and tube spacing to be changed from the Uponor drawing. These changes would have a negative implication on the heating of the home.

The Applicant remarked that the floor was uneven in spots. For example, the floor rose 3 to 4 inches in front of the refrigerator. As well the garage floor sloped toward the house which created a problem when a car parked with melting snow.

The boiler was requiring 4 to 6 litres of make-up water daily long before the boiler was replaced. This caused the pressure to be dropped from 15 psi to 10 psi which in turn reduced the flow in the tubes. Normally this is a closed system that should rarely, if ever, need to receive make-up water. This water requirement tended to suggest some leakage in the tubes. Indeed some water came up through a crack in the middle of the garage floor indicating failed tubes in this area.[13]

The Applicant produced some infrared pictures to examine variations in the slab temperature.[14] Where the PEX tubing is functioning properly the tube location is clearly observed and the colour can be used to roughly establish the floor temperature. On page two the tube location is obvious and the spacing is quite irregular. On other pages, such as page six, one can see a dark area representing reasonably uniform temperatures which are much lower. The Applicant said that this represents a leak in the PEX tubing and the leaking water has spread out underneath the slab. It was indicated that this, like a high water table, would represent a significant heat loss.

The Applicant was concerned that the main header was a ¾ inch copper pipe. He believed the diameter should have been at least a 1 inch pipe. He subsequently confirmed this on a recorded conversation with a Canadian Baxi representative.[15] The Baxi boiler was tending to short cycle which tends to lead to a drop in water temperature. In the very cold weather the boiler would shut down. The Applicant had to go up on the snow laden roof and chip hoar frost off the combustion air intake in order to restart the boiler. David Liles later indicated that both he and Rob Boyes had even been involved in some hoar frost removal. Rob Boyes, brother of David Boyes, said he had no recollection of this. Once the hoar frost was removed the boiler would run for a few hours before shutting down again. This means that the boiler was only operating a fraction of a 24 hour day. In addition the diverter valve did not close properly causing considerable noise as well as a drop in domestic hot water temperature. It was also discovered that two of the thermostats were wired incorrectly.[16]

Dale Tebby, a HVAC specialist visited the subject home. He pointed out that the system had inadequate make-up air. As well the expansion tank, which was located in the attic, would likely create a condensation problem with the weather in this area. After experiencing the heating in this home he concluded that there was either no insulation in the floor or some PEX loops were leaking.

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[13] Exhibit 17
[14] Exhibit 59
[15] Exhibit 54
[16] Exhibit 18

In order to maintain heat and reduce propane consumption the Applicant supplemented the heating system with a wood burning stove located in the garage and added fans to circulate the warmer air. By February 2006 the Baxi boiler had been condemned by the regulating authority so it had to be replaced quickly. Now the home was left with little heat or hot water. Tarion was informed before this replacement took place but failed to get involved. The Applicant felt he had no option but to act. He concluded that some of the ice forming on the vent had damaged the Baxi boiler when ice chips fell down the exhaust pipe. It appears that this caused rust which destroyed the circuit board.

At a pre-trial, in the civil litigation between the applicants and the builders, the judge ordered that a test be set up to assess the PEX loops for any leakage. The heating system installer, David Liles, and a heating technician from Dale Tebby's firm would represent each side of the dispute and they were to conduct pressure tests. The test procedure was approved by Uponor. The test results for two consecutive days (May 25 and 26, 2009) were consistent and seven of the sixteen loops were found to be leaking.[17] Two in the garage went from 60 psi down to 0 psi very rapidly. The Applicant associated this to the water on the garage floor and the major snow melting in front of the garage doors.

Concerned that others were suggesting that the boiler changes contributed to the leaks which were noted, the Applicant had the PEX evaluated by the tube manufacturer. Tebby Air Conditioning & Heating Ltd., an Uponor installer, took the samples from the supply side of the manifold and also the return side as these locations experience the most extreme temperatures. The Uponor investigation revealed that there had been no damage to the PEX tubing caused by the boilers.[18] Incidentally it was noted that the tests were done under another PEX user's name because Uponor would not have become involved if they knew that litigation was involved.

The Applicant encountered many people who were reluctant to get involved with his heating problems once they realized that a lien or litigation existed. He stated that a number of Tarion representatives also indicated that they could not become involved when the builder had a lien pending. He provided as evidence a recorded telephone conversation in which Michelle Yantha changed her position regarding a `benefit` after consulting with her manager.[19] This conversation also seemed to indicate that Tarion could not find all the relevant records submitted by the Applicant to Joyce Taylor the Customer representative soon after the home was first constructed.

The Applicant made it very clear to Tarion that he was very upset with the performance of his heating system. He did not want the builder on his property. On his lawyer's advice he did not wish to have Tarion inform the builder of any of his concerns.

[17] Exhibit 34
[18] Exhibit 34
[19] Exhibit 30

Evidence of the Applicant`s Father

He visited the site about five times while it was under construction. A number of deficiencies were noted:

- the attic insulation was less than half of what was specified (R19 versus R40),[20]
- the kitchen floor sloped upward about 3 inches causing hollow areas under the tiles,
- there was no drain in laundry room,
- the front entrance is not heated as designed, and
- he observed pink insulation but not the rFoil (bubble wrap) nor any red Tuck tape.

Evidence of Dale Tebby – expert witness

Dale Tebby has 42 years experience in the Heating, Ventilation and Air Conditioning Industry. For the past 21 years he has owned Tebby Air Conditioning & Heating Ltd.

Mr. Tebby has numerous credentials relating to: Baxi boilers, Uponor Wirsbo installations and he is designated as a designer – Ontario Building Code etc. He has installed 70 to 80 Baxi boilers with very few problems.

In May 2004 the Applicant asked Dale Tebby to discuss the heating system in this home. He was quite familiar with Baxi boilers and explained the cause of the hoar frost that had been shutting down the boiler during the winter.[21] At the hearing Mr. Tebby explained that this is caused by recycling. More specifically some of the moist hot air being vented out the exhaust is drawn into the intake where it condenses causing ice to form. He was aware of this on several other Baxi installations over the last few years. Those homes that vented through the side wall rather than the roof do not experience this problem.

On his initial walk through the house, in stocking feet, he rapidly concluded that the home either has a leaking tubes or no insulation under the slab. As well Mr. Tebby demonstrated that the system did not have enough make up air to run properly. He agreed to have his technician check out the boiler. This was done and the boiler checked out as satisfactory in May 2004; yet the house was remaining colder than expected.

The system was losing water, 4 to 6 litres daily, and this should never happen. Virtually the only place it could go is under the slab. It was suggested that the PEX loops should be pressure tested for 24 hours with suitable representatives from both the installer and the homeowner. There would be an engineer and a technician representing each side.

[20] Exhibit 21
[21] Exhibit 34

The installer, David Liles, agreed to this test procedure. As previously mentioned this test was conducted in May 2009 and it revealed 7 of 16 loops were losing pressure.[22]

Mr. Tebby indicated that the normal approach was to pressurize, with air, the PEX loops to 100 psi overnight followed by a concrete floor pour the next day. Only if this test is successful the lines can be filled with liquid.

Following the pressure tests the tube ends were tested. This was done to make it clear that no damage had occurred by the addition of a wood boiler. Tube pieces from loop ends were sent to Uponor who conducted the testing. Uponor would also test for any UV damage related to excessive exposure to sunlight. Uponor carried out a variety of tests and reported the tube samples showed no signs of a manufacturing or material defect.[23] This means that any changes to the heating system have not affected these PEX loops.

On cross examination Mr. Tebby indicated that Baxi got a fix for the hoar frost problem about three years ago.

Evidence of Tim Kieffer – expert witness

Tim Kieffer has been offering structural engineering services continuously since 1981 when he completed a master's degree in Civil Engineering. His practice primarily deals with multi-million dollar industrial or commercial projects.

In March of 2008, Mr. Kieffer was retained to investigate deficiencies in the subject home. The floor slab was the main focus of his two-page report.[24] He noted cold spots on the floor, examined construction photographs and infrared images. Mr. Kieffer observed a number of variations from the design drawings which were produced by Totten Sims Hubicki Associates ("TSH"). He was informed by the Applicant that at least 4 litres of water had to be added to the system each day. Mr. Kieffer noted that the TSH drawings specified that the wire mesh, along with the PEX loops, were to be lifted up about 2 inches to have the appropriate amount of concrete cover. These loops, which were attached to the wire mesh, were not lifted, or supported on supports (called chairs); therefore there was no concrete cover below the tubing at the bottom of the slab. His conclusion was that the entire slab had to be replaced to make it consistent with the design drawings.[25]

Following the pressure tests that confirmed the failure of the in-floor heating system, Crystal Gardiner from Tarion asked Mr. Kieffer to estimate the costs of the repair process. He concluded that to meet the design requirements the walls would have to be supported while a slab was replaced. His estimate of the renovation cost was

[22] Exhibit 19
[23] Exhibit 19
[24] Exhibit 34
[25] Exhibit 34

$245,000 but said it could easily vary by 25 percent depending on the amount of damage done during the slab replacement.[26]

Evidence of Chrystal Gardiner

Chrystal Gardiner is the Field Claims Representative, a position she has held since May of 2004. Her job involves judging whether homeowners' claims are warranted or not. Prior to this job she was a building inspector.

The homeowner provided a Contract Home Information Form to Tarion dated 16 March 2004 which referred to separate paperwork related to the claims. The homeowner indicated that the builder was not to be involved at this time. Some of the documents that the homeowner has referred to do not seem to be in the Tarion file for this home.

A Major Structural Defect Form ("MSD") was received on 29 June 2009 regarding the subject home. This indicated that the heating system fails to produce enough heat to occupy the house. Ms. Gardiner indicated that the MSD requires that the defect must be adversely affecting the use for which it is intended. The form indicated that previous notices to Tarion about this problem have not resulted in any action.[27]

At the time of the Tarion site visit the PEX loops were being tested. The witness stated that litigation would not affect the decision. Ms. Gardiner subsequently indicated that because the system has been altered the claim has been denied.

The pressure tests revealed 7 of 16 loops are leaking and these results were made aware to this witness. Further the Uponor tests indicate that the boiler changes had not affected the PEX tubing. On cross examination Ms. Gardiner was asked, if Tarion is denying the claim used in the alterations, why she asked Mr. Kieffer to quote the cost of repairing the leaks.

Evidence of Jim Fortune

Jim Fortune has been with Tarion for 21 years and is currently Manager Builder Relations.

Mr. Fortune made reference to Section 14 of the *Ontario New Home Warranties Plan Act* (Act). In general this section deals with the right of a person to recover from the guarantee fund of Tarion, under the stated circumstances. He spoke of a benefit and suggested that Tarion would not pay a claim unless the builder was involved. Refusing to let the builder be involved during a Tarion inspection would lead to denied coverage.

Mr. Fortune referred to Bulletin 42 (Revised). This document explains the Customer Service Standard at that time. As previously mentioned the evidence was that two of these builder requirements never occurred.

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[26] Exhibit 28
[27] Exhibit 8 Tab 13

Evidence of Howard Coggins - expert witness

Howard Coggins is a self-employed professional engineer with 30 years of experience. Since 1987 he has operated under the name of Kontek Engineering, an incorporated company. His projects range from very small to very large. Mr. Coggins's experience is mainly in the mechanical area, mostly dealing with commercial and residential HVAC systems.

He has experience in heating systems including placing PEX pipes in slabs. He also has some structural, electrical and project management experience. He is certified to all BCIN requirements of Ontario Building Code ("OBC").

Regarding the R values of the insulation under the slab, Mr. Coggins stated a number of times that he assumed that the R value indicated in the manufacturer's literature (namely that rFoil has an R value of 14.3 downward) was correct. He stated that he had no first hand experience with rFoil. When asked, which of the eleven types of insulation listed in article 9.25.2.3 of the OBC (1997) would include rFoil, following examination of the article, he replied none of them.

Mr. Coggins believes that pressure tests are the best way to establish if loops are leaking. Gauges can leak so soap testing is essential to isolate possible leaks to the slab. He believes a very small drop in pressure may be related to the test equipment. No testing is foolproof so repeatability is important. He believes that the cause of any leaks would not appear be related to the installation as the building inspector checked the construction work.

The witness indicated that any problems with the insulation must be minor as the propane consumption for the 45 day test was less than expected.[28]

In cross examination Mr. Coggins agreed that moving the manifolds and thereby producing loop lengths, some of which exceeded 300 feet, seemed excessive.

Evidence of David Boyes

David Boyes has several businesses including: new homes, framing, manufacturing and distributing a concrete repair product, tool and die making, as well as being a licenced pastor. He has been in the building business since 1987.

Mr. Boyes indicated that the first time he was made aware of these heating system concerns of the homeowner was in 2008 or 2009.

Regarding the insulation levels, Mr. Boyes stated he put R10 in the floor, R40 in the ceiling and R28 in the walls. Under the slab is one inch of CodeBord with rFoil on top.[29]

[28] Exhibit 39 Tab 1
[29] Exhibit 36

The rFoil, which is aluminum foilfaced with bubble pack, is taped with red Tuck tape to form a vapour retarder. Mr. Boyes indicated that the insulation under the slab has an R value of 5 for the CodeBord and R14.3 for the rFoil.[30] He noted that this exceeded the R10 required by the OBC. He stated that the building inspector saw this being installed and had no problem with one inch of CodeBord under rFoil. Mr. Boyes produced a book of documents.[31]

When analyzing the homeowners' propane heating bills, he calculated that they used less fuel than expected during the first 45 days.

Regarding the level of the concrete floor, Mr. Boyes believes that the concrete is all within ±0.5 inches of the desired grade.

Mr. Boyes indicated that the pipes did not leak when the original system was installed. He suggested if they now leak, it must relate to the changes made by the homeowner. He would fix the problem if it was a warranty issue but not if the homeowner had altered the system.

Mr. Boyes indicated that the wire mesh along the PEX tubing remained at the bottom of the concrete slab.

If attic insulation has measured less than the design level of R40, Mr. Boyes suggested the insulation which was blown in must have settled down over time.

Evidence of David Liles

David Liles installed the heating loops and boiler. On one previous occasion he had installed over rFoil. Nobody expressed any concern about using rFoil on this project.

A pressure test for about 10 weeks took place until the boiler was installed in February 2003. The air pressure remained constant. The Applicant felt little glycol had been added to the system to prevent freezing. Mr. Liles and Mr. Boyes discussed this and concluded that a 30 percent propylene glycol solution was added to the water in the system. Imported bottled water was used as the well was not yet in place.

Mr. Liles said hoar frost is a known, but rare, problem. He was never made aware of the heating problem until 2007 or 2008. He has no employees so either he, or his wife, handle all telephone calls. He stated that he saw Rob Boyes, brother of David Boyes, once clear the hoar frost himself.

He indicated that Uponor said it was acceptable to leave the PEX tubing on the rFoil rather than lifting it up in the concrete as specified on the TSH drawings. He noted that hydronic installations which occur in winter take more time to get the home up to temperature. This is because additional heat flows toward the frozen ground.

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[30] Exhibit 24A
[31] Exhibit 39

Mr. Liles basically used the Uponor diagram for the heating zones. It was modified to locate the manifolds for the sixteen loops in one location. A radiant design summary was produced.[32] Mr. Liles sought approval from Uponor, for the manifold location changes. He indicated that he received oral approval from an Uponor employee. He agreed that the manifold relocations have changed loop lengths which can be seen on his design summary. Uponor did not update the loop layout diagram.

He agreed that more propane would be consumed if the boiler was short cycling. However he does not recall the boiler short cycling. He believes that the propane use was not exceptional.

THE LAW

A major structural defect is defined in the Act as:

- Any defect in work or materials that results in the failure of a load-bearing part of the home's structure or materially and adversely affects its load-bearing function: or
- Any defect in work or materials that materially and adversely affects the use of the building as a home.

ANALYSIS

As previously mentioned the builder did not provide the Applicant with the Homeowner Information Package, nor did he arrange for a Pre-Delivery Inspection. Both of these are required by Builder Bulletin No. 42. When heating problems occurred during the first winter the builder had a lien on this property. This lien, which related to alleged extras, appears to have affected the involvement of Tarion. It should be recalled that this is a single storey slab-on-grade home with a hydronic heating system. The cause of the inadequate heat was not easy for the homeowner to establish.

The lien expired; however the parties are still involved in litigation. Tarion was first made aware of the heating problem on February 17, 2004 during the first winter. On the advice of his lawyer the Applicant did not wish the builder to visit the site or gain any information that would affect the pending legal dispute. These factors in combination caused Tarion not to visit the home until after the Applicant provided notice of a MSD claim by letter dated June 30, 2009.

Each winter the homeowner has had major heating system problems which he has slowly analyzed. The Applicant, who is a licenced boiler installer, supplemented his original boiler with a wood burning boiler which he located in his garage. He also added fans to circulate the warmer air. The original boiler had major problems primarily because of hoar frost caused by recycling of moist exhaust air into the intake where it froze. Mr. Liles, the heating system installer, testified that both he and Rob Boyes knew

[32] Exhibit 11

about this hoar frosting problem while they were still on the construction site. In winter this ice would soon shut down the Baxi boiler and make it necessary for someone to climb up on the snowy roof in order to chip away the hoar frost which was blocking the air intake. This would allow the boiler to be started up again and run for a few more hours before the cycle was repeated. The Applicant was often at work for the day and would come home to find a cold house and no hot water for showers etc. It should be noted that during the first winter, conditions were so bad that his wife and son had to move in with her parents who lived many miles away.

The Applicant believed that the home used much more propane than he had expected and he began to believe that the amount of insulation could be a problem. Various parties have made calculations of propane consumption during the first 45 days. This consumption evidence does not seem credible as there is only one person residing in the home with very little hot water available and a home which was difficult to keep above 60°F. Even more important the furnace only worked for a few hours after the hoar frost was removed before it turned itself off. As noted by David Liles the first winter would be the worst as the home was built in winter on frozen ground. These propane calculations are of very little value as evidence.

There was some suggestion that the water table was too high and this was causing a very large heat loss. The Applicant arranged for an excavator to dig about 100 feet of 6 foot deep trenches around his home. These trenches remained open for days. Even when some rain was experienced these trenches were soon dry. Clearly the water table can be ruled out as the cause of major heat loss.

The evidence was that in winter the snow melted around the walls of the home for about two feet and significantly more in front of the garage. This caused the Applicant to suspect that the insulation level could be contributing to the larger than expected heat loss. While the excavator was at the home digging trenches some checking of the insulation took place. There is a video taken at the front of the garage which was dug down to the bottom of the edge of the slab. It was noted that only the bottom half of the slab edge had 2 inches of Styrofoam SM (about R10) and there was only 1 inch of CodeBord (about R5) under the slab. The insulation levels had being specified by TSH. The TSH design called for R12 under the slab, R10 at the slab edge and R12 essentially horizontally around the building. This meant that much less than one-half of the required insulation was in place. One photograph shows the floor of the main part of the home shortly before the concrete was to be placed.[33] It shows an rFoil product, taped with red Tuck tape so the combination would act as a vapour retarder, which was apparently placed on top of one inch of CodeBord. The 1 inch of CodeBord is noted horizontally around the main part of the building. The manufacturer states that rFoil has an R value of 14.3 while a Canadian Mortgage and Housing Corporation investigation of slab insulation alternatives shows a value of R as 2.4 (RSI = 0.4).[34] The Ontario Building Code in section 9.25 lists eleven acceptable types of insulation and the builder's expert confirmed that rFoil is not on that list. That means this product has not

[33] Exhibit 36
[34] Exhibit 24A

been approved for use as insulation. Therefore the insulation under the slab is R5 while R12 has been specified. The insulation does not comply with the drawings or the building Code.

In the garage area, the evidence suggests that no rFoil was in place.[35] As well there was very little insulation at the edge of the slab in the vicinity of the garage doors. It is not surprising that the pressure test results indicate that two of the garage loops show no pressure remaining after 24 hours. This suggests major leaks in these tubes.

The insulation values in floor, walls and ceiling all affect the loss of heat and therefore the consumption of propane. The walls are constructed with a system that is known as insulated concrete forms (ICF) so these walls are probably close in R value to what was specified. The ceiling on the other hand was measured by an independent firm and it was found to be slightly less than one-half of the specified R40.[36] Fortunately this attic was accessible so insulation was added. Clearly it is extremely costly to add insulation under the floor slab.

For several years the Baxi boiler continued to struggle to heat this poorly insulated house. Finally in 2006 the boiler failed and the Applicant was prevented from using it. It appears that some of the ice chips from the hoar frost had fallen into the boiler controls and caused fatal damage. The Applicant called Tarion and three days later with no reply he had a new boiler installed, by Dale Tebby who is a licenced installer, as it was February and time was of the essence. It appears that Tarion employees considered the lien or even the litigation as a benefit and they should not get involved. In addition the Applicant did not want the builder involved. Evidence of one taped conversation where the Tarion representative changes her mind after consulting with management was offered at the hearing.

The Applicant observed some water slowly coming up through a crack in the middle of the garage floor slab.[37] Since the water table had been found to be much lower than the house slab the Applicant started questioning the source of this water. Indeed he noted that the heating distribution system required 4 to 6 litres of extra make-water each heating day. This is a closed system that should, rarely if ever, need make up water. This suggested leakage in the PEX tubing which distributes heat throughout the floor slab. PEX tubing is very strong and is considered resistant to freezing. This system was first filled with a solution combining bottled water with propylene glycol as it was the middle of winter and the first winter with frozen ground under the slab would be the most challenging. Evidence was given that it was the worst winter in 30 years with the temperature often reaching minus 30°C. The way that such temperatures are handled is to add propylene glycol to the water in order to make the mixture more freeze resistant. In addition the tubes are lifted to mid slab height so the concrete which surrounds the tubes resists any expansion of the PEX tubing. The Applicant believed that very little glycol solution had been added while the builder and installer testified that

[35] Exhibit 30
[36] Exhibit 21
[37] Exhibit 37

30 percent had been added. It is interesting to note specification no. 11 on the Uponor drawing states:

> 11. DO NOT ALLOW TUBING TO FREEZE' A 50% PROPOLENE GLYCOL/SOLUTION IS RECOMMENDED

Public information shows that a 30 percent solution freezes at 9° F (-13°C) while a 50 percent solution freezes at -26°F (-32°C). It is not difficult to conclude that some freezing has taken place given minus 30°C temperatures. Why did the surrounding concrete not prevent the tubing from failing? The evidence was that the installer choose not to elevate the tubes to mid slab depth as required by the TSH structural drawing S-1. In addition, the Uponor specification number 4 states:

> 4. FOR INSTALLATIONS IN CONCRETE FLOORS' THE MINIMUM COVERING FOR THE PIPE IS 1", THE MAXIMUM IS 3-4".

The replacement boiler is a NTI Trinity Lx. The Installation and Operation Instructions provide several warnings. The following one is of interest:

> Immediately repair any leaks in the system plumbing to avoid the addition of make-up water; make-up water provides a source of oxygen and minerals that may lead to heat exchanger failure.

This is interesting as the leaks and make up water may have contributed to failure of the first boiler and it may yet cause the new boiler to need replacement. One can only immediately stop using make-up water by shutting down 7 of the 16 heating system loops or locating and fixing 7 leaks at very big cost and significant delay. The solution of fixing the leaks would not resolve the inadequate insulation or the PEX loops being at the wrong elevation.

The lack of concrete cover means that the tubing is resting on the soft rFoil bubble wrap on the bottom as opposed to being elevated and therefore surrounded by far more load resistant concrete on all sides. As any leakage is replaced by water the percent propylene glycol is further reduced, thereby adding to the likelihood of freezing and even greater leaking.

The system installer, David Liles, stated that he had oral permission from Uponor to make several changes to the Uponor design including: manifold location and thus loop lengths, including several loops over 300 feet long and spacing as well as elevation of PEX tubes in the slab. It is not credible that Uponor gave such permission. For example, in the Radiant Design Summary the tube spacing is shown as 12 inches while the Uponor design calls for many tubes around the building perimeter to have 6 inch spacing. The evidence was the main door vestibule is now unheated while it is loop 4 on the Uponor drawing. The evidence strongly suggests that any Uponor warranty would be void with all these design changes. The homeowners deserve a warranty on this heating system.

In 2009 tests were conducted with representatives (engineers and technicians) from each side present. These tests revealed that 7 of 16 loops were leaking at that time. It should be noted that the problem with the leaking tubes is unrelated to the boiler being

used to heat the water. This was proved by having Uponor test the tubing which would be most affected by heat. The tests revealed that the tubing was sound and thereby not affected by any changes that the homeowner made to the heating system.

Why was water seeping up through the garage floor slab? Two loops have failed in this area and there is a crack in the concrete floor. Recall that there is little insulation and even more snow melting at the front of the garage. Since the heat can easily leave the building in this area, freezing is not at all surprising. The R value of the door is lower than the walls, so missing insulation represents an easy path for heat to escape.

There is no evidence of rFoil in the garage. Certainly it is not under the edge of the slab. This product has a sheet of aluminium foil, which is an excellent conductor, between layers of bubble wrap. Where this rFoil represents continuous strips wall to wall, as in the main part of the building, it most likely represents what is known as a thermal bridge. This would facilitate heat escaping around the edge of the building and thus contributing to the extra snow melting which the Applicant observed and photographed.

The Baxi boiler did not function properly as it turned itself off because of hoar frost. During winter in 2006 this Baxi boiler was condemned and had to be replaced.

Much of this evidence was hidden from the Applicant and therefore not obvious. It was only revealed by examining the building behaviour and court mandated pressure tests, followed by six days of testimony before this Tribunal. The following clearly differ from both the expectations of the homeowner and design specifications:

Let us indicate some of the **defects in work or materials** that have been revealed:

- the insulation value, recognized by the OBC, under the slab is only R5 while R12 is specified and this represents about 42 percent of the requirement,
- the slab edge in the area of the garage door is missing even more insulation both vertically, horizontally and under the door resulting in excessive melting,
- the attic insulation was one-half of the level specified and now has been repaired,
- the rFoil represents an excellent conductor which would act as a thermal bridge,
- the three manifolds are not located as in the Uponor design,
- the loop pressure was lowered to reduce leakage further reducing the heat,
- the elevation of the wire mesh and attached tubing is not as specified by TSH,
- the propylene glycol solution was much less than recommended resulting is a freezing point of 9°F (-13°C) while the evidence was the temperatures got down to -22°F (-30°C) while the building was being constructed,
- the required make-up water further reduces the percent of propylene/glycol in the water and may well have contributed to past or even future heat exchanger failure,
- the heating loops are not located as they were specified by Uponor,
- some of the loops are longer than the design requires thereby reducing the heat,
- the loop spacing is stated as 12 inches where design calls for 6 inches in spots

- thermal imaging reveals much variation in the distance between adjacent tubes,
- the likelihood of Uponor warranting this heating system is very remote,
- regarding the cause of the leaking: it is most likely that these leaks occurred in the first winter which was very cold and the ground was initially frozen, and
- the court ordered tests which were conducted jointly by both parties, recently revealed 7 of 16 loops are now leaking.

This series of defects in work and materials have **materially and adversely affected the use of the building** in the following ways:

- the home was so cold that the wife and son of the Applicant had to move out during the first winter,
- the homeowner had to climb up on the snowy roof to make the boiler function during the time when the Baxi boiler was installed,
- there was often no hot water for showers, dishes or laundry,
- the Applicant had to add a wood stove to make the home warm enough to get through the winters and this represents on-going labour and giving up part of the garage until these heating problems are addressed,
- seven of sixteen loops which were designed to heat the home are not working according to court ordered testing,
- the vestibule of this new home has no provision for heat,
- the operating instructions advise against using make-up water because of damage to the existing boiler heat exchanger, therefore 7 loops should be taken out of service at this time,
- parts of the home above the seven leaking loops should be turned off and therefore be cold while the other nine loops attempt to heat the areas above them despite inadequate insulation,
- the owners have to wear slippers because of the cold portions of their floor.

DECISION

For the reasons stated above, and pursuant to the authority vested in it by section 16(3) of the Act, this Tribunal makes the following order. The Tribunal orders that Tarion's decision to disallow the Applicant's claim be set aside and the Tribunal directs Tarion as follows:

Tarion is directed to perform the following remedial works to remove the faulty heat distribution system and deficient insulation. The Applicants should receive, properly installed in the home, a replacement heating distribution system together with insulation as specified that complies with the Ontario Building Code, the Totten Sims Hubicki engineered drawings as well as the specifications and drawing of Uponor for the radiant heat layout. This system should be constructed so it will provide adequate heat to the entire home and be capable of receiving an Uponor warranty. The Builder has indicated that it is willing to do any work which is the warranted, and as necessary consequence bear the costs. For the reasons above, the Builder should be willing to provide the funds needed, but in view of the ongoing litigation between the parties, Tarion should

respect the wishes of the Applicants that an independent third party be hired to do the actual remedial work.

The Applicant provided notice to the parties of his intention to seek costs according to section 14 of the Tribunal's Rules of Practice. The Tribunal dismisses the claim.

This order does not deal with secondary damages that may be suffered by the family while extensive slab replacement and installation of the remedial works occurs.

LICENCE APPEAL TRIBUNAL

_____
Ken Selby, presiding Member

RELEASED: September 28, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5812-ONHWPA-CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TRIBUNAL: PATRICIA L. CASSIDY, Vice-Chair

APPEARANCES: FAMILY MEMBERS OF THE APPLICANTS, Agents, representing the Applicants

JOSEPH KENNEDY, Counsel, representing Tarion Warranty Corporation

LUC S. BOCK, Agent, representing L.S. Bock Developments Inc., the Added Party

DATES OF HEARING: June 9, 10 and August 4, 2010 Sudbury

REASONS FOR DECISION AND ORDER

BACKGROUND

By Notice of Appeal dated December 12, 2009, the Applicants by their representatives appealed the Decision Letter issued by Tarion Warranty Corporation ("Tarion") dated October 23, 2009. The Decision letter was entered as Exhibit #1 and the Notice of Appeal was entered as Exhibit #2 in this hearing. Essentially, these documents deal with the following:

1. The Applicants entered into a contract to purchase a new home located in a small community in northern Ontario. They paid a deposit to the Added Party vendor, L.S. Bock Developments Inc., in the sum of $27,000.00 towards the purchase of the home.

2. On consent, the closing date for the transaction was extended several times and a final closing date was eventually agreed to be December 12, 2007.

3. A dispute arose between the Applicants and the Added Party vendor regarding the amount of money required to finalize the purchase of the home, and, when no satisfactory resolution was reached, the transaction did not close and the Applicants never did acquire title to the home.

4. The Added Party vendor subsequently sold the home to another party and title was transferred to them.

5. The Applicants commenced a civil action in the Ontario Superior Court of Justice against the Added Party. That action was ultimately settled, on consent, and a Release was signed releasing the Added Party vendor from any and all causes of action, claims, demands for damages for financial loss or compensation of any nature or kind relating to the action.

6. The Applicants then made these claims against the *Ontario New Home Warranties Plan Act* (the "Act") for a deposit refund under section 14(1) of the Act, and for delayed closing compensation under section 2 of O. Reg. 165/08 under the Act.

7. Tarion determined that the Applicants were not entitled to a deposit refund or to delayed closing compensation under the Act.

THE EVIDENCE

The following were not contested and are found as facts:

1. The Applicants, pursuant to an Agreement of Purchase and Sale dated July 4, 2007, agreed to purchase a new home from the Added Party, L.S. Bock Developments Inc., within a municipality located in northern Ontario.

2. The Applicants paid the Added Party a deposit of $27,000.00 towards the purchase of the home.

3. The original closing date for the real estate transaction was October 31, 2007; however, that date for closing was extended, on consent, several times. Ultimately, the date for closing the real estate transaction was set for December 12, 2007, again, on consent.

4. A dispute arose between the Applicants and the Added Party regarding the amount of money due to the Added Party on closing, and, when they were unable to resolve the dispute, the transaction did not close and the Applicants did not ever acquire title to the home.

5. The Added Party vendor listed the subject property for sale, the home was sold and title was taken by the current owners, who are not parties to this appeal.

6. The Applicants commenced an action in the Ontario Superior Court of Justice, by Statement of Claim issued on December 18, 2007, claiming, among other things, general damages of $150,000.00. The Statement of Claim made specific reference to the deposit paid to the Added Party vendor in the amount of $27,000.00.

7. The Applicants and the Added Party vendor were both represented by counsel in the Ontario Superior Court action, and, ultimately, they resolved that action on consent. Pursuant to the Consent filed with the court, an order was issued providing that the Applicants would receive the sum of $60,000.00 out of monies which had been paid into court by the Added Party vendor.

8. On October 23, 2008, the Applicants signed a Full and Final Release, wherein they acknowledged receiving the settlement funds of $60,000.00 from the Added Party vendor. In addition, the Release provided that the Added Party vendor was released from any and all actions, causes of action, claims, demands for damages for financial loss or compensation of any nature or kind whatsoever relating to the action. In signing the Release, the Applicants also agreed not to make any claims or commence any proceedings with respect to any matter released and discharged, which might result in any claim against the Added Party vendor for contribution or indemnity or other relief. Further, in signing the Release, the Applicants declared that they fully understood the terms of the settlement and the $60,000.00 settlement funds received was accepted by them in full and final settlement of any and all claims they might have against the Added Party vendor. The Release did not preserve the Applicants' rights to pursue any claim of any kind against the Added Party vendor; it was a full and final release.

9. At all material times, during the negotiation and execution of the settlement, the Applicants were represented by counsel and assisted by their daughter and her husband.

A great deal of evidence was received by the Tribunal over three full days of the hearing of this appeal. Although the male Applicant did not participate in the hearing, the female Applicant was present throughout the hearing and testified. In addition to the female Applicant, a total of eight witnesses testified at this hearing. The witnesses who testified included Mr. Denis Michel, Barrister and Solicitor, who represented the Applicants in their failed attempt to purchase the subject property from the Added Party vendor and who also, represented the Applicants in the civil suit they brought against the Added Party vendor at the Ontario Superior Court of Justice. Mr. Leo Arseneau, Barrister and Solicitor, who represented the Added Party in defending the claim brought by the Applicants herein at the Ontario Superior Court of Justice also testified. In addition to the evidence received through oral testimony given by witnesses, this Tribunal also received considerable documentary evidence which was filed and entered as Exhibits #1 through #10 in this proceeding.

Denis Michel is a lawyer in Sudbury, Ontario, and represented the Applicants in their attempt to purchase the subject property from the Added Party. He testified that he drafted and had the Statement of Claim issued at the Ontario Superior Court of Justice, wherein the Applicants sued the Added Party for damages over the failed real estate transaction. In his evidence, Mr. Michel acknowledged he never advised or indicated to Mr. Arseneau that his clients would be making a claim to Tarion. Mr. Michel also confirmed, in his testimony, that he took the Applicants' oath for the proof of claim submitted to Tarion on October 24, 2008, one day after they had completed the Full and Final Release settling the civil claim before the Ontario Superior Court of Justice.

Leo Arseneau is also a lawyer in Sudbury, Ontario. He was admitted to the bar in Ontario in 1979, and has been practicing law for more than 30 years. He represented the Added Party, L.S. Bock Developments Inc., in the civil action brought against it by the Applicants, which resulted in the payment of $60,000.00 to the Applicants. Mr. Arseneau testified that the settlement was "all inclusive" and that it included the $27,000.00 deposit paid by the Applicants to the Added Party vendor. He stated that he never received any correspondence from the Applicants or on their behalf, advising that the $60,000.00 settlement did not include the deposit, nor did he ever receive any correspondence stating that the Applicants wanted to preserve their right to make a claim against Tarion.

Mr. Arseneau testified that he had drafted the Full and Final Release executed by the parties to settle the Ontario Superior Court action commenced by the Applicants against the Added Party vendor and that neither the Applicants nor their lawyer requested any changes to the Release at any time. Mr. Arseneau elaborated that the terms of the Full and Final Release clearly indicated that it was a final settlement and the Release precluded the Applicants from making any further claims against the Added Party or the Respondent because of the contribution and indemnity provision contained in the Release.

The female Applicant testified for many hours, in which she reviewed the difficulties she and her husband encountered in their attempt to finalize the real estate transaction they had hoped to close with the Added Party, for ownership of the property in a small community located in northern Ontario. In her testimony, the female Applicant acknowledged that neither she nor her husband ever owned the property and she also confirmed her understanding that the Act required her to be an owner to be entitled to compensation for delayed closing.

Although the female Applicant truly believed that she was entitled to the return of the deposit of $27,000.00 paid to the Added Party, she admitted that she had nothing in writing to support her belief that the deposit would be protected. She admitted that she had read, understood and signed the Full and Final Release and that she understands that the phrase "all inclusive" contained therein means "everything".

Notwithstanding these admissions, the female Applicant testified that she believed the advice she received that, even if she accepted the $60,000.00 settlement funds to resolve the Ontario Superior Court action, she could still make a claim to Tarion. She confirmed that she signed the Tarion proof of claim after signing the Full and Final Release settling the Ontario Superior Court action.

The female Applicant admitted that, on the original date scheduled for closing the real estate transaction of October 31, 2007, the Applicants did not tender funds or documents, and that on the last scheduled closing date in December 2007, they did not tender the funds requested by the vendor.

During the presentation of the Applicants' case, a great deal of time was spent on the issue of whether or not the addendum to the Agreement of Purchase and Sale had ever been presented to the Applicants. In her testimony, the female Applicant acknowledged that the addendum had never been requisitioned on their behalf, and, she admitted that in December 2007, she would have purchased the property regardless of whether or not the addendum had formed part of the Agreement of Purchase and Sale. She acknowledged that, to the best of her recollection, neither she nor her counsel ever asked about it and she acknowledged having received the Tarion Homeowner's Information Package in December 2007.

Although there were broad allegations made that the builder/vendor had breached provisions of the Agreement of Purchase and Sale, the female Applicant could not identify what provisions of the Agreement the Added Party allegedly breached.

The undisputed facts include the fact that the Applicants never owned the property located in northern Ontario. Title to the home was not transferred to the Applicants because there was no agreement on the amount of funds due to the vendor on closing. The Applicants did not tender the funds required by the vendor and title to the property never passed to them. Subsequent to the failed closing, the Applicants initiated a civil suit against the Added Party, which ultimately settled on consent. The settlement included the payment of the sum of $60,000.00 to the Applicants by the Added Party in exchange for which the Applicants provided the Added Party with a Full and Final Release. It is not necessary to review and summarize the totality of the evidence received during this appeal in light of the undisputed facts.

THE LAW

The Act contains the following relevant provisions:

Definitions

1. In this Act,

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner;

"home" means,

(a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,…

"owner" means a person who first acquires a home from its vendor for occupancy, and the person's successors in title;

Warranties

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

Application of warranties

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Compensation

14. (1) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

(a) the person has exercised a statutory right to rescind the contract before closing; or

(b) the person has a cause of action against the vendor resulting from the fact that title to the home has not been transferred to the person because,

(i) the vendor has gone into bankruptcy, or

(ii) the vendor has fundamentally breached the contract.

14. (6) In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source.

Notice of decision under s. 14

16. (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

Powers of Tribunal

16. (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

APPLICATION OF LAW TO FACTS

To succeed with their claim for a refund of the deposit paid, the Applicants have the burden of proving the elements required by section 14(1) of the Act have been satisfied. To qualify for warranty coverage, an applicant must first prove each of the requirements of that section and the Applicants herein have failed to do that. On the facts, there was no statutory right for the Applicants to rescind the contract of purchase and sale which they entered into with L.S. Bock Developments Inc., and there was no allegation they attempted to in any event.

Further, title to the home was not transferred to the Applicants because of a dispute between them and the Added Party vendor over the funds required to close the transaction. It was not a case of the vendor having gone bankrupt or of it having breached the contract as contemplated by the Act. They disagreed on the amount due on closing and, consequently, the transaction never closed and the vendor subsequently sold the home to the current owners who are not parties in this appeal.

To be entitled to delayed closing compensation, the Applicants must prove that they are owners as defined by section 1 of the Act, but they are not, and, in fact, never were owners of the subject property. Consequently, the Applicants are not entitled to delayed closing costs.

Section 14(6) of the Act requires Tarion to consider any compensation or benefits available from any source. The undisputed fact is that the Applicants accepted the sum of $60,000.00 from the Added Party vendor, and, in exchange for having received those funds they signed a Full and Final Release. It is notable that prior to executing the Full and Final Release, the Applicants had received independent legal advice from a lawyer of their choosing who was fully cognizant of the events leading up to the execution of that Release, given that he had been involved as the Applicants' legal counsel in the aborted real estate transaction and had also represented the Applicants in the civil suit launched at the Ontario Superior Court of Justice. After receiving independent legal advice, the Applicants signed the Full and Final Release and did not preserve any rights to pursue the return of the deposit paid to the Added Party.

The $60,000.00 settlement of the action commenced at the Ontario Superior Court of Justice, which the Applicants accepted in full and final settlement of all claims they had or might have had against the Added Party, is a benefit as contemplated by section 14(6) of the Act.

Section 13(6) of the Act deals with the application of warranties which are set out in section 13(1) of the Act. Neither the return of deposit funds paid nor delayed closing costs are warranties under the Act. The warranties identified in the Act and the Regulations to it relate to construction and not the issues raised by the Applicants in this appeal. Section 13(6) of the Act does not apply to this case.

This is a very unfortunate situation. There is no question that this ordeal has been a difficult one for all of the parties involved. They have all suffered a great deal of emotional and financial strain coming to this point. The reality is that the Release executed by the Applicants is a standard full and final release. There is nothing ambiguous or unclear about it. The Applicants, upon receiving independent legal advice, knew or ought to have known, that all matters at issue between them and the Added Party were resolved. The undisputed facts are that, in addition to the fact that the Applicants never were owners of the property as contemplated by the Act, nobody, at any time, gave notice of intent to preserve any entitlement to make any claims to Tarion. The clear and unambiguous language in the Full and Final Release precludes the Applicants from recovering any further compensation such as they seek in this appeal.

ORDER

For the reasons outlined above, the Tribunal, pursuant to the authority vested in it by section 16(3) of the Act directs Tarion to disallow this claim.

LICENCE APPEAL TRIBUNAL

_____
Patricia L. Cassidy, Vice-Chair

RELEASED: September 24, 2010

This decision may also be available on Quicklaw.

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Decisions under the Ontario New Home Warranties Plan Act

Fiscal Year 2010- 2011, October - December

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- 5919 – ONHWPA - Claim
- 6134-ONHWPA-Claim
- 6123-ONHWPA-Claim
- 6013–ONHWPA–Claim
- Rocket Homes & Property Management Inc.
- 5487 – ONHWPA – Claim
- 5853 – ONHWPA – Claim

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6134-ONHWPA-CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: KEN SELBY, Presiding Member

APPEARANCES: THE APPLICANT, Self-represented

DAVID OUTERBRIDGE, Counsel, representing Tarion Warranty Corporation

RON PROTOCKY, Agent, representing Arista Homes (Boxgrove) Inc., the Added Party

DATE OF HEARING: October 12, 2010 Toronto

DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal (the "Tribunal"), by the Applicant, from a decision of Tarion Warranty Corporation ("Tarion") set out in the Decision Letter dated June 4, 2010 which denied the request for a conciliation inspection. This appeal is instituted under the authority of section 16(3) of the *Ontario New Home Warranties Plan Act,* R.S.O. 1990, c. O.31 (the "Act").

With prior notice, Tarion brought a motion to dismiss the Applicant's appeal on the basis that the Applicant's request for conciliation was statute barred by s. 4.3 of Regulation 892 under the Act.

This decision will only deal with Tarion's motion to dismiss the Applicant's appeal.

BACKGROUND

The home of the Applicant was first occupied on the 15th of January 2008. A Year-End Form, which listed a number of claims of the homeowners, was delivered to Tarion in December 2008.[1] The builder dealt with most of these items within the 120 day period required by s. 4.3 of Regulation 892 under the Act. The colour of the brick used in the home was the one item that remained outstanding. Brick colour is the only item which the Applicant was appealing at this hearing.

On May 15, 2007, the Applicant completed a Client Exterior Colour Package Preference which indicated the homeowner's first, second and third choices for brick colour.[2] The Applicant believes that she was assured by Ange, an employee of the Added Party, that it was not too late to choose the brick colour for their home. On September 5, 2007, over three months later, the homeowners discovered that bricks other than any of those they chose were being installed on their home.

EVIDENCE

The Applicant ultimately requested a conciliation inspection by Tarion regarding the brick colour. The Homeowner Information Package as well as two letters from Tarion made it clear that homeowners have one month following the 120 days that the builder has to deal with the items listed on the Year-End Form. Both of these letters indicate that the Applicant must request a conciliation inspection between May 16, 2009 and June 15, 2009, if Tarion was to become involved.[3]

The evidence was that the Applicant made a telephone call to Tarion about one week after the deadline while the Respondent indicated that the written request for a conciliation inspection was about two months late.

THE LAW

Sections 4.3(8), 4.3(9) and 4.3(10) of the regulation 892 read as follows:

> (8) Subject to subsection (9) and section 5.1, if a home has a date of possession on or after September 1, 2005 and if an owner submits a year-end form to the Corporation with respect to the home during the year-end claim period, the vendor shall have until the end of the 150th day after the first anniversary of the date of possession to repair or resolve the claim items that are listed on the form that are covered by a warranty. O. Reg. 483/05, s. 5; O. Reg. 9/09, s.4.
>
> (9) If the vendor does not repair or resolve all of the claim items listed on the year-end form mentioned in subsection (7) by the end of the 150th day after the first anniversary of the date of possession, the owner may request a conciliation by contacting the

[1] Exhibit 3 Tab 5
[2] Exhibit 4 Pg 9 and 10
[3] Exhibit 3 Tab 2 K and M

> Corporation at any time from the 121st day to the 150th day, both inclusive, after the first anniversary of the date of possession. O. Reg. 483/05, s. 5.
>
> (10) If the owner does not request conciliation under subsection (9) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the year-end form that the vendor does not repair or resolve by the end of the 150th day after the first anniversary of the date of possession. O. Reg. 483/05, s. 5.

DECISION

The Applicant did not request a conciliation inspection within the prescribed time limit required by the Act. Pursuant to the authority vested in it by section 16(3) of the Act, this Tribunal orders that the Applicant's claim is out of time.

LICENCE APPEAL TRIBUNAL

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Ken Selby, Presiding Member

RELEASED: November 8, 2010

This decision, may also be available on Quicklaw.

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

6123-ONHWPA-CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: KEN SELBY, Member

APPEARANCES: THE APPLICANT, unrepresented

SCOTT KIRKPATRICK, Counsel, representing Tarion Warranty Corporation

DATE OF HEARING: November 8, 2010 Toronto

DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by the Applicant from a decision of Tarion Warranty Corporation ("Tarion") set out in the Decision Letter dated June 2, 2010, which indicates three items are being appealed.[1] Item 3 has subsequently been resolved so only items 1 and 2 are being appealed. This appeal is instituted under the authority of section 16(3) of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "Act").

BACKGROUND

The date of possession of the home was October 24, 2008. The Applicant purchased the home from the original purchaser about 10 months after it was initially occupied. Many items on the Year End list were warranted and have now been resolved. The two items being appealed are (i) seven cracked tiles in the bathroom and (ii) a visible ridge in the hardwood flooring.

[1] Exhibit #1

FACTS

1. The parties agree that seven tiles are cracked in the bathroom. The cracks appear to be in random locations. The questions are: when did these cracks occur and what caused them?

The Applicant believes that the cracks occurred during the construction process. He noted that the contractor is no longer in business. He spotted a few white spots in the narrow cracks between the two pieces of a given tile. The Applicant speculated that some of the thin set mortar had flowed up between the pieces as the second piece of a broken tile was being installed. In addition, the Applicant noted some colour changes along these cracks, which suggested some remedial work has taken place.

2. The parties agree that there is a noticeable ridge in the hardwood floor.

The Applicant stated that the floor squeaked in this area and referenced section 2.6 of the Construction Performance Guidelines ("CPG"), which deals with floor squeaks. The Tarion representative had not noted any floor squeak.

THE LAW

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code.

ISSUES

Do the cracked tiles and/or the hardwood ridge constitute material defects or poor workmanship?

Many items are covered by the First Year Warranty. The homeowner bears the onus of proving that the claim is covered by the warranty set out in the statute, and he must do so on the balance of probabilities.

EVIDENCE

The Tarion Field Claim Representative noted that these cracked tiles were not noted on the Pre-Delivery Inspection Form. The evidence also was that the Applicant did not note these cracks prior to purchasing the home.

The Tarion representative suggested that the previous owner may have attempted to make these cracks look less obvious prior to selling his home. It appeared that the cracks had received some grout material, which tended to make the cracks less obvious.

Section 12.2 of the CPG states that such ridges or depressions in hardwood flooring are warranted, if and only if, they exceed ±6 mm. The Applicant participated in the test recommended in Appendix 4 of the CPG, which determined that the ridge in question was only 5 mm above the plane of reference.

The Tarion representative indicated that section 2.6 of the CPG relates to floor squeaks associated with poor connections in the floor framing system. There was no evidence of loose connections in the floor framing system.

APPLICATION OF LAW TO FACTS

If the cracked tiles were caused by the builder, they should have been obvious to the original homeowner. One would expect that they would have been noted on the Pre-Delivery Inspection Form. Since repairs appear to have occurred, it seems that the original homeowner was trying to hide these cracked tiles from any potential buyers. The Applicant was unable to meet the onus of proof that the vendor was responsible for these seven cracked tiles.

The ridge in the hardwood floor only measured 5 mm and did not meet the threshold for a warranty repair.

ORDER

For the lack of evidence and pursuant to the authority vested in it by section 16(3) of the Act, this Tribunal directs Tarion to disallow the claims of the Applicant.

LICENCE APPEAL TRIBUNAL

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Ken Selby, Member

RELEASED: November 29, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6013–ONHWPA–CLAIM

AN APPEAL OF DECISIONS OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c.O.31

TO DISALLOW CLAIMS

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: The Applicants, self-represented,

BRENT ARNOLD, Counsel, representing Tarion Warranty Corporation

GARY GREWAL, Agent, representing Northridge Homes Ltd., the Added Party

DATES OF PRE-HEARING: June 29, 2010, August 18, 2010
November 19, 2010 Toronto

ORDER

The pre-hearing in this matter resumed on November 19, 2010 in Toronto before this Tribunal in the presence of the Applicants, who are self-represented, Mr. Arnold, Counsel, representing Tarion Warranty Corporation ("Tarion") and Mr. Grewal, agent, representing Northridge Homes Ltd.("Northridge Homes"), the builder and Added party. The Applicants' names will not be used in this Order to preserve their privacy; they will be referred to as the "Homeowners".

Four Decision Letters have now been issued by Tarion and they are being consolidated in this appeal. At the pre-hearing, the Homeowners reviewed each of the Decision Letters and advised which claims they intend to pursue and which are being withdrawn. The status of these claims are summarised on the tables below. The Claim references are those used by Tarion in its Decision Letters.

Decision Letter dated March 24, 2010

Claim Withdrawn	Claim Appealed
3) Claim (18) (7)	1) Claim (1) (17)
4) Claim (23) (23)	2) Claim (8) (6)
5) Claim (41) (41)	
6) Claim (45) (45)	
7) Claim (46) (46)	
8) Claim (51) (51)	
9) Claim (53) (53)	

Decision Letter dated July 9, 2010

Claim Withdrawn	Claim Appealed
14) Claim (Owner form #5)	2) Claim – Windows not closing properly

Decision Letter dated October 14, 2010

Claim Withdrawn	Claim Withdrawn	Claim Appealed
1) Claim (18)	3) Claim (2)	2) Claim (1)
4) Claim (3)	5) Claim (4)	7) Claim (8)
6) Claim (5)		8) Claim (9)
10) Claim (11)	11) Claim (12)	9) Claim (10)
13) Claim (14)	14) Claim (15)	12) Claim (13)
15) Claim (16)	16) Claim (19)	
17) Claim (20)	18) Claim (21)	
19) Claim (22)	20) Claim (24)	
21) Claim (25)	22) Claim (26)	
23) Claim (27)	24) Claim (28)	
25) Claim (29)	26) Claim (30)	
27) Claim (30)	28) Claim (32)	
29) Claim (33)	30) Claim (34)	
31) Claim (35)	32) Claim (36)	
33) Claim (37)	34) Claim (38)	
35) Claim (39)	36) Claim (40)	
37) Claim (42)	38) Claim (43)	
39) Claim (44)	40) Claim (47)	41) Claim (48)
42) Claim (49)	43) Claim (50)	
44) Claim (52)	45) Claim (54)	

Decision Letter dated October 27, 2010

Claim Withdrawn	Claim Appealed
	1) Claim Homeowner Form #3
2) Claim Homeowner Form #4	3) Claim Homeowner Form #7
Claim Withdrawn	Claim Appealed
	4) Claim Homeowner Form #8
	5) Claim Homeowner Form #1
6) Claim Homeowner Form #3	7) Claim Homeowner Form #4
	8) Claim Homeowner Form #7
	9) Claim Homeowner Form #8
	10) Claim Homeowner Form #9
	11) Claim Homeowner Form #10
12) Claim Homeowner Form #11	13) Claim Homeowner Form #12
	14) Claim Homeowner Form # 2C
	15) Claim Homeowner Form #1
	16) Claim Homeowner Form #2B
17) Claim Homeowner Form #5	18) Claim Homeowner Form #6
19) Claim Homeowner Form #2	

The claims that are being pursued may be broadly categorised under the following subject matters. The numbers used are those used by Tarion to identify the claims.

Roof	Windows	Structural	Floor	Other
March 24, 2010 Decision Letter				
Claim 2)				Claim 1) – Finish Grading
July 9, 2010 Decision Letter				
	Claim 2)			
Oct 14, 2010 Decision Letter				
	Claim 12)	Claim 2) 7)	Claim 41)	Claims 8) 9) - Bricks
Oct 27, 2010 Decision Letter				
Claim 9)	Claim 14) 16)	Claim 3) 5) 7) 8) 15) 18)		Claim 1) 4) 10) 13) – Electrical Safety
				Claim 11) – Leak & Cold

The Homeowners assert that there are structural and other problems with the house which may require an expert investigation. There was some discussion of the case of *Cecilio v Tarion Warranty Corp.* [2007] O.J. No. 1692, a decision of the Divisional Court, and the ramifications of that case on the question of who should conduct such expert investigations, who should pay for them and who should have access to the results. The Homeowners, being self-represented, can not be expected to be aware of the case. In *Cecilio*, the homeowner complained of sounds coming through the wall he shared with his neighbour. Mr. Cecilio was able to demonstrate that the common wall had not been constructed in accordance with the Ontario Building Code and the question was who should bear the cost, which was substantial, of conducting an investigation of the sound resisting qualities of the wall. The Divisional Court decided that in the circumstances of the case, it was not appropriate for Tarion to do the testing. The Divisional Court returned the matter to the Tribunal to determine whether the homeowner or the builder should conduct the sound testing.

If the Homeowners in the present case believe that they can demonstrate clearly that there is good reason to think that further expert investigation is required on any of their complaints, then they may bring a motion to the Tribunal requesting that Northridge Homes undertake the necessary investigation and the Tribunal will determine which party should conduct the investigation, which party should pay for it and which parties should have access to the resulting report. The Tribunal may be approached regarding the procedures to be followed in bringing such a motion.

The Homeowners are reminded that in the hearing of this matter, they are required to prove for each of the claims they are appealing that, on the balance of probabilities:

1. A warranty contained in the *Ontario New Home Warranties Plan Act* has been breached;
2. The Homeowners have sustained damages as a result of the this breach, and
3. What the cost of repairing each item claimed will be.

The Tribunal makes the following Order:

1. If the Homeowners wish to rely on any quotations, expert reports or other documents at the hearing that they have not previously disclosed to the other parties, then they must disclose these by February 1, 2011. The Homeowners are referred to Rule 6 of the Tribunal's Rules of Practice for the specific requirements of disclosure of expert reports.

2. The other parties will have until February 14, 2011 to disclose any documents, including any expert reports, on which they intend to rely at the hearing and which have not been previously disclosed.

3. This hearing in the matter will commence on **March 1, 2011** at **9:30** a.m. at the Tribunal's Chambers, 1 St. Clair Ave. West, Toronto, Ontario and will continue, if necessary, on March 3rd, 4th, 9th and 10th.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice Chair

Released: November 25, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

ROCKET HOMES & PROPERTY MANAGEMENT INC.

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: SHANE KAZUSHNER, Counsel, representing Rocket Homes & Property Management Inc.

R. MATTHEW BARTEAUX, Counsel, representing the Registrar, *Ontario New Home Warranties Plan Act*

DATES OF HEARING: August 18, 20, 23 and October 27, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This appeal is brought by Rocket Homes & Property Management Inc. (the "Applicant") under section 9 of the *Ontario New Home Warranties Plan Act* (the "Act") from the Registrar's Notice of Proposal ("NOP") of October 14, 2009, as amended by Supplemental NOPs of March 29, 2010 and July 16, 2010, to refuse to renew the registration of the Applicant.

The Registrar advanced the following six reasons in support of his NOPs:

1. Pursuant to s. 7(1)(c)(i) of the Act, the Registrar finds that the registrant cannot reasonably be expected to be financially responsible in the conduct of the registrant's undertakings. Specifically:

    a) the financial information provided by the registrant discloses that it has insufficient equity;

2. Pursuant to s. 7(1)(c)(i) of the Act, the Registrar finds that the registrant cannot reasonably be expected to be financially responsible in the conduct of the registrant's undertakings. Further or in the alternative, the Registrar finds that the registrant has failed to comply with the requirements of s. 10(3) of Regulation 892. Further or in the alternative, pursuant to s. 8(2) of the Act, the Registrar finds that the registrant is in breach of a term and condition of registration. Specifically:

    a) the registrant has failed to provide financial statements as required by s. 10(3) of Regulation 892, and s. 1.0.3, s. 1.3.1(iii) and s. 1.6 of Regulation 894 and s. 1.3 of the Vendor Agreement and/or s. 1.4 of the Builder Agreement and requested by correspondence dated September 9, 2009 and September 23, 2009.

3. Pursuant to s. 8(2) of the Act, the Registrar finds that the registrant has a record of breach of warranty and is in breach of the term and condition of registration. Specifically:

    a) the registrant breached the warranties under s. 13 of the Act for certain homes and thereby breached the term and condition of registration prescribed by s. 1.3 of Regulation 894.

4. Pursuant to s. 7(1)(d) of the Act, the Registrar finds that the registrant does not have sufficient technical competence to consistently perform the warranties. Specifically:

    a) the registrant has a high ratio of 5 chargeable conciliations to 22 possessions and has demonstrated poor after-sales service for the homes.

5. Pursuant to s. 7(1)(c)(ii) of the Act, the Registrar finds that the past conduct of the registrant and/or its officers and/or director affords reasonable grounds for belief that the registrant will not carry on the registrant's undertakings in accordance with law and with integrity and honesty. Specifically:

    a) the applicant failed to enroll, in a timely manner, multiple homes and thereby contravened s. 12 of the Act.

6. Pursuant to s. 7(1)(c)(ii) of the Act, the Registrar finds the past conduct of the applicant and/or its officers and/or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty. Further or in the alternative, the Registrar finds that the applicant has failed to comply with the requirements of s. 2(6) of Regulation 892. Further or in the alternative, pursuant to s. 8(2) of the Act, the Registrar finds that the applicant is in breach of a term and condition of registration. Specifically:

a) the applicant has failed to provide to the Corporation within 15 days from the date of possession of each home sold the completed and signed forms as required by s. 2 paragraph 5 of Regulation 892.

b) the registrant failed to inform Tarion that their status as an Ontario corporation was cancelled on January 21, 2008 at the request of the Corporations Tax Branch, Ministry of Finance.

The Respondent Tarion Warranty Corporation ("Tarion") called five witnesses and filed three volumes of documents. The Applicant called two witnesses and filed a volume of documents.

PROVEN FACTS

There are a number of facts and events which are not in dispute. Accordingly, the Tribunal finds the following to be proven facts:

Ranjay Singh ("Mr. Singh") is the sole officer, director and shareholder of the Applicant. The Applicant was incorporated on October 2, 2002. It was dissolved at the request of the Ministry of Finance of Ontario on January 21, 2008. The charter of the Applicant was revived on May 13, 2010.

The Applicant signed Tarion's standard Vendor Agreement and Builder Agreement on May 26, 2005.

Mr. Singh signed Tarion's standard indemnity agreement on May 24, 2005, in which he agreed to indemnify Tarion for up to $40,000.00. This agreement lapsed in May 2010.

The Applicant has had 5 chargeable conciliations to 22 possessions.

Tarion settled with five homeowners for $9,478.21 in respect of those chargeable conciliations. The Applicant fully reimbursed Tarion for this amount but not until after the pre-hearing in this matter.

Tarion holds $75,000.00 in security from the Applicant.

No one from the Applicant attended any of the scheduled conciliation or claim inspections to consider homeowners' complaints.

The Applicant signed "Conditions of Registration" with Tarion on March 5, 2009. In April 2009, the Applicant enrolled two homes late with Tarion.

The Applicant was late in filing its 2008 financial statements with Tarion. It has yet to file its 2009 financial statements.

PRELIMINARY MATTERS

Mr. Kazushner appeared on behalf of the Applicant at the opening of the hearing on Wednesday, August 18, 2010. He requested a short adjournment to August 30, 2010, because of an "emergency" of Mr. Campbell, the original counsel for the Applicant.

Mr. Barteaux, for Tarion, opposed the application on the following grounds:

1. The Applicant had not complied with the Rules of the Tribunal[1] as no notice had been given nor any materials filed.

2. The hearing had already been adjourned twice[2], the second time to accommodate Mr. Campbell.

3. Mr. Kazushner was unable to tell the Tribunal what the nature of Mr. Campbell's "emergency" was.

In these circumstances, the Tribunal reluctantly granted an adjournment to Friday, August 20, 2010.

THE CASE FOR TARION

The Respondent called three Field Claim Representatives and a Contractual Claims Analyst as witnesses to testify in respect to the five chargeable conciliations:

Home 1 (2007) - loose siding
Home 2 (2009) - water penetrating through basement
Home 3 (2008/2009) - five unrepaired warranted items
Home 4 (2009) - fourteen warranted items
Home 5 (2009/2010) - delayed closing claim

In all cases the Applicant completely ignored Tarion's notices and ultimately caused Tarion to cash settle directly with the homeowners.

Tarion informed the Applicant when a conciliation was chargeable and said, "If you do not agree with Tarion's findings, you may have the opportunity to commence arbitration under the Builder Arbitration Forum ...". The Applicant did not do so.

Brian Hama

He was sworn and testified that he is a senior licensing and underwriting analyst with Tarion. He is responsible for risk assessment on larger builders and problematic ones.

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1 Rule 12 of the Tribunal's Rules of Practice
2 Exhibit #6, Tab 7

He is very familiar with the Applicant and Mr. Singh. His testimony is summarized as follows:

He pointed to a letter dated January 23, 2009,[3] from Tarion to the Applicant, setting out the conditions under which the Registrar was prepared to renew the registration of the Applicant. The Applicant did not sign and return this until March 5, 2009. Mr. Hama referred to paragraph 3 and noted his concerns about poor after-sales service by the Applicant.

He also referred to the Builder Agreement[4] and the Vendor Agreement[5] signed by the Applicant with Tarion. He pointed out a number of paragraphs in those documents and how the Applicant had been in breach, e.g., paragraph 1.6 of the Builder Agreement which required the Applicant to communicate any fact that could have a material adverse effect on the Applicant's ability to carry out any warranty work. He testified that it was Tarion that discovered that the charter of the Applicant had been revoked.

He conducted a risk assessment of the Applicant and obtained a credit report on the Applicant. As a result, Tarion was concerned about the financial state of the Applicant and Mr. Singh. The Applicant, despite numerous requests, did not file its financial statements for 2008 until recently. Moreover, those statements were woefully inadequate. They are unaudited, "notice to reader" type, unsigned, and with no indication as to who had prepared them.

Mr. Singh appeared to have virtually all of his assets tied up in real estate of questionable value and had no financial liquidity.

According to Mr. Hama, five chargeable conciliations in 22 possessions were far in excess of the provincial average and raised a red flag to him about the Applicant and Mr. Singh.

He informed the Tribunal that two of these occurred after the pre-hearing in this matter.

The Applicant enrolled two homes late, only one month after agreeing, among other things, not to do so.

He referred to documents[6], being four pages of Administrative Statistics Summary prepared by Tarion, which showed that in one case, the Applicant was 357 days late in enrolling a home.

He felt that the Applicant did not have sufficient equity or technical competence to be registered under the Act.

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3 Exhibit #3, Tab 6
4 Exhibit #3, Tab 3
5 Exhibit #3, Tab 4
6 Exhibit #5, Tab 1

Under cross-examination, he conceded that Tarion did not know at what prices the Applicant had sold certain real properties listed on a personal net worth statement signed by Mr. Singh. He said that Tarion does not consider properties under development by a registrant in determining its financial capability.

THE CASE FOR THE APPLICANT

Kevin Saraphanian

He was sworn and said that he has been the site supervisor for the Applicant since March 2009. He had, however, worked for the Applicant prior to that time on an "as needed" basis.

Home 2 - basement wall leak - February 2009:

He visited the site prior to his start date as site supervisor. He saw the crack in the wall which had already been repaired once. He brought in another product and repaired it again. He thought that he had fixed it since he never heard back from the homeowner. He said that the homeowner wanted the earth at the wall dug out and the wall repaired from the outside. This was not necessary in his opinion.

He went back to the property after the claim inspection and conducted a water test and could not see any water leaking.

On cross-examination, he conceded that he could not produce a written record of the water test or the date he performed it.

Home 3 - items settled by Tarion - November 2008:

This was before his time as site supervisor. He went in to help out the Applicant but he was refused entry by the person looking after the house in the homeowner's absence. He said that if he had been allowed to enter the premises he could have easily repaired the items.

The Applicant did not inform Tarion in writing that it had been denied access.

Home 4 - 14 items settled by Tarion - May 2009:

Mr. Saraphanian "fell on his sword" on this one. He said that it was his fault that the Applicant did not respond in a timely way to Tarion and fix the items in question. He had just started as the Applicant's site supervisor and was overwhelmed, and simply did not know Tarion’s policies and procedures.

Home 5 - delayed closing - August 2009:

Mr. Saraphanian was particularly critical of the homeowners. He described them as deceitful. He mentioned the upgrades that the Applicant had provided to the homeowners and the fact that they had consented to an extension of the closing date. He said that the Applicant worked on the "honour system" and was shocked when the homeowners claimed compensation for the delayed closing.

He was unable to produce any written documentation establishing that the homeowners had agreed in writing to extend the closing date or waive their right to compensation.

Mr. Singh

He was sworn and testified that he was at all times the sole shareholder, president and officer of the Applicant.

He had been in the house construction business with another man but wanted to go on his own so he incorporated the Applicant in 2002.[7]

He took full responsibility for the problems of the Applicant but said that he was “not good at paperwork" and had relied on others. In the early days of the Applicant, he was the only employee.

Beginning in 2008, he started having serious personal problems. He was separating from the mother of his child and was engaged in a custody battle. Moreover, he began to have medical problems brought on by stress for which he sought professional help.

He explained that he built Home 1 in 2007 for his girlfriend and that they intended to live in it. Accordingly, it did not need to be registered with Tarion.

He said that the homeowner was really concerned about the sewer connection, which was not the Applicant’s responsibility, and noted that the loose siding was an afterthought.

In 2008, his whole world was collapsing. He had to sell his cars and some of his properties and his medical problems escalated. He had problems with Revenue Canada and put that in the hands of his accountant and it did not work out well. He subsequently hired a new lawyer and accountant, and expressed confidence that everything was going well now.

He said that he found out that the charter of the Applicant had been cancelled by the Ministry of Finance of Ontario for failure to file tax returns and that was when he fired his previous accountant and hired a new one, who straightened the matter out and got the charter revived.

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[7] Exhibit #3, Tab 1

He hired Mr. Saraphanian as his site supervisor and now that Mr. Saraphanian is familiar with Tarion's practices and procedures, there will be no more breaches of warranty.

He testified as to certain real properties listed on his net worth statement and stated that those he sold were sold at very close to the valuations he put on his statement. He stated that he has acquired more properties and is able to procure mortgage financing, which shows his financial worth.

He testified that he builds good homes and that his after-sales service had been poor in the past, but that was no longer going to be a problem.

He testified that the chargeable conciliations were very minor and that it was cheaper for him to have Tarion deal with the homeowners to settle with them and then reimburse Tarion.

He stated that his personal circumstances are much better now and he asked the Tribunal for a second chance.

On cross-examination, he was forced to concede that as time goes by, the number of chargeable conciliations against the Applicant goes up. He also acknowledged that he failed to produce any medical certificate to corroborate his medical problems even though the pre-hearing in this matter was in March 2010.

He was asked as to why the Applicant did not file Ontario tax returns which led to the cancellation of the Applicant's charter. He explained that the head office of the Applicant is the address of his parents' home and that they are in India for eight months a year.

THE LAW

The Act:

7. (1) An applicant is entitled to registration by the Registrar except where,
…
(c) the applicant is a corporation and,
…
(d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

8. (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

12. A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

R.R.O. 1990, Reg. 892:

2. In connection with the sale or construction of a home, the requirements for the delivery of documents under the Plan are as follows:

5. For every home with a date of possession on or after October 1, 2003, the vendor shall, on the pre-delivery inspection date, complete and sign a certificate of completion and possession form and a pre-delivery inspection form approved by the Corporation and deliver a copy of the completed and signed forms to the purchaser.

6. Within 15 days from the date of possession of each home sold by a vendor, the vendor shall submit to the Corporation the completed and signed certificate of completion and possession form mentioned in paragraph 5.

10. (1) Every registration and renewal thereof expires one year after the date it is granted to the registrant.

(2) Every registrant shall apply for renewal of registration not less than 30 days before the date on which the registration expires, giving full particulars of any change in the facts set forth in the most recent application for registration or renewal of registration on record.

(2.1) The Registrar may permit an applicant to apply for renewal of registration after the time specified in subsection (2) if the Registrar determines that doing so would not be contrary to the public interest and that the applicant would be entitled to registration under section 7 of the Act if the applicant were applying for registration.

(3) Every applicant for renewal of registration shall complete, execute and deliver to the Registrar such form or forms of application and such other documentation as the Registrar may provide from time to time.

(4) With each application for renewal of registration under the Plan, the applicant shall pay to the Corporation the renewal fee set out in Schedule A.

R.R.O. 1990, Reg. 894:

1. The following are conditions of every registration under the Plan:

0.3 An applicant for registration as a vendor or builder or a registrant shall,

i. within the time period specified by the Registrar, provide such information or material relating to the person's entitlement to registration as the Registrar requires, and

ii. at the request of the Registrar, have the information and material verified by affidavit.

3.1 The registrant, and where applicable its officers and directors, whether in connection with the registrant or other registrants, shall, at all times, carry out each of their undertakings to the Corporation in accordance with the law and with integrity and honesty. Without limiting the generality of the foregoing, it is a breach by the registrant of this condition of registration if the registrant, or where applicable any of its officers or directors, whether in connection with the registrant or other registrants, fails, at any time,

i. to fully indemnify the Corporation for all monies paid out by the Corporation to third parties for which the registrant or any of its officers or directors is responsible,

ii. to fully honour and comply with any outstanding guarantee or indemnity given to and in favour of the Corporation,

iii. to provide truthful, accurate and complete financial information to the Corporation as and when required, or

6. The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.

The Courts have held that the Act is consumer protection legislation and should be liberally construed to provide that protection.

The onus is on Tarion to prove its case on a balance of probabilities.

APPLICATION OF THE LAW TO THE FACTS

The Applicant did not offer any defence to any of the allegations against it as contained in the NOPs, all of which are listed, *supra*. The Tribunal accepts the evidence of all of Tarion's witnesses. It gives little weight to Mr. Singh's assertions on his health and financial problems as he failed to provide any corroborative evidence thereof. It follows, therefore, that Tarion has proved each and every one of the six allegations it made against the Applicant and Mr. Singh. Any one of the allegations would have been sufficient to deny the Applicant renewed registration.

Mr. Singh asked that the Applicant have a “second chance" and said that "things are better now" and that he and the Applicant would comport themselves better in the future. Yet, the Applicant had two chargeable conciliations after the pre-hearing in this case.

If the Tribunal were to grant the Applicant’s request, it would merely reward the completely unacceptable behaviour of the Applicant and Mr. Singh. The Act is consumer protection legislation and Ontarians expect this Tribunal to apply the Act and regulations accordingly and protect them against builders of this sort.

The Tribunal is not confident, based on the evidence, that Mr. Singh will redeem his promises and conduct his affairs with honesty and integrity and in accordance with law. He appears to be one who considers his obligations to Tarion to be optional. He is incapable, apparently, of fulfilling the simplest administrative tasks, e.g., filing tax returns, responding to Tarion's letters, filing certificates with Tarion on time. The list of his failings seems to go on and on.

The Tribunal will discuss only one of the six allegations against the Applicant to illustrate the problems Tarion has had with it.

Chargeable Conciliations

The Applicant had five chargeable conciliations in 22 possessions. This is far in excess of the provincial average of one in a 100. No one from the Applicant deigned to attend any of the conciliation or claim inspections, despite being invited to do so by Tarion. Rather than contest these claims before the proper forum, the Builders' Arbitration Forum, the Applicant sought through testimony, cross-examination and argument, to attenuate the seriousness of the claims. The mandate of this Tribunal is not to pass judgment on whether a claim is properly chargeable or not. Rather, this Tribunal is to determine whether the Applicant should have its registration renewed.

In this connection, Mr. Singh, in his evidence in-chief, said words to the effect that it was cheaper for him to pay Tarion than try and resolve the homeowners' complaints against the Applicant. This damning evidence from his own mouth shows his complete disregard for Tarion and his customers.

He should not build homes in Ontario.

DECISION AND ORDER

Costs

The issue of the opposed request for an adjournment is described, *supra*, under “PRELIMINARY MATTERS”.

Counsel for Tarion asked for two days of costs in accordance with Rule 14. He argued that Tarion was prepared to proceed on August 18, 2010, as scheduled, and had told this to Counsel for the Applicant on August 16, 2010. He advanced the following reasons as to why Tarion was entitled to costs:

1. All of his witnesses were present at the Tribunal on August 18, 2010. They could have been otherwise engaged in productive work.

2. Tarion had his fees to pay for at least one day.

3. Tarion had to pay the Tribunal its per diem charge.

He reiterated the fact that the hearing was marked peremptory and had already been adjourned twice to convenience the Applicant's then Counsel.

Mr. Kazushner did his best to counteract these arguments. But, in the circumstances, and especially because the Tribunal has never been told of any details of the "emergency" faced by original Counsel, a costs award is warranted. The Tribunal finds that the Applicant acted unreasonably in asking for an adjournment in this case notwithstanding that the Tribunal granted, albeit reluctantly, a short adjournment.

In accordance with Rule 14, the costs to be awarded are to be no more than $400.00 per day if the hearing has not commenced, or $800.00 per day if the Tribunal has commenced the hearing.

The Tribunal finds that the hearing had commenced and that the first order of business was the adjournment request. The Tribunal has considered all of the circumstances and orders that the Applicant pay Tarion forthwith $800.00, being one day of costs.

Order

In respect to the main issue and in accordance with the power granted to it under the Act, the Tribunal orders the Registrar to carry out his Proposals and refuse to renew the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: November 18, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5487 – ONHWPA – Claim

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990 c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: APPLICANT, self- represented

BRENT J. ARNOLD, Counsel representing Tarion Warranty Corporation

ROBERT J. KENNALEY, Counsel representing 1438244 Ontario Inc., Added Party

DATES OF HEARING: June 15-19 & 22-25, 2010, July 5, 2010
September 9, 13, 14, 15, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision letter of Tarion Warranty Corporation ("Tarion") dated May 12, 2009, (the "Decision Letter"), wherein the claim of the Applicant for water penetration was disallowed.

The Applicant is the registered owner of a four story, 54 unit condominium complex, (the 'Property'). It is occupied primarily by retirees and individuals over the age of 65. Some residents of the Property have experienced varying degrees of water infiltration into their units since 2004. They would like this to be stopped. Pursuant to the Act every vendor of a new home warrants that that the home is constructed in a workmanlike manner and is free from defects in materials, including windows, doors and caulking such that the building envelope of the home prevents water penetration. This warranty applies during the first two years of possession.

The Applicant claims that poor workmanship in the construction of the Property has lead to a systemic problem with water penetration involving the common elements and that

notice of this issue was given within the first two years of possession as required to establish warranty coverage.

Tarion has warranted a common element claim relating to the water penetration of one unit of the Property, but disputes that the problem is systemic. Further, it has denied the Applicant's claim for water penetration of the Property on the basis that 1) it was not reported by the Applicant within the two year warranty period and therefore is too late for warranty coverage and 2) the Applicant entered into a 'Full and Final Release' with the Added Party in October of 2007, thereby forgoing any right to make this claim.

ISSUES:

There are three issues to be addressed by the Tribunal:

1) Is the Applicant's claim for water penetration properly denied for being outside the statutory warranty period?

2) Can Tarion rely upon the 'Full and Final Release' between the Applicant and the Added Party as a basis for denying the Applicant's claim for water penetration?

3) If the claim should not be denied for the foregoing reasons, should the claim be warranted? What should be the scope of the warranted water penetration claim? Is it a systemic problem?

EVIDENCE

In addition to documentation, the Tribunal heard oral evidence from three witnesses in support of the Applicant's claim: Paul Johannesson, an Applied Science Technologist, who carried out a building envelope review of the Property commencing in October of 2008; Robert Marshall, a professional engineer who preformed the Bulletin 19 review of the Property; and lastly a unit owner, hereinafter referred to as 'Consumer A'. Consumer A is also a member of the Board of Directors of the Applicant.

In addition to documentation, the Registrar called two witness: Warren Northcott, the Tarion representative assigned to warranty claims relating to the Property, and Gerry Genge, a professional engineer and a principal of GRG Engineering Consultants, engaged by Tarion to asses the water penetration problems with respect to Consumer A's unit of the Property.

Further documentation was submitted by the Added Party, and the following three witnesses were called: Ken Pagel, a principal of the Added Party; Lisa Bertrand, a representative of the primary project manager for the construction of the Property; and Mr. Paul Sandori, an architect. The majority of the witnesses summoned by the Applicant did not give evidence.

The following is a summary of the relevant evidence which has been organized according to the three issues to be addressed by the Tribunal.

1) Is the Applicant's claim for water penetration properly denied for being outside the statutory warranty period?

The first step in addressing this issue of notice is to understand what was known about the alleged defects, when it was known and what notice was provided to Tarion about it. For ease of understanding, the evidence relating to the Property as a whole and that relating to Consumer A's specific unit has been organized separately, where possible.

Evidence relating notice of the deficiencies of the Property as a whole.

The first assessment of the Property with respect to building defects was in the form of the Bulletin 19 review process. This process, prescribed by the Act and overseen by Tarion, involves an independent engineering review of a new construction and it is intended to form part of the quality control process. Milestone reports are generated every 60 days by a Field Review Consultant (FRC) for the purposes of reporting deficiencies. As Mr. Northcott put it, it tells Tarion what is not going well and what needs to be tracked.

Mr. Robert Marshall, a professional engineer, was the FRC on the Property project. Initially he carried out this role as an employee of J.R. Burnside & Associates Limited, ("Burnside") but left the employ of Burnside in 2004 and continued as the Field Review Consultant as an employee of Cedaridge Services Inc.

It is not clear when the final Bulletin 19 report was submitted to Tarion. The last Milestone Report in evidence was dated August 12, 2004, so it is assumed it was after that date. A copy of the final Bulletin 19 report appears to have been provided to the Applicant by the Added Party in August of 2006.[1] The Tribunal notes that this was after the Performance Audit, (described below), was completed on the Property.

The 'Narrative Milestone Reports' numbers 3 and 4 contained in the final Bulletin 19 report refer to outstanding issues which appear to be connected to the current issue of water penetration. Milestone Report 3 sets out the concern of the FRC that Exterior Insulation Finish System ('EIFS') is not an approved roofing material in a horizontal location and that without projections from balconies or roof eaves it may not perform.[2] EIFS is the exterior cladding system installed on the outside of the Property and was used in horizontal locations such as window sills and the roof parapet. Milestone Report 3 identifies what solutions the Added Party was considering to address this concern with respect to the EIFS window sills. The 'Narrative' Milestone Report number 4, prepared after the remedial work was undertaken, describes the deficiencies in that remedial work. The FRC states:

[1] Exhibit 7
[2] Exhibit

> "Based on the FRC concerns that EIFS is not approved as a roofing material in a horizontal location, the vendor/builder forces have installed prefinished metal sill flashings with drip projection over the EIFS window sills. Some of the metal sill flashings are short (in length) and do not extend entirely to the corner of the jambs. The caulking passed adhesion tests requested by the FRC, with excellent adhesion. However, at some of the caulked corners, the gap between the metal sill and jamb is excessive and there is insufficient caulking material to bite on the metal sill to form a water tight seal. Metal end dams with upturns were suggested to be installed at all susceptible locations". [3]

Similar deficiencies in the installation of the metal window flashings were noted in the report of GRG Building consultants, dated October 29, 2008, approximately four years later.[4] This would suggest that the deficiencies noted in the Bulletin 19 report were not appropriately corrected, or at least some of the deficiencies were never corrected.

Tarion received a performance audit for the Property from the Applicant on January 16, 2006, ("the Audit"),[5] and shortly thereafter provided a copy to the Added Party. The Audit was completed for the Applicant by RBS Consulting Engineering Group Inc. ("RBS"). There is no indication in the Audit that the Bulletin 19 report(s) were reviewed as required under s. 44(5)(c) of the Condominium Act. The facts before the Tribunal suggest that the Applicant did not receive a copy of the final Bulletin 19 report until after the Audit was completed. The Audit also did not include a unit survey as required by Section 44(5)(d) of the Condominium Act. The Audit did identify approximately 123 items requiring repair involving the common elements. It is also noted that under the final section of the Audit entitled "Discussion" it was stated:

> *"Water ingress to the building structure must also be addressed as soon as possible since it affects the longevity of the structure."*

Mr. Northcott of Tarion testified that he would have noticed that there were no unit surveys. He also acknowledged that he is aware they are to be completed. He indicated that he had no knowledge of whether surveys were done with respect to the Property.

In his evidence, Mr. Pagel, a principal of the Added Party, testified that he was experienced in dealing with consumers and Tarion warranty issues and that this experience was what he brought to the project. Mr. Pagel testified that he had noted at the time that the Audit was received by the Added Party that it was thinner than might be expected and that a unit survey was not included. He acknowledged that he was aware that a unit survey was normally part of a performance audit.

In addition to many items dealing with defects in caulking, there are a number of items on the Audit which specifically mention water leaks, water penetration, or concerns of not keeping the outdoor elements out. Such specific items are set out below, as described in the Audit:

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[3] Exhibit 7
[4] Exibit 6, Tab 10
[5] Exhibit 3, tab 7

> Item 42: One of the 4th floor unit owners was commenting on a roof leak entering from the main roof.
>
> Item 55: The coating on the exterior balconies is incomplete in numerous areas. Cracking of the slabs is allowing water ingress.
>
> Item 60: The top of the parapet has the metal flashing terminating at the top of the stucco finish which is to be sloped outward as documented but is flat or sloping inward and will allow water to penetrate. The top of the stucco finish is also starting to crack in areas.
>
> Item 100: The stucco system does not appear to be a proper rain screen and is not pressure equalized and is not pressure equalized. No through wall flashing was visible and venting was inconsistent.
>
> Item 100 [the numbering system had duplication, this item was subsequently numbered 100A]: The reinforced concrete balconies were found to be cracking substantially in a number of areas and was allowing water to penetrate the balconies below. Rusting exposed reinforcing bars were noted in some areas. There is no thermal break between the building slab and the balcony slab.

On May 3, 2006 the first 'common element' meeting was held to deal with the items on the Audit. These meetings were attended by a number of individuals including Mr. Northcott, Mr. Pagel, Mr. Rymell (the principal of RBS and the author of the Audit), Lisa Bertram and lay member(s) of the Board of Directors of the Applicant. The President of the Applicant at the time acted on behalf of the Applicant with respect to the outstanding deficiencies identified on the Audit. This gentleman was a retiree who did not have an engineering or construction background; however, Mr. Northcott testified that he understood that this individual felt himself competent to represent the Applicant.

Notes were taken of these meetings by Mr. Northcott. They were not intended to be 'minutes' of the meetings but simply a summary of what occurred. The Tribunal notes that in paragraph 2 of the meeting summary for this first meeting it states:

> "*it should be noted that the only complaint that has been received by Tarion for (the Property) is the Performance Audit; therefore, only items specifically identified in the Audit are eligible for warranty coverage."*

It is not clear to the Tribunal why such a declaration was made at this point given that the two year warranty period for the Property expired in March of 2007. It was not accurate with respect to other complaints, although Mr. Northcott may not have personally been aware of the complaints.

In fact at this point there had been at least two unit owners submit end of year forms to Tarion identifying water penetration complaints and the Added Party was aware and had responded to these complaints. Mr. Pagel was in attendance at this first meeting. His evidence confirmed that he was aware of the unresolved water penetration problem with Consumer A's unit from the 'outset'. The Tribunal understood this to mean from the first occurrence of water infiltration in December of 2004. The Added Party had designated a 'Tarion co-ordinator' whom the Unit owners were directly dealing with so it was fully aware of the nature of all claims.

During the two year warranty period for water penetration, ending March 12, 2007, there were three complaints of unit water penetration made to Tarion in addition to Consumer A's complaint. Two were on Tarion unit owner forms. Specifically, on June 21, 2005, Consumer B had noted water damage as a result of a storm on their First-Year Form. This consumer did not mention water damage on their second-year form.[6] Consumer C submitted a Second-Year Form to Tarion on August 15, 2006,[7] indicating that there appeared to be moisture coming in the living room, affecting the floor, from underneath the windows. Mr. Northcott testified that none of these unit holders requested conciliation nor did the Applicant bring the claims forward.

The third report of unit water penetration was connected with item 42 of the Audit. This item refers to a unit owners 'comment' on a roof leak. It was in fact determined by the Added Party to be a leak caused by a lack of caulking around some vents on the west wall of the Property. This finding was set out in an email July 17, 2006, from one of the principals of the Added Party to the representative of the Applicant at that time.[8] The response of the Applicant's representative, which was copied to Mr. Northcott, is noteworthy. He wrote:

> "I do not believe this. We now have signs of leaks in the corridor outside unit ['x']. Furthermore why would you not have kept us informed on the repairs you were doing that were listed on the Tech Audit. You also have not made note of this on the Tarion spreadsheet."

Neither author of the exchanged emails was called as a witness.

The 'spreadsheet' being referenced above was a spreadsheet setup and updated by the project manager, Bertram Construction, for the purposes of tracking the status of the deficiencies noted in the Audit. The earliest dated spread sheet before the Tribunal was one revised as of April 2006. The Tribunal notes that the descriptions of the Audit items have been abbreviated and in some cases appear to misstate the deficiency. For example item 60 is described as "flashing sloping inward, stucco cracking". Item 60, relates to the stucco finish being flat or sloping inward which will allow water penetration. Whether this was of any consequence as to how this issue was dealt with is unclear; however it, and the correspondence above, supports the submission by the Applicant that the spreadsheet was not an exact document.

Consumer A indicated in her testimony that there were other units affected by water penetration which was not reported because the units were owned by the Added Party, or its associates, and therefore such a report would be against their own interests. Her evidence was that three units were owned by the Added Party or its principals and three by other business associates. She provided pictures of the inside of one unit owned by a principal of the Added Party which showed that the wood floor by the patio doors had been replaced by ceramic tile, with some surrounding damaged to the floor still evident. There were also pictures showing water damage in the bedroom of the unit. It was Consumer A's evidence in chief that this unit was not occupied but used as storage for

[6] Exhibi 3, tab 14
[7] Exhibit 3, tab 17
[8] Exhibit 10

painting materials and that the Applicant had received a repair requisition for two transom windows and caulking around the sliding glass door.

In cross-examination Mr. Pagel suggested that the water damage in the unit in question may have been caused by a tenant leaving a door open, but that he really did not know the specifics. Nor could he provide comments regarding the apparent water damage in the unit bedroom. Although Mr. Pagel confirmed that the principals of the Added Party and their investors owned a number of units at the time of the registration of the declaration, he stated that he did not know how many. The Tribunal found this difficult to believe.

In late August, early September, of 2007, the Applicant requested RBS to carry out an inspection of four specific units whose owners had complained of water damage. Water damage was in fact found in all four, and it was concluded by RBS that the damage related back to items 103 to 105 on the Audit.[9] Those items were described in the Audit as follows:

> Item 103: The underside of the stucco system and flat trim above doors was found to have minimal or no coating installed and the mesh was exposed and not wrapped behind the insulation in many locations.
>
> Item 104: It appears that the caulking has been installed onto the finish colour coat of the stucco system which is not as specified by the manufacturer due to bonding concerns. Some joints are delaminating from the stucco finish.
>
> Item 105: It was noticed that a number of exterior grilles and louvers around the building were not caulked around the perimeter. The fan housing around the north garage fan is badly damaged.

The RBS findings with relation to the water damage[10] were forwarded to Mr. Northcott at Tarion on September 13, 2007.

Mr. Northcott testified that no mention was made about water penetration of the units during any of the common element meetings with the exception that there had been one issue involving a roof leak entering into a unit and that was identified as item 42 on the Audit. Mr. Northcott gave no indication that he was aware of the subsequent finding that the problem identified as item 42 related to uncaulked vents which the Tribunal assumes is related to item 105 according to the description of that item.

In April of 2009 the Applicant sent Tarion the Building Envelope Review prepared by Burnside & Associates (the 'Burnside Report') alleging significant defects with the wall and window systems which have led to water penetration. By the letter dated April 9, 2009,[11] addressed to the attention of Mr. Northcott at Tarion, the Applicant set out its position that the deficiencies identified in the Burnside report are related to previously identified deficiencies in the contruction of the Property which were never rectified. The

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[9] Exhibit 15 tab 30
[10] Exhibit 11
[11] Exhibit 4, tab 58

Burnside report merely confirmed that the deficiencies remained. The Applicant advised Tarion at this time that the water infiltration through the building envelope is part of the same deficiency which was reported in December of 2004 by Consumer A, and it should be considered 'part of the Audit'.

In response, Tarion issued its Decision Letter dated May 12, 2009, denying the claim in part on the basis that other than the water penetration in Consumer A's unit, other water penetration issues were either repaired more that 2 years ago or were not reported during the first two years and therefore are too late.

Evidence relating to Consumer A's complaint of water penetration

The Property unit owners began taking possession of their units sometime in 2004. Consumer A took possession of her unit in November of 2004. At this time the Added Party was the registered owner of the Property. The Property was transferred to the Applicant on March 12, 2005. This is when the statutory warranty period began to run for common elements[12].

A letter was sent out by a representative of the Added Party to the unit owners, dated April 25, 2005, (after the Applicant had become owner), requesting that updates on the outstanding pre-inspection delivery form or 30-day form items be left in the condominium office to the attention of the writer. On November 25, 2005, this same individual wrote to Consumer A as the 'Warranty Co-oridinator', for the Added Party who was operating as Mariposa Land Development Corporation ('MLDC')[13] at that time, in response to Consumer A's end of year one form. The letter confirmed the following item, among others, was in progress; "the master bedroom patio door was to be assessed as it appears to be leaking after initial repair."

Consumer A's First- Year Form was dated October 26, 2005, and was received by Tarion. The first item identified by Consumer A was that the master bedroom patio door was leaking whenever it rained and there was damage to the hardwood and trim.

Consumer A also sent Tarion a Second-Year Form dated October 18, 2006. On this form Consumer A checked off box number 2 on the form entitled "water penetration of the rest of your building envelope (eg. Windows, doors, and exterior walls)", indicating there was water penetration and added the notation 'see page 3'. Page three was entitled 'Water Penetration (cont'd)'. It was type written and outlines in detail the history of the water penetration problem involving Consumer A's unit and attempts to repair it.

Tarion confirmed receipt of Consumer A's Second-Year Form in writing. The first paragraph of Tarion's confirmation letter dated, October 23, 2006,[14]read:

[12] Ontario New Home Warranties Plan Act, s. 15(b)
[13] Exhibit 10
[14] Exhibit 9

> This notice is to inform you that we received your Second-Year Form and are accepting it based on the Date of Possession provided by your builder on the Certificate of Completion and Possession for your home, November 4, 2004, instead of the Date of Possession you noted on your Second-Year Form. A copy of this Second-Year Form is attached.

The second paragraph of the confirmation letter read in part:

> All items noted on the Second-Year Form that are part of your unit and are covered by the two-year warranty should be repaired or otherwise corrected by your builder by February 26, 2007 except as noted below.

The note 'below' referenced related to a qualification that the timelines may not apply due to weather conditions. The consumer was then advised that if any of these items have not been corrected by this date, (February 26, 2007), they may contact Tarion between February 27, 2007 and March 28, 2007 to request a conciliation inspection of the home to assess the situation.

Finally, the last paragraph of this confirmation letter explains that the repair time line described above does not apply to items included in the condominium project's common elements because such items are not covered by a unit's statutory warranty and that these items should be reported to the condominium corporation's Board of Directors. For a complete description of the consumer unit's boundaries the consumer was referred to Schedule 'C' of the declaration of the condominium.

Mr. Northcott testified that unit year end claim forms are not read when received by Tarion.

In accordance with Tarion's confirmation letter of October 23, 2006, Consumer A requested conciliation on February 28, 2007. Consumer A testified that a Tarion representative attended her unit on April 5, 2007, along with an employee of the Added Party who had been attending to repairs. Rather than inspecting the items of complaint the Tarion representative advised Consumer A that he would not be inspecting the claim items as he had already discussed the problems with the Added Party's representative. He then went through each of the items and indicated to Consumer A that they were the result of common element problems.

Following this event a Warranty Assessment Report was issued dated April 11, 2007[15]. The Applicant claim for water penetration was denied on the bases that it was a common element claim and Tarion "can only deal with the condominium corporation when and if the corporation chooses to file a complaint". There was no mention of a time frame for such a claim.

Mr. Northcott became involved with the issues surrounding Consumer A's unit in August 2007, at which time the Added Party had been unsuccessful in identifying or correcting the cause of the water penetration. Mr. Northcott continued in the role as mediator until October 2008 when the decision was made by Tarion that it would take over repairs as

[15] Exhibit 6 Tab 4

a common element claim. The Decision was made to warrant the claim based on the unit notice, which according to Mr. Northcott is not the usual approach. Mr. Northcott admitted that the leaks in Consumer A's unit have been 'troublesome leaks to diagnose'.

In his testimony Mr. Pagel stated that he was not surprised that Consumer A's claim was considered a common element claim; after all the water was coming in from outside. He was however surprised that in the end Tarion had made a decision to warrant the claim as it was 'out of time'. In his opinion the Added Party's participation has been therefore a voluntary gesture of good will and Consumer A was really getting more than she was entitled to. This would appear to include the Added Party's reimbursement to Consumer A for monies spent addressing a developing mould problem.

LAW

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. 0.31 ("Act")

> S. (2) Upon its designation, the objects of the Corporation are extended to include,
> (a) the administration of the Ontario New Home Warranties Plan;
> (b) the establishment and administration of a guarantee fund providing for the payment of compensation under section 14, whether by the establishment of a fund for the purpose or by contract with licensed insurers;
> (c) assisting in the conciliation of disputes between vendors and owners; and
> (d) engaging in undertakings for the purposes of improving communications between vendors and owners. R.S.P. 1990, c. 0.31, s. 2(2)

Relevant Sections of Regulation 892, R.R.O. 1990, dealing with the Administration of the Plan

> s.5.2 (1) in sections 5.3 to 5.8
>
> "first-year claim period" means the period beginning immediately after the registration date of the declaration and description for the condominium project and ending on the first anniversary of that date:
>
> "first-year claim form" means the form that the Corporation requires for a warranty claim that an owner makes in respect of the common elements of a condominium project and submits to the Corporation during the first-year claim period:
>
> "owner" means, in respect of common elements of a condominium project, means the condominium corporation.
>
> s.5.3 The Corporation may, in its sole discretion, extend or abridge any times specified in section 5.5 to 5.7, if it determines that,
>
> (a) the vendor is unable or unwilling to repair or resolve the claim items covered by a warranty;
>
> (b) the warranty claim involves items requiring seasonal repairs including air conditioning, items involving health and safety or items involving other extraordinary circumstances: or .....

s.5.5 (1) In order to make a warranty claim during the first-year claim period in respect of the common elements of a condominium project, the owner shall complete and submit to the Corporation a first-year form. O. Reg. 274.10, s. 7
(2) An owner may submit one or more first-year forms to the Corporation at any time during the first-year claim period.

5.6 (1) In order to make a warranty claim during the second-year claim period in respect of the common elements of a condominium project, the owner shall complete and submit to the Corporation a second-year form.

(2) An owner may submit one or more second-year forms to the Corporation under subsection (1) at any time during the second-year claim period.

Relevant sections of *Condominium Act*, 1998, S.O. 1988, c.19

s. 44 (4) the person who conducts the performance audit shall determine whether there are any deficiencies in the performance of the common elements described in the description after construction has been completed on them that,
(a) may give rise to a claim for payment out of the guarantee fund under section 14 of the Ontario New Home Warranties Plan Act to the corporation; or
(b) subject to the regulations made under this Act, would give rise to a claim described in clause (a) if the property of the corporation were subject to that Act.

s. 44 (5) In making the determination, the person who conducts the performance audit shall
(c) review all final reports on inspections that the Corporation within the meaning of the *Ontario New Home Warranties Plan Act r*equires be carried out on the common elements; and
(d) conduct a survey of the owners of the corporation as to what evidence, if any, they have seen of,
(i) damage to the units that may have been caused by defects in the common elements, and
(ii) defects in the common elements that may cause damage to the units.

s. 44 (8) The person who conducts a performance audit shall prepare a written report that includes,
(a) a copy of the person's certificate of authorization within the meaning of the *Professional Engineers Act* or certificate of practice within the meaning of the *Architects Act*, as the case may be;
(b) details of the inspection and findings made by the person in the course of conducting the audit;
(c) a statement that the person has reviewed all final reports described in clause (5)(c) and a summary of the results of it;
(d) a copy of the survey described in clause 5(d) and a summary of the results of it;
(e) the determination that subsection (4) requires the person to make; and
(f) all other material that the regulations made under this Act require.

s. 44(10) The filing of the report with the Corporation within the meaning of the *Ontario New Home Warranties Plan Act* shall be deemed to constitute a notice of claim that the corporation gives to the Corporation within the meaning of that Act under the regulations made under that Act for the deficiencies in the report.

Analysis

The Tribunal begins its analysis of the facts and the law with a review of the objects and role of Tarion and the process available to consumers of new homes when a Builder fails to meet the standards expected.

The objects of Tarion as set out in the Act, include the administration of the Act, the establishment of a fund for the payment of compensation under section 14 of the Act, assisting in the conciliation of disputes between vendors and owner, and engaging in undertakings for the purposes of improving communications between vendors and owners. The Act is consumer protection legislation and it is the expectation of purchasers of new homes that Tarion is the entity that will ensure that the intent of the Act is carried out. This is a reasonable expectation, given its stated objectives.

Consumers, when faced with a deficiency in their new home have always had the right to take legal action against a builder based on breach of contract. The Act, however, provides what should be a less adversarial, less complex and a more cost effective means of resolving conflicts with respect to specific deficiencies, (breaches). Ultimately the Act guarantees that there will be funds made available to compensate a consumer if a builder cannot be made to correct certain deficiencies to the standard specified by the Act and its regulations.

The Act and the regulations should provide clarity to builders and homeowners as to what deficiencies are simply not to be disputed. These identified deficiencies form the basis of the warranties under the Act. Clearly not all deficiencies are covered by the warranties; they are limited in scope and in the length of time they are available. For those deficiencies that fall outside these statutory warranties the remedy to a home owner remains to simply, or not so simply, take legal action against the builder in a civil court for breach of contract. A consumer's ability to enforce their contractual right to have a home built as agreed, and in compliance with the applicable laws and building code, is not dependent on the statutory warranties. However steps to enforce those rights through civil proceedings must also be exercised within a limited time frame. Unfortunately, the warranty period and the period in which legal action can be taken run concurrently, so while pursuing one avenue of recourse, the other may be eliminated.

In order to have the benefit of the statutory warranties provided by the Act, notice of a claim must be given to Tarion within the prescribed time frame. Sections 5.5 and 5.6 of Regulation 892, state that first and second year claims relating to common elements are to be submitted by the owner of the common elements to the Corporation (Tarion). The wording is that the 'owner shall complete and submit a second-year form".

Notice was given to Tarion by three homeowners on their first year forms that water had entered their units. One homeowner repeated this complaint with an entire typed page entitled 'water penetration' on a second-year form. However, Tarion apparently does not read year end forms from homeowners. It takes the position that unless notice is given by the owner, (here the Applicant), as prescribed by s. 5.5. and 5.6, no warranty coverage will be provided for defects involving a common element.

What is interesting to the Tribunal is that in practice the primary method of notice accepted by Tarion for a common element claim is not that prescribed by regulation 892. The primary and accepted form of notice for a common element claim is the

submission of a ‘performance audit’ as prescribed by s. 44(4) of the *Condominium Act, 1998*. This is deemed to be notice to Tarion pursuant to s. 44(10) of that Act.

There is no reference in section 5 of Regulation 892 to a performance audit. The ‘performance audit’ that is prescribed by s. 44 of the *Condominium Act, 1998* requires a unit survey and a review of the reports of the inspections which Tarion required to be carried out on the property – the Bulletin 19 reports. The obvious and logical intent of these requirements is to ensure that those common element problems that were identified during construction are addressed by the audit, and the claims which manifest themselves in connection to the units, would be included and form part of the Performance Audit and thus the common element claims relating to the first and second year warranties.

It is required under the *Condominium Act, 1998* that the Condominium Corporation engages either a licensed engineer or architect, for the purposes of completing the performance audit. Requiring the audit to be completed by such highly qualified individuals, who, one would assume, would know what constituted a common element, together with the requirement that there be unit surveys, is indicative, in the Tribunal’s opinion, of the intent to create legislative safeguards to ensure that owner(s) receive the protection offered under the Act for all common element claims.

In the case at hand it is fair to say that a series of mistakes by different persons along the way have thwarted the effectiveness of these legislated safeguards and consumer protection processes such that in the end the process through which the Applicant has had to negotiate did not have the appearance of consumer protection as might have been expected. The Audit submitted to Tarion by the Applicant was clearly deficient in that it did not include a unit survey as required by the *Condominium Act, 1998*. Mr. Pagel testified that he had noted that there was no unit survey. Mr. Northcott testified that he would have noticed that there were no surveys. Both are experienced in dealing with condominiums and Tarion claims. The Tribunal concludes that both the Added Party and Tarion knew or ought to have known the required unit surveys were not included and that the Audit was not in compliance. The Audit also does not indicate that any review of the final Bulletin 19 reports was undertaken. There is evidence that the Applicant did not have the Bulletin 19 report until after the Audit, but the Tribunal cannot conclude, based on this, that it was not reviewed by RBS. But this fact, combined with the lack of reference to any review of the Bulletin 19 Report(s), does raise suspicion that this requirement was also overlooked. Had the unit survey been completed and had the deficiencies identified in the Bulletin 19 report been tracked as was intended, it is very likely that this proceeding could have been avoided or reduced in scope at the very least.

There is no evidence that this omission of the unit survey was ever relayed to the Applicant or RBS, notwithstanding that the Audit was submitted at least one month in advance of when it was required to be submitted, and notwithstanding that from May 2006 until June 2007 regular meetings were being held, involving Tarion, to discuss the

common element claims at which the Applicant and/or a representative of RBS were in attendance.

Counsel for Tarion has argued that it is not up to Tarion to police compliance with s. 44 of *Condominium Act, 1998*, although he was unable to answer the question as to whose job it should be. It may be that it is not up to Tarion to investigate the thoroughness of the individual findings of an audit; however, when there is a blatant deficiency such as the omission of a unit survey, and when that deficiency is known or ought to be known by Tarion, to suggest it should then be allowed to rely on the defective audit as proof of deficient notice seems to be counter to the intent of both s. 44 of the *Condominium Act, 1998* and the Act which is to ensure the new owner of a condominium property has warranty protection against all common element deficiencies.

In addition to wanting to rely on an audit that clearly lacked the required unit surveys, Tarion argues that the unit forms that were sent directly to it indicating water penetration through the building envelope did not constitute proper notice. The reasons are firstly that Tarion does not read the year end forms provided by a unit holder. And secondly, the onus is on the unit holder to determine whether their claim relates to common elements and if so the unit owner must advise the Condominium Corporation as only a form completed by that entity will constitute notice. That is Tarion's interpretation of s. 5.5 and s. 5.6 of the Act.

Here is the difficulty with this approach. Homeowners are not advised that their forms are not read. On the contrary the letter sent to Consumer A in response to the Second Year Form makes specific reference to the content of the first page suggesting that it was read. The Second Year Form completed by Consumer A requests the homeowner to check off boxes, one of which relates to water penetration of the 'building envelope' and gives the examples "windows, doors and exterior walls". There is no caution in these sections that if your home is a condominium these are common element claims and will not be covered, a simple enough caution to add. There was no evidence before the Tribunal that the unit owner had provided the wrong form; rather that she was simply not the appropriate person to be completing it.

There was a caution, at the end of the letter Consumer A received from Tarion confirming the receipt of her Second Year Form, that common element claims would not be included. However, given the specific reference in the form to the building envelope, which is a common element in condominiums, it is understandable how confusion arose. Consumer A requested conciliation in February 28, 2007, and one would have thought that at this point Tarion would read what had been submitted and advise of the problem. But it was not until April of 2007 that Tarion advised that the water penetration was involving a common element and a complaint had to come from the Condominium Corporation. Apparently the complaint was so clearly a common element problem an inspection was not required. Had Consumer A's form been read in a timely fashion steps could have been taken to address any issue of irregularity before the expiration of the two year warranty period. Both Tarion and the Added Party take the position that the warranty period expired on March 12, 2007.

There was some evidence that Consumer A did advise the Applicant of the issue of water penetration of her unit. This was sometime in February of 2006, after the submission of the Audit and before she was advised by Tarion that the complaint had to come from the Condominium Corporation. She was told that it was 'too late' by the then president of the board of the Applicant. Clearly this was not correct and one more of the mistakes in the chain of events. This mistake, however, was not made by a professional with any particular expertise in the Tarion process.

In the view of s. 44 of the *Condominium Act, 1998* that requires unit owners to be surveyed about defects in their units to ensure all common element claims are in the performance audit, it does not seem appropriate to interpret s. 5 of the Act to mean that a unit owner can never give notice of a common element claim when you have a situation such as the one before the Tribunal. This interpretation was initially applied here and the result was that a consumer who found herself owning a condominium unit which, from the first month of possession, did not keep the rain out, and who immediately and continually gave written notification of this defect to the builder and Tarion for two years, was told she had no recourse because, basically, the wrong form had been used.

The builder had initially accepted responsibility to correct this clear breach of warranty, as it should. Regardless of the Tarion warranty program, the builder had contractual obligations to the unit owner of which it was clearly in breach, (a point that the Added Party seems to have overlooked). The builder then ceased to take responsibility upon Tarion's decision. For Tarion's involvement to actually dissuade a builder from correcting an indisputable breach of warranty is a total failure of the purpose of the Act. The purpose of the Act is not to provide a shield of protection to a builder who builds a home that from the outset will not keep the rain out and who is immediately and continually advised of the problem and asked to fix it. Tarion's subsequent change in position to accept the unit owner's notice as notice of a common element claim may have been 'unusual' but clearly it was the right thing to do.

Tarion and the Added Party have argued that this matter is not about Consumer A's unit as Tarion has undertaken to warrant that claim for water penetration as of October 14, 2008. Although it has been warranted as a common element claim, as one assumes it must as it in fact involves the common elements, Tarion says the notice should only be considered as notice of a claim relating to a localized problem, not as notice of any systematic problem involving the Property.

The Applicant however, takes the position that the water penetration of Consumer A's unit is symptomatic of a larger problem and that this larger problem stems back to deficiencies previously identified in the construction process and in the Audit, which were never properly corrected. The notice of the water penetration by Consumer A, made within the warranty period, should be therefore viewed as notice of a common element claim relating to defects in the building envelope as a whole which have resulted in water penetration.

The written notice provided by Consumer A of the degree of water penetration and the persistent nature of it, is, in the Tribunal's opinion, notice of symptoms of a real and persistent problem with the building envelope; a problem the Added Party was intimately aware of, as it had been attempting to solve it for years. In view of the years of failed attempts at resolving the problem by focussing on repairs in and around Consumer A's unit, and in view of the evidence of previously identified defects and concerns relating to the risk of water penetration, it is difficult to conclude that the problem of the reported water penetration is merely a localized problem.

There is evidence before the Tribunal which supports the Applicant's submission that the water penetration that has occurred is related to previously identified defects. In particular defects identified as early as the Bulletin 19 process and later in the Audit process. The Tribunal finds the following to be facts proven in the evidence:

1. The final Bulletin 19 Report submitted to Tarion, provided notice that EIFS is not an approved roofing material on a horizontal location and that without projections from balconies and roof eaves it may not perform.

2. EIFS was used on horizontal locations at window sills and the roof parapet of the Property.

3. Metal flashing was installed on the window sills, (to address the concern of using EIFS on horizontal locations), but the installations were defective: the metal flashing installed on the sills was too short and the caulking was insufficient to be water tight. These defects were set out in the Bulletin 19 Narrative Report no. 4 provided to Tarion. This defect was found by GRG Engineering consultants in their assessment of the water penetration of Consumer A's unit. Problems with the metal sills and sealant adhesion was also noted in the Burnside Report in areas unrelated to Consumer A's unit.

4. The Audit concluded that there were concerns of water penetration. It stated that water ingress to the building structure must be addressed as soon as possible as it affects the longevity of the structure. The Audit identified 6 defects directly relating to, or which may result, in water leakage or penetration: Items 42, 55, 60, 100, 100A, and 105. These defects have been confirmed to be likely causes of the current water penetration of the Property by the expert evidence before the Tribunal.

5. Item 42 on the Audit, identified as a leak into a unit from the roof, was determined by the Added Party to relate to insufficient caulking of vents. Item 105 on the Audit identified a deficiency in caulking of intrusions into the EIFS. Item 42 was notice of the result of this defect: water penetration into a unit. Tarion was advised of the connection of 105 and water penetration within the warranty period. The performance of the EIFS is dependent on the exterior surfaces of the EIFS and the sealants around intrusions/penetrations.

6. Items 55 and 100A, relate to cracking concrete balconies that allowed water ingress. This defect has been confirmed as a cause of the current water penetration issue.

7. Item 60 involves the use of EIFS as a roofing material in a horizontal location on the roof parapet of the Property. EIFS is not an approved roofing material. Item 60 indicated that the condition of the parapet will lead to water penetration. It has been confirmed that this defect has been a cause of water penetration.

8. Item 100 identified a problem with the EIFS being a proper rain screen and the absence of through wall flashing. Both the Burnside and GRG found defects with the wall flashing in the areas where the EIFS was removed.

In summary, the Tribunal finds that Tarion has been provided notice of a common element claim relating to water penetration within the statutory warranty period through the unit year end forms, in particular that submitted by Consumer A, and the Audit in the general comments and in particular defects related to water ingress, specifically items 42, 55, 60, 100, 100A, and 105. Whether Tarion or the Added Party initially appreciated how these defects were connected to water penetration is a different issue. Both have been resistant to acknowledging any connection even during these proceedings. It has taken numerous professional and much investigation but it is clear that the water penetration which has occurred can be traced back for the most part to previous concerns of construction defects that were either not corrected or inadequately addressed. It is unfortunate that the early warnings were not considered more thoroughly and acted upon.

It may be that, had the various professionals involved in the early stages of this project been more thorough, the errors in construction committed by the Added Party could have been reduced, avoided, or corrected. However what is clear is that the Applicant played no part in the construction defects and took those steps required of an owner to have them discovered and reported to Tarion.

Based on the above, the Tribunal finds that the claim for water penetration should not be disallowed on the basis of lack of notice.

2) Can Tarion rely upon the 'Full and Final Release' between the Applicant and the Added Party as a basis for denying the Applicant's claim for water penetration?

In a letter authored by Mr. Pagel dated July 6, 2007 and addressed to the then president of the Applicant, the Added Party set out an offer to settle those items on the Audit that had not been resolved to date and were noted in the minutes of the Tarion meeting of June 21, 2007. This letter is hereinafter referred to as the 'Settlement Letter'.[16] The Added Party proposed to pay a 'reasonable cash settlement' in exchange

[16] Exhibit 3, tab 37 and Exhibit

for a full and final release which was to be prepared by the Added Party's lawyer and signed by the officers of the Applicant.

In the Settlement Letter Mr. Pagel advises the Applicant that the Added Party has calculated its costs of repairing item 102A of the Performance Audit, relating to the south exit ramp of the Property, to be under $20,000 and that the Added Party had obtained a building permit for the work which the building officials have agreed would correct the deficiencies. He then acknowledged his awareness that the Applicant may want to take other action with respect to that ramp.

The total amount of the cash settlement offered was $44,000. This was to include item 102A being the garage ramp, estimated by the Added Party as approximately $20,000 and the heating reserve payment previously agreed to, which was in the amount of $18,750. The balance of approximately $5,250.00 was presumably for the remaining items listed in the Tarion meeting summary for June 21, 2007, and not specifically excluded. The following items were listed in the June 21, 2007 summary: 2, 29, 30, 39, 46(b), 54, 60, 102, 103, 104, 105, 102A, 105A, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118.

The Applicant was given until noon on July 12, 2007, to accept the terms of the Settlement Letter after which the offer would be withdrawn. It was also acknowledged in the Settlement Letter that the acceptance of the offer and 'endorsement' of the Full and Final Release was conditional upon the Applicant receiving payment of the 'Heating Reserve Fund' previously agreed to, within five days of the endorsement of the Full and Final Release.

The Settlement Letter was signed by the then president and vice-president of the Applicant on August 3, 2007, with four hand written terms added. The first identified the amount of the Heating Reserve Fund agreed to as $18,750.00. The others were that the release should be attached as a schedule to the settlement letter, that the release should be mutual, and that the release was conditional on the required work being done by a specific date.

It was Mr. Pagel's evidence that the Applicant requested an extension of time to consider the details of the offer. This is supported by the series of emails between the Added Party and a representative of the property management company for the Property dated July 12 to 16, 2007.[17] These communications were circulated to the Applicant's president and other representatives at the time.

According to the evidence of Mr. Pagel, the form of release forwarded to the Applicant by the Added Party was not found acceptable and a form of release was prepared by the Applicant's solicitor and forwarded to the Added Party.[18] This form of release was then altered by the Added Party's solicitor: the paragraphs were rearranged by moving what previously were paragraphs 2 and 3 to be paragraphs 1 and 2, additional details

[17] Exhibit 15, tab 20
[18] Exhibit 23

were added to the condition precedent originally in the final paragraph, and an additional paragraph was added. The Tribunal finds that the alterations made by the Added party's solicitor did not add clarity.

In the final version the 'Full and Final Release (the 'Release') was as follows:

> FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby mutually release and forever discharge each other from any and all actions, causes of action, claims and demands for damages, loss or injury, however arising, where heretofore may have been or may hereafter be sustained by either of them in relation to the following:
>
> 1. Any and all further claims for work by Mariposa Land Development Company ("MLDC"), notwithstanding the foregoing, the Tarion warranty shall remain in full effect;
>
> 2. Any and all claims with respect to any shortfall in the first year budget for [the Applicant].
>
> 3. Any and all claims and all claims (sic) for additional work, including but not limited to all the outstanding items from the Performance Audit for [the Applicant], Reference #31860-1123859 (the "Audit") and listed in the Tarion minutes of June 21, 2007 save and except the following work:
>
> a. Complete the paving of the parking garage ramp;
>
> b. Repair the parapet referred to in Item #50 of the Audit as per the repair methodology proposed by MLDC;
>
> c, Addition of a door as per Item #80 of the Audit.
>
> d. The heating reserve payment in the amount of Eighteen thousand Seven Hundred Fifty ($18,750) dollars.
>
> The foregoing shall include all damage, loss or injury not known or anticipated but which may arise in the future and all effects and consequences thereof.
>
> Notwithstanding the foregoing, this release shall become null and void should the items listed under Section 3a to 3d (inclusive) not be completed by MLDC on or before **November 15, 2007 in accordance with approved plans and specification filed with the City of 'X'.**
>
> **AND FOR THE SAID CONSIDERATION the undersigned further mutually agree not to make any claim or take any proceedings against any other person for the matters discharged by this release.**

This Release was signed by the Applicant on October 16, 2007, and by the Added Party October 22, 2007. [19]

Mr. Johannesson gave evidence regarding whether the work described in paragraphs 3b and 3c were completed. He testified that items 50 and 80 were in fact not completed. His findings were set out in a letter dated July 8, 2009.[20] Noted in this letter is the discrepancy between the description between items 50 and 80 in the Audit and those in the Release. He reiterated his findings in his testimony which were that there

[19] Exhibit 3, tab 37
[20] Exhibit 6, tab 13

was still significant water ponding against the south parapet and that the roof and parapet showed no signs of alteration, and that the electrical outlets in the sump room were not 'GFI' protected.

The Applicant's evidence addressed the items as identified by number in paragraphs 3b and 3c of the Release. The evidence of the Added Party was that, in fact, those items were intended to be items 60 and 30, not 50 and 80 as stated. These latter numbers were used simply in error.

Items 60 and 30 were described in the Audit as follows:

> Item 60: The top of the parapet has the metal flashing terminating at the top of the stucco finish which is to be sloped outward as documented but if flat or sloping inward and will allow water to penetrate. The top of the stucco finish is also starting to crack in areas.
>
> Item 30: The exit corridor from the garage and the north exit stair has exposed services passing through the corridor and must be in a fire rated enclosure where they are exposed to the exit corridor. The vestibule off this corridor to a storage room should not have a power panel located within it and the exhaust fan in the ceiling space is always running and is not operating property. The door did not have a fire label which is required. All the ducts passing through the walls did not have fire dampers installed and some had openings around the perimeter. The vestibule and storage room lights were missing protective covers.

On the basis that the excluded work items were 60 and 30, Mr. Pagel testified that all required work had been completed. With respect to item 60 (referred to as 50 in the Release) he directed the Tribunal to an email sent to Mr. Rymell setting out the proposed method of repair for the hair line cracks in the parapet and indicated that that was what was being referred to in paragraph 3b. There was no responding correspondence from Mr. Rymell confirming his approval. Mr. Pagel testified that there had been no discussion to put metal flashing on the parapet cap.

The Tribunal notes that this evidence seems to be in contrast to the written tracking documentation with respect to item 60. On the coloured spread sheet used to track the Audit items, updated as of June 21, 2007, the comments under status are as follows:

> "coating/caukling placed over in the good weather in the spring. Rymell wants to see what the coating is prior to agreement. Sloping horizontal stucco to be sealed and capped with metal flashing. MLD to forward repair methodology to [the Applicant]."

In the Tarion meeting summary for April 19, 2007, the notes for item 60 read:

> "MLD reported that the parapet was constructed as designed. [The Applicant] has had their consultant review it further and indicated that it is his opinion that all areas of the horizontal stucco should be sealed and capped with metal flashing. MLD to forward the methodology to [the Applicant] for review in anticipation of repairs to take place prior to June 2007."

The Added Party provided a copy of an email from the Applicant's representative which states "Inspect the work on Friday, October 5, 2007 competed by Granolite. The repair work can be considered completed."

With respect to item 30, (referred to as 80 in the release), it was Mr. Pagel's evidence that the required door was installed in the summer of 2007 and adjusted sometime in October of 2007. In cross-examination Mr. Pagel acknowledged that he 'heard' that the Applicant was challenging that the work required under 3c of the Release was complete. He also acknowledged the door installed in satisfaction of this claim item might need to be 'adjusted' due to it 'rubbing' but otherwise it was complete.

The Added Party produced in its materials a copy of an email from the Applicant's representative to Mr. Pagel dated September 27, 2007. It states

> "for you (sic) information I am still representing Elgin Bay regarding the Tarion Deficiencies. We are not in agreement with your remarks regarding the outstanding deficiencies. Item #80 (sic) is not complete. Drywall finish and painting not complete. Door from corridor is hitting door closer on new door and requires re installation."[21]

This last complaint about the corridor door hitting the door closer on the new door is what the Tribunal understood to be the existing problem which Mr. Pagel suggested only required an adjustment to correct otherwise the work was complete.

LAW

Ontario New Home Warranty Plan Act, R.S.O. 1990, c. O.31

> 13. (6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Cases considered:

Metropolitan Toronto Condominium Corp. No. 1101 v Ontario New Home Warranty, [2003] O.J. No. 5145.
Markey v. Tarion Warranty Corp, [2006] O.J. No. 2929

ANALYSIS

In disallowing the Applicant's claim on the basis of the Release Tarion is relying on s.14 (3)(b) of the Act which provides that an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty. Tarion argues that because the Applicant signed the Release with respect to the outstanding Audit items it no longer has a cause of action against the Added Party for damages resulting from a breach and therefore it is not entitled to receive payment out of the guarantee fund.

Tarion relies on the Divisional Court cases of *Metropolitan Toronto Condominium Corp. No. 1101 v. Ontario New Home Warranty* [2003] O.J. No. 5145. In that case the Divisional Court held:

[21] Exhibit 16, tab 45

> "It would, therefore, be contrary to the purposes of the Act to construe s. 13 (6) as barring settlements by denying effect to the releases that form an essential part of settlement agreements. There is no issue that the statutory granting of the warranties themselves cannot be waived. There is nothing in the legislative scheme created by the Act, however, that limits the ability of a vendor and a warranty claimant from settling a properly filed warranty claim in exchange for a release and such a release should be enforceable, unless it would be unconscionable due to the existence of some vitiating factor."

Clearly the purpose of Section 13 (6) of the Act is to ensure owners are not deprived of the protection of the warranties. It does not prevent a purchaser from making a bargain to forego their entitlement to a claim in exchange for some other valuable consideration. Such an agreement however, must be in writing and in such language that leaves no reasonable doubt that the purchaser knew and understood what they were waiving. [22] All this must be in the absence of any factors which would make the enforcement of such an agreement or waiver unconscionable.

The Applicant has argued a number of grounds as to why the Release should be found null and void. The Tribunal will address these arguments starting with the least persuasive.

The Applicant first argues that the Release is void on the basis that the Settlement Letter of July 6, 2007, was to be accepted by July 12, 2007 but was not signed by the Applicant until August 3, 2007, well after the apparent expiration of the offer. Although an expired offer cannot be accepted, it is possible that an offer can either be renewed or extended. Mr. Pagel testified that the Applicant requested that it be given further time to respond to the settlement offer. The emails between representatives of the Applicant and the Added Party do, in the Tribunal's opinion, confirm this.

It was also argued that the Release was to be mutual and the Added Party had failed to sign it. Apparently, until these proceedings, the Applicant did not have a copy of the Release signed by both parties. However, based on the evidence submitted, the Tribunal finds that the Release was signed by both parties. Therefore the Tribunal does not find it void for this reason as suggested by the Applicant.

The Applicant has also argued that the Release was conditional on certain work being completed by a certain date and that condition was not met. In support of this the Applicant points to the findings of Mr. Johannesson. Mr. Johannesson reviewed the items identified in the mutual Release as Items #50 and #80. According to the Performance Audit item 50 relates to the roof and is described in the Performance audit as "The main roof has a low spot by the south parapet and is ponding water". Item 80 relates to the sump room and reads "Electrical outlets within the room were not GFI protected".

The Added Party has argued that the item numbers referred to in the signed Release are incorrect, simply due to typographical errors and should be read as items 60 and 30

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[22] See *Markey v. Tarion Warranty Corp.* [2006] O.J. No. 2929

respectfully. The full descriptions of item 60 and 30 are set out above. The description of work set out in paragraphs 3b and 3c do not make the connection to items 60 and 30 obvious. In fact it would be difficult simply reading paragraph 3c to connect it in any way to item 30, particularly in view of the fact it refers to item 80 and the addition of a door which is not specifically mentioned in Audit item 30. At least 3b refers to a parapet which item 60 does discuss.

The Release is conditional on certain work being done. Clearly it was important to the parties that this work be completed or it would not have been made a fundamental term. Did the parties intend the excluded work to be that relating to 60 and 30 as argued by the Added Party? Various versions of the Settlement Letter, which gave rise to the release, were put before the Tribunal. The Settlement Letter reproduced at Tab 37, in Exhibit 3, is a faxed copy of the agreement and is of such poor quality that the item numbers referred to are not legible. A non-faxed version of a settlement letter with the same date was included in Tarion's materials[23], however, it was not the version accepted by the Applicant as there is no reference to a replacement door as either item 30 or 80. During the proceedings the Added Party provided a more legible copy of the Letter of Settlement signed by the President of the Applicant and the items referred to appear to be items 60 and 30.[24] It is not clear why this more legible copy was not produced earlier. The Tribunal accepts that this is a copy of the Settlement Letter which was ultimately signed by both the President and Vice-President of the Applicant. Based on this more legible copy of the Letter of Settlement, together with the notes of the Common Elements meetings, there is support for the conclusion that the intent of the parties was to address outstanding work relating to items 60 and 30 of the Performance audit, and the numbers 50 and 80 were in error. This could not have been concluded based soley on the written words of paragraphs 3b and 3c.

If the conclusion that the exempted work related to items 60 and 30 is correct, was that work completed? The terms of the Release are not very helpful in determining what the expectations of the parties were with respect to the work to be done. Little detail was given. Paragraph 3d states "repair the parapet referred to in Item #50 of the Audit as per the repair methodology proposed by MLDC". It has already been discussed that item 50 should have read item 60. As set out above item 60 involves two issues, one of putting metal capping on the parapet and the second involving cracks in the stucco. The Added Party has argued that the methodology which was 'proposed' was that set out by a company called Granolite Company Limited in a letter to the Added Party dated May 31, 2007. The Granolite 'methodology' clearly only addresses the 'hair line' cracks in the stucco at the moulding trim.

The exclusion of any reference in the repair methodology 'proposed' of one of the two issues encompassed by item 60 is somewhat puzzling. All previous notes on the spreadsheet and in the meeting summaries leading up to the June 21, 2007, meeting indicate that the Applicant's engineering consultant required that a metal cap flashing be installed to repair the deficiency. At the June 21, 2007, meeting when the Applicant

[23] Exhibit 3, tab 33
[24] Exhibit 36

apparently agreed to the methodology, (according to the Tarion summary), the Applicant's engineering consultant Mr. Rymell, was not in attendance. Mr. Pagel testified that the methodology was sent to Mr. Rymell for approval; however there was no evidence before the Tribunal that Mr. Rymell did approve it.

There was no evidence of any correspondence to the Applicant directly as to what was proposed. There were no details attached to the Release, as to what was proposed by MLDC. And although the Added Party had indicated they would be calling the representative of the Applicant at that time, and the Applicant's engineering consultant Mr. Rymell, it in fact did not call either witness to clarify what was agreed to. There is evidence that the lay representative of the Applicant approved the repair work done to the cracks in the stucco by Granolite. Whether this was all that was expected is not completely clear, given the lack of details of the proposed methodology in the Release and in view of the required repairs stated repeatedly on the Audit spread sheet and common element summaries. The Tribunal is unable therefore to reach any conclusion with certainty as to what was agreed to and if what was agreed to was or was not completed. What is clear to the Tribunal is that item 60 as set out in the Audit was not repaired.

Paragraph 3c involved the installation of a door relating to Item 30 (misstated as 80). The description for Item 30 is set out above and is quite lengthy. Paragraph 3c of the Release simply stated *"Addition of a door as per Item #80 of the Audit*". Mr. Pagel was informed on September 27, 2007, in writing that this work was not considered by the Applicant to be completed for two reasons, one relating to drywall finish and painting. The other reason was that the door from the corridor was hitting the door closer and, according to the Applicant, needed to be re-installed.[25] In his evidence Mr. Pagel suggested that the door just needed to be adjusted. The Tribunal took this to be an acknowledgement that there was an issue with the two doors hitting each other and that there is still an outstanding step to be done. This is many years after the fact.

The Tribunal was not provided evidence to determine the magnitude of this problem: whether the Applicant's representative was correct in saying it needed to be re-installed or whether Mr. Pagel is correct in that it can be corrected with an 'adjustment'. Nor did Mr. Pagel explain what was involved in what he described as 'an adjustment" and how that would correct the defect complained of, that he did not dispute. It is clear to the Tribunal that Mr. Pagel and the Applicant view things differently. Again, there is some question as to whether the work was completed in accordance with the agreement and expectations of the party.

Aside from the incorrect numbering, and vagueness, there is also ambiguity in the terms of the Release. Paragraph one of the Release makes a general statement that the Release shall relate to "Any and all further claims for work by Mariposa Land Development Company ("MLDC"), notwithstanding the foregoing, the Tarion warranty shall remain in full effect". Tarion and the Added Party have argued that this should be

[25] Exhibit 16

interpreted to mean in relation to major structural defects. Strictly speaking, that is not what it says. The Tribunal finds this term ambiguous.

Thus far, in order to interpret the Release in the manner suggested by the Added Party, the Tribunal must change the item numbers referred to in two fundamental terms of the contract, piece together what was intended to be the repairs contemplated by the parties from various emails from unrelated parties, and restrict the meaning of 'Tarion warranty' to only major structural defects. In the Tribunal's opinion, this process is more akin to the creation of an agreement rather than interpreting a written agreement, and that is not the role of the Tribunal. Referring back to the cases discussed at the outset of this issue, a consumer can forgo their right to a claim but it must be done in accordance with a written agreement in language that does not create any doubt as to what has been agreed to. The Release in this case is not such an agreement and in the Tribunal's opinion it should not be enforced due to the uncertainty created by the various errors, vagueness and ambiguity.

However, if the Tribunal is wrong on this point and the Release is enforceable, what does the Release encompass?

Paragraph 3 indicates that the Release is to relate to "any and all claims and all claims (sic) for additional work, including but not limited to all the outstanding items from the Performance Audit for [the Applicant], Reference #31860-1123859 (the "Audit") and listed in the Tarion minutes of June 21, 2007". The initial language of this paragraph appears broad; however it is then qualified with the addition of the word 'and'. The Tribunal finds that it is reasonable to interpret the Release as including those outstanding items from the Performance Audit and listed in the Tarion 'minutes' of June 21, 2007. This interpretation is supported by the Settlement Letter which states that the purpose of the settlement was to resolve all 'remaining claims', including those for additional work, including outstanding items from the Performance audit 'as indicated in the Tarion minutes of June 21, 2007'. The Tribunal therefore finds that the intention of the parties was to address those items on the Audit which were noted in the summary notes for June 21, 2007. These included items: 2, 29, 30, 39, 46(b), 54, 60, 102, 103, 104, 105, 102A, 105A, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118.

The Tribunal notes these items do not include items 42, 55, 100 and 100A, which represent four of the six defects which have been connected with the current water penetration complaint; clearly they were never properly resolved. In addition, the Release explicitly excludes item 60. Clearly item 60 was not corrected in all aspects. As reviewed, the capping of the parapet has been the recommended repair to deal with the water penetration of the horizontal EIFS moulding since the time of the Audit, and noted in the Bulletin 19 review, and it remains the best recommended repair.

What the Release also does not address is any common element claim for water penetration. As both Tarion and the Added Party have argued consistently that water penetration was not raised as a common element claim on the Audit nor raised at any of the common element meetings it is difficult to understand then how the Release signed

in October of 2007 is to be interpreted to include a claim for water penetration. Counsel for Tarion conceded that the Release cannot be interpreted to include the water penetration claim as it relates to Consumer A's unit as that claim was not part of any common element discussions at any point. It was unclear to the Tribunal whether it was being suggested that the Release could, however, be interpreted to include any common element claim with respect to water penetration.

The claim for water penetration submitted by Consumer A has been found by this Tribunal to be a properly filed common element claim for water penetration for the Property, the scope of which has yet to be determined. The Tribunal does not understand how this common element claim could be found to be addressed by the Release with respect to the Property as a whole but not with respect to the one unit. The parties clearly had not addressed their minds to this claim and therefore the Applicant can not be deemed to have understood they were waiving their right to this claim, and certainly there was no consideration given for the waiver of this claim. At the time the Release was signed the water penetration was an on going issue, although it had been denied as a claim, and clearly would not have been waived in exchange for nothing.

Further, Mr. Pagel indicated in his testimony that he did not believe that the Added Party had an obligation to do any of the repairs to address the water penetration issue which manifested itself with respect to Consumer A's unit as it was' out of time'. He of course was wrong on this; however, it certainly makes it clear that the claim for water penetration was not contemplated by the Added Party at the time the Release was signed and the settlement amount was negotiated. The Tribunal finds that the common element claim for water penetration is not encompassed by the Release signed in October of 2007.

In summary, the Tribunal concludes there are two grounds to hold that the Release does not bar the Applicant's claim. Firstly, because the Release is not enforceable as it cannot be interpreted in a meaningful way without being altered and embellished. It contains errors, lacks detail and therefore certainty, and contains ambiguous terms. Secondly and in the alternative, if it is enforceable, it only encompasses those outstanding items listed in the Tarion summary of June 21, 2007, excluding item 60. It does not encompass items 60, 55, 100, 100A identified in the audit and which relate to the defects presently found to be contributing to the water penetration of the Property, and it does not include the common element claim of water penetration for the reasons set out above.

3) If the claim should not be denied for the foregoing reasons, should the water penetration claim be warranted? What should be the scope of the water penetration claim? Is it a systemic problem?

Burnside Findings

The Applicant relies upon a report produced by R. J. Burnside & Associates Limited ('Burnside') dated January 8, 2009, (hereafter referred to as the 'Burnside ' report) in support of its claim that the water penetration is a systemic problem, a result of improper construction of the Exterior Insulation Finish System ('EIFS') which is the cladding on the Property. A summary of the observations and conclusions of that report follow.

Mr. Johannesson was the author of the Burnside Report and was a Senior Building Science Specialist and Project Manager at Burnside at the time he conducted his assessment of the building envelope of the property. A building envelope is defined in the report as the building assembly or the 'large membrane' that separates the indoor and outdoor environments. In particular it includes the exterior walls, including windows and doors and the roof assembly. Given that the concrete floors at the second and third floors of the Property penetrated the exterior wall assembly, they were regarded as part of the building envelope in the Burnside Report.

The investigation conducted by Mr. Johannesson involved a general visual review of the building envelope, a unit owner survey, a thermographic review of the building exterior, water leakage testing of windows and patio doors, air leakage testing of the building envelope and, sealant and EIFS cut tests. Cut tests means sections of the EIFS cladding were removed in order to view the underlying components. The water leakage testing was performed by Mr. Johannesson, for the purpose of gaining a qualitative representation of in-situ performance of the units. [26]

Based on a visual review of the building envelope Mr. Johannesson made the following observations.

The roofing membrane, where reviewed, appeared to be a two-ply torch-applied modified bitumen membrane with granular surface. The joints appeared to have been sealed with lap sealant to protect exposed bitumen from solar degradation. The membrane was described as being in good condition and was not suspected of leaking.[27]

The concrete balcony slabs on the north and south sides of the building had an unusually high occurrence of sectional cracks through the slab. Some cracks appeared to be repaired. Many of the cracks were noted as actively leaking. In many locations the cracks continued through the up-stand curbs at the exterior wall. Mr. Johannesson concluded "the cracks are consistent with concrete shrinkage and may have been due to a higher than normal water cement ratio maintained during construction".[28]

[26] Burnside Report, Exhibit 4, pg 3 of 18
[27] Burnside Report Exhibit 4, pg 4 of 18
[28] Burnside Report Exhibit 4, pg 6 of 18

The exterior walls are constructed of structural steel studs with interior gypsum finish, exterior gypsum sheathing and EIFS. There was a large urethane sealant joint at the foundation and first floor wall connection. There was no through wall flashing but, instead, one inch (approximately) wide intermittent gaps in the sealant. Typically continuous through-wall flashing would be present at a joint such as this. Upon closer review of the joint it was observed that the sealant had pulled the finish coat of acrylic stucco away from the base coat. [29]

It was noted during the thermographic review that patterns consistent with EIFS saturation were noted at the window sills on the south elevation of the buildings. It is pointed out in the Burnside report that leaks at these locations would be consistent with the observations in the Oct 29, 2008 GRG report that noted that the sill flashing is not caulked to the EIFS below therefore water blowing under the flashing can access the drainage plane. [30]

A water leakage testing was conducted on November 5 and 11, 2008 by a method consistent with the ASTM E1105 standard, on ten randomly selected patio doors and windows. All windows and patio doors leaked within three minutes of beginning the test, in varying degrees and in different locations: transoms, sills, and floors. [31]

Sealant and EIFS 'cut tests' were conducted at four different locations around the building in areas it was believed provided a reasonable representation of the conditions and detailing of the building envelope. A section involving both the wall base and window sill was chosen, and a section of the EIFS removed. It was found that the sealant around the window had poor adhesion to the finish coat of the stucco and that sealant adhesion at the metal window sill was also poor. The sill had been attached to the base coat of EIFS with dabs of construction adhesive and no sealant had been applied. In addition to the lack of sealant, no flashing was found below the sill to direct water from the drainage plane to the exterior of the building.

Further review of sheathing uncovered the de-bonding of the glass matt facing and disintegration of the internal gypsum core. It was also found that there was corrosion of the sheathing fasteners and significant corrosion of the steel studs.

With respect to the roof parapet, it was noted that the sealant used to secure the metal coping was not continuous. It was therefore suspected that wind driven rain could enter the drainage plane behind the EIFS.

With respect to the drainage plane, it was observed that there was no suitable path for water to drain out in certain cut test locations. The flashing (behind the EIFS) was not fully adhered and would not be effective in redirecting water out of the assembly. Also where the cut test was done near a patio door, the base flashing was not integrated with

[29] Exhibit 4, pg 6 Burnside Report
[30] Exhibit 4
[31] Exhibit 4, pg 8 Burnside Report

the patio door jamb flashing and the patio floor flashing terminated behind the concrete curb. Therefore water that entered the EIFS system would remain trapped.

A unit survey was also conducted and 31 unit holders responded. In response to questions relating to the exterior wall, eight indicated that their units had leakage or stains at exterior walls at windows, 3 had leaks at the top of exterior walls, 5 had leakage or stains at the bottom of the walls, and 5 reported leakage only when it rains. In response to a questions related to windows and doors 7 unit holders indicated that they had leakage.

The Applicant, through the testimony of Consumer A, suggested that unit surveys were not completed by the unit owners connected with the Added Party, nor by a number of the retired residents who go south for the cold weather season.

The Tribunal notes that the units found to have water damage due to water infiltration in August of 2007 all responded on the Burnside unit survey of November 2008 that they have some kind of leakage or water stains.

The conclusion of the Burnside report is that the building envelope was not built in accordance with good building practices, 1997 Building Code and the Act. If it had, the exterior envelope would be free from water leaks and premature deterioration of building envelope components. The Building Code requires protection of wall assemblies from ingress of precipitation. The Code Appendix also acknowledges moisture related material damage as the most obvious and significant problem with uncontrolled leakage. The frequency of test failures and the inconsistency of construction practice lead Mr. Johannesson to the conclusion that there are systemic flaws in the design and construction of the exterior wall assemblies. In cross-examination Mr. Johannesson opined that he would not expect leakage in windows and doors only 3 to 4 years old.

The Applicant also relies on a letter dated April 29, 2010, from the company BASF which supplied the wall system for the Property. The system is called “Senerflex Channeled Adhesive Design Wall System”. The conclusion of the supplier was that the problems being experienced by the Applicant were not related to the quality of material supplied but rather the installation. The author of this letter did not testify. The deficiencies noted included improper flashing details, (including the cap on the parapet which does not extend over the system as required), the absence of drainage means, substitution of materials not provided by the supplier, improper treatment of penetrations, and adhesive patterns not in accordance with application instructions. It was noted that at least some of the photographs reviewed by BASF were provided to it by Consumer A.

Mr. Johannesson reviewed the BASF letter and provided a further opinion regarding the property in a report dated May 12, 2010[32]. He concluded that because of the substituted

[32] Exhibit 11

components the system no longer meets the Ontario Building Code 1997 requirements[33]. Specifically section 9.27.1(1) states:

> "Exterior walls shall be protected with cladding including flashing, trim and other special purpose accessory pieces required for the cladding system being used to restrict the entry of rain and snow into the wall assembly".

His interpretation is that this section supports the position that the Senerflex Channeled Adhesive Design Wall System must be completed with BASF components only. The peel and stick flashings installed at the window and door perimeters are not BASF components and therefore the installation does not meet the requirement of the Code. This is the basis for Mr. Johannesson's opinion that the water penetration that is occurring is related to this issue and is therefore a systemic problem.

A list of recommended repairs was included in the Burnside report, although no estimate as to cost. A subsequent estimate was prepared by Burnside dated July 6, 2009, in the amount of $716,374.79.[34] The Tribunal notes that there is some variation from the recommended repairs in the Burnside report and the subsequent estimate.

Findings of the Field Review Consultant

The Bulletin 19 Review of the Property was performed by Mr. Rob Marshall, a professional engineer. This review is a requirement of the Ontario New Home Warranty Program and is to represent an independent engineering review of the Property construction. In his testimony Mr. Marshall acknowledged that he was the Field Review Consultant ('FRC') on the Property project. Initially he carried out this role as an employee of Burnside, but left there in 2004 and continued as the Field Review Consultant as an employee by Cedaridge Services Inc.

Mr. Marshall testified that the cladding system installed on the Property was a 'type C' system which is a 'drain' system. At the time it was installed there were no published standards; the first practice guide was published in 2010. [35] He confirmed that a number of things could affect the way it performs, the most important being the adequacy of the details. When asked if a change in the system would change the integrity of the system he replied that it would depend on the nature of the change. He was unable to comment on the change regarding the 'blue skin' membrane. Nor could he give a definitive answer regarding the flashing details as he did not have the architectural details. He was not aware of changes affecting the 'envelope'.

As part of Bulletin 19 Milestone report number 4, dated August 12, 2004, Mr. Marshall completed a narrative Report indentifying the deficiencies in the steps taken to cover the horizontal EIFS used as window sills, steps required to address the concern that EIFS was not an approved roofing material.

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[33] Exhibit 11
[34] Exhibit 6 Tab 13
[35] Exhibit 26

Findings of RBS Consulting Engineer Group Inc.

RBS completed the Audit on the Property. The relevant findings of that Audit are included in the findings of GRG set out below.

In his written report dated September 12, 2007, regarding his investigation of water egress into particular units Mr. Rymell made the following comments about deficiencies related to unit doors:

> The PVC strips had been caulked intermittently and have now failed where it was applied. These strips have also buckled in many places throughout the building. This will likely not pose a water ingress problem in the near future for those doors located under a balcony. However, for all those doors which are exposed there is a likelihood of water ingress.
>
> These PVC strips should be reset and caulked using a compatible sealant as recommended by the door manufacturer. In addition the reveal over unit 402 bedroom door should be caulked using a sealant compatible with the EIFS system.

Findings of GRG Building Consultants

In response to the Burnside report, GRG Building consultants were engaged by Tarion to review the problems described in the Burnside report, determine what is the cause of the problem, whether it was caused or was the result of the audit deficiencies or repairs, whether the problem has the same cause as that involving consumer A's unit, and what is the recommended method of repair and cost. GRG had previously investigated, and assisted, in resolving the issues with Consumer A's unit.

Mr. Genge, a professional engineer, authored the GRG report dated April 1, 2010. His findings include that the EIFS cladding on the Property is 'essentially' a face-sealed cladding system that has some facility to drain small amounts of water. The report states that EIFS does not leak through the face of the wall unless there were defects in the exterior lamina; however, sealants, openings and other interruptions in the EIFS may leak and be presumed to represent a failure in the EIFS itself.

This description of the EIFS system is somewhat different than the description that Mr. Genge has previously given this system. In an email letter to Tarion dated November 12, 2008, copied to Consumer A, Mr. Genge states, in relation to the Property EIFS system, that:

> 'this design would be considered to be a "drained" system if there were no defects in the construction."[36]

With respect to the windows and doors of the Property, Mr. Genge reviewed the certification testing for the windows and doors and noted that the test does not certify the performance of the transom light above the casement windows and the patio doors. His conclusion was that there was no verification that the compound window and

[36] Exhibit 9

window/door assembly had been tested and found to comply with the applicable standard and the Ontario Building Code requirements for water leakage resistance.

GRG reviewed the Bulletin 19 Reports and noted there was a deficiency identified below the window sills where the recommendation was to install a Senershield water penetration barrier. Senershield is a product sold by Senergy, a BASF company. A water penetration barrier was installed, with mechanical penetrations with upturns. GRG was advised by the Added Party that the as-applied wall system included some modifications from the Senergy system. The details of those modifications however were not identified by the Added Party and therefore were not known by GRG.

Mr. Genge noted the concerns identified by the FRC in June of 2004 that EIFS is not approved as a roofing material in a horizontal location. Prefinished metal sill flashing with drip projection over the EIFS window sills were installed in response to this concern. However, Mr. Genge does not comment on the FRC's subsequent findings, after the installation of the sills. Those findings were that:

> Some of the metal sill flashings are short (in length) and do not extend entirely to the corner of the jambs. The caulking passed adhesion tests requested by the FRC, with excellent adhesion. However, at some of the caulked corners, the gap between the metal sill and jamb is excessive and there is insufficient caulking material to bite on the metal sill to form a water tight seal. Metal end dams with upturns were suggested to be installed at all susceptible locations". [37]

It is therefore not clear that his conclusion that the FRC found that there were no deficiencies is actually based on the last Bulletin 19 Milestone Report which appeared in the Bulletin 19 Milestone Report submitted to the Tarion and provided to the Applicant on November 8, 2006, [38] (after the Audit was submitted).

Mr. Genge then reviewed the Audit and those items that could be related to building envelope leaks. GRG concluded for a number of items that "There appears to be no relationship between reported leaking and these defects." Set out below are summaries of the notes and findings for those Audit items considered by GRG which appear to have some relationship with the reported leaking.

Item 55:

> The coating on the exterior balconies is incomplete in numerous areas. Cracking of balcony slabs is allowing water ingress.

It was noted that the Added Party had done repairs on more than one occasion in relation to this item. Based on what Mr. Genge has referred to as the 'minutes' of the Common Element meetings, he notes that the Applicant indicates this item is resolved. Mr. Genge confirms the existence of cracks in the balconies that appear to be sealed but exhibit evidence of leaking and may direct water to the interior space.

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[37] Exhibit 7
[38] Exhibit 7

Item 60:

> "The top of the parapet has the metal flashing terminated at the top of the stucco finish which is to be sloped outward as documented but is flat or sloping inward and will allow water to penetrate. The top of the stucco is also starting to crack in areas."

GRG noted that the Audit does not describe the 'horizontal' portion of the EIFS molding to be a deficiency in the same manner that the FRC described the horizontal window sills as a deficiency. Relying on the meeting summaries, Mr. Genge concludes that the Applicant's consultant advised that the areas need to be capped with metal flashing, (which the Tribunal notes is a similar solution as that undertaken with respect to the sills during construction), and that the Added Party undertook to supply a repair methodology recommended by the system supplier. GRG was not provided with the proposed method of repair.

GRG also noted that the parapet moldings are cracking at the joints between sections, that leak stains are evident below the moldings at these joints, but that there was no evidence that the cracked joints have contributed to water ingress; however, GRG required the cap flashing-to-EIFS joint to seal the cap flashing against wind-driven rain. GRG then included the statement, "We are unaware of any other repair methodology that may have been undertaken." (It is unfortunate that GRG was not given the repair methodology that was apparently undertaken on the parapet; it might have been helpful to know what was actually done.)

Item 100:

> The stucco system does not appear to be a proper rain screen and is not pressure equalized. No through wall flashing was visible and venting was inconsistent.

Based on the meeting summaries GRG concluded that the Applicant considered the item resolved and it was not listed in the 'minutes' of June 21, 2007. GRG concluded that there was no overall complaint about the design of the EIFS, or that the Applicant had come to understand that the EIFS design was consistent with the custom of the trade and the RBS reported defect that it was not a proper rain screen and not pressure equalized, was not a required repair. With respect to flashing, it is noteworthy that GRG, in assessing Consumer A's unit in this report, found that the quality of the flashings was poor and had it corrected.

With respect to Consumer A's unit, the Tribunal notes Mr. Genge's previous findings set out in his letter of report of November 12, 2008. He then wrote:

> "our repair efforts to date have focused only on the found defects in construction at this unit and have been based on the assumption that isolated defects in construction have lead to the observed leaking. Since we have found that the construction defects at the critical drainage areas are not discrete but repeated at both sides of the door and both sides of the HVAC unit, we do not

> believe that the level of construction review applied can be relied upon as a measure of general quality. The problems observed may well be wide spread. [39]

Item 104:

> It was noticed that the caulking has been installed onto the finish colour coat of the stucco system which is not as specified by the manufacturer due to bonding concern. Some joints are delaminating from the stucco finish.

GRG noted from the meeting summary of June 21, 2007 that the Added Party advised that this issue was resolved: the Applicant was to notify if there were further concerns. GRG comments that adhesion of sealant to finish coat is not recommended and that the noted sealant adhesion problems would appear to be localized sealant installation problems. It is noteworthy that sealant adhesion problems were observed.

> Item 105: It was noticed that a number of exterior grilles and louvers around the building were not caulked around the perimeter.

Mr. Genge's comments were that missing sealant adhesion would appear to be a localized sealant installation problem. As the defect locations were not made known to GRG, as the locations are undefined, he concluded that there was no connection between the reported leaking and the defects. These conclusions suggested to the Tribunal that GRG was not directed to any particular location regarding this defect and therefore he was not able to determine any connection.

Item 100A:

> "The reinforced concrete balconies were found to be cracking, substantially, in a number of areas and were allowing water to penetrate balconies below. Rusting exposed reinforcing bars were noted in some areas. There is no thermal break between the building slab and the balcony slab.

GRG noted that the Common Element Meeting summary notes only make one reference to this issue. On May 3, 2006, it is noted that the issue of the slab not having a thermal break is a "comment requiring no further action". GRG, however, concluded that the balcony cracks on the units as noted in 100A are contributing to leaks in those units.

GRG reviewed the findings set out in the report of RBS dated September of 2007 with respect to water penetration of four particular units. The report suggested that the water penetration related to items 103, 104 and 105 of the audit. Mr. Genge found that Mr. Rymell's more detailed description of the defect, of an unsealed 'flat strip' set out under RBS findings above, did not relate to items 103-105 of the Audit; however, he did find that those head flashings were not sealed and he required that they be sealed, as well as the transom lite framing joints at Consumer A's unit. In addition, although the caulking was not missing, at the time of the GRG inspection, the HVAC in Consumer A's unit had been removed and reinstalled and it was found that the perimeter flashing

[39] Exhibit 9

tie-in from the cabinet was deficient and the flashing of the exhaust box was also deficient. Both were corrected.

GRG noted that there were other defects involving Consumer A's unit that were observed that were not reported by RBS.

With respect to the Burnside report, GRG concluded, based on the fact that only 10 of the 54 units (18.5 %) reported wall or window leaks, and only 17% reported leaks at balcony slabs, the problem is not systemic.

GRG also reviewed the findings of the Burnside report regarding the specific units; as well GRG carried out a visual review of a number of other units. In all GRG inspected approximately 14 units, which included the four identified by Mr. Rymell (of RBS) as having water penetration in September of 2007. Detailed findings as to the water damage and the possible leak sources were included in the report. They included, among other things: unsealed flashing, loose head flashing, water being directed into the EIFS from balconies above, water being directed into the EIFS from the curb, inadequately flashed exhaust vent louvers, open or cracked frame welds of doors or window, faulty transom lites, sill flashings with inadequate caulking, roof parapet cap flashing, unsealed wall penetrations, door jam weather striping, and faulty balcony slab crack seals.

Recommended remedial work was identified at a cost estimated at $192, 500.

Mr. Paul Sandoori

The Added Party's witness Mr. Sandoori provided some comments regarding the reports. He indicated he could have provided more comments had he had more time to review them. He confirmed he was not an expert in sealants. His opinion was that windows should last years before they leak.

On page 2 of his report Mr. Sandori makes the comment that "no attempt was made by RJB to determine, as far as possible, the effect of years of neglect and lack of maintenance or routine repairs". He pointed to two general comments made in the GRG report that localized repair of sealant failure should be undertaken as part of normal building maintenance, and that maintaining the weather stripping in good condition and adjusting sliding doors can correct the leaking at the jamb which occurred during the water testing of RJB. Mr. Sandoori also stated he did not feel the lack of maintenance was sufficiently stressed in the GRG Report. The Tribunal has read all the reports which Mr. Sandori based his opinion on and found nothing to support his conclusion that the Property is suffering from years of neglect and lack of routine maintenance. His report was not helpful.

LAW

Relevant sections of the Act:

13(1) Every vendor of a home warrants to the owner,

(a) that the home,
(i) is constructed in a workmanlike manner and is free from defects in material,
(ii) is fit for habitation, and
(iii) is constructed in accordance with the Ontairo Building Code;
(b) that the home is free of major structural defects as defined by the reulations;
(c) such other warranties as are prescribed by the regulations.

Exclusions

(2) A warranty under subsection (1) does not apply in respect of
(a) defects in materials, design and work supplied by the owner;
(c) normal wear and tear;
(f) damage resulting from improper maintenance;

Relevant sections of Regulation 892

s. 15 (1) In this section,

"building envelope" means the wall and roof assemblies that contain the building space, and includes all those elements of the assembly that contribute to the separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits:

s. 15(2) Every vendor of a new home warrants to the owner ,

(a) that the home is constructed in a workmanlike manner and is free from defects in materials, including windows, doors and caulking such that the building envelope of the home prevents water penetration;…

(3) The warranties described in subsection (2) apply only in respect of claims made during a two-year warranty period ending on the second anniversary of the date of possession in respect of homes that were enrolled, or should have been enrolled, after December 31, 1990.

(4) The warranties described in subsection (2) are prescribed under clause 13(1)(c) of the Act.

ANALYSIS

Section 15(2) of Regulation 892 provides that every vendor of a new home warrants the home is constructed in a workmanlike manner and is free from defects in materials, including windows, doors and caulking such that the building envelope of the home prevents water penetration. The evidence submitted by both the Applicant and Tarion confirms that the Property of the Applicant was not constructed in a workmanlike manner, and was not free from defects, such that the building envelope of the Property prevented water penetration. The common element claim for water penetration has been found to have been made within the warranty period and should therefore be warranted. Tarion has in fact warranted the water penetration claim as it relates to Consumer A's unit; the issue is what is the extent of the poor workmanship and the defects which have lead to water penetration? Is it a systemic problem?

A significant quantity of expert evidence and documentation has been provided to the Tribunal to assist in the determination of the cause and extent of the water penetration problem involving the Property. Sorting through it all has been a challenge but in the end there appears to be a number of similar findings amongst the experts. Although the Burnside Report and the GRG Report do not appear to agree as to whether the problem is 'systemic' they both conclude that there are defects in the building envelope which have lead to the water ingress. Based on those reports and other evidence the Tribunal finds the following facts to have been proven:

1. The EIFS system installed on the Property was considered by the FRC to be a 'drained' system. However, given the way it was constructed it is essentially a face-sealed cladding system that has some facility to drain small amounts of water. Where water has penetrated the wall assembly there has been premature deterioration of the sheathing and envelope components. The performance of this wall system is largely dependant on the integrity of the exterior surface of the EIFS and the sealants to the window/door, and louvers etc.

2. The water penetration of the Property is the result of a variety of causes. In some instances it has been the result of deficient tie-in of the curbs, window/door lovers, etc., to the substrate below the EIFS cladding: in other words it is the result of a failure to construct the wall assembly as designed. GRG found this to be the case involving Consumer A's unit. Burnside found this to be the case where it conducted cut tests.

3. There is a common condition of leaking at the cracks and joints in the balcony slabs. The slabs are extensions of the floor framing system and as such a crack in the balcony slab extends into the unit. Leaking at the crack in the balcony has lead to water being directed into the interior, where it has dripped into the ceiling bulkhead and caused damage. Repairs have been attempted but they were insufficient and unsuccessful.

4. The transom windows are faulty and require repair. There are also glazing defects in the windows generally that have allowed water ingress. The water ingress relating to windows is not the result of poor maintenance.

5. The roof parapet has been a source of water ingress. EIFS is not an approved roofing material on a horizontal location. This deficiency relates back to concerns identified on the Bulletin 19 report and it was also noted on the Audit as item 60. This deficiency has never been properly addressed.

6. The metal sill flashing, installed in response to concerns raised by the FCR were not installed so as to ensure a water tight seal and have resulted in water ingress.

The GRG and Burnside Reports confirm that the construction of the wall assembly was not as designed in the locations they carried out their most thorough investigations.

Although at the time of construction there were no published standards, the expert evidence before the Tribunal has indicated that the way it was constructed has allowed water to enter into the wall assembly but that it is not properly directed out. In two of the locations it was noted that there was deterioration of the wall assembly components. The Applicant has asked the Tribunal to conclude that the poor workmanship exposed by these investigations is systemic, and is the cause of the water penetration.

Although it would not be unreasonable to suspect that the installation method was consistent, and therefore defective throughout the Property, and in fact GRG noted this possibility in November of 2008, the evidence however relating to the water penetration that has been documented to date does not indicate that water penetration has in fact been a consistent problem throughout the Property. In view of this, the Tribunal is hesitant to conclude that to correct the water penetration issue the entire EIFS system needs to be reinstalled. Clearly, however, there are a number of deficiencies in construction and materials which have caused water penetration of the Property and they should be corrected.

The recommended remedial work by Tarion's expert, set out on Pages 37 and 38 of the GRG report, addresses what the Tribunal has come to understand as the key deficiencies that have lead to water penetration and it is the work that the Tribunal finds ought to be carried out by Tarion, at a minimum. In summary this remedial work includes:

1. With respect to window and sliding doors, all exterior vinyl joints be sealed including the trim, mitres, and butt joints. All transom lite glazing be provided with a bead of sealant by removal of the interior stops.

2. The underside of all metal sills at all punched window openings should be sealed and the sealant drawn up the ends to reseal the top of the sill-to-EIFS jamb connection. (As noted above, this relates to a defect that was noted on a Bulletin 19 milestone report).

3. Balcony slabs are to be waterproofed. Where the balconies pond water the membrane should be built up to allow drainage. (This relates to items 55 and 100A of the Audit).

4. The roof cap flashing shall be replaced with a wider flashing that covers the nose of the EIFS moulding and includes a drip edge. This would reduce the ingress of water at the EIFS moulding. (This relates to item 60 on the Audit, and is the repair that was recommended by RBS in 2006, and was noted as required by the supplier). This is the repair identified by GRG as the better method of repair of the roof parapet, and it is the repair that the Tribunal finds ought to be done.

It is also recommended by GRG that the sliding doors should be adjusted to fit correctly at the jams and meeting stile and be re-weather stripped, and the jamb to sill joint

should be cleaned and sealed on both the operable and fixed sides of the door. The Tribunal is of the opinion that this work does not clearly address a defect in work or materials and therefore should be undertaken at the expense of the Applicant.

Finally, it is recommended by GRG that if the repair work identified on pages 37 and 38 of the Genge report are not completely successfully then additional destructive testing would be required to assess EIFS-related leaks. The Tribunal understands this to mean that if, after the remedial work water penetration occurs then an investigation of its cause will occur similar to that undertaken to resolve the water penetration issue of Consumer A's unit. The Tribunal agrees and orders that this recommendation should also be followed. Although the current problems that need to be addressed are significant, if the water penetration is allowed to continue and the wall assembly becomes saturated clearly the magnitude of required repairs will be even greater and may lead to a major structural defect.

The Added Party has voiced objection to the balcony slabs being waterproofed on the basis that it is 'betterment' and is not a code requirement. It is not in the Tribunal's opinion betterment if it is in fact a requirement to prevent water leakage into the Property and to meet the Added Party's s.15 warranty obligation.

The Added Party has also argued that the roof parapet was built as designed. There has been some challenge to that as there were different diagrams with different roof parapet designs on record. Two show a fully capped moulding, as in diagram A14-1 for the 'stair roof parapet', dated June 17, 2004, and diagram A14-3 of the ground floor roof dated July 11, 2002 and submitted with the building permit application.[40] One diagram, A14-7 of 'TYP. roof parapet 'dated June 4, 2003, shows a portion of the stucco moulding as being exposed. This later diagram was identified as 'for construction'. It is not clear why the stucco moulding would be covered in two roof situations and not in all roofing situations. In any event, it seems clear to the Tribunal that the design that the Added Party has relied upon used EIFS as a roofing material. Based on the FRC comments in the Bulletin 19 this would appear to be inappropriate. There was no evidence provided to the Tribunal that countered the finding of the FRC back in 2004. It was also pointed out in the Audit as a deficiency that would lead to water penetration. It was also pointed out by the supplier of the EIFS system that this was a deficiency. The Tribunal concludes that using EIFS as a roofing material, even as designed in diagram A14-7, would fall under either poor workmanship or a defective material, and it did in fact lead to water penetration. It was one of the mistakes in this Property's history.

The history of the problems with this Property is long. As suggested earlier, there has been a series of missteps that have contributed to this. Mistakes were made in the construction of the Property. The Bulletin 19 process did not apparently identify all the construction errors that were occurring and those identified where not tracked. The performance audit process did not include all the required steps. Recommended repairs were not followed. Communications were not read. Rights and obligations were not understood. In the end, there has been a long and costly resolution process. It is hoped

[40] Exhibit 30

that the remedial process will not be as long, given that all parties now have clarity as to what is necessary and expected.

One of the factors that has prolonged this process, and is worthy of additional comment is the lack of trust. The Added Party's denial of any legal responsibility to repair the water penetration of Consumer A's unit certainly has not been helpful in establishing credibility or trust with the Applicant. Equally unhelpful were comments by Counsel for Tarion during these proceedings suggesting that Consumer A was getting more than she was entitled to. This has done nothing to instil trust in Tarion to carry out sufficient repairs to truly address the problems faced by the Applicant. The Act is consumer protection legislation. That Tarion appeared to begrudgingly offer that protection, when clearly it should and has agreed to do so, is unfortunate to say the least. Consumer A has been without the full use of her home for almost 5 years through no fault of her own. The persistence of this water penetration problem involving Consumer A became a red flag to the Applicant and the doubt as to the commitment of Tarion and the Added Party to fixing the problem has clearly contributed to the length and expense of this resolution process.

As stated earlier, now that there is clarity that there are defects in workmanship and materials, that are covered under warranty, and that if not properly dealt with will lead to greater problems, it is hoped that the remedial stage will proceed without incident.

ORDER

Section 16(3) of the Act gives the Tribunal the authority to order such action as the Tribunal considers Tarion ought to have taken. The Tribunal hereby orders Tarion to ensure that the remedial work set out by its own expert on pages 37 and 38, of the GRG Report dated April 1, 2010, including the replacement of the parapet cap, be completed in a timely and thorough fashion. The goal is to eradicate water ingress into the Applicant's property, and these repairs are seen as the minimum repairs required. There is only one exception and that is that, unless agreed to otherwise, Tarion shall not be responsible for the adjusting, re-weather stripping, cleaning and sealing of the jamb to sill joint, relating to the sliding doors as described on page 37. This work should be the responsibility of the Applicant and it is recommended that it be completed and such completion be documented.

LICENCE APPEAL TRIBUNAL

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Elizabeth Sproule, Presiding Member

Released: December 21, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5853-ONHWPA-Claim

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: KENNETH W. KOPROWSKI, Vice Chair

APPEARANCES: PAUL HOSACK, Counsel representing both Applicants

MONTGOMERY SHILLINGTON, Counsel representing Tarion Warranty Corporation, Respondent

DAVID ECCLES, Agent representing Springfield Construction Ltd., Added Party

DATE OF HEARING: July 13, 14; September 7, 8, 9, 2010 Hamilton

DECISION AND ORDER

This is an appeal by the Applicants to the Licence Appeal Tribunal (the "Tribunal") from a decision dated December 22, 2009, of Tarion Warranty Corporation ("Tarion") under the *Ontario New Home Warranties Plan Act* (the "Act") that Tarion considered the Applicants' claims as not warranted.

BACKGROUND

The house that is the subject of this appeal is located in a small community in Southern Ontario. The house is located on the north shore of Lake Erie at the top of a cliff that is approximately 40 or 50 feet above water level, and has an unobstructed view of the lake. In that location, it is exposed to strong winds off the lake.

After the Applicants moved in, several problems developed with the home. Four of those problems are the subject matters of this appeal.

The complaints that were brought before this Tribunal were as follows (in the order, and with the numbering, in which they appear in this Decision):

I. The vents on the walls of the house all flap loudly with a strong northerly or southerly wind.

II. There was leakage under the basement sliding patio door.

III. There was ponding that occurred over the lakeside patio that was immediately outside the basement patio door.

IV. The hardwood flooring on the main floor became cupped and, near the upper patio door, developed gaps.

Tarion considered the above items not to be warranted under the Act by its decision letter dated December 22, 2009 (Exhibit 1). The Applicants disagreed with that decision and appealed to this Tribunal by filing their Notice of Appeal (Exhibit 2).

The hearing took place over a period of five days in Hamilton, Ontario. At the end of the fifth day, there was insufficient time to hear oral arguments from all the parties. Therefore, by agreement of all the parties, each party was required to file written submissions with this Tribunal in accordance with a timetable that this Tribunal ordered. Although the parties, on consent, subsequently lengthened that timetable, in the end, all parties complied with the timetable as amended. This Tribunal received the last submission on November 30, 2010.

The Tribunal is grateful to all the parties and their representatives for providing very thorough, detailed and impressive arguments on the issues in this appeal.

ISSUES

1. Whether the problem relating to the vents should be warranted?

2. Whether the problem relating to the basement patio door should be warranted?

3. Whether the problem relating to the lakeside patio water ponding should be warranted?

4. Whether the problem relating to the cupping of the hardwood floor should be warranted?

FINDINGS

On the evidence presented to this Tribunal and for the reasons that follow, the Tribunal decided as follows:

1. The problem relating to the vents is not warranted.

2. The problem relating to the basement patio door is warranted.

3. The problem relating to the lakeside patio water ponding is not warranted.

4. The problem relating to the cupping of the hardwood floor is warranted.

EVIDENCE

Background Evidence of the Applicants

The Applicants are husband and wife. As between them, only the husband testified. The Tribunal will refer to him as “the Applicant” throughout this Decision. Where both are meant, the Tribunal will refer to them as “the Applicants.”

The Applicant, who is now retired, is very familiar with the Ontario Building Code. His complete Resume is found at Tab K of Exhibit 3. He is a Professional Engineer and had been the Chief Building Official for a large municipalities in the Province of Ontario. In that position, he set up a building department to ensure the proper enforcement and interpretation of building requirements and to provide for the education of all building inspectors who reported to him. He sat on numerous committees concerned with both national and provincial building codes..

Because of his leadership position and experience, the Tribunal recognizes that the Applicant is very knowledgeable about the issues in this appeal.

The Applicant stated that, on May 17, 2007, he and his wife purchased the house that is the subject of this appeal for the purchase price of $676,000.00. The house is two and a half storeys high. Throughout the hearing, the upper floor was referred to as the main floor, and the lower floor was referred to as the basement level. There is also a loft that overlooks the main floor in an open-concept design. The house has an unobstructed view of the lake. The southerly rear wall of the house faces the lake, and the front of the house faces north; that is, inland. At this location, therefore, the house is subjected from time to time to strong southerly winds blowing off the lake against the southerly rear wall of the house.

The Added Party (“builder”) built the house approximately two years before the Applicants purchased it, and had used it as a model home. Although the builder occupied the home occasionally, it remained unoccupied for the most part until

after the Applicants purchased it. However, before the Applicants purchased it, the house was used regularly by either the builder or by real estate agents.

The Applicants started to live in the house full time in October, 2007, although the Applicant's evidence was that, from the time they purchased it in May, 2007, until October, they had been in the house at various times and for various lengths of time.

By the time the Applicants completed the year-end form on May 12, 2008, for Tarion, there had arisen certain issues in the house, although those issues were not raised in the Pre Delivery Investigation checklist at the time of purchase. The year-end form is found at Tab I of Exhibit 3, which is the Applicants' Book of Documents, beginning at page 21 of that Tab.

The Tribunal will now review the evidence as it related to each item of appeal.

I. Evidence relating to the Vents

(a) Evidence of the Applicant

The complaint about the vents on the year-end report, being item 2 found on page 2 of 5 of that report (page 22 of Tab I), was that all vents flapped loudly with moderate to strong southerly or northerly winds. The decision letter, Exhibit 1, from Tarion, dated December 22, 2009, did not warrant that item. There were five such vents in particular. Three were on the west wall, one was on the east wall, and one was on the lakeside wall.

In denying that claim, the decision letter referred to Section 6.2.3.8(4) of the Ontario Building Code. That section states that exhaust outlets shall be designed to prevent back draft under wind conditions. If there were a back draft, then the heating, ventilation and air conditioning ("HVAC") system installed in the house would not be able to function properly. But, the Applicant testified that, when a strong wind blew, the flapping of the vents sounded like a "brass band," to quote his testimony, because the flaps on the vents would continuously open and close.

The Applicant did not contest the wording of that provision of the Building Code but took the position that the provision does not define "wind conditions" so that the provision should be applicable to a house faced with any wind conditions, and not just strong winds that the Applicants experienced blowing off lake Erie onto the south side of their house.

However, the builder performed some remedial work. He placed metal magnets on the vent flaps and installed metal boxes to cover the west wall vents. This remedial work is illustrated in photos 3, 4, 5 and 7 found at Tab 37 of Tarion's Book of Documents, Exhibit 4. Photo 7 is actually a photograph looking up into

the most distant vent seen in photo 3. The Applicant also placed caging around two of the vents, seen in photos 4 and 5. Regrettably, this remedial work did not solve the noise problem, entirely.

But, not only did the situation create a noise problem, but the situation also allowed the high winds to blow warm, humid air into the house through those vents, because they did not close properly to prevent back drafts. That is especially the case with the vent that faces the lake, because it is a direct vent of the basement fireplace. It is shown in the top photo of each of pages 14 and 15 of Tab G of Exhibit 3. The Applicant testified that, to have a fresh air vent on the lake-facing wall, high on a hill facing a lake when strong southerly winds blew created havoc with the moisture levels in the house, even with a properly working HVAC system.

There is also another vent in the joists of the rear wooden deck, but the Applicant testified that no one could tell him where that vent led.

He also subsequently discovered that the main cold air return in the basement was not even connected to the furnace.

The Applicant suggested that, for the lake-facing fresh-air intake, the intake should be permanently sealed and an Energy Recovery Ventilation ("ERV") system should be installed and the fireplace moved. This could be done in conjunction with an HVAC re-design that the Applicant stated that Tarion had agreed to, through Mr. Nabil Hussein, a witness for the Applicants, and through Tarion's field representative, Mr. Sandro Nevicato. The Applicant's own expert, Mr. Catt, also stated, in a report, that the HVAC system was inadequate. His report is filed as Exhibit 5, although counsel for Tarion urged this Tribunal to place little weight on the report because Mr. Catt did not testify and, therefore, neither he nor his report were subject to cross-examination and scrutiny.

To correct the vent problem, the Applicant testified that two contractors that he spoke to suggested installing hydraulic vents for the vents on the west wall. The cost for this proposed remedial work would be about $1,000.00 to $1,500.00.

Cross-Examination of the Applicant by Tarion

On cross-examination by counsel for Tarion, the Applicant confirmed that, for the first year after the Applicants moved into the house, the air conditioner was not performing well on hot and windy days, when the wind was from the south; that is, blowing from across the lake. Despite running constantly, the unit could not cool the temperature in the house to less than 80 degrees F. even though the thermostat was set at 78 degrees F. A basement dehumidifier was on constantly during the summer, emptying into the sump pump well. The furnace fan was on, as well. In the summer of 2009, the Applicant installed a second dehumidifier on the main level. They kept all vents open during the summer. However, the

Applicant had to tape every aluminum vent beneath the floor level because they were leaking air.

When asked why he did not correct the main cold air return in the basement that was not connected to the furnace, the Applicant explained that it was hidden by drywall. Because it was hidden, even the Applicants' own consultant, Mr. Catt, did not notice it.

He also stated that, after buying the house in May, 2007, the Applicants stayed in the house up to three days a week, depending on the activities they attended in the community. When winter came, they stayed there all winter.

Counsel also pointed out that, in the Certificate of Completion and Possession, found at Tab 3 of Exhibit 4, the Applicants made no complaints about the issues now before this Tribunal. The Applicant explained that he was not familiar with that form and felt rushed when he signed it. Only after they started to live in the house did they discover some problems.

The Applicant re-stated that humid outdoor air comes through the vents on the west side of the house and through the fresh air vent and the fireplace vent.

Cross-Examination of the Applicant by the Builder

On cross-examination by the builder, the Applicant stated that he did not remember the builder showing him that the noise could be reduced if the Applicants turned the vent fans on whenever there was a wind. However, this Tribunal notes that no evidence was presented to it that would corroborate the effectiveness of that advice, if it were given.

(b) Evidence of Sandro Nevicato

Mr. Nevicato had been, as at the time of this hearing, a Tarion field claims representative for four years. In that capacity, he inspects houses and determines and makes final decisions on warrantability issues. He had inspected between three hundred and six hundred homes.

Before working for Tarion, he had been a construction manager and building site supervisor. He had also been, for about twenty years, a Federal Building Inspector, dealing only with residential housing. In that position, he prepared technical audits, to determine what technical problems might be encountered in such housing in the decade following their construction.

He became involved with the Applicants' house when there had been a change of inspectors after the Applicants had complained about the previous field claims representative from Tarion.

Mr. Nevicato performed his first inspection of the Applicants' house on January 8, 2009. His report dated January 26, 2009, is found at Tab 16 of Exhibit 4. This was his first re-inspection after he replaced the previous field claims representative.

Mr. Nevicato then performed a follow-up inspection on April 30, 2009. His report from that inspection is dated May 21, 2009, and is found at Tab 22 of Exhibit 4.

Mr. Nevicato performed yet another inspection on November 17, 2009, at the request of his Claims Director, Ms. Metcalfe, to review the Applicants' outstanding issues. His report of that inspection, dated November 20, 2009, is found at Tab 31 of Exhibit 4.

After those three inspections (January 8, April 30 and November 17, 2009), Mr. Nevicato wrote the decision letter of December 22, 2009. During his testimony, he explained his decisions on the four issues that are involved in this appeal.

In his report of January 26, 2009, in dealing with the problems with the vents, Mr. Nevicato concluded that there was still a problem with the back draft and the resultant noise, so that more work should be done. He therefore warranted the venting noise problem.

As for the return air vents, he found that four of the seven cold air return vents were not functioning properly. He thus renewed the warranty for that item and required it to be repaired.

After his inspection on April 30, 2009, he concluded, in his report of May 21, 2009, that the problem of the noise from the vents was resolved. The builder had added covers to the three vents on the west side of the house and had also placed weights on the louvers. The Applicants agreed that the situation had been improved but not eliminated and therefore did not agree that the matter should no longer be warranted.

Also, in his report of May 21, Mr. Nevicato did not consider that the return air vent problem had been resolved to his satisfaction. This led to an inspection of the HVAC system by an independent body.

Nevertheless, despite the Applicants' objections, Mr. Nevicato found no breach of the one-year workmanship warranty relating to the vents because the builder had covered some boxes with metal boxes and had added weights to the louvers so that stronger winds would be required to create the noise that the Applicants had complained of.

Mr. Nevicato confirmed that the Ontario Building Code requires that there be no back drafts in the vents. He stated that he had no doubt that the vents met the

Ontario Building Code requirements of backdraft prevention. He also believed that the problems complained of were resolved once the metal boxes were placed over the three vents on the west wall and once the metal magnets were placed on the louvers. On November 17, 2009, during his inspection, the wind was blowing, but he heard nothing. Thus, Mr. Nevicato did not warrant the items, because he concluded that they complied with the Ontario Building Code. As well, no provision in the Construction Performance Guidelines says anything about noise tolerance. In addition, he stated that he was not aware of anything that could be done to completely eliminate the noise problem in a residential setting.

Mr. Nevicato explained that the Construction Performance Guidelines were produced by Tarion with input from those in the construction business. In response to questioning from the Tribunal, Mr. Nevicato stated that he did not know if any consumers or consumer groups were involved in setting those guidelines. He also confirmed that neither the *New Home Warranties Plan Act* nor the Regulations under that act provide the details that are found in the Guidelines.

On cross-examination by the Applicants' counsel, regarding the vents, counsel pointed out that Mr. Nevicato took wind speed and direction readings when he inspected the house on November 17, 2009. The wind speed was 5.8 miles per hour, and it was blowing from the north. However, Mr. Nevicato acknowledged that the complaints from the Applicants arose when the winds were blowing from the south, the opposite direction from that noted in Mr. Nevicato's readings. In fact, Mr. Nevicato was never at the house when the wind was blowing from the south.

He initially warranted the noise problem from the vents. However, he stated that vents with hydraulic lifts (the Applicant's suggestion) might solve the noise problem, but he has never seen such vents in residential buildings. He considered the builder's corrections sufficient when the builder placed boxes over the vents and weights on the louvers. However, he also admitted that if a strong wind is blowing from the south, there is a wind tunnel effect when it blows between the Applicants' house and the houses that were beside theirs. He also admitted that he had no idea where the fresh air intake on the south side of the house, under the deck, led. It did not close. It was permanently open.

In response to questioning from this Tribunal about installing hydraulic lifts in the vents, Mr. Nevicato stated that such lifts are over and above the requirements of venting in a residential home. There would also have to be some additional wiring installed, necessitating further renovations. The matter would just be too costly.

(c) Evidence of the Builder

The builder testified on his own behalf as the builder's only witness.

In response to questioning from the Tribunal, the builder stated that he has been in the building business for about 37 or 38 years, since he was 14 years old. He has constructed both commercial and residential structures, but mostly residential. He had built close to 500 homes in an area slightly north of the area where he Applicants' house is located. He built homes while still working at a nearby factory.

The Tribunal was impressed with the builder as a sincere witness. Of all the witnesses that testified before the Tribunal at this hearing, he was one of the witnesses whose evidence was the most forthright, was not seriously assailed, was not given to conflicting testimony and whose credibility was not challenged in any significant way.

On the question of the vents, he stated that the vents met Ontario Building Code requirements. He tried to accommodate the Applicants by placing covers over three of the vents and by placing magnetic weights on the louvers. He recommended to the Applicants that they turn on their fans to remove air from the house and to, thereby, stop the louvers from hitting each other. He feels that the Applicants want something that is above the Ontario Building Code requirements, even though the vents that he installed already meet the Code requirements.

ANALYSIS

The Applicants provided no evidence to this Tribunal to prove, on a balance of probabilities, that the vents violated the provisions of the Act. Section 13(1) of the Act sets out the warranties that apply to new homes that are registered under that Act, as follows:

> 13 (1). **Every vendor of a home warrants to the owner,**
>
> **(a) that the home,**
>
> **(i) is constructed in a workmanlike manner and is free from defects in material,**
>
> (ii) is fit for habitation, and
>
> **(iii) is constructed in accordance with the Ontario Building Code;**
>
> (b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(Emphasis is added)

Mr. Nevicato testified, as did the builder, that the vents met the provisions of the Ontario Building Code, especially after the remedial steps that the builder took. On the other hand, the Applicant presented no evidence to prove that the vents did not meet those provisions, or that they were not installed in a workmanlike manner. The particular location of the Applicants' house and its exposure to southerly winds off the lake were the circumstances that created the noise problem. Nevertheless, although the Applicant gave his own interpretation of the term, "wind conditions," in section 6.2.3.8(4) of the Ontario Building Code, he provided no evidence to support that interpretation.

The Applicant suggested installing hydraulic vents in order to correct the noise problem. However, such a remedy would provide to the Applicants something more than they had bargained for in the contract to purchase the house inasmuch as such vents, according to Mr. Nevicato, are not installed in residential premises. Such a suggestion also places an unreasonable expectation on the builder who had built the house two years previously as a model home.

The builder suggested a simpler solution; that is, to turn on the exhaust fans on windy days. The Applicant presented no evidence that such a suggestion could not work. Nor was there any evidence that the Applicants had tried that solution.

In addition, the Applicants submitted, in written argument, that the house was not fit for habitation. That was not addressed at any time during the Applicant's testimony. There was no evidence whatsoever, other than, perhaps, by innuendo, that the house was not so fit. In any event, in the circumstances of this case, where the Applicants continue to live in the house, the Tribunal rejects that argument.

Therefore, considering the evidence provided to this Tribunal, the Tribunal holds that Tarion correctly identified the vent problem as unwarranted.

II. Evidence relating to the Basement Patio Door

(a) Evidence of the Applicant

The Applicants complained that the basement patio door leaks at the bottom sill. They submitted to Tarion photos that showed that snow had entered around the bottom of the patio door. The patio door was the same kind as the patio door on the main, upper, level. The upper door leaked, as well, but Tarion replaced the upper patio door and the window above it. Therefore, the Applicants' position was that the basement patio door should be replaced, as well, because it leaked, too, and because it was exactly the same kind of door as the upper patio door.

The upper patio door had been replaced as a result of an e-mail message dated September 24, 2009, from David McPherson, Senior Building Inspector for the area where the Applicants' house was located. His message is found at page 17 of Tab E of Exhibit 3. In his e-mail, Mr. McPherson states that Article 9.7.3.2 (1) of the Ontario Building Code provides that glass in windows shall be designed in conformance with CAN/CGSB-12.20-M, "Structural Design of Glass for Buildings".

The message goes on to state that Appendix A of the Ontario Building Code Article provides three tables for selecting glass thickness, but that they are subject to the following restriction; namely, the building is not in an exposed location such as a hilltop or the shore of a large body of water. Therefore, the Applicants' position is that, given that the Applicants' house falls within the restriction, then the thickness of the replacement window needs to be designed by a professional, taking into account the wind loading of the noted conditions.

At no time was there evidence provided to this Tribunal that anyone followed the direction of Mr. McPherson.

Although this matter did not appear on the Pre Delivery Inspection form or on the year-end report, there is an e-mail of January 20, 2009, from the Applicants to Mr. Nevicato, Tarion's field representative, stating that the Applicants were having an issue with the basement patio door. The e-mail is found at Tab I of Exhibit 3, page 102. Since this involved water penetration, Counsel for Tarion advised the Tribunal during this hearing that Tarion accepted the fact that the water penetration issue was reported within the required time period.

The first two photos found at Tab G of Exhibit 3 were photos that the Applicants provided to Tarion to illustrate the leakage problem (snow).

Tarion sent a contractor to try to remedy the problem, but the problem persisted. Therefore, the Applicant referred this Tribunal to the information contained in Tarion's own Warranty Assessment Report, dated May 21, 2009, and found at Tab 22 of Exhibit 4. The last page of the report contains, among other things, under the heading, "The Two Year Warranty," the following information: "Every vendor of a home warrants for two years after the date of possession that there will be no water penetration through the basement or foundation of the home [s. 14 of Reg. 892 under the Act]."

In the decision letter of December 22, 2009, Tarion denied this claim because there was no defect in workmanship that amounted to a breach of the One Year Workmanship Warranty (see Exhibit 1, page 5 of 7, item 5).

The estimated cost to replace the basement patio door is found in Exhibit 6, page 3 of 8. That is an estimate dated June 14, 2010, from Unlimited Building

Solutions. The estimated cost is $15,106.00 plus GST. The Tribunal notes that the estimate was prepared before the imposition of the Harmonized Sales Tax (HST) in Ontario on July 1, 2010, at the rate of 13 per cent.

However, this Tribunal also notes that the estimate relates to the installation of an inswing French door system. This is a different door than the sliding patio door that had been installed initially, although the upper door was replaced with an in-swing door, as well (see evidence summary of Bryan Stott, below).

Cross-examination of the Applicant by Tarion

The Applicant stated, on cross-examination, that he had a contractor add a patio door on the main floor in the summer or fall of 2007. Before that installation, he also enlarged the rear deck to about twice the size of the original deck. Photograph 2 at Tab 37 of Exhibit 4 shows the addition to the deck. It is the left half of the deck shown in the photo. The photo clearly shows that the addition is directly above the basement patio door. The basement patio door is the one about which the Applicants complained was leaking at the bottom sill.

(b) Evidence of Bryan Stott

Mr. Stott had been a field claims representative for Tarion since December, 2007.

In late October or early November, 2009, he attended at the Applicants' house.

On the question of the basement patio door, he confirmed that he had received a letter from Unlimited Building Solutions stating that the replacement of the patio door on the main floor would cost $15,000.00 and the cost of replacing the elliptical window immediately above it was $8,400.00. However, Mr. Stott could not say that, just because the upper patio door was to be replaced, then the lower patio door should be replaced, as well. He stated that even engineers were having trouble in interpreting the relevant portion of the Ontario Building Code as it relates to that door. He did not know if there was leakage at the basement patio door, but agreed that, if the homeowner shows evidence of leakage, then the door must be put into compliance with the Ontario Building Code.

Concerning the replacement of the upper patio door, Mr. Stott's e-mail message of June 18, 2010 (Exhibit 6, page numbered 6) confirms that it would be replaced with an in-swing design to be better able to handle the high winds off the lake.

(c) Evidence of Sandro Nevicato

In his report of May 21, 2009, Mr. Nevicato continued the warranty on the upper patio door and on the leakage problem in the elliptical window above that door. This was significant to the Applicants because, if the upper patio door was

warranted, then the basement patio door, which was identical to the upper one, should also be warranted because of leakage.

But, in neither of his reports of January 26, 2009, and May 21, 2009, did Mr. Nevicato deal with the claim that the basement patio door did not comply with the Ontario Building Code, as that problem had not been referred to in either the Pre Delivery Inspection form or in the Certificate of Completion and Possession.

But, on November 17, 2009, (his third inspection) Mr. Nevicato inspected, for the first time, possible leakage under the basement patio door. Up until then, only the upper patio door had been discussed. However, Mr. Nevicato could not perform a water test on the lower door because the Applicants had, by that time, winterized the house, so that there was no access to a functioning outdoor water tap.

Mr. Nevicato testified that this matter arose after the Applicant complained about it in an e-mail to Tarion, dated January 20, 2009. The Claims Director, Ms. Metcalfe, instructed Mr. Nevicato to add the item to his list of things to review in the house. That complaint did not appear on the year-end form.

The Applicants' argument was that, if the upstairs patio door (which was the same as the basement patio door) was to be replaced because of water leakage, then the basement door should be replaced, as well. But, Mr. Nevicato explained that the basement door was more protected by the overhanging deck, and would not be as exposed to rain, whereas the upper door was more exposed to the elements. Despite that reasoning, however, the Applicant's evidence was that snow entered into the inside track of the basement patio door and onto the adjacent floor. Mr. Nevicato further explained that there are weep holes at the bottom of the doors, going right through to the interior of the house, where there is a track. This is illustrated in photo 25 in Tab 37 of Exhibit 4. But, there were no covers on the holes of the lower patio door. That explained the water penetration issue. Of significance to this Tribunal, Mr. Nevicato was not asked to determine whether the door complied with the Ontario Building Code.

But, Mr. Nevicato referred to the requirements of the Ontario Building Code for windows, found at Tab 2 in the Brief of Authorities. Article 9.6.6.2 states that glass in doors shall conform to Sentence 9.6.5.2 of the Code that states that sliding doors shall conform to CAN/CGSB 82.1-M, "Sliding Doors." In turn, Exhibit 7 was filed to show that the patio door product that the builder used did, in fact, conform to CAN/CGSB-82.1-M89. Exhibit 7 is the brochure that describes the door installed in the house. The builder had given it to Mr. Nevicato. On reviewing the Code requirements and the information in the brochure, Mr. Nevicato was satisfied that the door complied with the Code.

In further support of this opinion, Mr. Nevicato referred to photographs 19 to 24 at Tab 37 of Exhibit 4. He noted that no water damage could be seen in those photos.

Cross-examination of Sandro Nevicato by the Builder

The builder's position on the basement patio door was directly related to his objection to the decision by Tarion to warrant and replace the upper patio door and the elliptical window above it. The builder maintained throughout this hearing that the Applicants' installation of another patio door so close to the upper patio door weakened the structure. It was that action, so the builder maintained, that caused the leakage in the original patio door and upper window. The leakage did not occur because of the builder's defect in workmanship or materials. In addition, the builder maintained that the Applicant should have obtained another building permit before he installed the door. The Applicant's position on the issue of the building permit was that he (the Applicant) did the work on the permit issued to the builder, since the builder's work had not yet been completed.

Therefore, on cross-examination of Mr. Nevicato, the builder questioned him on the matter of the lost seal in the upper patio door. In response, Mr. Nevicato stated that the builder could have obtained replacement glass at no charge, through the warranty on it.

He also agreed with the builder that a homeowner could not use a builder's permit to make alterations if the builder's work had already been completed.

Also related to the leakage at the upper patio door, Mr. Nevicato stated that the leakage was on the left side of the door, looking at it from the outside, and it was on the left side that the Applicant had installed another patio door, about twelve inches away from the one installed by the builder. Mr. Nevicato stated that it was possible, though not a certainty, that placing such an addition at that location could have damaged the seal on the left side of the upper window. Photo 2 at Tab 37 of Exhibit 4 illustrates how close the added patio door is to the one installed by the builder. Mr. Nevicato confirmed that the builder had told him that it was for that reason that the builder did not consider it to be his responsibility to replace the upper window.

Cross-examination of Sandro Nevicato by the Applicants

On the issue of the use of the builder's permit, Mr. Nevicato admitted to counsel for the Applicants that he had no evidence that the house was, in fact, finished at the time of the addition of the patio door. He did not see any orders to comply, but, on the other hand, he did not see an occupancy permit, either. He also acknowledged that, if there are outstanding issues on a building permit, then it is not closed.

Concerning the patio door in the basement, Mr. Nevicato stated that he saw no evidence of leakage during his inspection on November 17, 2009. When shown photographs 19, 20, 21 and 25 at tab 37 of Exhibit 4, he stated that the marks shown in those photos were not the results of water accumulation. Instead, as he had told the builder, those marks were the results of dead bugs and bug excrement.

Mr. Nevicato stated that Article 9.7.3.2 of the Ontario Building Code did not apply to that basement patio door. Yet, as seen in the e-mail from Dave McPherson, Senior Building Inspector (Page 17, Tab E, Exhibit 3), the glass in the door had to comply with that article. Mr. Nevicato responded that he did not examine the glass in that door, just the leakage.

(d) Evidence of the Builder

Regarding the basement patio door, the builder testified that he personally chose a door that is made by one of the largest manufacturers of sliding doors that meet or exceed the Ontario Building Code requirements. He never saw any water enter through the weep holes of the door. The holes are designed to take water away from the lower trough.

ANALYSIS

The Tribunal heard evidence of the Applicants having installed an additional patio door on the upper level and having enlarged their deck after they purchased the house. However, there was absolutely no evidence to relate that work to the leakage problems that the Applicants experienced with the basement patio door or with the upper patio door. At most, there were only suggestions and speculation relating to that possibility.

In addition, whether the Applicants performed their work with or without a proper building permit is, in the circumstances of this case, a non-issue in considering their complaint about the leakage at the lower patio door.

Mr. Nevicato stated that he did not perform a proper water test on the basement patio door, although he was prevented from doing so on November 17, 2009, because the Applicant had winterized his house by that time. However, there was no evidence to explain why a water test could not be performed the following year, once the weather was more amenable to such testing.

Mr. Nevicato also stated that the upper patio door was more exposed to the rain. It leaked. Therefore, it was replaced. But, with respect to the basement patio door, he stated that it was protected by the overhanging deck. The protecting portion was that portion that the Applicants themselves added to the deck, as seen in photograph 2 of Tab 37 of Exhibit 4. Considering that the upper door leaked, and considering Mr. Nevicato’s evidence about the overhanging deck

protecting the lower door (which was exactly the same as the upper door), then the Applicants may very well have helped themselves to avoid a greater leakage problem at the basement patio door by having extended the deck.

Since Mr. Nevicato asserted that the deck above it protected the basement patio door, the inference that this Tribunal draws from his testimony is that, if the protection of the deck were not there, then the basement door would have leaked, as well, as did the upper door.

Tarion argued that the Applicants could not, now, argue that the basement patio door violated the Ontario Building Code because any violation of the Code that the Applicants assert is a new problem, was not addressed in the year-end form and, therefore, the Ontario Building Code issue is not properly before this Tribunal. Notwithstanding that argument, counsel for Tarion, during the hearing, accepted the fact that the water penetration issue in the basement patio door was reported within the required time period.

This Tribunal has long accepted that the *Ontario New Home Warranties Act* is remedial consumer protection legislation, and should be given a fair and liberal interpretation (see *Mandos v. Ontario New Home Warranty Program* [1995] O.J. No. 3647; *Markey v. Tarion Warranty Corporation* [2006] O.J. No. 2929; *Cecilio v. Tarion Warranty Corp.* [2007] O.J. No. 1692). Considering that the water penetration problem at the basement patio door was properly raised within the two-year period, as acknowledged by counsel for Tarion, and that the matter was referred to in the decision letter, the Tribunal considers that this matter is properly before this Tribunal and appropriate to be adjudicated upon.

The Applicant's evidence clearly shows penetration of snow on the sill of the lower patio door and onto the Applicants' floor. The Applicant's evidence also clearly shows that the exact door was replaced on the upper level because of leakage. There was no evidence that the basement patio door was any better than the upper door (other than by way of the protection afforded by the overhanging deck).

In addition, Tarion argued that the Applicants have not proved any damages. But, the fact remains that the evidence clearly shows penetration of snow. The upper patio door was exactly the same kind of door and was replaced.

Mr. Nevicato suggested, in his evidence, that the lower patio door did not have covers on the door's weep holes, located at the bottom of the door. All that was needed was to place covers over those weep holes. However, there was no evidence to show that the upper patio door lacked weep hole covers, yet the upper door still leaked. The Tribunal, therefore, questions the efficacy of Mr. Nevicato's suggested remedy for the lower door.

The evidence indicated that it was the glass that Mr. McPherson said, in his e-mail of September 24, 2009, should comply with Article 9.7.3.2(1) of the Ontario Building Code. But, it was the entire upper door that Tarion replaced, not just the glass. This Tribunal, therefore, concludes that there is no legitimate reason that the same should not be done for the basement patio door on the ground that the door was defective in that it was not suitable for the location of the Applicants' house.

Therefore, this Tribunal finds that, giving the Act a fair and liberal interpretation, and considering the evidence before it, the basement patio door leakage problem is warranted. The lower door should be replaced, as well, with the same kind of door that was used to replace the upper door.

The Tribunal accepts the damage figure of $15,106.00, being the amount for a replacement door. Neither Tarion nor the builder contested that amount. To that amount, unless any exemption applies, HST at 13% should be added.

III. Evidence Relating to Lakeside Patio Water Ponding

(a) Evidence of the Applicant

The Applicants complained of water accumulating near the foundation wall over the patio at the rear of the house in the spring of 2008. At times, as well, the air conditioner was under water by two or three inches. This situation existed from the time the Applicants purchased the house.

The patio can be seen in photos 26 to 29 at Tab 37 of Exhibit 4.

The builder arranged to have one of his workmen remedy the matter by regrading the patio. Photos 4 to 8 at Tab G of Exhibit 3 illustrate the patio and the work done by the builder to correct the problem. The Tribunal notes that the remedy did not include raising the level of the air conditioning unit. It was left on the patio bricks at the same height at which the bricks had been installed originally. As well, only the first six rows of bricks from the patio door were removed and replaced, but, again, excluding the area on which the air conditioner sat. The Applicant testified that the workman poured fine grain over the area exposed once the bricks were removed, but then tamped it down with his feet, and then replaced the bricks.

The problem still exists.

The Applicant further stated that the surrounding grass area is higher than the level of the patio, so that the patio acts like a "bathtub" when there is a rain, to quote the Applicant.

The Applicant referred this Tribunal to article 14.12 of the Construction Performance Guidelines found at Tab 1 of Exhibit 4, on the last page. The article deals with water ponding in surface grading of a building site. It states, in part, as follows: “The site shall be graded so that water does not accumulate at or near the building. Backfill against a foundation shall be graded to prevent drainage towards the building after settling.”

The Applicant testified that he believed that that provision should apply to his situation.

The article goes on to state: ”Subsidence of the land around the building or along utility lines, alterations by the homeowner such as landscaping or improper maintenance is excluded from the statutory warranty.”

The Applicant submitted an estimate to repair the ponding. It is found at pages 54 and 55 of Exhibit 5, in the amount of $11,792.68, including HST.

Cross-examination of the Applicant by Tarion

On being cross-examined by counsel for Tarion, the Applicant stated that the ponding was caused as a result of having a clay sub-grade and an inadequate sub-base of fine sand. However, he could not dispute that the original grading was inspected and a certificate was issued. On the issue of whether the Applicants’ enlargement of the deck area caused the ponding, counsel pointed out that one of the supporting posts shows some displacement of patio stones. That is illustrated in photo 27 at Tab 37 of Exhibit 4. There is also some displacement of patio stones at another supporting post shown at photo 29 found at the same Tab. The Applicant explained that it was the builder who erected the post shown in photo 29. The post shown in photo 27 was the one that the Applicants had erected.

Cross-examination of the Applicant by the Builder

Still on the issue of whether the Applicants’ enlarging of the deck contributed to the ponding, the builder asked why the Applicant did not obtain a building permit before he enlarged the rear deck. The Applicant stated that the original building permit had not lapsed, so that he did not need one. However, at no time was evidence given to this Tribunal as to whether the original permit had lapsed or whether, even if it hadn’t, the Applicant could still enlarge the deck without an additional permit. Nevertheless, on being pressed by the builder, the Applicant stated that he did not recall whether the builder had told him that he needed a structural engineer, new heat-cool calculations and a new building permit before he enlarged the deck.

Concerning the repair work that one of the builder’s workers did on the patio stones, the Applicant stated that he did not know how much gravel the workman

added under the patio stones. The builder then referred to the Warranty Assessment Report dated September 29, 2008, found at Tab 9 of Exhibit 4. Among other things the report, prepared by Tarion representative Dean Hickey, states that he performed a water test on the patio on September 24, 2008. Some pooling was found, but the pooling was not deemed to be significant at the time of the test. However, this Tribunal notes that there was no evidence as to whether the water test equated the weather and wind conditions that the Applicants experienced whenever the ponding occurred.

(b) Evidence of Sandro Nevicato

The Tribunal notes that neither of the two reports made by Mr. Nevicato on January 26, 2009, and May 21, 2009, had to deal with the lakeside ponding issue, as neither had been referred to in the Pre Delivery Inspection form or in the Certificate of Completion and Possession.

Then, for the first time, in his report of November 20, 2009, Mr. Nevicato referred to the rear yard patio settlement, and the ponding that the Applicants complained of. His report stated that such a matter was not warranted because settlement and subsidence of land around a building, other than subsidence beneath the footing of the building, is excluded from the statutory warranty. The Tribunal notes that, in Mr. Nevicato's decision letter of December 22, 2009, he states that the depressions within the interlock stone were the likely result of a compression of the sub-base material.

Mr. Nevicato testified that this item was originally not warranted. However, the builder, as a gesture of good will, had the first six rows of patio stones removed, had more support placed underneath to level the ground, and then replaced the patio stones. However, the stones underneath the air conditioner, which were also within the first six rows of stones, were not replaced.

Mr. Nevicato attributed the problem to subsidence that is excluded from warranty. In addition, there is no basement or living area beside the patio area, so there can be no effect on the house itself that might cause damage to the house. Furthermore, a previous water test showed that ponding did not remain for a long period of time. Also, the overhead deck protected the patio.

Mr. Nevicato also illustrated, by referring to photograph 27 in Tab 37 of Exhibit 4, that the Applicants had extended the overhead deck after they occupied the house and, in doing so, placed another column on the patio area. Photograph 2 of Tab 37 shows the added post on the extreme left side of the photo. As a result of the Applicants having made that alteration, Mr. Nevicato referred to article 14.12 of the Construction Performance Guidelines (Tab 1 Exhibit 4) which states that subsidence of the land around the building or along utility lines, alterations by the homeowner such as landscaping or improper maintenance is excluded from the statutory warranty. However, this Tribunal notes that there was no

evidence presented to it from which this Tribunal could conclude that the Applicants' alterations caused the ponding or that the Applicants were guilty of any improper maintenance.

According to Mr. Nevicato, a solution for the problem would be to raise the patio so that water drains away. According to him, a two-man crew could do that in a day,

Cross-examination of Mr. Nevicato by the Builder

Mr. Nevicato agreed with the builder that the depression of the interlock stones, as noted on page 6 of Mr. Nevicato's decision letter, was not a lot. Also, if the builder's workman raised the patio level under the first six rows of stones by that amount, no tamping would be necessary.

Cross-examination of Mr. Nevicato by the Applicants

Mr. Nevicato acknowledged that ponding in the first year is a warrantable item, but not subsidence. He also acknowledged that the Applicant had raised the complaint about ponding in his first-year form. It was item 13 on the form, found at Tab 4 of Exhibit 4. But, Mr. Nevicato considered that the builder resolved the complaint about ponding when the builder's workman raised the level of the first six rows of the patio stones. If the ponding continued, then the responsibility would be that of the local property standards officer because that officer would have been the one who approved the grading in the first place.

(c) Evidence of the Builder

The builder stated that the problem was due to subsidence. Even though the ponding was not warranted, the builder still conducted a courtesy repair in good faith for the homeowner. The subsidence was no more than 1.5 centimetres, so that, according to the builder, it is not possible to tamp that minimal subsidence.

On cross-examination by counsel for the Applicants, counsel pointed out that the ground beyond the patio stones was actually higher than the patio stones. The builder stated that he noticed that, but that was an area beyond the three-foot apron that Tarion oversees. As well, he had never seen a builder tamp the ground beyond the excavation area of a house. The underlying soil is clay, so that sand was placed under the patio stones, and it is this sand that subsided. The stones were installed sometime in April, 2005. He had obtained a grading certificate, approving the grading.

ANALYSIS

The ponding was not included in the Pre Delivery Inspection form or in the Certificate of Completion and Possession, but was included in the one-year form

as item 13 (Tab 4, Exhibit 4). There was no evidence that the Applicants noticed it when they purchased the house in May of 2007, or in the period from May to October, 2007. They noticed the ponding in the spring of 2008.

As a result of the complaints from the Applicants, the builder did a courtesy repair of the first six rows of bricks, but not of the bricks on which the air conditioner was placed.

The builder had obtained a grading certificate, approving the grading at the house (Exhibit 4, Tab 7, page 2). There was nothing presented to this Tribunal that contradicted that evidence. Consequently, this Tribunal does not accept the submission of the Applicants that the builder failed to ensure that there was proper grading. Approval had been given for the grading. There was, therefore, no evidence of any defect in workmanship.

The first Tarion field inspector performed a water test and found that ponding had occurred, but not to a significant degree. Subsequently, Mr. Nevicato, in his decision letter, stated that the depressions within the interlock stone near the lower patio door measured between 1 and 1.5 centimetres and were likely the result of compression of the sub-base material, or subsidence. He further stated that, since the municipality approved the grading in the first place, any problem with grading should be taken up with the municipality. This Tribunal agrees with that. The Applicants may have a dispute with the official who approved the grading, but the Tribunal has no jurisdiction to decide upon a dispute between those parties. The Tribunal can only base its decision on the provisions of the Act. In this case, the Act specifically states, in section 13(2), that subsidence is excluded from the warranties in section 13(1) of the Act, referred to earlier.

Section 13(2) states as follows:

> (2) A warranty under subsection (1) does not apply in respect of,
>
> (a) defects in materials, design and work supplied by the owner;
>
> (b) secondary damage caused by defects, such as property damage and personal injury;
>
> (c) normal wear and tear;
>
> (d) normal shrinkage of materials caused by drying after construction;
>
> (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
>
> (f) damage resulting from improper maintenance;
>
> **(g) alterations, deletions or additions made by the owner;**
>
> **(h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;**

> (i) damage resulting from an act of God;
>
> (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
>
> (k) damage caused by municipal services or other utilities;
>
> (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.
>
> (Emphasis is added)

However, the Applicants relied upon paragraph 14.12 of the Construction Performance Guidelines (Exhibit 4 Tab 1) to support their position. In their written submissions, the Applicants relied on the following provision of paragraph 14.12:

> The site shall be graded so that water does not accumulate at or near the building. Backfill against a foundation shall be graded to prevent drainage towards the building after settling,

However, the Applicants did not refer to another provision of that paragraph which states:

> **Subsidence of the land around the building** or along utility lines, alterations by the homeowner such as landscaping or improper maintenance **is excluded from the statutory warranty**
>
> (Emphasis is added)

The reference in the Guidelines to the exclusion of subsidence from warranty is exactly what the Act states.

The Applicant further stated in his submissions that there was no evidence to suggest that settlement occurred after the Applicants purchased the house. However, it is the Applicants who have the onus to prove their case on a balance of probabilities. Considering the evidence of the Applicants and that of the builder and Tarion, this Tribunal concludes that the Applicants have failed to meet that onus. They have failed to satisfy this Tribunal, on a balance of probabilities, that the ponding issue was a breach of any of the warranties in section 13(1) of the Act, referred to earlier.

Tarion, in its submissions, suggested that the Applicants' enlarging of the deck might have caused the ponding problem, contrary to section 13(2)(g), above quoted. However, there was no evidence to support that submission, so that this Tribunal does not accept that argument.

Therefore, the evidence that this Tribunal accepts is that the builder obtained approval for the grading at the house and subsidence of the patio stones had

occurred subsequently. Subsidence is specifically excluded from warranty by Section 13(2)(h) of the Act.

Therefore, this Tribunal concludes that the complaint relating to lakeside patio water ponding was properly excluded from warranty.

IV. Evidence Relating to the Cupping of the Hardwood Floor

The issue of the cupping of the hardwood floor attracted, by far, the greatest amount of testimony from expert witnesses, the largest number of exhibits, the most conflict of evidence, and was the most vigorously contested issue by the parties in this appeal.

Evidence on behalf of the Applicants

(a) Evidence of the Applicant

The Applicants complained that the hardwood flooring is cupped throughout the main floor. Cupping occurs when the outside edges of the hardwood strips curl up, so that the edges end up being higher than the centre of the strip.

Cupping was not a factor in the loft and basement because they each had carpeting on their floors. This problem was not identified in the Pre Delivery Inspection form, a fact that Tarion relied on heavily, arguing that the problem, therefore, occurred after the Applicants took possession, so that it could not be determined who created the environment in which cupping occurred.

The Applicant retained a consultant, Catt, who provided two reports on the cupping, one dated June 18, 2010, and the other June 22, 2010, filed as Exhibit 5. Counsel for Tarion urged this Tribunal to place little weight on Mr. Catt's reports because he was not present to give evidence or to be cross-examined.

At Tab A of Exhibit 3, on the first page, there is an e-mail dated March 19, 2010 from Mr. Catt to the Applicants. In the message, Mr. Catt stated that, in his opinion, the HVAC system in the Applicants' house was poorly designed, by not taking into consideration the unique features of their house. Further, he stated that he believed that the Applicants' humidity problems were related to excessive leakage of humid outside air into the house during the summer months and the system's inability to handle those conditions. The Applicant stressed in his testimony that Mr. Catt's conclusion was the same as that of Mr. Hussein, who had been hired by another business, Unlimited Business Solutions, that Tarion had asked to look into the matter.

Further, Mr. Catt provided a System Sizing Summary, found at Tab A of Exhibit 3, beginning at page 5 of that Tab. In the Summary, Mr. Catt states that the size of the air conditioner should be 3.64 tons, which is larger than the Applicants'

current 2.5-ton air conditioner. According to the Applicant's testimony, Mr. Hussein also told him that a larger unit was needed than the Applicants' 2.5-ton air conditioner.

In addition, in his report of June 18, 2010, Exhibit 5, Mr. Catt gave five reasons that humid air was entering the Applicants' home:

a) fresh air intake that is aimed directly at the winds blowing off Lake Erie.
b) a fireplace flue (basement level) that is also aimed directly at the winds blowing off Lake Erie.
c) three sliding patio doors that face the winds blowing off Lake Erie
d) windows that appear to be leaking, which also face the winds blowing off Lake Erie.
(e) vents for the kitchen (main and basement levels) allow considerable amounts of moist air to infiltrate the building envelope.

Also, four of seven cold air returns were not working. As well, a two-foot length of the main return air ductwork in the furnace room was completely detached when the Applicants purchased the house in May, 2007, yet this fact was not discovered until just before the Applicants prepared the one-year form in 2008.

In his report of June 22, 2010, Mr. Catt states that Tarion's own scope of work called for the replacement of the undersized air conditioner and furnace.

In response to allegations that the cupping problem occurred because the Applicants did not begin to live full-time in the house until October, 2007, the Applicant responded by giving numerous examples of the times that he and his wife, or one of them, would be in the house about two or three times a week. They would sometimes stay overnight.

Despite placing a dehumidifier in the basement of the house when they bought it, and running the air conditioner, the Applicants still could not lower the temperature in the house below 78 degrees F. during the summer.

The Applicant referred to the report of a consultant, Terry Koskela (Tab C, Exhibit 3), who later testified on behalf of the Applicants. Mr. Koskela stated that, because the HVAC could not be controlled properly, there was high humidity in the house, and it was the high humidity that caused the cupping. Mr. Koskela supported Tarion's suggestion to replace and re-design the HVAC system.

The Applicant then referred to two project summaries found at Tab 12 of Exhibit 4. These were both dated February 28, 2008; that is, about nine months after the Applicants purchased the house. These were project summaries prepared by one M. DiCenzo. They are heat and cooling calculations related to the Applicants' house.

On page 3 of Tab 12, there is a calculation done for a house with drapes on the windows. The calculation on page 4 is done for a house without drapes. This is significant because the Applicants did not place drapes in their windows because they wanted an unobstructed view of the lake from their house. On the other hand, while the builder used the house as a model home, he did have some drapes in the windows. But, subsequent evidence revealed that some of the window space was still uncovered.

The part of the calculations that the Applicant relied on was that, with drapes in the windows, a 2.4-ton air conditioner was sufficient for the house. Without drapes, a 3.2-ton air conditioner would be needed. The Applicants' air conditioner is 2.5 tons. Therefore, with drapes on the window, the Applicants' air conditioner would be the correct size. That is the position of the builder. The Applicant testified that the addition of a new patio door and the lack of shading in his house were factors in Tarion's decision in this matter. On the other hand, the Applicant testified that Mr. Hussein stated that with or without the added patio door and with or without shading, the air conditioning unit in the house is undersized. The Applicant's own contractor, Catt, also agreed that the air conditioning unit was undersized (see his report of June 22, 2010, Exhibit 5).

In denying the warrantability of this claim, Tarion referred in its decision letter to article 12.21 of the Construction Performance Guidelines found at Tab 1 of Exhibit 4. That article states, among other things, that damage caused by the homeowner's improper maintenance is excluded from the statutory warranty. The Guideline also states that the statutory warranty is also excluded if the cupping is caused by excessive humidity due to the failure by the homeowner to provide adequate ventilation.

But, in response, the Applicant emphasized that he put a dehumidifier in the basement when he bought the house, and that it emptied directly into the sump pump well, so that it could operate continuously. He also had the air conditioner turned on to cool the house to 78 degrees F., although the temperature rarely went below 80 degrees. He even added another dehumidifier on the main floor, but still could not control the humidity level when there was a south wind blowing on windy days.

The Applicants' consultant, John Kirec, filed a report, found in Exhibit 5, beginning at page 35 thereof. His conclusion was that the cupping was the result of the floor being exposed to high levels of humidity, due to uncontrolled site conditions. Again, Counsel for Tarion urged the Tribunal to place little weight on the report because Mr. Keric did not testify at this hearing and could not be cross-examined.

When they saw the problem, the Applicants first contacted their insurance company who examined the floor but did not pay out any claim.

The estimate to replace the flooring was $48,710.62, which included moving the existing counters and furniture. There was also a quote from Alexanian's at page six of Exhibit 5, in the amount of $9,870.00. However, the Alexanian quote did not include moving counters and furniture and only dealt with sanding the floor, not replacing it. Nevertheless, the Alexanian quote states that sanding the floor will not offer the same type of finish as the original factory finish. Further, the Alexanian quote states that sanding and refinishing the floor "...would result in a significantly inferior acting and in a different looking product."

Cross-examination of the Applicant by Tarion

The Applicant stated that the cupping is found throughout the house, although it is least in the office area, which is located directly above the furnace. The Applicant confirmed his belief that the cupping is caused by excessive humidity in the house. In turn, the excessive humidity is caused by hot humid air coming though the vents, the HVAC system being undersized for a house in that location, and four out of seven of the cold air returns not working. However, counsel showed the Applicant the readings for the cold air returns found at Tab 21 of Exhibit 4. Sandro Nevicato, Tarion's field representative, prepared the readings. They show a one-page set of readings for six cold air returns. Three had readings of 75 cubic feet of air per minute or less when Mr. Nevicato took the readings. The Applicant did not agree with those readings. He insisted that the four cold air returns on the east side of the house do not work, although the three on the west side do work properly. There is no date on the readings found at Tab 21.

Counsel then referred the Applicant to the quote for the replacement of the hardwood floor found at page 10 at Tab D of Exhibit 3. There is a quote of $23,710.69, compared to the figure that the Applicant gave in his testimony of $48,710.62. The Applicant did not know how the lower figure was calculated.

In addition, counsel referred the Applicant to the heat loss calculations found on page three at Tab 12 of Exhibit 4. The calculations were prepared taking into consideration that drapes were on the windows. The air conditioner recommended was 2.4 tons, yet the Applicants' air conditioner is 2.5 tons. Nevertheless, the Applicant repeated that Mr. Hussein, a mechanical contractor hired by Unlimited Building Solutions, a business that Tarion had asked to look into the matter, identified the unit as being undersized for the Applicants' house. However, the Applicant did concede that there is nothing in the Ontario Building Code that requires an air conditioner in a house.

When challenged about the absence of drapes or window coverings in the house, the Applicant stated that they bought the house for the view of the lake and wanted nothing to obstruct it.

Cross-examination of the Applicant by the Builder

Concerning the System Sizing Summary that Mr. Catt had done, found at Tab A of Exhibit 3, the Applicant stated that Mr. Catt had done his calculations for both draped and undraped windows and still concluded that the air conditioning unit that was needed was 3.64 tons, whereas the Applicants' is 2.5 tons. But this contrasted with the report at Tab 12 of Exhibit 4, prepared by M. DiCenzo, which stated that, with draped windows, a 2.4-ton air conditioner was sufficient. The Applicant acknowledged that the latter report stated that it conformed to the requirements of CAN/CSA-F280-M90. The builder then referred the Applicant to the Ontario Building Code requirements, found at Tab 1 of the Book of Authorities that Tarion filed. The Applicant acknowledged that Building Code article 6.2.1.1 stated that air conditioning systems shall be designed, constructed and installed to conform to good engineering practice as described in, among other documents, the requirements of CAN/CSA-F280-M90 as the DiCenzo report stated. Mr. DiCenzo did not testify at this hearing, so that his report could not be tested on cross-examination.

The builder also pointed out to the Applicant that the total airflow in Mr. DiCenzo's calculations was 967 cubic feet of air per minute (cfm). This compared to the readings taken by Mr. Nevicato found at Tab 21 of Exhibit 4. Those readings totaled 990 cfm, so that the builder's point was that the unit was proper. Nevertheless, the Applicant still maintained that four of the seven cold air returns were not working properly, so that there is insufficient air being drawn.

By way of reply evidence, counsel for the Applicant referred again to the Ontario Building Code requirements in article 6.2.1.1 that the builder had referred to at Tab 1 of the Book of Authorities. The Applicant stated that the "good engineering practice" referred to in that article meant that the air conditioning unit should be designed for the worst case scenario to deal with the high winds and high humidity of a structure located on a cliff overlooking a lake. The Applicant stated that, if the worst case scenario were not planned for, then, just as in the case of their house, the building would suffer.

That would also apply to the heat loss calculations found at Tab 12 of Exhibit 4 (the DiCenzo calculations). The worst case scenario would be the lack of drapes, so that good engineering practice, according to the Applicant, would require a 3.2 ton unit, as stated in the report that was done in the absence of drapes. Since such units are sized by increments of .5, then a 3.5-ton air conditioner would be necessary for the Applicants' house.

(b) Evidence of Nabil Hussein

Mr. Hussein has been a mechanical contractor since 1993. He has a design certificate enabling him to design HVAC systems in buildings up to 6,000 square feet. The Applicants' house was approximately 3,000 square feet in size.

Unlimited Building Solutions had hired Mr. Hussein when Tarion retained that business for its assistance in this matter, but it was the Applicants who had subpoenaed him to testify at this hearing. Mr. Hussein inspected as much as he could see of the HVAC system in the Applicants' finished house. He saw the calculations found on pages 3 and 4 at Tab 12 of Exhibit 4, as prepared by M. DiCenzo, that required a 2.4-ton air conditioning unit (with drapes) and a 3.2-ton unit (without drapes), Mr. Hussein verified that the Applicants had a 2.5-ton unit. He concluded that the Applicants' furnace and air conditioning unit were undersized.

Mr. Hussein based his conclusion on his calculations of a worst case scenario; that is, his design was done with windows uncovered. He stated that this was in accordance with good practice. He also did his design knowing that the Applicant had added an additional patio door to the main level. Such a door of 6 feet by 8 feet would lose an additional 2000 to 3000 British Thermal Units ("BTU") of heat energy. A one- ton air conditioner would be rated at about 12,000 BTU's.

To determine the tonnage, he did not cut into the Applicants' walls to verify the insulation levels, but, rather, based his calculations on the insulation values required by the Ontario Building Code. These values are R-12 in the basement, R-20 on the main floor, and R-40 in the attic.

He reviewed the report from Mr. Catt found at Tab A of Exhibit 3, in which a 3.64 ton unit was said to be needed for the Applicants' house. Mr. Hussein stated that a 3.5-ton unit would be sufficient. If a unit is undersized, as he stated that Applicants' unit was, then the house would still have a high humidity problem. He also tested the venting and found that four return air vents were not working properly or at all.

On cross-examination by counsel for Tarion, Mr. Hussein stated that an air conditioning unit should not be larger than required because, if it is too large, it cools the building too fast, but does not dehumidify, so that the moisture cannot be pulled out of the air. However, he looked only at the return vents, and not the supply vents, nor did he do his own heat-loss calculations.

He also confirmed that, when he went to the Applicants' house, he was working for Unlimited Building Solutions, he was paid by that business and he did not have any dealings about this house with any Tarion field representative.

In cross-examination by the builder, Mr. Hussein stated that he did not know the type of insulation that the builder used nor did he know the actual R-value of the insulation that the builder had installed in the house.

(c) Evidence of Terrance Koskela

The Applicants received a report from Mr. Koskela dated March 8, 2010, found at Tab C of Exhibit 3.

Mr. Koskela had spent 15 years in the hardwood lumber industry as at the time of this hearing. His work involved procuring and buying raw materials for the manufacture of flooring. He also advises end users about the maintenance and care of wood flooring. In his work, he is responsible for the care and drying of hardwood lumber, emphasizing the importance of knowing the moisture content of wood.

In his report, he states that he has attended at the National Hardwood Lumber Association school in Tennessee, in the United States of America, where he earned a certificate in hardwood lumber inspection. Also, he has taken specialized courses that pertain to the specifics of lumber drying, the reaction of wood to its environment, and the specific physical properties of various hardwood species. He has travelled to other cities in Canada, as well, to receive his hardwood specific education.

He reviewed the report of Mr. Chad Frenette, an expert witness called by Tarion, and disagreed with certain aspects of that report, primarily Mr. Frenette's opinion that the cupping of the Applicants' flooring was caused by what Mr. Frenette called the "Greenhouse Effect." Mr. Frenette's report was filed as Exhibit 5.

Mr. Koskela inspected the Applicants' flooring on March 6, 2010. He testified that, as soon as he walked into the house, he noticed the cupping of the hardwood floor, describing the condition as very noticeable throughout the house. The floor looked wavy. The majority of the boards were cupped. He measured the relative humidity on the main floor to be 60 to 63 per cent and in the basement to be 65 to 68%. In his report, he states that relative humidity should be kept between 35% and 55%, and ideally at 45%. He also took moisture content readings of the hardwood flooring and found that the moisture content was 7.5 to 9.0 per cent.

Also, near the elliptical window at the back of the house, on the main floor, where water had leaked into the house, he found that crowning and gapping had taken place. "Crowning" is the condition of hardwood flooring where the centre of the board is higher than the edges. This is the opposite of cupping. He stated that the leaking of water at that window would definitely have a crowning and gapping effect on the flooring.

He also noticed that gaps between the boards had been repaired with putty, but the putty had separated. He considered such repair to be unsightly, sloppy and unprofessional.

He also checked the nailing pattern of the wood board fasteners. Normally, the fasteners should be found 6 to 8 inches apart on every row. In the Applicants'

case, Mr. Koskela found that there were areas where there were spaces of 10, 13 and up to 17 inches. He stated that the person who had spaced those fasteners so far apart did not follow industry guidelines. Furthermore, smaller nails should be used when installing the flooring in corners that were hard to get at and next to walls (face nailing); however, at the Applicants' house, Mr. Koskela found no face nailing in the first 3 or 4 rows from the walls, and that is where the gapping occurred.

As for the cupping, he stated that the condition is caused when the wood is wetter on the bottom of the board than at the top, as a result of a moisture imbalance through the thickness of the wood. Of significance to this Tribunal, he stated that such moisture imbalance makes the wood swell, and that such swelling cannot happen without excessive levels of moisture, as might be expected in a house near Lake Erie. Of further significance to this Tribunal, he stated that, if the Applicants cannot control the moisture level in their house, then they cannot prevent cupping.

He stated that a heat recovery ventilation system ("HRV") would remove such excess moisture. He would expect such a system to be installed in a house located near a large lake, but no such system was installed in the Applicants' house. In his report, he states that, after the Applicants told him that Tarion intended to replace the furnace and air conditioning system as being undersized, he (Mr. Koskela) had no doubt that the cupping was caused by the lack of control that the Applicants had over the temperature and humidity levels in their home. He strongly supported the replacement of the system.

He further testified that, in the Applicants' house, the wood had been exposed to prolonged excessive moisture. The cupping would occur over a 6 to 12 month period, or longer, but not in a matter of days or weeks. This was significant because one of the arguments of Tarion was that there was no mention of cupping in the Pre Delivery Inspection form or in the Certificate of Completion and Possession so that the cupping must have occurred after the Applicants took possession of the house.

Mr. Koskela stated that he had read the report, Exhibit 9, of Tarion's expert witness, Mr. Frenette. Mr. Koskela strongly disagreed with Mr. Frenette's opinion that one of the causes of the cupping was the "Greenhouse Effect", caused when a home is not lived in year round, and is unoccupied. Mr. Koskela stated that there was no evidence to support that conclusion in this case. His reasoning was that, according to the National Wood Flooring Association ("NWFA") the "Greenhouse Effect" is caused when a structure is closed up, and there is no air flow. The sun shining through the windows causes heat, condensation and humidity, resulting in the wood swelling. This would occur when a house is closed up for one or two seasons, without ventilation. Then, when the occupants return and run the furnace or air conditioner continuously, the wood shrinks, and gapping occurs. But, significantly, Mr. Koskela saw no evidence of gapping

except in the restricted area of water leakage by the elliptical window. Cupping would occur if a house were abandoned for a few months. However, after hearing the Applicants' explanation that, after buying the house, they ran the air conditioner continuously, and had a dehumidifier running constantly and occupied the house one, two or three times a week between May and October, 2007, Mr. Koskela stated that there was no evidence that the "Greenhouse Effect" would apply in this case.

Mr. Koskela also disagreed with that part of Mr. Frenette's report (page 4) that the cupping was caused because windows were not covered with drapes, thereby allowing direct sunlight and humidity to gather. On the contrary, Mr. Koskela stated that he has yet to be made aware that manufacturers of wood flooring recommend window coverings. The more likely cause was excessive humidity caused by closeness to the lake and the inability to control humidity and temperature.

However, Mr. Koskela did agree with other parts of Mr. Frenette's report. He agreed with the stated causes of cupping found at page 3 of that report. That is, he agreed that a wet or damp basement, poor or no ventilation and the poor operation of the HVAC system all applied to the conditions in the Applicants' house.

As for the cost of remedying the cupping problem, Mr. Koskela stated that, in his opinion, the estimate found at Tab D of Exhibit 3 ($48,710.62, being the total of the two estimates of $33,769.31 and $14,494.31) was a fair estimate, especially since the Applicants' flooring was higher end. The flooring would have to be removed and replaced. He would not recommend sanding the flooring for several reasons. First, the flooring was higher end and of exceptional quality. Also, that flooring has a leading finish in the industry, done at the factory, and cannot be duplicated in the house after sanding. As well, the manufacturer's finish is anti-microbial that reduces bacteria that form in the wood, and sanding and re-finishing would remove that benefit. Furthermore, the high-end wood in the Applicants' house had a bevelled edge, creating the nicest aesthetics, but sanding removes the bevelled edge and changes the look of the floor. Finally, the manufacturer's factory finish warranty on the floor is 25 years. Sanding would eliminate that warranty. As well, Mr. Koskela was not aware of any refinishing company that would provide an equally long warranty.

On cross-examination by counsel for Tarion, counsel made the point that Mr. Frenette is a certified wood flooring professional, but Mr. Koskela is not. Also, Mr. Koskela has never given opinion evidence before this Tribunal before, and does not actually install floors, but, rather, sells them and explains how to care for them.

Mr. Koskela confirmed that the crowning and gapping below the elliptical window on the main floor occurred within about two or three feet of the wall, but he could

not say the time periods within which those conditions occurred. However, he stated that, to correct crowning and gapping, the flooring should be replaced.

He also told counsel that the installation of engineered flooring would have been a better option than the flooring that was used. Engineered flooring, according to Mr. Koskela's report, has a solid hardwood surface and a multi-layered, cross grain laminated core. It has increased stability over solid flooring and is beneficial for applications in homes that are exposed to high levels of moisture.

Mr. Koskela also stated that an HRV would be necessary if a house is subjected to high humidity, in order to extract the moisture from the air.

On the issue of the "Greenhouse Effect," Mr. Koskela stated that, if hot sun were shining on a hardwood floor, there still must be moisture to gather before cupping occurs. Although he saw cupping in all areas of the main floor, it was more pronounced in the kitchen and living area.

On cross-examination by the builder, Mr. Koskela agreed that it is the responsibility of the homeowner to maintain the relative humidity in a house. Mr. Koskela also acknowledged that cupping occurs when the bottom of the flooring is wet and the top is drier. But, he did not check whether there was a vapour barrier installed between the flooring and the underlying plywood throughout the flooring that might prevent the bottom of the flooring from getting wet. The builder questioned how water could penetrate the vapour barrier. Although Mr. Koskela stated that he was not an expert on the question of vapour barriers, he stated that moisture might penetrate if the barrier strips might not be completely sealed.

Evidence on behalf of Tarion

(a) Evidence of Chad Frenette

Without objection from the Applicants and the builder, Mr. Frenette was qualified as an expert on the causes and remedies of hardwood floor problems. His Curriculum Vitae, accepted by the other parties, is found at Tab B of his report, filed as Exhibit 9. Mr. Frenette has appeared as an expert witness in the past for Tarion, homeowners and builders. Among other qualifications, he is a certified professional wood flooring inspector and a certified flooring installer. He has inspected over 100 floors a year for the previous 10 years.

Mr. Frenette inspected the Applicants' house on May 19, 2010. During his inspection, there were also present the Applicant, Mr. Koskela and a heating and air conditioning expert commissioned by the Applicant, but whose name Mr.

Frenette could not recall. The photographs found at Tab A of Exhibit 9 illustrate his observations.

Photographs one to five show the crowning and gapping that occurred in the floor area beside the upper patio door, where water leaked in and onto the floor. In his report, he states that “drastic” shrinkage had occurred. His conclusion is that the area of crowning and gapping should be removed and replaced. Mr. Frenette stated that the estimated cost is $1,100.00, for both labour and material. The Tribunal notes that Mr. Koskela, the Applicants’ witness, also recommended replacement.

As for the cupping, Mr. Frenette testified that the cupping was slight, and not serious, contrary to what Mr. Koskela stated, who performed his inspection on March 6, 2010, slightly over two months earlier. However, Mr. Frenette’s testimony is also contrary to his own written report. In Mr. Frenette’s report, Exhibit 9, at page 2, under the heading, “Observations,” Mr. Frenette states that the cupping is throughout the main floor area and “...is particularly noticeable...” for the reasons stated in the report.

Mr. Frenette’s conclusions about the cupping were based on the Applicants’ house being only a summer home. However, after hearing the Applicant’s testimony at this hearing about how frequently the Applicants attended at the house, Mr. Frenette realized that the house was more than a summer home.

He stated that cupping could occur within one month or two years after installation. In a house near a lake, where there are high levels of humidity, swelling and cupping can occur. Swelling involves humidity entering the wood floor, causing it to swell in all directions. However, he did not see swelling in the Applicants’ house, only the cupping and crowning.

He stated that high humidity was not the only cause of cupping. At the time of his inspection of the house, it was very sunny. There was no covering on the windows to block the sun. That fact was a possible cause of the cupping because the wood would be dry on the top, from the sun shining on it, but wetter underneath. Conditions that cause any rapid drying would result in cupping. Therefore, Mr. Frenette emphasized that cupping did not occur because of a defective air conditioner. However, consistent with the testimony of Mr. Koskela, Mr. Frenette stated that the question of not having drapes on windows was not a matter dealt with by the NWFA.

Mr. Frenette also checked for a vapour barrier between the sub-floor and the wood floor itself. At one air vent, he observed a 15 pound asphalt barrier, which was an acceptable sub-floor. He concluded that, if such a vapour barrier were under one part of the floor, it would be absurd to think that it would not be under the rest of the floor. It was the builder who told him that such a vapour barrier was installed under the entire floor.

Mr. Frenette also conducted some tests on the floor itself with a special pin moisture meter. He found the moisture content of the floor to be 7 per cent at a depth of 1/8” (near the top of the flooring) and 12 per cent at a depth of 5/8” (near the bottom of the flooring). The moisture imbalance would be a factor in causing the cupping. However, he performed only one test, in order to avoid putting many holes in the floor.

He also found the relative humidity in the house to be 43.5 per cent on the main floor and 44.3 per cent in the basement. He stated that the recommended humidity level should be 30 to 50 per cent, whereas Mr. Koskela had stated that the level should be 35 to 55 per cent, and ideally at 45 per cent. Mr. Koskela’s readings on March 6, 2010, were 60 to 63 per cent on the main floor and, in the basement, 65 to 68 per cent.

As for the staple pattern, contrary to Mr. Koskela’s findings, Mr. Frenette found that the staples were placed, on average, in the accepted range of 6 to 8 inches apart. Some were over 8 inches and some were less than 6 inches, but the average was acceptable. Neither Mr. Frenette nor Mr. Koskela stated specifically where on the floor they measured the staples. Nevertheless, Mr. Frenette stated that the staple pattern had nothing to do with the cupping of the floor boards.

Mr. Frenette testified that his report states that one of the causes of the cupping was the “Greenhouse Effect” in the house. That is, when the house is not lived in year round, leaving the house unoccupied, the large windows in the house would allow heat to generate in the house, causing condensation and, therefore, swelling. But, also, the heat on the surface of the wood would dry the surface of the wood floor, leaving the bottom of the flooring wetter, thereby creating the moisture imbalance that causes cupping. He stated that, if the house were closed up for a couple of months, with the sun heating the flooring, cupping would be a natural result. This opinion, however, contrasts with the evidence of the Applicant in that the Applicants were, in fact, in the house from time to time throughout the period May to October 2007, and that they left the air conditioner running. Surprisingly, however, Mr. Frenette stated that his conclusions would still be the same whether the house was occupied or not. That opinion was based on the Applicants having removed the curtains from the windows, having installed an extra patio door on the main floor and not having occupied the home permanently.

His solution for the cupping problem was to adjust the moisture issue and then sand and refinish the floor. He would not recommend replacing the floor because, after sanding, some finishing products are as good as those used in the factory that manufactured the flooring. Despite that, however, he did agree that sanding would remove the micro-bevel in the Applicants’ flooring. He stated, contrary to the testimony of Mr. Koskela, that the final product would, nevertheless, be a better result.

He further stated that it would not be necessary to remove kitchen cabinetry or counters in sanding and re-finishing the floor. He estimated that the cost would be $3.75 per square foot. Therefore, at 1,600 square feet, the cost to sand and re-finish the Applicants' floor would be $6,000.00. In addition, there would be additional costs at $100.00 per room for 5 rooms. Also, there would be costs of $500.00 for travel and $100.00 to move two appliances, for an additional amount of $1,100.00. These figures amount to a total of $7,100.00. He compared this to the estimate from Alexanian's in the amount of $9,870.00, and explained that the latter estimate included an amount for profit.

Mr. Frenette did not explain how his recommendation that the flooring by the upper patio door be replaced in order to remedy the crowning and gapping there could co-exist with the rest of the flooring being sanded and re-finished, or what appearance that would leave for the Applicants.

Cross-examination of Chad Frenette by the Builder

Mr. Frenette agreed with the builder that he, the builder, had told Mr. Frenette that, in his construction of the house, he used 15-pound asphalt vapour barrier throughout the house. Therefore, the vapour barrier would stop cupping from below because the moisture from below would not penetrate the vapour barrier. There would be no way for the moisture to penetrate the vapour barrier unless through any seams in it.

In effect, then, Mr. Frenette agreed that there were only two ways that cupping could have occurred: either because of wetness rising from the basement (which Mr. Frenette stated could not occur because of the vapour barrier) or by dryness on the surface of the wood floor resulting from the heating of the surface from sun shining through the uncovered windows.

Cross-examination of Chad Frenette by the Applicants

Counsel for the Applicant challenged Mr. Frenette for not having stated in his report that the surface drying of the flooring could cause the cupping. In the report, Mr. Frenette referred to only four possible causes: wet or damp basements, plywood sub floors with excessive moisture, poor or no ventilation, and the HVAC system not operating. Nowhere in the report does he refer to surface drying. Mr. Frenette acknowledged that he did not state that cause in his report.

Counsel also pointed out that Mr. Keric's report (page 35 of Exhibit 5) also states that the cupping was caused by high humidity. Mr. Frenette acknowledged that he and Mr. Keric had the same qualifications.

As well, counsel referred to technical publication No. C200 of the NWFA, filed as Exhibit 10. At page 7 of the publication, there are nine possible causes of cupping listed, yet Mr. Frenette referred to only four in his report. Mr. Frenette stated that the four that he listed were the most likely causes in the Applicants' case. But, of significance to this Tribunal, he also admitted that the publication does not refer to dryness of the surface as a cause. The publication does, however, state that cupping could be caused when a wood floor experiences conditions that cause rapid drying on the surface. But, that condition is also associated with gaps as the flooring shrinks, but Mr. Frenette already stated that he saw no gapping except beside the upper patio door, yet the cupping was noticeable throughout the entire upper floor. Mr. Frenette acknowledged that he did not use a tape measure to measure how far the sun shone into the upper floor. He also admitted that the day of his test (May 19, 2010) was not a hot, humid and windy day, as the Applicants had experienced from time to time when they occupied the house and when the problems in the house began.

Mr. Frenette also acknowledged that, if the Applicants had set the air conditioner at 78 degrees F., as they had said, then that condition would not cause dryness. Nor would having a dehumidifier running constantly in the basement cause dryness. But, of significance to this Tribunal, Mr. Frenette admitted that poor or no ventilation arising from 4 of 7 cold air returns not functioning properly and an HVAC system not operating properly could result in the cupping. Cupping could also be caused if air in the house did not circulate properly. The Tribunal notes that it was the testimony of the Applicant that all these conditions existed in the Applicants' house.

On the question of the vapour barrier that was installed between the sub floor and the wood flooring, Mr. Frenette acknowledged that the vapour barrier is permeable and will allow a certain amount of moisture through, although it does slow the moisture down. This was contrary to his previous evidence that the vapour barrier would not allow moisture through. Also, there would be holes in the vapour barrier because of the staples used to secure the wood flooring.

Furthermore, there was moisture in the wood flooring, according to Mr. Frenette's measurements. There was 7% at the top and 12% at the bottom, as stated in his report. But, if no moisture could come through the vapour barrier, yet the cupping occurred after the Applicants purchased the house, Mr. Frenette could not explain where the moisture came from. He did acknowledge, however, that it could have come from an installation on a wet sub floor or it could have come through the vent that was installed between the basement ceiling and the main floor. He also states in his report that the Applicants' house is in a high moisture area due to the lake front location. That fact would contribute to higher than average relative humidity in the home.

Concerning Mr. Frenette's conclusion that the "Greenhouse Effect" could have caused the cupping, he acknowledged with counsel for the Applicants that such

an effect would occur if the house were unoccupied and there was no ventilation. Also, if air was not circulating properly, poor ventilation bringing in humid air from the bottom of the flooring, and then cycling it with drier air on the surface can cause cupping. However, this Tribunal notes that it was the testimony of the Applicant that the house was occupied from time to time, the fan was always running and the air conditioner was set to 78 degrees F., but the ventilation was poor and the HVAC system was not operating properly. Mr. Frenette also agreed with counsel for the Applicants that there had been mould found in the basement of the house, and mould would have been caused by excessive moisture there.

Finally, Mr. Frenette recommended in his report that the remedy for the Applicants would be to have the floor sanded and re-finished. However, having said that, he also acknowledged that the micro-bevel edge would be lost. As well, he could not say whether the warranty after sanding and re-finishing would be as good as the warranty from the manufacturer. The Tribunal notes that that evidence about the micro-bevel and the warranty is consistent with that of the Applicants' witness, Mr. Koskela.

(b) Evidence of Dara Bowser

Tarion introduced Mr. Bowser as an expert witness to respond to the evidence that the Applicants had presented by way of a report from their witness, Mr. Catt, whose report is found at Tab A of Exhibit 3. Mr. Catt did not testify at this hearing.

Counsel for the Applicants vigorously opposed Mr. Bowser being qualified as an expert witness. Counsel for Tarion led evidence about Mr. Bowser's qualifications, on which the other parties cross-examined him. After all parties made submissions as to whether he should be qualified, the Tribunal adjourned the hearing to the following hearing day in order to consider the matter at length.

The Tribunal gave lengthy oral reasons the following day and ruled that Mr. Bowser could be qualified as an expert on the design, testing, inspection and fault investigation of HVAC and air conditioning systems. His report, dated May 27, 2010, was filed as Exhibit 11. A further report of his, dated August 29, 2010, was filed as Exhibit 12.

Exhibit 12 is a review of the heat loss calculations prepared by Gary Bell, Exhibit 8 ("the Bell report"). Mr. Bell did not testify at this hearing. As well, there is no evidence that Mr. Bell even attended at the Applicants' residence to prepare his report. Mr. Bell's report specifically states that it is an analysis of building structure using information about windows, doors, and insulation values as supplied by the builder, contractor and/or owner. It also contains a waiver of liability on the ground that he is not responsible for changes in structure by the builder or contractor during construction. Accordingly, this Tribunal places no weight on the Bell report and, therefore, will not detail the criticisms of it that Mr. Bowser made in his report of August 29, 2010 (Exhibit 12).

On March 4, 2010, Mr. Bowser carried out detailed testing of the duct system performance in the house, but made no further analysis or testing. He also reviewed the report from Mr. Catt and a book of documents entitled “Expert Witness Reference Material” containing expert witness material that counsel for Tarion gave to him. That book of materials was not filed as an exhibit at this hearing so that this Tribunal could not review it.

Mr. Bowser confirmed that the system in the house was a high-efficiency natural gas furnace and an air conditioner of 2.5 tons. The ventilation system was made up of bathroom and kitchen fans.

He stated that the moisture problem symptoms were consistent with what he called the “unattended house syndrome.” That is, the symptoms occur in seasonal homes and newly constructed but not yet occupied homes where the building is left unattended during the spring and summer without heating, air conditioning or air circulation. However, once again, this Tribunal notes that such conditions are inconsistent with the evidence of the Applicant who specifically stated that the Applicants were in the house up to three times a week during the summer, the air conditioner and fan were on constantly, and a dehumidifier was operating in the basement of the house. Such a syndrome is also inconsistent with the evidence of the builder who states that he was in the house from time to time, as were real estate agents taking potential buyers through. Therefore, given the assumption he made and given the limited scope of his inspection and report, this Tribunal places little weight on the evidence given by Mr. Bowser as it fails to assist this Tribunal in determining the cause or causes of the cupping of the hardwood floor.

His assumption based on lack of air circulation is not only inconsistent with the Applicant’s testimony but also with Mr. Bowser’s testimony that, even if return air grilles do not function as designed, if air is supplied to a room (such as when, as the Applicant testified, the fans were on continuously), there is still circulation, such as under doors and through partitions that are not air tight.

Mr. Bowser stated that the moist air that Mr. Catt stated came through the air intake would not be enough to exceed the ventilation requirements of the house. In fact, when Mr. Bowser was there in March, 2010, the air coming in was below the detectable range of his equipment. However, this Tribunal notes that Mr. Bowser was not at the house during the summer, on a hot, humid, windy day under conditions that the Applicant complained about. Mr. Bowser stated that wind off the lake would not be a significant factor relating to air in the house, so that the HVAC unit was not undersized. This assertion is contrary to the evidence in Mr. Catt’s report and to the testimony of Mr. Hussein.

He stated in his report that he was not in a position to give an opinion as to the adequacy of the air conditioning system in the house where the windows in the

house were unshaded, although the cooling loads would be increased in such a situation. On that point, he did not review the heat loss calculations done by M. DiCenzo (page 3,Tab 12, Exhibit 4) except to confirm that the information on that page is consistent with the equipment installed in the house. Mr. Bowser agreed that only a 2.4-ton air conditioner was needed. However, Mr. Bowser also stated that, when he was at the Applicants' house, he did not verify the operation of the air conditioner. He simply assumed that the air conditioner was operating properly.

As for the Catt report (Tab A, Exhibit 3), Mr. Bowser stated that Mr. Catt used heating and cooling calculations that were more suitable for commercial premises, and not residential premises. Consequently, he could not interpret those calculations for the Tribunal because he was unfamiliar with the calculations used. As an example, he stated that, in Table 2 of Mr. Catt's report, under the heading "Sizing Data (Heating)," Mr. Catt used a ventilation air flow of 400 cubic feet of air per minute ("cfm") whereas the Ontario Building Code uses 150 cfm for residential buildings.

In concluding his report, Mr. Bowser states that he does not consider it plausible that an under-sized air conditioner alone is responsible for the excessive spring and summer moisture conditions. That may very well be true, especially in view of the Applicant's testimony that there were several other factors, as well, that the Applicant felt caused the high moisture content. However, Mr. Bowser goes on to state in his report that a more plausible scenario is that the house was left closed up and unattended for a period of time at a critical point in the spring or summer, without operation of the heating or cooling systems and without air circulation within the home.

However, this Tribunal notes that the testimony of the Applicant related to that scenario, and which the Tribunal accepts, belies the basis of Mr. Bowser's conclusion.

Cross-examination of Mr. Bowser by the Builder

The cross-examination of Mr. Bowser by the Added Party did not challenge or discredit Mr. Bowser's testimony-in-chief.

Cross-examination of Mr. Bowser by the Applicants

On cross-examination, Mr. Bowser emphasized that, in his report, Exhibit 11, he gave no opinion about the cupping in the house. However, this Tribunal notes that his report does state that the under-size of the air conditioner alone is not responsible for the spring and summer moisture conditions. However, according to the evidence presented to this Tribunal, it is precisely the moisture problem (the imbalance between the moisture content on the top of the wood flooring and

the moisture content at the bottom) that was said to have caused the cupping problem.

He also acknowledged that there was an air intake under the deck, but he could not determine either where it led or whether it was connected to anything.

Counsel for the Applicant also questioned Mr. Bowser about calculating heat loss and cooling requirements by basing the calculations on translucent shades on the windows, as opposed to having no shading on the windows at all. He stated that such a practice was not written anywhere, but it was his practice.

Counsel next compared Mr. Bowser's report, Exhibit 12, to the heat loss calculations at Tab 12 of Exhibit 4, prepared by M. DiCenzo on February 28, 2008. On page 3 of Mr. Bowser's report, he states that the air conditioning unit for the house should be 2.22 tons for the house with shades on the windows. With no interior shades on the windows, the unit should be 3.07 tons. Yet, on the DiCenzo calculations, the size of the unit was stated to be 2.4 tons with drapes and 3.2 tons without shading. The Tribunal notes that the calculations are similar.

Counsel then asked if Mr. Bowser agreed with the witness, Nabil Hussein, who said that, in calculating heat loss, the worst case scenario should be considered, such as in a house with unshaded windows. He responded that he did not agree or disagree because he does not comment on another person's practice.

Counsel next referred Mr. Bowser to Mr. Catt's report of June 22, 2010 (page 4 of Exhibit 5). There, in commenting on paragraph 11.4 of Mr. Bowser's report of May 27, 2010 (Exhibit 11), Mr. Catt suggested that good engineering practice should require air conditioning sizing to be based on unshaded windows, contrary to what Mr. Bowser stated. Counsel next suggested that sizing based on unshaded windows would be in keeping with the wording of article 6.2.1.1 of the Ontario Building Code, which specifically refers to good engineering practice appropriate to the circumstances. Mr. Bowser agreed that the Ontario Building Code refers to good engineering practice but simply stated that Mr. Catt is entitled to his own opinion on the matter of sizing an air conditioning unit.

Although Mr. Bowser stated in his earlier testimony that he only assumed the air conditioner was operating properly on the day of his inspection, he did agree with counsel for the Applicant that, with the 2.5 ton unit that was in the house, the unit should have been able to reduce the temperature in the house to 75 degrees F. (as opposed to the temperature of 80 degrees F. that the Applicants experienced). He then qualified that answer by saying that the temperature might be higher at the peak time of a hot day, but should be lower in the evening or on a cloudy day.

Mr. Bowser acknowledged that there was before this Tribunal four sets of heat loss calculations. Mr. Bowser prepared one, Gary Bell prepared another and M.

DiCenzo prepared two. All the reports had different results. Yet, in Mr. Bowser's file, there were three other calculations that also had different results, but which were not placed in evidence before this Tribunal. Mr. Bowser stated that it was, indeed, possible to have seven different results, because heat loss calculations were not an exact science. Results could vary due to different assumptions or different conditions, such as shading and wind protection. Therefore, counsel suggested that, if there could be seven different results, then the calculations should be based on the worst case scenario, as Mr. Hussein had suggested. In response, Mr. Bowser disagreed with Mr. Hussein. He stated that it was not appropriate to size cooling needs based on extreme conditions.

Mr. Bowser did not explain why he did not file at this hearing the results of his other calculations.

Finally, in response to counsel's suggestion, Mr. Bowser denied that he ever told the Applicants that Tarion had the best scam in the world and that Tarion charges the builders who then pass on their costs to their clients. However, he did acknowledge telling the Applicants that, as a general observation, the Tribunal is one that is not fair to the homeowner, although it was the legislation under which it operated that was at fault.

(c) Evidence of Bryan Stott

It will be recalled that Mr. Stott has been a field claim representative for Tarion since December, 2007.

After he inspected the Applicants' house in late October or early November, 2009, he recommended to Tarion that the furnace and air conditioner be increased in size because, as he stated, he was trying to use common sense to avoid the cost of hiring experts to examine the system. As of the date of this hearing, Tarion had not replaced the units. Although he is not qualified to determine the sizing of such units, he had spoken to Mr. Hussein who felt that the air conditioner was undersized. Mr. Stott did not doubt Mr. Hussein, considering that the house was large and it was beside a large lake.

On cross-examination by the builder, Mr. Stott confirmed that the Applicants' complaint about the cooling system was that it was not able to cool the house below a certain temperature, but Mr. Stott could not recall the exact temperature.

He also confirmed that he thought the system should be replaced "to smooth things over," to quote his testimony, especially in view of seven different experts' reports relating to heat loss calculations.

On cross-examination by counsel for the Applicants, Mr. Stott confirmed that he thought it would be more economical to replace the furnace. Although he did not know what reports were done, he just heard about them from Mr. Hussein. Mr.

Stott agreed that it would be better to err on the side of caution and go with a bigger unit because he agreed with Mr. Hussein's assessment.

(d) Evidence of Sandro Nevicato

Mr. Nevicato made no mention of the cupping problem after his two inspections on January 8, 2009, and April 30, 2009.

After his inspection of November 17, 2009, he still could not determine who had caused the damage. That matter, therefore, remained not warranted. On the question of the cracks between the wood flooring strips, he referred to the Construction Performance Guidelines found at Tab 1 of Exhibit 4. The explanation in paragraph 12.20 states that cracks resulting from joints that remain open in excess of 2 millimetres over the length of the strip are not acceptable. The Tribunal pointed out to Mr. Nevicato that photographs numbered four and five in Exhibit 9 (the report from Chad Frenette) showed that the cracks abutting the upper patio door were 2 millimetres or more in width. However, Mr. Nevicato explained that the width did not exist for he entire length of the floor strip, as paragraph 12.20 required.

Mr. Nevicato referred to photographs 8, 9, 10 and 11 at Tab 37 of Exhibit 4 that clearly showed the flooring in the house. He referred to the problem as "minor cupping," as quoted from his decision letter. The Tribunal notes that this observation conflicts with that of Mr. Koskela's, the Applicants' witness, who testified that the cupping was very noticeable. Mr. Nevicato's observation also conflicts with the written report (Exhibit 9) of Mr. Frenette, Tarion's own witness, where it is stated, on page 2, that the cupping throughout the main floor area "...is particularly noticeable..."

Mr. Nevicato confirmed that the Applicants did not note the cupping in the Pre Delivery Inspection form and the 30-day form, but did include it in the year-end form. Therefore, he concluded that the cupping occurred after the Applicants took possession of the house and that, therefore, it was not a problem at the time of purchase. He had also seen mould in the basement. To him, that meant that there was a higher moisture level in the basement that would contribute to the moisture imbalance in the flooring above. On January 8, 2009, during his first inspection, he noted that the relative humidity in the basement was higher than that in the room above.

He could see no installation problem. In June, 2009, Tarion hired Unlimited Building Solutions to review the HVAC system to ensure that all return air grilles drew air, because four return vents were not working properly. They were also to complete any necessary repairs. (see scope of work at Tab 26 of Exhibit 4). It was Unlimited Building Solutions that hired Gary Bell and Nabil Hussein. Tarion did not.

Mr. Nevicato also stated that the Applicants added another patio door on the main level. The original plans for the house did not include that door. Therefore, if, by making his own alterations by adding the patio door and thereby adding more glass to the wall, the heating and cooling characteristics were altered, then Tarion could not be responsible for that and, therefore, could not warrant the matter. However, this Tribunal notes that there was no evidence that would allow it to conclude that the addition of that door actually did cause the existing HVAC system to be inadequate, as opposed to having been inadequate in the first place.

Nevertheless, Tarion had agreed to replace the HVAC system, but only in its attempt to resolve the matter amicably and at the least expense.

Mr. Nevicato's opinion about the gaps was the same as his opinion in his report of November 20, 2009.

Cross-examination of Mr. Nevicato by the Builder

On the question of why Mr. Stott recommended changing the furnace, Mr. Nevicato stated that he knew that Mr. Stott's decision was based on the calculations obtained from Unlimited Building Solutions, but Mr. Nevicato wanted a further opinion. When he prepared a new scope of work for the furnace, the Applicants rejected it because Tarion had already told them that the system would be replaced. Mr. Nevicato noticed no freezing up of the system, and that was a sign that the system was operating properly.

The builder then asked Mr. Nevicato about the exclusion for "acts of God" referred to in the Construction Performance Guidelines at tab 1 of Exhibit 4, at page numbered 12. Mr. Nevicato stated that sun shining on a floor that did not have window coverings would not be an act of God. Nor would normal or heavy rainfall against the building. However, if damage were caused as a result of such rains, then the damage might be considered an act of God. Ultimately, Mr. Nevicato had decided that the glass and transom window on the upper floor should be replaced and weep hole covers should be placed on the door. He authorized nothing else.

Cross-examination of Mr. Nevicato by the Applicants

Although Mr. Nevicato had completed his preparation of the scope of work relating to a new HVAC system, he stated that the Applicant had complained about it so that Mr. Nevicato was removed from the investigation. Besides, that was when Tarion had made the decision to replace the furnace, so Mr. Nevicato did not complete his report. Nor were other reports given to the Applicants as a result of that decision. He did not know what heat loss calculations were used in arriving at the decision to replace the furnace. Nevertheless, he was the one who

had to write the decision letter, because he was the person who had done the inspections.

On the matter of the cupping, Mr. Nevicato did not state that it was noticeable, contrary to that very statement made by Mr. Frenette in his report (page 2, Exhibit 9) where Mr. Frenette stated as follows:

> The flooring is cupping throughout the main floor area. This is **particularly noticeable** due to the southern exposure and large uncovered windows at the back of the home. The direct sunlight reflects across the flooring making any uneven planks or cupped planks appear **obvious**.
> (Emphasis is added)

Mr. Nevicato also disagreed with the suggestion that, if an HVAC system is not working properly, then a homeowner's ability to control the climate in the house was limited. His reason was that the HVAC system is not the main way to control moisture in the home, because the furnace, air conditioner, duct work, exhaust fans, open windows and vents also assist in the process. However, he admitted that he had no evidence of the moisture level in the house for the first two years after it had been built.

Cupping is a warrantable item. Article 12.21 of the Construction Performance Guidelines (Tab 1 Exhibit 4 page numbered 219) states that hardwood flooring shall be installed without cupping. But, because that problem was not referred to until after the Applicants took possession of the house, Mr. Nevicato could not determine who caused the damage, notwithstanding the fact that he himself had not been at the house at all before the Applicants purchased it. Nevertheless, he admitted, and considered it to be a fair statement, that a house has to be lived in before problems are noticed.

As for the gapping, Mr. Nevicato did not consider the gapping to be enough to be warrantable. This contrasts with the testimony of Tarion's own witness, Mr. Frenette, who stated that the area of gapping should be replaced. It also contrasts with the report of Mr. Frenette where he wrote that the gapping was "drastic" (Exhibit 9, page 2). Mr. Nevicato also stated to counsel for the Applicants that he did not notice any gapping at the heat register beside the upper patio door. But, this contrasts with Mr. Frenette's evidence that moisture leakage caused gapping at that location.

When asked, therefore, whether a homeowner's ability to control the environment in the house would be compromised by a defective HVAC system, Mr. Nevicato would not answer directly, but said that it depended on what was meant by the word, "compromised." Yet, Mr. Nevicato informed the Applicants, in his decision letter, that it was the Applicants' responsibility to maintain proper indoor humidity levels. When Mr. Nevicato performed his inspection on January 8, 2009, the humidity level on the main floor was 37 per cent, and in the basement, 41 per cent. Yet, his evidence was that humidity levels should be kept in the range 35 to

45 per cent. This Tribunal notes that the Applicants' humidity level was within that range. His evidence contrasted somewhat from the recommended humidity levels stated in the Construction Performance Guidelines. The range of humidity levels in those Guidelines is 30 to 50 per cent (Tab 1, Exhibit 4, page numbered 261).

Evidence on behalf of the Builder

On the question of the cupping, the builder stated that he had the house for two years after he finished building it. It was a model home, a showcase. For seven days a week, either he personally was in the house, or real estate agents were. The furnace, air conditioner, exhaust fans and fireplace were all used from time to time.

But, the Applicants made a major renovation by adding another patio door on the main level. He believed that this broke the seal of the elliptical window and altered the structural integrity of the wall, causing the upper patio door to leak water. He felt that Tarion made a mistake to repair the main floor patio door and elliptical window.

Also, in the two years it was a model home, the house had drapes on the windows. He used spray foam insulation in the basement, considered the best for basement insulation. Only Dara Bowser and Mr. DiCenzo actually obtained the insulation values from the builder in doing their heat loss calculations. None of the others did, so that the builder considered their reports to be, to use his wording, "bogus."

He emphasized that he was the one who built the house, so that he was the one who knew it best. He stated that he built it as though he were going to own it.

He had spoken to Mr. Frenette about the hardwood floor. The builder told Mr. Frenette that he used fifteen-pound asphalt paper on the sub-floor, as recommended by the floor manufacturer. The builder was present when the asphalt paper was installed on the entire floor.

As for the fresh air intake under the deck, he said that it was connected to a cold air jumper duct.

In the two years that the builder owned the house, he experienced no flooding that would create moisture.

He also used dehumidifiers and, in a book that he gives to purchasers of his houses, he advises them to do the same. Tarion produces the book.

Finally, he believed that the furnace was properly sized. He considers that the evidence provided by Dara Bowser is the evidence to rely on because he is the

one who used the actual “as built” calculations. The builder disagreed with Tarion’s suggestion to replace the furnace and air conditioner.

He disagreed strongly with the suggestion of Mr. Bowser that the Tribunal process does not favour the homeowner. On the contrary, he feels that Tarion goes to great lengths to assist the homeowner in order to avoid the hearing process.

On being questioned by counsel for Tarion, the builder confirmed that a primary exhaust fan is what the Ontario Building Code requires and such was installed in this house.

The builder also confirmed that, on transferring possession to the Applicants, he told them how to properly maintain the hardwood floor. He told the Applicants to use a dehumidifier and the primary exhaust fan.

On being questioned by counsel for the Applicants, the builder confirmed that he started to build the house in September, 2004. The roof was on five weeks later, well before winter started. He finished in about May, 2005.

He confirmed that moisture readings of the sub-floor and hardwood floor were not taken. It took 11 days in March, 2005, to install the flooring, including the time to acclimatize the wood flooring to the building. He used the furnace for that purpose. The temperature was 72 degrees F. when the flooring was installed. Once construction was completed, he used a dehumidifier in the basement.

Counsel for the Applicants then reviewed the window coverings during that period before the Applicants purchased the house. Those details are found at Tab J of Exhibit 3. There were no coverings in the lower level walkout windows or on a small circular window in the loft. Other windows were partially covered at the top one-third of the window. In the main living room area, there were drapes that would be pulled together on hot days. There were no drapes on the large window above it.

Although no one actually lived in the house before the Applicants took possession, the builder had stayed there about ten or twelve times in two years, and real estate agents were there most days from about noon until 5:00 or 6:00 p.m.

ANALYSIS

One of Tarion’s arguments was based on the premise that the position of the Applicants is that the HVAC system is defective and, therefore, caused the cupping. In taking that position, Tarion, therefore, considers the cupping to be secondary damage, which is excluded from warranty under the Act.

Section 13(2)(b) of the Act states:

> (2) A warranty under subsection (1) does not apply in respect of,
>
> .
>
> .
>
> (b) secondary damage caused by defects, such as property damage and personal injury;

However, the Tribunal rejects that argument because the premise on which it is based is not the position that the Applicants took.

Throughout the hearing, the position of the Applicants was that the cupping of the hardwood floor was caused by excessive humidity in the house. In turn, the excessive humidity was caused by hot, humid air coming through the vents. An inadequate HVAC system, and four of seven cold air returns not working properly prevented the Applicants from combatting the problem. Therefore, the Applicants did not argue that the HVAC system caused the problem, but, instead, argued that the system prevented the Applicants from overcoming the real cause; that is, hot, humid air entering the house.

The Tribunal notes that the issue of secondary damage was not raised in the decision letter of December 22, 2009. The decision letter does not warrant the cupping because it states that damage caused by the homeowner's improper maintenance is excluded from warranty. The warranty is also excluded if the cupping is caused by excessive humidity because the homeowner failed to provide adequate ventilation. But, those reasons fly in the face of the evidence before this Tribunal.

The evidence of the Applicants, as this Tribunal accepts, is that they put in a dehumidifier in the basement when they moved in, and it ran continuously, emptying into the sump pump well. They also ran the air conditioner continuously, setting it at 78 degrees F., had the fans running and later added a dehumidifier on the main floor. If, then, as the evidence revealed, those steps were not adequate because the system itself was not adequate, then it is unreasonable to deny the warranty on the grounds that the homeowners did not take sufficient steps. The evidence discloses that the Applicants did all that they could do with the system that they had to work with.

There were six witnesses, plus the builder, who testified on the issue.

Mr. Koskela, a witness for the Applicants, inspected the house on March 6, 2010. He noticed the cupping as soon as he walked into the house. He stated that the cupping was noticeable throughout the house. The majority of the boards were cupped. The floor looked wavy. Even Tarion's witness, Mr. Frenette, in his report, stated that the cupping was "particularly noticeable."

The relative humidity readings that Mr. Koskela took on March 6 were 60 to 63% on the main floor and 65 to 68% in the basement. The moisture readings on the floor were 7.5 to 9.0%. The moisture readings were similar to the readings that Tarion's witness, Mr. Frenette, obtained during his inspection on May 19, 2010 (7% near the surface and 12% near the bottom).

Mr. Koskela also found gapping and crowning near the upper patio door, caused by water leakage. So did Mr. Frenette.

Mr. Koskela measured the distance between the nails that secured the floor to the sub-floor and found them to be farther apart than normal. His measurements were 10, 13 and even 17 inches apart. The norm is 6 to 8 inches. Mr. Frenette, on the other hand, found the nailing pattern to be within the normal range.

Mr. Koskela and Mr. Frenette both agreed that cupping occurs when there is a moisture imbalance, where the wood is wetter on the bottom than at the top. Mr. Koskela stated that excessive levels of moisture would be expected in a house near Lake Erie. Further, if the moisture level cannot be controlled, then cupping cannot be prevented. Therefore, Mr. Koskela supported Tarion's suggestion to replace the HVAC system.

Mr. Hussein, called by the Applicants, also agreed to the replacement of the HVAC system. He concluded that, with or without window shading, and with or without the added patio door, the Applicants' furnace and air conditioner were undersized. In fact, there was no evidence that the addition of the patio door contributed to the cupping problem. Mr. Hussein's conclusion was based on what he called good practice. Mr. Hussein concluded that a 3.5-ton air conditioning unit would be sufficient, not the 2.5-ton unit that the Applicants have. If the unit were undersized, then the house would have a high humidity problem, as the Applicants experienced in their house.

Mr. Hussein also found that four of seven return air vents were not working properly. So did the Tarion witness, Mr. Nevicato. Even Tarion's witness, Mr. Frenette admitted that if four of seven cold air returns and the HVAC system were not working properly, cupping could occur.

Bryan Stott, a Tarion field claim representative, testified that he recommended that the furnace and air conditioner be replaced. He based his suggestion on the information that Mr. Hussein told him, and out of an attempt to arrive at a "common sense" solution.

Mr. Koskela stated that cupping could occur in a 6 to 12-month period, even longer. This is similar to Mr. Frenette's testimony that cupping could occur one month to two years after installation. Mr. Frenette also acknowledged, as did Mr. Koskela, that cupping can occur near a lake or where there are high levels of

humidity. Mr. Nevicato acknowledged that problems might not be noticed until someone actually lives in the house.

Mr. Koskela disagreed with Mr. Frenette's conclusion that the Applicants' house suffered from the "Greenhouse Effect." Mr. Frenette based that conclusion on the premise that the Applicants' house was used only as a summer home, closed up and without any air circulation. It was only after the testimony of the Applicant that Mr. Frenette realized that the house was more than a summer home. As stated, the Tribunal accepts the evidence of the Applicant about the frequency with which they were at the house between May and October, 2007 and that the Applicants moved in permanently afterwards.

Mr. Koskela stated that the "Greenhouse Effect" occurs when a house is not lived in year round and is unoccupied. Even the NWFA considers that the "Greenhouse Effect" occurs when a house is closed up and has no air flow. But, that was not the case with the Applicants' house. On the contrary, on the facts that this Tribunal accepts, the Applicants had the air conditioner running continuously, set at 78 degrees F. They also had a dehumidifier running continuously in the basement. They went to the house two or three times a week, and sometimes stayed overnight.

In addition, the NWFA considers that, if there were drying because of a "Greenhouse Effect" in the house, then there would be gapping throughout the floor. But, in this case, gapping occurred only by the upper patio door, and the evidence before this Tribunal was that such gapping was caused by water leakage, not by the "Greenhouse Effect."

Mr. Koskela also disagreed with Mr. Frenette's testimony that the cupping was caused by the lack of shade on the windows. Mr. Frenette testified that the lack of shade would allow direct sunlight to dry the surface of the wood. However, Mr. Frenette did not refer to this situation in his report as a cause of the cupping. He mentioned it only in his oral testimony. In addition, if the lack of shade caused drying, more gapping would be seen, but, in this case, gapping was found only by the upper patio door. As stated earlier, that gapping was caused by wetness, not by drying. Nor does the NWFA list drying as a cause of cupping. Mr. Frenette agreed with this on cross-examination. In addition, Mr. Koskela pointed out that not even the window manufacturers recommend window coverings. Furthermore, cupping occurred even in areas that were not exposed to direct sunlight.

Furthermore, although Mr. Frenette stated that the floor could have suffered from excessive dryness, he still obtained moisture readings on May 19, 2010 of 7% near the surface of the wood and 12% near the bottom. In addition, he stated to counsel for the Applicants that setting the air conditioner to 78 degrees F. and running the dehumidifier in the basement would not cause dryness. Even his relative humidity readings on May 19 were 43.5% on the main floor, and 44.3% in the basement. Those readings were within an acceptable range.

Mr. Frenette also admitted that the moisture could have occurred if the flooring had been installed on a wet sub-floor. The builder himself testified that he did not take moisture readings of the sub-floor or of the wood flooring before installing it.

Also, Mr. Frenette agreed that moisture could have penetrated from the basement through the vapour barrier between the basement ceiling and the floor above by seeping through any seams and through the numerous staple holes.

Furthermore, Mr. Frenette agreed that moisture in the flooring could also have occurred because of the location of the Applicants' house in a high moisture area, or as a result of excessive moisture in the basement, as evidenced by the mould found there.

On reviewing the report and testimony of Mr. Frenette, this Tribunal considers that he based his findings on the premise that the Applicants' house was not lived in, there was no air circulation in it and was unoccupied. The facts do not support that premise. Therefore, this Tribunal does not accept his conclusion that the cupping resulted from the "Greenhouse Effect" or from excessive dryness in the house. As a result, where the testimony of Mr. Koskela and Mr. Hussein differ from the testimony of Mr. Frenette, this Tribunal prefers the evidence of Mr. Koskela and Mr. Hussein.

The situation is similar to the report and testimony of Tarion's witness, Dara Bowser. He based his report and testimony on the premise that the Applicants' house suffered from an "unattended house syndrome." But, as already stated earlier in these reasons, this Tribunal accepts the Applicant's testimony and the builder's testimony that the house was occupied and that at least the Applicants took steps to keep air circulating in the house by using the air conditioner and to remove moisture by using a dehumidifier in the basement. Both the air conditioner and the dehumidifier ran continuously.

In addition, Mr. Bowser did not verify the operation of the air conditioning system and he gave no opinion about the cupping in the house. He conducted only a testing of the duct system but no further analysis or testing. He reviewed a book of documents that Tarion had given to him but which was never presented to this Tribunal. He also acknowledged that he himself had performed three additional heat loss calculations and that they had different results, but he did not present those calculations to this Tribunal. He further acknowledged that there were seven such calculations altogether. He conducted four, Mr. Bell conducted one and Mr. DiCenzo conducted two. Each one had a different result.

Considering that Mr. Bowser based his conclusion on a premise that the evidence did not support and considering the limited scope of his inspection, where his testimony differs from that of Mr. Koskela and Mr. Hussein, this Tribunal prefers the evidence of Mr. Koskela and Mr. Hussein.

Mr. Nevicato also testified for Tarion,. His reasons for denying the warranty on the cupping issue were set out earlier.

The Tribunal notes, however, that when he conducted his inspection of the Applicants' premises on January 8, 2009, his relative humidity readings were 37% on the main floor and 41% in the basement. These readings were within the acceptable range.

The Tribunal has already held that the Act is remedial consumer protection legislation and should be given a fair and liberal interpretation. Therefore, considering the evidence presented to this Tribunal, as detailed and analyzed, above, the Tribunal agrees with the submissions of the Applicants that the excessive moisture in the Applicants' house was caused by defective work on the home, in that it was built in such a way as to allow for a moisture imbalance to occur. The HVAC system did not cause the floor to cup. It did not put moisture in the bottom of the boards. Instead, the house design and construction for that particular location allowed for the moisture imbalance and the HVAC system prevented the Applicants from doing anything about it. This Tribunal concludes that the Applicants have proved, on a balance of probabilities, that there has been a breach of the warranty that the home be constructed in a workmanlike manner under the Act. Therefore, the problem related to the cupping of the hardwood floor should be warranted.

Remedy

Having decided that the cupping problem is warranted, the Tribunal must now consider the proper remedy.

Mr. Frenette stated that the entire main floor could be repaired by sanding and refinishing it. This conflicts with his testimony that the smaller area of gapping below the upper patio door should be replaced. The Applicants, therefore, if Mr. Frenette's recommendations were followed, would have one area of the floor replaced and another, larger area sanded and refinished. The Tribunal considers that that is an unreasonable solution to impose on the Applicants.

On the other hand, Mr. Koskela recommended that the entire floor be replaced, not just repaired. He approved the Applicants' cost for doing so in the amount of $48,710.62.

His reasons for replacing the floor are as follows:

1. The flooring was higher-end flooring and, therefore, of exceptional quality.

2. The finish on the flooring was applied at the factory by the manufacturer and cannot be duplicated after sanding. The author of the letter from Alexanian's

(Exhibit 5, page 6) agrees. On the other hand, Mr. Frenette stated that some finishing products are as good as those used in the factory that manufactured the flooring. The Tribunal considers that his suggestion leaves too much uncertainty as to whether the Applicants will end up with the same quality flooring as had been installed originally.

3. Sanding removes the anti-microbial finish that the manufacturer adds as added protection for the flooring and for the consumer.

4. Sanding removes the bevelled edge of the flooring. Mr. Frenette agreed. Removing the bevelled edge changes the look of the floor. Again, the author of the letter from Alexanian's agrees.

5. The manufacturer's warranty is 25 years. The warranty after sanding and refinishing would not be that long. Mr. Frenette did not deny that in his cross-examination.

Based on the evidence presented to this Tribunal, the Tribunal concludes that repairing the floor by sanding and refinishing would leave the Applicants with something less than they had bargained for. Therefore, considering the above factors, this Tribunal agrees that the Applicants' floor be replaced and not just repaired by sanding and refinishing.

CONCLUSION

The Tribunal finds that the problem relating to the noise caused by the flapping vents is not a warrantable item and denies the Applicants' appeal on that issue.

The Tribunal also finds that the problem relating to lakeside patio water ponding is not a warrantable item and denies the Applicants' appeal on that issue.

The Tribunal finds that the problem relating to the basement patio door is a warrantable item. The Applicants are entitled to damages in the amount of $15,106.00. To that amount should be added HST at the rate of 13%, (unless any exemption from that tax applies) making a total of $17,069.78.

The Tribunal also finds that the problem relating to the cupping of the hardwood flooring is warrantable and that the flooring should be replaced. The cost of replacing the floor is found at Tab D of Exhibit 3, page 9. The amount shown is $33,769.31. However, that figure includes the cost of a patio door in the amount of $6,824.56. This amount should not be included in the replacement floor cost. Therefore, the difference is $26,944.75. Overhead and profit is calculated at page 10 of Tab D, in the amount of $3,822.28, making a total of $34,766.74, including HST ($26,944.75 + $3,822.28 + HST).

As well, there is the cost of packing, moving and cleaning in the amount of $14,941.31, as shown at page numbered 4 of Tab D. This figure included GST in the amount of 5% calculated on the sum of $14,229.82. As of July 1, 2010, HST at the rate of 13% is chargeable. Therefore, 13% of $14,229.82 is $1,849.88 for a total of $16,079.70.

The total amount payable is, therefore, $50,846.44 ($34,766.74 + $16,079.70).

ORDER

For the reasons stated above, and pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal dismisses the appeal relating to the problem of the vents and of the lakeside patio water ponding and directs Tarion to deny those two claims.

The Tribunal directs Tarion to allow the claim of the Applicants that relates to the basement patio door as warranted. The Tribunal directs Tarion to pay to the Applicants the sum of $17,069.78, inclusive of HST, for this claim.

The Tribunal directs Tarion to allow the claim of the Applicants that relates to the cupping of the hardwood floor as warranted. The Tribunal directs Tarion to pay the sum of $50,846.44 to the Applicants for this claim.

LICENCE APPEAL TRIBUNAL

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Kenneth W. Koprowski, Vice Chair

RELEASED: December 29 , 2010

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Decisions under the Ontario New Home Warranties Plan Act

Fiscal Year 2009 - 2010, January - March

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

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

6058–ONHWPA–CLAIM-withdrawal

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: THE APPLICANTS, in person

MARSHALL REINHARDT, Counsel, for Tarion Warranty Corporation

DOUG IRVINE, Agent, for the Added Party, Reidco North Ltd.

DATE OF HEARING: January 24, 2011 Toronto

ORDER

At the outset of the hearing, the Parties notified the Tribunal that they had settled all outstanding issues. Accordingly, the Applicants withdrew their appeal of the Decision Letters issued by Tarion dated April 28, May 18 and November 23, 2011. This matter is now concluded and the Tribunal will close its file.

Licence Appeal Tribunal

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D. GREGORY FLUDE, Vice-Chair

Released: *January 25, 2011*

6080-ONHWPA-CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: THE APPLICANTS, unrepresented

ELLIE CHOI, Counsel, representing Tarion Warranty Corporation

TREVOR WHIFFEN, Agent, representing the Added Party

DATE OF HEARING: December 8, 2010 Toronto

ORDER

This is an appeal by the Applicants from the decision letter of Tarion Warranty Corporation (the "Respondent") dated May 3, 2010, to disallow the claim of the Applicants made pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended, (the "Act") with respect to their home built by the Added Party.

BACKGROUND

This is the second hearing before the Tribunal by the Applicants with respect to a claim or claims arising from the purchase of their house (the "Residence"). The previous hearing was held on February 22 and 23, 2010, before Vice-Chair Sproule (the "February Decision").

In the February Decision, the Tribunal dealt with two issues: should the Respondent be responsible for repairing the outstanding warranted deficiencies and if money is to be paid, what amounts are the Applicants entitled to receive. The Tribunal ruled that the Respondent would not be directed to perform or arrange to perform the

warranted work and found that the amount the Applicants were entitled was $35,972.90.

By letter dated March 1, 2010, the Applicants raised the issue of water penetration in two storage areas in the basement of the Residence and cracks in the foundation walls. An inspection was conducted and a Warranty Assessment Report issued dated April 16, 2010. Based on the Warranty Assessment Report, the decision letter, dated May 3, 2010, was issued denying the claims of the Applicants on the basis that there is no defect in work or materials that constitutes a breach of the Major Structural Defect Warranty.

At the commencement of the hearing, the Applicant in attendance (the "Applicant") advised the Tribunal that he was withdrawing the claim with respect to the cracks in the foundation wall and therefore the hearing proceeded with the claim regarding water penetration only.

ISSUES

The issue to be determined in this hearing:

is there water penetration into the two storage rooms of the Residence and, if so, does such penetration constitute a major defect.

For reasons which will be discussed later in this decision, the Added Party sought costs against the Applicants.

EVIDENCE AND ANALYSIS

At the commencement of the hearing the Respondent's Book of Documents was admitted as Exhibit 3 and the Respondent's Supplementary Book of Documents was admitted as Exhibit 4.

The evidence of the Applicants consisted of the testimony of the Applicant and a series of photographs taken by the Applicant on or about February 20, 2010, which were admitted as Exhibits 6 (A) through (M) in these proceedings.

The Applicant testified that problems with moisture in the two storage rooms has been an on going issue since he purchased the Residence and no one has been able to determine the cause of the problem. The Applicant stated that the rooms were originally finished as storage rooms, however items stored in either room became covered with mold and could not be used.

The Applicant testified that after the rooms were stripped to the bare walls, it was possible to see moisture on the walls and ceilings.

The Applicant stated that the proposal to allow air to circulate through the storage rooms by opening the windows in the rooms is unworkable.

The Applicant testified that he owns a business called Rainbow Waterproofing and Tarping Systems and has been in business for 20 years. He stated that, notwithstanding his work in this area, he could not identify the cause of the moisture in the storage rooms.

It was the Applicant's position that the exterior walls should be torn down and replaced at a roughly estimate cost of $50,000.00.

Under cross examination, the Applicant acknowledged that he had received $4,830.00 with respect to the issue of moisture in the storage rooms, but stated that this payment was for the costs of materials to restore the rooms to their previous finished condition. The Applicant stated that this work could not be done until the moisture problem was solved.

The Applicant stated the storage rooms were not being used and when shown the photograph at Exhibit 3, Tab 4, page 1, stated that the items in the lower left hand corner of the photograph were moldy and had just been left there.

The Respondent called Donald Butwell who stated that he is employed by the Respondent as a field claims representative and had previously worked for the City of Toronto for 6 years as a building inspector. The witness stated that he has a BA degree from the University of Toronto in urban planning and environmental science.

The witness testified that he was the person who attended at the Residence on April 14, 2010 and conducted the warranty assessment inspection of the two storage rooms.

The witness stated that at the time of his inspection the walls of the rooms were bare and that there was no standing water, no pooling and no running water in either room. The witness testified that he inspected the rooms in the presence of the Applicant and that he did not detect any mold or mildew in either room.

The witness testified that there was no evidence of a failure of a load bearing wall or that any portion of the basement was unuseable.

Under cross examination, the witness stated that at the time of his inspection the walls were dry and there was no evidence of water in the rooms.

When it was suggested to the witness that the photograph at Exhibit 3, Tab 4, indicated moisture, the witness testified that he disagreed that the photograph showed signs of moisture and stated that when he ran his hand over the walls they were not wet.

At this juncture, the Applicant indicated that he had photographs which he wished to refer to in his cross examination of this witness.

In order to accommodate the Applicant, it was agreed between the Parties that the hearing would adjourn for lunch and that the Applicant would be allowed to retrieve the photographs from his vehicle and provide them to the Respondent and the Added Party for their review.

At the recommencement of the hearing, the Parties agreed that, if properly introduced, the photographs could be entered as exhibits. The Applicant returned to the stand and having acknowledged that he was under oath stated that he had taken the photographs two days before the February hearing. The Applicant identified the 10 photographs and they were entered as exhibits.

The Applicant stated that the photographs showed marks of water penetration not condensation and that this was the same problem which had existed since he bought the Residence.

Mr. Butwell was recalled to continue his cross examination and was reminded that he was still under oath. The Applicant presented several of the photographs to the witness who disagreed that the pictures show discolouration of the walls which indicated water penetration. The witness did acknowledge that certain photographs show some form of staining which did suggest the presence of moisture.

When shown Exhibit 6 (B), the witness agreed that it showed moisture on the ceiling but stated that this was due to sweating or condensation not penetration.

The witness testified that he had seen similar situations and that when the space was properly ventilated the problem disappeared.

THE LAW

The relevant sections of the Act are as follows:

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations. R.S.O. 1990, c. O.31, s. 13 (1).

Exclusions

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;

(g) alterations, deletions or additions made by the owner;

(h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;

(i) damage resulting from an act of God;

(j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;

(k) damage caused by municipal services or other utilities;

(l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession. R.S.O. 1990, c. O.31, s. 13 (2).

CONCLUSIONS AND ORDER

It is difficult to understand why this matter is once again before the Tribunal. In the February Decision, the Tribunal stated at page 3, in the forth paragraph that

> The scope of repairs warranted are well understood and documented.

However the Applicant believes there is a further issue for consideration and the Respondent issued a decision letter denying the claims as set forth above.

The Applicant expressed, in a passionate fashion, that the problem with moisture in the storage rooms had not been addressed in the February Decision and was therefore open to appeal.

The Added Party believed that all issues with respect to the Residence had been settled when they agreed to pay the Applicants the sum of $25,000.00. They believed that when the issues went before the Tribunal in February 2010, that was the end of the matter. That the Added Party is once again before the Tribunal with respect to an issue which the Added Party believed had been settled twice is the reason the Added Party is seeking costs.

The burden of proof that there is a major structural defect falls upon the Applicants and the Applicant produced no evidence to support his claim that there is water penetration. In fact, the Applicant admitted he does not know the source of the moisture in the storage rooms.

It is the view of the witness for the Respondent that the moisture is due to condensation which, pursuant to sub section (2) (e) of the Act, is an exclusion from the warranties.

In conclusion, the Tribunal finds that the Applicants failed to prove that there was a warranted defect.

Accordingly for the reasons stated above and pursuant to the authority vested in the Tribunal by Section 16 (3), the Tribunal confirms the decision of the Respondent to disallow the Applicants' claim.

REQUEST FOR COSTS

Although the Tribunal understands the frustration of the Added Party in these proceedings, it finds that it is not appropriate to award costs. The conduct of the Applicants in this matter is not of such a degree that an award of costs would be appropriate and dismisses the Added Party's request for costs against the Applicants.

LICENCE APPEAL TRIBUNAL

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E. ALAN GARBE, Vice-Chair

Released: January 17, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6229/ONHWPA.CLAIM-Pre-Hearing-Withdrawal

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Member

APPEARANCES: THE APPLICANT, unrepresented

GREGORY BANKS, Counsel, representing Tarion Warranty Corporation ("Tarion")

COREY LIBFELD, Agent, representing Port Union Homes Ltd., (the "Added Party")

DATE OF PRE-HEARING: January 24, 2010 Toronto

ORDER

A pre-hearing was held in this matter on January 24, 2011, in Toronto, Ontario, before this Tribunal, in the presence of the Applicant, Gregory Banks, Counsel for Tarion, and Corey Libfeld, Agent for the Added Party.

After a brief discussion of the issues, the Applicant determined the first year claim items were concluded. The Parties agreed that various documents reviewed were concerned with the first year issues and the present appeal.

The Applicant advised he would be turning his attention to his second year claim issues and thereupon withdrew the present appeal.

As a hearing date had not been previously scheduled for this matter, the proceedings before the Tribunal are now concluded and the file closed.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Member

Released: January 25, 2011

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6240–ONHWPA–CLAIM–withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Presiding Member

PARTIES: APPLICANT, unrepresented

GENA ARGITIS, Counsel representing Tarion Warranty Corporation

GRAHAM CHALMERS, Agent representing Victoria Charles Inc.

DATE OF PRE-HEARING: January 4, 2011 Toronto

ORDER

A pre-hearing was held in this matter on January 4, 2011, in Toronto before this Tribunal in the presence of the Applicant, Gena Argitis, Counsel representing Tarion Warranty Corporation (the "Respondent") and Graham Chalmers, Agent representing Victoria Charles Inc. (the "Added Party").

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant, the Respondent and the Added Party.

2. The issues under appeal have been resolved on terms which the parties wish to remain confidential and the Applicant has withdrawn her appeal.

3. The hearing in this matter, no longer being necessary, is therefore cancelled and the proceedings before this Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Mary Ann Spencer, Member

Released: January 5, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6257-ONHWPA-CLAIM-Settlement

APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: A FAMILY MEMBER OF THE APPLICANTS, Agent, representing the Applicants

R. MATTHEW BARTEAUX, Counsel, representing Tarion Warranty Corporation ("Tarion")

STEVEN MACKEL, Agent, representing Medallion Developments (North Maple) Limited (the "Added Party")

DATE OF PRE-HEARING: January 19, 2011 Toronto

ORDER

A pre-hearing was held in this matter on January 19, 2011, in Toronto, Ontario, before this Tribunal, in the presence of one of the Applicants, R. Matthew Barteaux, Counsel for Tarion, and Steven Mackel, Agent for the Added Party.

After a detailed discussion of the issues, the parties reached a settlement agreement related to all of the claims under appeal, the terms of which the parties agreed to keep confidential. As a result of the settlement agreement, the Applicants withdrew their appeal and executed and filed with the Tribunal a form evidencing their intention in that regard.

Accordingly, the hearing scheduled for March 7, 8 and 9, 2011, is cancelled, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: January 28, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

6013–ONHWPA–CLAIM

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

PARTIES: THE APPLICANTS, unrepresented

BRENT J. ARNOLD, Counsel representing Tarion Warranty Corporation

NO-ONE appearing for the Added Party, Northridge Homes Ltd.

DATE OF PRE-HEARING: February 17, 2011 Toronto

MOTION

Tarion has brought a motion seeking an order permitting access to the Applicants' property to prepare a responding expert's report. A necessary corollary of the motion is that the currently scheduled hearing dates will have to be adjourned.

Having heard the submissions of the parties, the Tribunal makes the following order:

1. The hearing is hereby adjourned and shall now commence at 9:30 a.m. on September 12, 2011 and continue as necessary on September 13 through 16 at the Tribunal's Chambers, 1 St Clair Avenue East, 12th Floor, Toronto, Ontario.

2. By March 19, 2011 the Applicants shall permit Tarion access to the property to conduct an inspection by an expert witness or witnesses of Tarion's choosing. Where possible, Tarion will schedule such inspection to occur after 5:00 p.m. Monday to Friday or during the day on a Saturday or Sunday.

3. By May 31, 2011, the Applicants shall permit Tarion access to their property so Tarion may conduct a second inspection by an expert witness, such inspection to be limited to completing tests to determine if there has been subsidence of the building, such inspection to be scheduled as set out in clause 2 above.

4. Tarion shall deliver a copy of any responding expert's report it intends to rely on at the hearing, together with a *curriculum vitae* of the expert, to the other parties by no later than June 21, 2011.

LICENCE APPEAL TRIBUNAL

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D. Gregory Flude, Vice Chair

Released: February 24, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

5981-ONHWPA-CLAIM-Withdrawal

APPEAL FROM A DECISION OF THE TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* RSO, 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: ONE APPLICANT, representing himself and the other Applicant

SCOTT KIRKPATRICK, Counsel, representing Tarion Warranty Corporation

LOU SQUAZZIN, Agent, representing Kenmore Homes (London) Inc., the Added Party

DATE OF HEARING: March 2, 2011 London

ORDER

This is an appeal by two Applicants from a decision of the Tarion Warranty Corporation denying their claim under the *Ontario New Home Warranties Plan Act,* R.S.O. 1990 c. O.31 (the "Act"). To preserve their privacy, the Applicants will not be referred to by name.

During the hearing and following a discussion between the parties, the Applicant advised that he was withdrawing the appeal on behalf of both Applicants.

Accordingly, the Tribunal orders and stipulates that the appeal is withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice-Chair

RELEASED: March 04, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6062-ONHWPA-CLAIM-Pre-hearing-Settlement

AN APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: KEN SELBY, Member

APPEARANCES: W. ALEX KYLE, Counsel, representing the Applicants

DANIELLE PECK, Counsel, representing Tarion Warranty Corporation (the "Respondent")

VINCE PETICCA, Agent, representing the Added Party, Fernbrook Homes (Alton) Limited (the "Added Party")

DATE OF PRE-HEARING: March 3, 2011 Toronto

ORDER

A second pre-hearing was held in this matter on March 3, 2011, in Toronto, before this Tribunal in the presence of W. Alex Kyle, Counsel for the Applicants, Danielle Peck, Counsel for the Respondent and Vince Peticca, Agent for the Added Party.

At the time of the pre-hearing, the Applicants had two outstanding issues. After extensive discussions the parties agreed to a settlement.

The Tribunal orders that the hearing in this matter is no longer required as this appeal is withdrawn, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Ken Selby, Member

RELEASED: March 10, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6270–ONHWPA–CLAIM-pre-hearing-withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Presiding Member

PARTIES: THE APPLICANT, appearing on behalf of himself and the other Applicant

GENA ARGITIS, Counsel representing Tarion Warranty Corporation

DATE OF PRE-HEARING: March 4, 2011 by Teleconference

ORDER

A pre-hearing was held in this matter on March 4, 2011 by teleconference, in Toronto before this Tribunal in the presence of one of the Applicants, appearing on behalf of himself and the other Applicant and Gena Argitis, Counsel representing Tarion Warranty Corporation (the "Respondent"). No representative appeared on behalf of the Added Party, 1443132 Ontario Ltd.

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicants, the Respondent and the Added Party.

2. The issues, as set out in the Respondent's Decision letter dated August 12, 2010, were resolved on terms the parties wish to remain confidential and the Applicants withdraw their appeal.

3. The matter before this Tribunal is concluded.

LICENCE APPEAL TRIBUNAL

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Mary Ann Spencer

Released: March 4, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6322-ONHWPA-CLAIM-Pre-hearing-Withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O. 1990, c. O. 31

TO DISALLOW A CLAIM

TRIBUNAL: DAVID B. CARYLL, Presiding Member

APPEARANCES: APPLICANTS, self-represented

GENA ARGITIS, Counsel, representing the Registrar, Tarion Warranty Corporation (the "Registrar")

EVAN SHEAR, Agent, representing Aberfoyle Meadows Limited c/o Cityview Homes (the "Added Party")

DATE OF PRE-HEARING: March 8, 2011 Toronto

ORDER

A pre-hearing was held on March 8, 2011 before this Tribunal in the presence of the Applicants, Gena Argitis, Counsel, representing the Registrar, and Evan Shear, Agent, representing the Added Party.

The parties resolved all of the issues in this matter. Therefore, the Tribunal orders:

1. That the proceedings in this matter are hereby concluded on the basis of the withdrawal of the Applicants' appeal.

2. The terms of the settlement are not filed with the Tribunal.

3. The scheduled dates for the hearing are cancelled.

LICENCE APPEAL TRIBUNAL

David B. Caryll, Presiding Member

RELEASED: March 10, 2011

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6329-ONHWPA-CLAIM-Pre-hearing-Settlement

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT,* R.S.O. 1990, c. O.31

TO DISALLOW A CLAIM

TRIBUNAL: KEITH PENNER, Member

APPEARANCES: THE APPLICANTS, unrepresented

GENA ARGITIS, Counsel, representing Tarion Warranty Corporation

CANDY KING, Agent, representing Urbandale Construction Limited, the Added Party

DATE OF PRE-HEARING: February 28, 2011 Ottawa

ORDER

A pre-hearing was held in this matter on February 28, 2011, in the presence of the Applicants, Gena Argitis, Counsel for Tarion Warranty Corporation (the "Respondent"), and Candy King, Agent for Urbandale Construction Limited (the "Added Party").

During the pre-hearing of this matter, the parties settled all outstanding issues and signed a Settlement & Release which was reviewed by the Tribunal. The parties wish to keep the terms of the Settlement & Release confidential.

Accordingly, the Tribunal orders that:

1. The parties to the appeal are the Applicants, the Respondent and the Added Party.

2. The issues in this matter are settled in accordance with the terms of the Settlement & Release, which has not been filed with the Tribunal by choice of the parties.

3. No hearing dates had been set, and this matter is, therefore, concluded.

LICENCE APPEAL TRIBUNAL

_____
Keith Penner, Member

RELEASED: March 9, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6346–ONHWPA–CLAIM-Pre-hearing-Withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Presiding Member

PARTIES: AGENT, Representing the Applicants

MICHAEL DOYLE, Counsel representing Tarion Warranty Corporation

MAXINE ANDREWS, Agent representing Stafford Homes Limited

DATE OF PRE-HEARING: March 17, 2011 Toronto

ORDER

A pre-hearing was held in this matter on March 17, 2011 in Toronto before this Tribunal in the presence of the Agent representing the Applicants; Michael Doyle, Counsel representing Tarion Warranty Corporation (the "Respondent"); and Maxine Andrews, Agent representing Stafford Homes Limited (the "Added Party").

The reasons set out in the Respondent's Decision Letter dated November 5, 2010 were discussed in detail. The Agent for the Applicants indicated that he fully understood the reasons and that the Applicants withdrew their appeal.

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicants, the Respondent and the Added Party.

2. The Applicants withdraw their appeal and the matter before this Tribunal is therefore concluded.

LICENCE APPEAL TRIBUNAL

_____

Mary Ann Spencer
Presiding Member

Released: March 18, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

6350–ONHWPA–CLAIM-Pre-hearing-Withdrawal

AN APPEAL OF A DECISION OF TARION WARRANTY CORPORATION UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT, R.S.O. 1990, c.O.31

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Presiding Member

PARTIES: APPLICANTS, Unrepresented

GENA ARGITIS, Counsel representing Tarion Warranty Corporation

COREY LIBFELD, Agent representing Jasper Village In Milton Inc.

DATE OF PRE-HEARING: March 17, 2011 Toronto

ORDER

A pre-hearing was held in this matter on March 17, 2011 in Toronto before this Tribunal in the presence of the Applicants; Gena Argitis, Counsel representing Tarion Warranty Corporation (the "Respondent"); and Corey Libfeld, Agent representing Jasper Village In Milton Inc. (the "Added Party").

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicants, the Respondent and the Added Party.

2. The issue, as set out in the Respondent's Decision letter dated November 15, 2010, was resolved on terms the parties wish to remain confidential and the Applicants withdraw their appeal.

3. The matter before this Tribunal is concluded.

LICENCE APPEAL TRIBUNAL

_____
Mary Ann Spencer
Presiding Member

Released: March 17, 2011

This decision may also be available on Quicklaw.

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- National Technology and Mangement Corp. known as National College of Technology and Management
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- Niagara On The Lake Culinary School Inc.
- Niagara On The Lake Culinary School Inc.
- National Technology and Mangement Corp. known as National College of Technology and Management – Motion
- Ontario Fire Academy Inc. Known As Ontario Fire Academy

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

NATIONAL TECHNOLOGY AND MANAGEMENT CORPORATION O/A NATIONAL SCHOOL OF TECHNOLOGY AND MANAGEMENT – Motion

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT, 2005,* S.O. 2005 c. 28 Sch. L,

TO REVOKE REGISTRATION

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: ALIAMISSE MUNDULAI, Counsel, representing the Applicant, National Technology and Management Corp.

DONA SALMON, Counsel, representing the Superintendent, *Private Career Colleges Act, 2005*

DATE OF HEARING: July 20, 2010 Toronto

REASONS FOR DECISION AND ORDER
MOTION TO RE-INSTATE APPEAL AND LIFT INTERIM SUSPENSION

OVERVIEW

The Applicant has brought a motion to re-instate its appeal and lift an interim suspension that was ordered by the Respondent.

The Respondent consents to the order re-instating the appeal but opposes the motion to lift the suspension.

FACTS

The salient facts are as follows:

i) The Superintendent of *Private Career Colleges Act, 2005* ("Superintendent" or "Respondent") issued a notice of proposal to revoke the Applicant and an order of immediate suspension of the Applicant dated August 18, 2009;

ii) The Applicant promptly appealed to this Tribunal. Pre-hearings were held and the matter scheduled for hearing.

iii) A series of inspections related to the Applicant occurred in February 2010 resulting in four Notices of Contravention and one Restraining Order, issued under the *Private Career Colleges Act, 2005* ("the Act"). Each of these Notices/Orders was reviewed by the Applicant and decisions in respect of those reviews are still pending;

iv) On February 24, 2010, the Applicant, who had previously been represented by counsel, wrote directly to the Superintendent and formally surrendered the Applicant's registration as a Private Career College, under s. 22 of the Act. The appeal, however, remained outstanding. The appeal was still scheduled for hearing on May 5, 6 and 7, 2010;

v) By notice of Motion dated April 30, 2010 (returnable May 5, 2010) the Respondent sought an order dismissing the appeal on account of their being no registration upon which to carry out the underlying proposal (flowing from the surrender referred to in iv) above);

vi) By Order of the Tribunal dated May 5, 2010, the underlying hearing was adjourned June 10, 2010 and August 13, 2010;

vii) On June 9, 2010, the Applicant wrote to the Tribunal and advised that she was withdrawing her appeal;

viii) By June 11, 2010, the parties had arrived at an agreement that, on consent, they would take steps to re-instate the appeal;

ix) On June 18, 2010, counsel for the Applicant wrote to the Respondent and advised that the Applicant was "withdrawing" her "voluntary" surrender of her registration; and

x) On July 5, 2010, the Applicant, through counsel, served the motion heard today, seeking a re-instatement of the appeal and lifting of the interim suspension order.

CONSENT ORDER

Based on the consent of the Parties, the Tribunal hereby orders the appeal re-instated and schedules the hearing of the appeal for the dates of **September 20 to 24 and September 27, 2010 to October 1, 2010.** This Order is, at the request of the Respondent, without prejudice to his position that the Applicant's surrender of its registration still stands and thus the appeal should be dismissed. Indeed, the Respondent has indicated it will return its motion in that regard at the outset of the hearing on September 20, 2010.

CONTESTED ISSUE - LIFTING OF INTERIM SUSPENSION

In terms of the interim suspension, the relevant legislation for consideration on this motion is found at sections 20 to 22 inclusive of the Act*,* as follows:

> 20. (1) The Superintendent may suspend a registration immediately by giving the registrant a notice of immediate suspension if the Superintendent is of the opinion that it is necessary to do so,
>
> (a) for the immediate protection of the interests of the students or prospective students of the private career college; or
>
> (b) to prevent a contravention of an Act of the Legislature or of Canada. 2005, c. 28, Sch. L, s. 20 (1).
>
> Content of notice
>
> (2) A notice of immediate suspension shall set out,
>
> (a) the reasons for the immediate suspension;
>
> (b) any additional action described in subsection 19 (1) that the Superintendent proposes to take; and
>
> (c) the right to require a hearing by the Tribunal if, within 15 days after service of the notice, the registrant gives written notice to that effect to the Superintendent and the Tribunal. 2005, c. 28, Sch. L, s. 20 (2).
>
> Hearing and appeal
>
> (3) Subsections 19 (3) and (5) to (13) apply with necessary modifications to an immediate suspension and subsections 19 (2) to (13) apply with necessary modifications to any additional action described in subsection 19 (1) that the Superintendent proposes to take. 2005, c. 28, Sch. L, s. 20 (3).
>
> Suspension immediate and not stayed by hearing
>
> (4) An immediate suspension is effective immediately upon giving the registrant the written notice of the suspension and is not stayed by a request for a hearing by the Tribunal. 2005, c. 28, Sch. L, s. 20 (4).

Lifting of suspension

(5) The Superintendent or the Tribunal may order that an immediate suspension be lifted upon being satisfied that the reasons for the suspension no longer exist. 2005, c. 28, Sch. L, s. 20 (5).

Application for registration after refusal, revocation

21.(1) A person who is refused registration may reapply for registration at any time if the person satisfies the Superintendent that there has been a material change in the person's circumstances. 2005, c. 28, Sch. L, s. 21 (1).

Same

(2) A person who is refused renewal of registration or the registration of which is revoked may reapply for registration if the person satisfies the Superintendent that there has been a material change in the person's circumstances, but the person may not reapply for registration until two years have elapsed since the renewal was refused or the revocation took effect. 2005, c. 28, Sch. L, s. 21 (2).

Surrender of registration

22. A registrant may surrender the registrant's registration at any time by giving the Superintendent written notice of the surrender accompanied by the certificate of registration. 2005, c. 28, Sch. L, s. 22.

The Applicant argues that it has shut down its school and thus, meets the test in section 20(5) as "the reasons for the [interim] suspension no longer exist". The basis for any interim suspension is circumscribed by s. 20(1) of the Act and must relate to an immediate risk to students, prospective students or a risk of a breach of the laws of Canada or Ontario. The Applicant points out that there is now no risk to students (there are none) or prospective students (there are no courses to offer, thus no prospective students). The Applicant further submits that, as there is no school in operation, there is no risk of a breach of the laws. Indeed, the Applicant, before the Tribunal, undertook to not open its school for business until the hearing of the appeal. The Applicant submits that it needs the interim suspension lifted in order to facilitate a third party sale of the College, a sale, it submits, benefits all parties. The Applicant points to an e-mail dated February 10, 2010, from the Respondent's counsel confirming that the Superintendent is not opposed to such a sale so long as the purchaser meets the necessary standards. The Applicant's evidence does refer to the difficulty it is having in selling its business to a third party so long as the interim suspension is operative.

The Respondent submits that the onus is on the Applicant to establish that the reasons for the suspension no longer exist. The Respondent further submits that the Applicant has failed to discharge that onus and points to the continuing breaches of the Act that were cited in February 2010 – thus confirming that the mere shutting down of the school (which occurred in August 2009) does not sufficiently protect the public. It is submitted that even with the School in shut down mode there is a risk to "prospective students"

based on the integrity issues that formed the basis for the interim suspension. To that extent, it is submitted that the undertaking offered at the hearing is of no value. In the alternative, the Respondent submits that the decision to lift an interim suspension is a discretionary one (see Niagara on the Lake Culinary School Inc., [2010] O.L.A.T.D. No. 96 at p. 3) and that, in the circumstances of this case, especially the surrender of the registration, that discretion should not be exercised in favour of the Applicant.

RULING ON CONTESTED ISSUE

The facts in this case are highly unique as the Applicant surrendered its registration in February 2010, but still sought to appeal the revocation proposal that had been made in respect of that registration and sought to lift the interim suspension. In June 2010 that appeal was withdrawn. It was not until June 18, 2010 that the Applicant sought to withdraw the voluntary surrender of its registration. Then the Applicant moved to re-instate its appeal.

On the Respondent's side, with one breath he argues that there is no proposal to carry out since the registration has been surrendered but with another breath he consents to the re-instating of an appeal about that very registration.

In the circumstances of this case, the Tribunal declines to exercise its discretion to lift the interim suspension. The Applicant has not made out a case that the integrity issues that formed the basis of the suspension order have been alleviated.

Moreover, there has been an extant surrender of the Applicant's registration. The Applicant confirmed that its registration was surrendered when it withdrew its appeal on June 9, 2010 (see Exhibit P of the Applicant's motion record). The assertion on June 18, 2010 that the Applicant had withdrawn its "offer to voluntarily surrender [its registration]" does not appear to have statutory validity. As stated earlier, the issue of the validity of the withdrawal regarding the surrender of the registration will be argued as part of a motion by the Respondent at the outset of the hearing of the appeal.

Accordingly, the Tribunal does not see fit, at this time, to grant a discretionary remedy lifting a suspension in respect of a registration that does not appear to exist. It may be that the interim suspension was rescinded as a necessary consequence when the Applicant surrendered its registration.

In these circumstances, the Tribunal does not feel it should make a positive order lifting a suspension of a registration that has been surrendered and not formally re-instated. The ruling in this regard is without prejudice to the Applicant convincing the Tribunal Member hearing the appeal, another Tribunal member, a judicial officer, a judge or any relevant adjudicator thereof, that its licence is not surrendered and that the interim suspension is in effect but should be lifted. An opportunity to make that argument is less than two months away.

ORDER

Accordingly, the Tribunal orders:

i) The appeal is re-instated, on consent, and will be heard on **September 20, 21, 22, 23, 24, 27, 28, 29, 30 and October 1, 2010.** The re-instatement of the appeal is without prejudice to the Respondent's return of its motion to dismiss the appeal (see Exhibit 5 to this motion);

ii) The Applicant's motion to lift the interim suspension is dismissed, without prejudice to it renewing that motion, if its registration is formally re-instated, prior to disposition of its appeal, by virtue of the Respondent's motion to dismiss, or otherwise.

LICENCE APPEAL TRIBUNAL

_____
Richard Macklin, Vice-Chair

Released: July 21, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

NIAGARA ON THE LAKE CULINARY SCHOOL INC.-Pre-hearing

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT, 2005.* S.O. 2005 c. 28 Sch.L

TO REVOKE REGISTRATION

TRIBUNAL: LYNDA TANAKA, Chair

APPEARANCES: HEATHER C. DEVINE and KATHLEEN BINGHAM, Counsel, representing the Applicant, Niagara on the Lake Culinary School Inc.

MELANIE HERBIN, Counsel, representing the Superintendent, *Private Career Colleges Act, 2005*

DATE OF PRE-HEARING: May 17, 2010 Toronto

ORDER

A pre-hearing was held in this matter on May 17, 2010 in the presence of the Applicant's Counsel and Counsel for the Superintendent, *Private Career Colleges Act, 2005* ("Superintendent" and "Act" respectively). Representatives of the parties also attended.

The matter concerns a Notice of Immediate Suspension pursuant to subsection 20(1) of the Act and Notice of Revocation of Licence pursuant to subsection 18(2) of the Act, issued February 12, 2010 by the Superintendent ("Notice"). The Tribunal held a hearing arising from a motion by the Applicant to set aside the Superintendent's Order of Immediate Suspension and dealt with those issues in the Tribunal's Decision issued April 27, 2010.

This pre-hearing was held to deal with procedural issues pertaining to the appeal of the Notice and to discuss settlement. The parties canvassed settlement of the matter and a second pre-hearing may be arranged, if required, at the request of the parties, to provide further settlement opportunities and to deal with any outstanding procedural issues.

The record of the proceedings to date at the Tribunal contains personal information concerning students of the Applicant. Rule 7 of the Tribunal Rules of Practice sets out the requirements for an order restricting access to the record of the proceedings in the circumstances defined in Rule 7.2. On consent of the parties, the Tribunal will restrict access to the record of the immediate suspension proceedings as indicated below.

The Tribunal therefore makes the following Order:

1) The parties to the hearing are the Applicant and the Superintendent.

2) The issues to be addressed at the hearing are as set out in the Notice and relate to allegations concerning past conduct of the Applicant and breach of statutory and regulatory obligations by the Applicant.

3) Should the appeal be resolved before the date scheduled for the hearing, both parties shall advise the Tribunal in writing immediately. If the parties are agreed on Minutes of Settlement which they wish to have reflected in a Tribunal order disposing of this appeal, they shall so advise the Tribunal. In either event, the hearing, no longer being required, will be cancelled.

4) The parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Tribunal's Rules of Practice.

5) The hearing shall commence on Monday June 21, 2010 at 9:30 am at the Tribunal's offices at 12th Floor, 1 St. Clair Ave. West, Toronto, and continue on June 22 to 25 inclusive and June 28, 2010 as necessary.

6) Pursuant to the Tribunal's powers under Rule 7, until the Tribunal decides otherwise on notice to the parties, the recording of the proceedings in the appeal of the immediate suspension portion of the Notice in this appeal and the following documents related to this appeal shall not be accessible by the public (with the exception of Canadian Border Services Agency in lawful fulfillment of its mandate) and shall be kept separate from the public record:

i) All exhibits,
ii) All volumes of documents disclosed pursuant to Rules 6 and 9 of the Tribunal's Rules of Practice,
iii) All submissions of the parties, including any factums,
iv) Any transcripts of any portion of the proceedings, and
v) Any documents not described above containing private information of individuals.

LICENCE APPEAL TRIBUNAL

_____
Lynda Tanaka, Chair

RELEASED: May 19, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

NIAGARA ON THE LAKE CULINARY SCHOOL INC.

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT, 2005.* S.O. 2005 c. 28 Sch.L

TO REVOKE REGISTRATION

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: HEATHER C. DEVINE, Counsel, representing the Applicant, Niagara on the Lake Culinary School Inc.

MELANIE HERBIN, Counsel, representing the Superintendent, *Private Career Colleges Act, 2005*

DATE OF HEARING: June 23, 24, 2010 Toronto

ORDER

Upon the application to the Licence Appeal Tribunal by, the Applicant, Niagara on the Lake Culinary School Inc. and the Superintendent, *Private Career Colleges Act, 2005,* 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 settlement signed by the Applicant and the Superintendent, *Private Career Colleges Act, 2005,* 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", the terms of which are incorporated into and made terms of this order.

LICENCE APPEAL TRIBUNAL

David Gregory Flude, Vice-Chair

RELEASED: June 24, 2010

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

SCHEDULE 'A'

Case File No. 5928/PCCA

Licence Appeal Tribunal

IN THE MATTER OF:

An appeal from a proposal of the Superintendent to revoke registration under the *Private Career Colleges Act, 2005*, S.O. 2005, c. 28, Sched. L ("Act")

Niagara-on-the-Lake Culinary School Inc. ("School")

Applicant

- and -

Superintendent, Private Career Colleges ("Superintendent")

Respondent

MINUTES OF SETTLEMENT

WHEREAS the Superintendent on February 12, 2010 issued an immediate suspension of the School's registration and a proposal to revoke the registration of the School for the reasons set out therein;

AND WHEREAS the School appealed that decision to the Licence Appeal Tribunal ("Tribunal") and a decision of the Tribunal was released on April 27, 2010;

The Superintendent and the School hereby agree that the matters herein be resolved as follows:

Withdrawal of Appeal and Proposal

1. By signing these Minutes of Settlement, the School and the Superintendent agree that the proposal to revoke and the School's appeal shall be disposed of in accordance with these Minutes of Settlement and both parties agree to a Consent Order that incorporates these Minutes of Settlement as the terms of that Order.

New Conditions of Registration

2. The following conditions are immediately added to the School's registration, and shall continue to remain in effect for two (2) years from the date these Minutes are signed:

A. Use of Auditor:
At its sole expense, the School shall retain the services of an Auditor, Raisa Taylor, C.A, who is qualified to perform audits as a licensed Chartered Accountant. In the event Ms. Taylor is no longer able to perform as the Auditor, the school will retain a new licensed public accountant or other person acceptable to the Superintendent within two weeks as a replacement.

Duties of Auditor:
The Auditor will report on compliance in writing to the Superintendent on a quarterly basis commencing on September 30, 2010 and quarterly thereafter for a total of eight (8) reports, as set out in Appendix A to these Minutes of Settlement.

Auditor's Report Requirements:
The requirements of the Auditor's report are set out in Appendix A to these Minutes of Settlement.

Duties of School vis-à-vis Auditor:
The School shall co-operate fully with the Auditor, and provide all information needed for the Auditor to complete his or her duties as set out in these Minutes of Settlement.

B. Student Contracts:
New student contract templates for each approved vocational program must be submitted to the Superintendent for approval within thirty days of signing these Minutes of Settlement. Once approved, these are the only student contracts to be used for vocational programs at the School.

A copy of Appendix B, a summary of these Minutes of Settlement, shall be attached to each student's contract during the term of this condition. The student shall be required to review and sign a statement attesting that he or she has read and understood the summary of the Minutes of Settlement.

C. Programs:
The School only offers approved vocational programs. The School also offers non-vocational programs that have been pre-screened and found to be non-vocational, or otherwise not to require approval under the Act, by the Superintendent.

This condition does not prevent the School from requesting changes to its approved vocational programs from time to time in accordance with the Act, nor from seeking approval for and, once approved by the

Superintendent, delivering new vocational programs. The terms of these Minutes will also apply to any subsequently approved programs.

D. Advertising:

The School does not advertise in any way or in any medium without the prior approval of the proposed advertising by the Superintendent, which approval shall not be unreasonably withheld.

The School must therefore submit copies of all proposed advertising to the Superintendent when requesting such approval, such approval will not be unreasonably withheld and approval or disapproval shall be communicated within 30 days of receipt.

E. Immigration-Related Services:

a) The School does not offer any immigration-related services or products to students for a fee, nor are such services bundled together with any programs for students;

b) The School does not retain possession of any original passport, visa or other immigration-related document issued to a student or proposed student of the School in student files except where the School is required by law or any policy issued by a federal or provincial government, agent or body to obtain such original documents in order to satisfy any obligations the School may have regarding the documentation required for the students to apply for and attend paid internships.

c) In the event the School is required by law or policy as set out in clause (b) to obtain original immigration documents, a note will be made in the student's file as to the date the documents were received, the purpose of the retention of the documents, and a form shall be signed by the student (with a copy of that signed form to be provided to the student) acknowledging that the documents are provided to the School in order to apply for and attend a paid internship.

Succession Plan

3. The School and its principal will implement a succession plan for the School, and will maintain that plan for the period of two years from the date these Minutes are signed.

The Succession plan is as follows: In the event that the School's principal is unable to operate the School for any reason for a period of seven (7) calendar days, on the eighth (8^{th}) day, Paula Cooper, of Secta Global Educations

Solutions will assume the interim operation of the School and shall be assigned all powers necessary to manage the School and continue its operations.

In the event that the School's principal is instructing a class at the school and unable to teach the class for a period of seven (7) calendar days, on the eighth (8^{th}) day Bruce Worden, C.C.C. will assume responsibility for instructing the class.

Further Proceedings

4. Neither the School nor the Superintendent will pursue further legal proceedings in any forum for any relief relating to any matters in relation to the conduct of any party which took place prior to the date of the signing of these Minutes of Settlement.

The School and the Superintendent agree that these Minutes of Settlement, along with the Superintendent's letter confirming the appointment of the School's Inspector and other matters, and the application for registration of Willow Cake and Pastries as a campus, are meant to be a complete settlement of the issues raised in the Superintendent's decision to immediately suspend and revoke the registration of the School, and the issue of the unregistered campus of the School which arose during the hearing on the motion to lift the immediate suspension before LAT.

The existing Notices of Contravention shall be withdrawn by the Superintendent and the requests for review withdrawn by the School. The Superintendent shall issue an amended Notice of Contravention (Appendix "C"). The School agrees to pay the $3,000 in administrative monetary penalties set out in Appendix C and waives its right to a review of the Notice. No new Notices of Contravention will be served for acts conducted prior to the execution of the Minutes of Settlement.

The Superintendent agrees that the Restraining Order issued against Cathy O'Donnell, an instructor of the School, shall not be used, for any reason, against the School.

Remedy, Breach of Minutes of Settlement, Further Contraventions

5. In the event that the School breaches any part of these Minutes of Settlement or contravenes the Act or Regulations in a material way from the date of the Minutes of Settlement on, the Superintendent may identify the alleged breach and provide the School 14 calendar days to rectify the breach. This does not restrict the Superintendent from taking other actions under the PCCA, 2005 with regard to a material breach. Examples of a material breach would include the School: failing to retain or replace an Auditor; failing to cooperate with the Auditor; offering unapproved programs; advertising without prior approval of the Superintendent; charging fees in excess of those approved as part of the program; failing to allow the Superintendent access to the School's records under section 10 of these Minutes; or the Auditor failing, without reasonable excuse, to file the required reports.

If a breach occurs that is not material, the Superintendent shall advise the School of the non-material breach and provide the School with 14 calendar days to rectify the breach. Specifically, the School will have the opportunity to work with the Superintendent during the 14 day period to ensure compliance with the Act and Regulations. Failure to rectify a non-material breach may result in further enforcement action by the Superintendent.

Order of Vice Chair Flude

6. The following terms from the Order of Vice Chair Flude as set out in the Licence Appeal Tribunal Decision between these parties are adopted by the parties:

a) The School shall immediately update its filings in the RICC system to properly disclose the full cost of the two year Chef Diploma and the number of hours involved in each segment of the program.

b) The School shall update its RICC filing to include the accommodation portion of the tuition fee.

c) The School shall give any student who registered in an unapproved program the option to re-contract in the approved program or receive a full refund of any fees paid. Prior to receiving any refund, all students shall return to the School any original Certificate issued to them showing the name of an unapproved course and any original work permit issued to enable students to participate on the paid internship.

d) The School shall obtain approval from the Superintendent's office for changes to its approved programs prior to changing the program and shall

seek approval for new programs prior to advertising such courses or entering into contracts with students to provide such courses.

Publication and Distribution of Minutes of Settlement

7. Appendix B, a summary of these Minutes of Settlement, will be immediately posted by the Superintendent on the Ministry's website. The School and the Superintendent shall distribute these Minutes of Settlement to any person, upon request.

General

8. References to the Superintendent mean the Superintendent of Private Career Colleges under the Act, and his delegates or designates.

9. The School understands that these Minutes do not fetter the Superintendent's ability to deal with any new issues that may arise with regard to compliance with the Act.

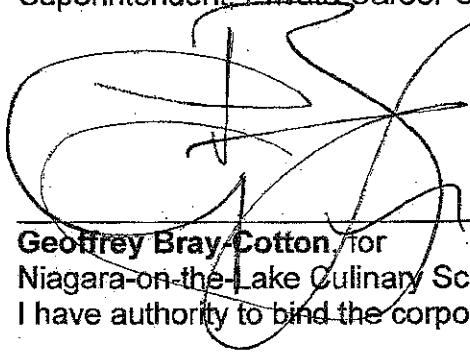
10. The School agrees to allow the Superintendent access to its records when reasonably required to do so pursuant to section 38 of the Act, even where the records are stored at a residence, and understands that the Superintendent is not required to give advance notice of such requirement. The School confirms that all School records will be stored in the designated front room of Mr. Bray-Cotton's current residence. If the location of the records changes, the School shall advise the Superintendent and Auditor in writing of the locations of the records and shall keep this information up to date with both. If and when the Superintendent wishes to access records in their current location at the residence, this access will take place in the designated front room of the residence. The Superintendent acknowledges that a search warrant or permission of Mr. Bray-Cotton is required to access any other location in the residence other than the designated front room. The Superintendent agrees to require such access during the School's regular business hours.

This section intentionally blank. Signature page follows.

We the undersigned hereby signify our agreement to the foregoing Minutes of Settlement dated June 23rd, 2010:



Allan Scott
Superintendent, Private Career Colleges



Geoffrey Bray-Cotton, for
Niagara-on-the-Lake Culinary School Inc.
I have authority to bind the corporation.

Appendix "A"

AUDITOR REPORTING REQUIREMENTS

The Auditor retained by the School shall enter into a compliance assurance engagement contract with the school that is approved by the Superintendent, and shall report on a quarterly basis for two years, beginning with a first report due to the Superintendent on September 30, 2010 (for a total of eight reports).

Nature and Scope of Work:
The Auditor shall conduct sufficient sampling, examinations, interviews and other work as in his or her professional opinion are sufficient to provide positive assurance opinions and findings on all of the following items, including any noted exceptions, deficiencies or qualifications:

1. Whether or not the School is delivering only approved vocational programs;
2. Whether or not the School is delivering its vocational programs as they have been approved (e.g. proper admission requirements being used, sufficient number and type of student evaluations, instruction taking place only at approved campuses, type and length of classes, correct fees being charged, etc.);
3. Whether or not the School has made substantial changes to an approved program, as defined in sections 13 and 44 of O.Reg. 415/06;
4. Whether or not the School is using only Ministry-approved student contracts, and that all contracts have been properly and fully completed and executed, including the student signing the copy of Schedule B attached to the contract;
5. Whether or not students understand the contract they have signed, with specific reference to the name and duration of the program in which they have enrolled, the amount of total fees they are obligated to pay and the timing of such payments, and the type of credential they will receive if they successfully complete the program as set out in the contract;
6. Whether or not student files meet the requirements set out in s. 45 of O.Reg. 415/06, and do not include original immigration documents with the exception of the documents required by the student to apply for and attend paid internships (such documents will be accompanied by a document setting out the reason for the immigration documents to be held within the student file); and
7. Whether or not the School's advertising (print, direct mail, web, etc.) meets the requirements of the Act and regulations and was pre-approved by the Superintendent.

Reports:
The Auditor's reports shall include all the following information:

1. Findings and professional opinions relating to each of the above items;
2. A financial statement pertaining to the School's trust fund, including a "trust comparison" report comprising a copy of the trust account bank statement, a trust bank reconciliation and a list of students and their remaining trust balances;
3. An explanation of the nature, timing and scope of testing, sampling and examinations upon which the findings were based;
4. A statement as to whether or not the School (including its officers, directors, employees and instructors) cooperated fully with the Auditor in all respects, including details of any non-cooperation.
5. An appendix containing true copies of any documents, transcripts of interviews, photographs or other things that, in the opinion of the Auditor, are required to explain or support findings;
6. Any other information that, in the judgment of the Auditor, ought to be included in the report;
7. The signature of the auditor attesting to the accuracy of the report.

Reports shall be delivered by courier to the Superintendent on or before the day they are due, and shall be in a format determined by the Auditor and acceptable to the Superintendent. The Auditor may contact the Superintendent prior to the report date to share his or her usual format and to ensure that it will be acceptable to the Superintendent, and such confirmation will not be unreasonably withheld.

Should the Auditor at any time become aware of a material breach of the Act, regulations or these Minutes, he or she must immediately report same to the Superintendent.

Supports
It is understood that the auditor will require assistance from the Superintendent to perform the engagement. The Superintendent will meet with the Auditor either in person or by phone and provide any information, documents or advice as may be required by the Auditor, and this assistance will be provided in a timely fashion.

The Superintendent will provide the following information to the Auditor and to the School respecting all approved vocational programs:

1. Name of the vocational program
2. Duration of the vocational program
3. Admission requirements for the vocational program
4. Advanced standing requirements for the vocational program
5. Cost of the program (required and optional fees)
6. Students evaluations as contemplated in the approved program

7. Information regarding approved aspects of vocational program as they relate to the items set out in sections 13 and 44 of Ontario Regulation 415/06
8. Copy of the approved contract for each approved vocational program.

The information noted above will be provided 14 days after the School confirms in writing to the Superintendent that it has made all desired changes to its existing programs in RICC.

Appendix "B"

NOTICE TO STUDENTS OF THE NIAGARA-ON-THE-LAKE CULINARY SCHOOL INC.

By agreement between Niagara on the Lake Culinary School Inc. (the School) and the Superintendent of Private Career Colleges (the Superintendent), the following key terms are applicable to the School's registration:

- The School only offers vocational programs that have been approved by the Superintendent. A full list of approved programs may be viewed on the Service Ontario website (http://ontario.ca/pcc). Once a program has been approved, the School must deliver the program exactly as it has been approved, and may not make any changes to the program except in accordance with the Private Career Colleges Act, 2005 (the Act).
- The School also offers programs that the Superintendent has confirmed are non-vocational or otherwise do not require approval. If you have any questions about a program being offered by the School, you may contact the Superintendent to obtain more information.
- Student contracts for vocational programs are in a form pre-approved by the Superintendent and include this Notice as an appendix.
- The School obtains approval in advance from the Superintendent for any advertising, including any print, direct mail, internet or any other form of advertising.
- The School does not provide any immigration services to students, nor does it bundle any type of fee for an immigration-related service with its other fees for vocational programs. The School can retain any original immigration-related documents belonging to students or prospective students where it is required to do so according to law or government policy. In that case, the School will provide the student written notice explaining the reason, and this notice will be attached to the documents to be kept in the student's file.
- The School has retained a licensed public accountant to perform a two year, compliance assurance engagement. This person will be reviewing the School's operations and reporting quarterly to the Superintendent about the School's compliance with the Act. The School will cooperate fully with the auditor and provide access to all necessary information for him/her to be able to make quarterly reports to the Superintendent.
- The School has put a succession plan in place to deal with circumstances in which the School's operator becomes unavailable to run the School or to instruct students. If you require more information, or have any questions or concerns, please contact the Superintendent through the School's assigned Inspector.

new paragraph

Margot Devlin, Inspector
Private Career Colleges Branch
Ministry of Training, Colleges and Universities
900 Bay St., 9th Floor
Toronto, ON M7A 1L2
Tel: (416) 314-0497 or 1-866-330-3395
Fax: (416) 314-0499
Margot.Devlin@ontario.ca

The following clause will be included on the Superintendent's version of Appendix "B", but is not required to be on the School's version as attached to student contracts:

*(Please note that the Niagara on the Lake Culinary School Inc. ("School") is **not** affiliated with the Niagara Culinary Institute of Niagara College, a publicly funded College of Applied Arts and Technology.)*

Appendix "C"

Content of Notice of Contravention 25b

Notice of Contravention #25b

SERVED PERSONALLY

June XX, 2010

Geoffrey Bray - Cotton
Niagara on the Lake Culinary School Inc.
14-450 Nassau Street,
Niagara-on-the-Lake ON, L0S1J0

NOTICE OF CONTRAVENTION

This letter is to inform you as the director/president of Niagara on the Lake Culinary School Inc. ("School") that on February 11, 2010 it was determined that the School contravened the following section(s) of the *Private Career Colleges Act, 2005* ("Act") and/or regulations made under the Act:

- Act, s. 11 — Restrictions on advertising and soliciting ($1,000)
- Act, s. 8 (1) – Prohibition against providing vocational programs ($1,000)
- Act. s. 9 of the PCCA, 2005 – Prohibition Against Charging Fee ($1,000)

For a Summary of each contravention see attached Schedule A.

As per section 51 of *Ontario Regulation 415/06* of the *Private Career Colleges Act, 2005* Niagara on the Lake Culinary School Inc. is required to pay penalties totalling $3000 within **30 days** of the date of this notice. If payment is not received within **30 days** after the date the notice of contravention was received, the amount will be subject to interest at the current postjudgment interest rate beginning on the 31st day following the date of notice. The current rate can be found at the following address:

www.attorneygeneral.jus.gov.on.ca/english/courts/interestrates.asp.

Review

As per Minutes of Settlement with the School, the School has waived its right to a review under the Act. The School had the benefit of legal advice regarding the Minutes of Settlement.

Allan Scott
Superintendent of Private Career Colleges

Schedule "A"

Act, s. 11 — Restrictions on advertising and soliciting ($1,000)

On January 28, 2010 the website belonging to Niagara on the Lake Culinary School Inc., was reviewed by the Superintendent's staff, who found it was advertising a "Hotel and Restaurant Program". The name of the approved program is "Hotel Management Diploma Program".

Act, s. 8 (1) – Prohibition against providing vocational programs ($1,000)

A review of student files in February 2010 showed that two students had been enrolled in The Baker Pastry Chef Diploma Program before it was approved by the Superintendent.

Act. s. 9 – Prohibition Against Charging Fee ($1,000)

Records from the School show that two students had paid fees to the school to become enrolled in the Baker Pastry Chef Diploma Program prior to its approval by the Superintendent under the Act.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

NIAGARA ON THE LAKE CULINARY SCHOOL INC.

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT, 2005.* S.O. 2005 c. 28 Sch.L

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: HEATHER C. DEVINE and KATHLEEN BINGHAM, Counsel, representing the Applicant, Niagara on the Lake Culinary School Inc.

MELANIE HERBIN, Counsel, representing the Superintendent, *Private Career Colleges Act, 2005*

DATE OF HEARING: March 11 and 12, 2010
April 15, 16, 19 and 20, 2010 Toronto

REASONS FOR DECISION AND ORDER
MOTION TO SET ASIDE AN IMMEDIATE SUSPENSION ORDER

This motion is brought by the Applicant, Niagara on the Lake Culinary School Inc. (the "School"), as the result of an order of the Superintendent appointed under the *Private Career Colleges Act, 2005* S. O. 2005 c. 28 Sch. L (the "Act"). On February 12, 2010, the Superintendent issued an order immediately suspending the operations of the School. In addition to the immediate suspension, the Superintendent has issued a Notice of Proposal to revoke the School's registration. The full hearing on the Notice of Proposal is scheduled to proceed commencing on June 21, 2010. By agreement of counsel, the evidence heard on this motion forms part of the record for the full revocation hearing. The parties will be at liberty to introduce such further evidence as they deem necessary to address issues other than the immediate suspension.

The discretion of the Superintendent to take the steps he did and the power of this Tribunal to consider the immediate suspension are set out in s. 20 of the Act as follows:

20. (1) The Superintendent may suspend a registration immediately by giving the registrant a notice of immediate suspension if the Superintendent is of the opinion that it is necessary to do so,

(a) for the immediate protection of the interests of the students or prospective students of the private career college; or

(b) to prevent a contravention of an Act of the Legislature or of Canada.

Content of notice

(2) A notice of immediate suspension shall set out,

(a) the reasons for the immediate suspension;

(b) any additional action described in subsection 19 (1) that the Superintendent proposes to take; and

(c) the right to require a hearing by the Tribunal if, within 15 days after service of the notice, the registrant gives written notice to that effect to the Superintendent and the Tribunal.

Hearing and appeal

(3) Subsections 19 (3) and (5) to (13) apply with necessary modifications to an immediate suspension and subsections 19 (2) to (13) apply with necessary modifications to any additional action described in subsection 19 (1) that the Superintendent proposes to take.

Suspension immediate and not stayed by hearing

(4) An immediate suspension is effective immediately upon giving the registrant the written notice of the suspension and is not stayed by a request for a hearing by the Tribunal.

Lifting of suspension

(5) The Superintendent or the Tribunal may order that an immediate suspension be lifted upon being satisfied that the reasons for the suspension no longer exist.

The Tribunal's authority to consider lifting the immediate suspension is set out in s. 20 (5). What is of note is that the Tribunal is not asked to question the sufficiency of the Superintendent's reasons for issuing the immediate suspension order. It is merely asked to consider if the reasons exist any longer. Consideration of the sufficiency of the Superintendent's reasons is the subject of the main hearing. The scheme of the legislation protects the rights of a registrant to carry on business pending a full decision on the merits provided it can satisfy either the Superintendent or the Tribunal that it can do so in a manner that does not contravene "an Act of the Legislature or of Canada" and in a manner that is not harmful to the interests of students or prospective students. A registrant is given an opportunity to show the Superintendent that it has heard his

concerns and, going forward, it will operate scrupulously within the statutory framework until its final fate is decided at a full hearing on the merits.

When the Superintendent is still not satisfied, the Applicant may appeal the immediate suspension to the Tribunal. By virtue of the s. 20, at this stage of the proceeding, the Tribunal is not asked to determine whether there have been breaches of the statute and regulations that provide sufficient grounds for revocation.

In deciding a motion to set aside an immediate suspension under the Act, the Tribunal accepts the three part approach set out by counsel for the Superintendent. Firstly, the Act requires the Tribunal to determine if the reasons for the immediate suspension still exist. Secondly, should the Tribunal find that the reasons for the immediate suspension no longer exist, should the Tribunal exercise its discretion to set aside the immediate suspension pending the hearing. Finally, in the event the Tribunal decides to exercise its discretion to set aside the immediate suspension, what conditions, if any, should be applied during the period leading up to the full hearing.

In considering the first branch of the analysis, the Tribunal must, of course, consider evidence concerning the Superintendent's reasons for his order of immediate suspension. Those reasons will undoubtedly impinge on the evidence to be considered at the full hearing, but the Tribunal is more concerned about what reasons stimulated the Superintendent to act immediately. As stated by counsel for the Applicant, it is apparent from the language of the Act that the immediate suspension provisions seek to protect the interests of students and prevent breaches of the law going forward. Past breaches may be reserved for a full hearing on the merits of the Notice of Proposal to Revoke. In considering the evidence, the Tribunal will attempt to identify those areas which should be the subject of a full hearing and distinguish those areas which need to be addressed at this time.

SUMMARY OF APPLICABLE EVIDENCE

In his testimony, the Superintendent pointed to the statements in his February 12, 2010 "Notice of Immediate Suspension and Proposal to Revoke Registration" that was Exhibit 1 to these proceedings. In particular he focussed of the words "*I have reasonable grounds for the belief that the operation of the Private Career College will not be carried on with honesty and integrity or in accordance with law*." The depth of his feeling in this regard was summed up in his advice to the Tribunal that he did not think that the principals of the school, Geoffrey Bray-Cotton and Janice Bartley, should ever be permitted to deal with students in Ontario again. He was of the view that the large number of regulatory breaches, coercion of students, issuing false credentials, offering unapproved courses and charging of more than 25% of the fees outstanding to international students were sufficiently serious breaches to warrant immediate suspension.

During an extensive cross-examination, he testified that in arriving at the above conclusion he had relied on the work of his investigative staff, particularly Teca Cameron and her manager, Brad Fauteux. The Superintendent had little personal knowledge of the file or of the support documentation. The Superintendent's concerns were reduced to 8 specific allegations as set out in Schedule "A" to the Notice. Ms Cameron testified that she had provided the first draft of these paragraphs, often with help or input from colleagues.

Of particular interest is the evidence concerning the visit of Ms Cameron to the School on October 6, 2009 to conduct an inspection. When Ms Cameron attended, the students were not attending classes. She was shown around the facilities and given full cooperation in terms of access to the School's office to review files. She was advised that Ms Bartley was away but she knew there were other files not immediately available. On the next day, Ms Cameron sent an email to Mr. Bray-Cotton that was affable in tone and certainly did not hint at serious problems at the School. She advised that she had reviewed the files and requested some follow-up documentation. She did not ask for student evaluation files or comment on the fact that such files were missing. There was no further communication with the school until service of the Order for Immediate Suspension on February 12, 2009.

It is clear then, from this evidence, that nothing in the review of the files immediately following October 6, 2009 raised sufficient concern to cause the Superintendent to issue an immediate suspension order. Following October 6, 2009, only the activities of three students changed attitudes at the Superintendent's office.

The three students in question complained to the Minister of Training, Colleges and Universities about the School. That complaint filtered down to Ms Cameron. She invited the students to attend an interview, which she conducted with a colleague, Larry Smith. At the interview, the three complaining students managed to convince the interviewers that the School was issuing marks and transcripts for courses not taken, was falsely advertising courses not approved, but, perhaps most significantly, was coercing students to use the services of Janice Bartley as an immigration consultant on pain of being given poor or failing marks. There were allegations that Ms Bartley was withholding students' passports and visas to stop them from returning to their native country, India.

Following the interviews, Ms Cameron and her colleagues reviewed the files to seek support for the students' complaints. They found that the files contained immigration documents. They looked at photographs of the bakery kitchen and accepted a complaining student's description that it was filthy. They determined that there were no student evaluations in the file so concluded the students were correct when they said they did not take courses for which credit had been given. What they did not do was contact the School for further documents or discussions on the student complaints. The Superintendent decided that the investigation should proceed without the School's knowledge in case the School decided to hide documents or take other steps to cover its tracks.

Having found what appeared to be independent confirmation of the students' complaints, the Superintendent's office decided to immediately suspend the School. The Superintendent was also aware that the three students had complained to the Canada Border Services Agency (CBSA) and that a criminal investigation was underway. He was contacted by an investigator. It was decided that representatives from his office and CBSA officers should attend at the School's offices on February 12, 2010. The CBSA would execute a search warrant and the Superintendent's staff would serve the Notice of Immediate Suspension and Proposal to Revoke Registration.

The School, for its part led the evidence of one current student, one former student, two instructors and a consultant hired to advise on regulatory compliance issues. The Tribunal will focus on the evidence of the consultant, Paula Cooper, as being the most applicable to the issues raised on this motion. Ms Cooper addressed each of the allegations and proposed solutions moving forward. The Tribunal will track her evidence and the evidence of the other witnesses with respect to each of the allegations as it relates to the immediate suspension order.

1. Offering an unapproved International Chef Diploma program with "internship" in contravention of s. 8 (1)

Ms Cooper's testimony was severely hampered by seizure of the School's records by, initially, the Canada Border Services Agency and, latterly, by the Superintendent. She did review the application history of the school starting with the first application in 2001. The initial application was for a two year course with two elements, a one year Chef Certificate program and a second year Chef Diploma program. A price was set for each year's course. In December 2002, the School received its registration to teach the Chef Diploma and commenced business. At the end of the first year, it issued a number of Chef Certificates and at the end of the second year it issued Chef Diplomas. It appears that the records at the Superintendent's office reflected only the fee for the second year Chef Diploma. Annual inspections by the Superintendent's office raised no objection to the issuance of the Chef Certificate on successful completion of the first year.

At some point, the School began attracting students from India. It contracted with these students to teach an "International Chef Diploma." There is no approved program called an International Chef Diploma. In fact, according to Ms Cooper's evidence, the components of the International Chef Diploma are the same as the Chef Certificate program which the school thought it has been entitled to offer since 2002.

2. Offering a vocational program prior to receiving approval under the Act in contravention of s. 8 (1)

The allegations in this section relate wholly to two students, one of whom contracted for the Bakery/Pastry Chef program before it was approved and the second of whom contracted for a Chef Diploma with a specialty in bakery/pastry. Since these events are past events, they are more properly considered in the full hearing. The major concern for the Superintendent was the fact that several months before the student contracted

for the Bakery/Pastry Chef program, his staff had specifically advised the School not to contract anyone for this course before approval was received. In the Superintendent's eyes, this breach showed the School to be particularly untrustworthy.

Ms Cooper stated that she felt the best solution was to offer the two students a choice of re-contracting to take the Bakery/Pastry Chef program or receive a refund. She advised the Tribunal that one student had agreed to a refund and the second wanted to re-contract for the now approved course.

3. Gross mismanagement of student files including not maintaining appropriate documentation of student evaluations and signed contracts.

It is alleged that after a review of 38 student files collected on October 6, 2009, many files were missing student evaluations, either at all or of sufficient number for the time spent on course. It is further alleged that in 19 of the 38, student contracts were not signed. Of these 19, in 17 cases the contracts had been signed by the students but not signed by the School. While these are allegations better considered at the full hearing, Ms Cooper advised that, in fact, all student files now have evaluations in them. She stated that Mr. Bray-Cotton has signed those contracts which had not been signed before and that the two students with unsigned contracts were being asked to sign.

There is also an allegation that the student files contained inappropriate immigration and work permit documentation and, in one case, an envelope with approximately $700.00 in cash. The Superintendent and Ms Cameron were unable to show any statutory or regulatory provision prohibiting student files from containing this documentation. Indeed, since the School arranges internships for its international students, the Tribunal can think of no better repository for these documents.

4. Misrepresentation in advertising of college

There were two brochures put forward in evidence on the motion. It is not clear from the evidence which of the two brochures is in issue. One, reviewed by the Superintendent, lists a number of unapproved courses or courses with unapproved names.[1] It sets out fee levels that are currently not approved. The Tribunal did not receive evidence that this brochure has ever been disseminated publicly.

Another, smaller brochure was reviewed by a student witness.[2] He identified one photograph showing a chef and a number of students. He stated that the photograph shows participants at a Tapas Bar competition at a local restaurant and has nothing to do with the School. This student also questioned the description of the campus. The campus is described as including four hotels, three restaurants, a café and two wineries. The student stated that the campus was only a local winery restaurant kitchen. Other evidence suggested that the bakery courses are taught at a location that would qualify as a café and that other local restaurants were used to train students. On

[1] Ex 29
[2] Ex 6 Tab 4

the current state of the evidence the Tribunal cannot conclude that these entries in the brochure are misleading. The photograph shows students of School and the campus clearly includes other local establishments.

There is a further allegation concerning an entry on the School's website. There is a module entitled "International Internships" that lists England, France, Italy, Germany or the United States as potential destinations for one of the internship sections of the course. Ms Cameron's file review showed no history of students taking internships offshore so the Superintendent concluded that the advertising of this element was misleading. A current student testified that he had been offered an internship in Hampshire, England arranged by the School. He also testified that he has probably lost that internship due to the immediate suspension but efforts are underway to attempt to secure a position in France. It appears that the School is making serious efforts to offer international internships to its students so the Tribunal cannot conclude on the current state of the evidence that this advertising is false.

International internships may raise issues with respect to supervision and evaluation. Ms Cameron hinted at this concern in her evidence. These issues were not noted by the Superintendent in the Notice, so the Tribunal will not deal with it.

5. Charging fees to students in excess of what was previously reported to the Superintendent

On the evidence so far, the Tribunal has serious concerns about the issue of fees. It appears that there has been significant confusion between the School and the Ministry over this issue since 2002. This confusion is addressed in the review of paragraph 1. above. What is clear is that the School charges a fee for the first year portion of the Chef Diploma program, alternately described as a Chef Certificate or an International Chef Diploma, and a fee for the second year portion. In the mind of the School these are two distinct elements. In the mind of the Superintendent, there is only one program, the Chef Diploma, and only one fee, that fee being half of the School's expectations. While issues of fault over this misunderstanding are better dealt with at the full hearing, the present situation is best addressed by the School correcting its filings with the Ministry to reflect the full cost of the two year Chef Diploma program and by providing an update of the hours involved.

6. Multiple instances of charging international students greater than 25% of the total program fees for a vocational program prior to the student's arrival in Canada

In a very able cross-examination, counsel for the School, Ms Devine, drew attention to the fact that the wording in the Act makes no mention of the arrival of the student in Canada. It refers to the commencement of the program as the trigger for collecting in excess of 25% of the fees. In some cases the program had commenced prior to the arrival of the student but after receipt of the balance of the funds that were in excess of 25%. In at least one other case, the School did not solicit full payment. The student was

advised by his Indian immigration consultant that he was more likely to be granted a Canadian visa if he paid in full. The Superintendent was of the view that the proper course of action would be for the School to return anything in excess of 25% to the student. The Tribunal is cognizant of the fact that, depending on the time between receipt and student arrival, such a counsel of perfection may cause more problems than it solves.

7. Issuance of academic credentials to students who did not successfully complete a vocational program

A consideration of the evidence on the issuance of academic credentials for courses not completed is best left to the full hearing. It addresses past behaviour.

8. Imposing undue pressure on, coercing and requiring a student to obtain a product or service from a particular person as a requirement for admission to a vocational program

Ms Bartley provides assistance to students seeking to renew work and study visas in Canada. It has been alleged that the School coerced students into using her services on threat of being given poor marks if they did not. As stated above, this issue raised the ire of the Superintendent following the student interviews. On the state of the evidence so far, the Tribunal cannot conclude that there is any risk of the School coercing students to use Ms Bartley's services. A determination of whether it happened in the past may be reserved until a full hearing.

With respect to the totality of evidence heard on the motion, the Tribunal is impressed by the willingness of the School to retain the services of Ms Cooper to ensure that any regulatory concerns of the Superintendent are addressed. In light of this fact, the Tribunal cannot conclude that the circumstances that gave rise to the immediate suspension order still exist. The issue of past regulatory breaches, their seriousness and their impact on the continued registration of the School are properly subjects for the full hearing. At this point in the proceedings, the Tribunal is of the view that any concerns are best rectified by the imposition of conditions.

Decision and Order

S. 20 of the Act incorporates the provisions of s. 19 (6). S. 19 (6) states:

> **Powers of Tribunal**
>
> (6) At a hearing under subsection (5), the Tribunal may, by order, direct the Superintendent,
>
> (a) to carry out the proposal specified in the notice;
>
> (b) to refrain from carrying out the proposal;

(c) to attach such conditions to a registration as the Tribunal considers appropriate; or

(d) to take such other action as the Tribunal considers appropriate

It is clear then that the Tribunal can impose "such conditions as the Tribunal considers appropriate" on an order setting aside the immediate suspension.

In terms of a finding on the evidence so far that Ms Bartley and Mr. Bray-Cotton have acted dishonestly or without integrity or are unlikely to operate in accordance with the law, even the two complaining students described them as very involved in the welfare of their students. Student 1 had been terminated or laid off from a number of internships. One student who successfully completed his internships testified that just as he started work at a restaurant, Student 1 was terminated for failure to do a bread service. Mr. Bray-Cotton always arranged for new internship placements for Student 1. Student 1 had his cell-phone number and could call any time. The same can be said of Student 2. When Student 2 failed to complete an internship, not only did Mr. Bray-Cotton arrange for an internship for Student 2 at a restaurant approximately 200 kms away, but he drove him there. Mr. Bray-Cotton's reward for his efforts was that Student 2 quit the job two weeks later because he didn't like it.

The email record over the years shows that the School has worked with the Superintendent's office and attempted to comply with regulatory issues as they arose. Going forward to the full hearing on the merits, the Tribunal is satisfied that the School can comply with any conditions the Tribunal may impose and a continuation of the immediate suspension is no longer necessary.

The Tribunal is satisfied that there is no reason to be concerned about student safety. Indeed, Ms Cameron testified that one of the potential alternate training schools intended to offer the course using the facilities currently used by the School and that this approach was acceptable to the Superintendent. The Tribunal is also satisfied that the current students are receiving the training for which they contracted. The Tribunal recognizes that the issue of approved fees and course hours is contentious but is of the view that these concerns are better dealt with at the full hearing. Students graduating from the School are employable as chefs based solely on their training and there is evidence that in the Niagara region they have no problems securing jobs because of the prestige of the School.

It is not seriously in dispute that there is no approved program entitled "International Chef Diploma." While the extent to which the School had a reasonable belief that it could offer a Chef Certificate is contentious, at this point it is clear that neither program has been approved by the Superintendent. It follows that neither of these programs may be offered in brochures or advertising or on the website.

It is also clear that programs offered in the glossy brochure, Exhibit 29, have not been approved, nor have the course fees been approved. In its submissions, the School takes the position that this brochure is a draft only and has not been published. The

Tribunal heard no evidence either in support or against this position. To the extent that this brochure relates to unapproved courses or fees, the school should not rely on it further.

Accordingly, the Tribunal orders the immediate suspension to be lifted on the following terms, which shall continue in effect until the Tribunal releases its decision following the full hearing:

1. The School may offer only the Chef Diploma Program, Bakery/Pastry Chef Program and Hotel Management Program as approved by the Superintendent.

2. The School shall immediately update its filings in the RICC system to properly disclose the full cost of the two year Chef Diploma and the number of hours involved in each segment of the program.

3. The School shall update its RICC filing to include the accommodation portion of the tuition fee.

4. The School shall give any student who registered in an unapproved program the option to re-contract in the approved program or receive a full refund of any fees paid. Students shall return to the School any certificate issued to them showing the name of an unapproved course.

5. The School shall obtain approval from the Superintendent's office for changes to its approved programs prior to changing the program and shall seek approval for new programs prior to advertising such courses or entering into contracts with students to provide such courses.

6. Pending the full hearing of the Superintendent's proposal to revoke the School's registration, the School shall not enrol new students nor shall it accept payment from potential new students of any money whatsoever.

7. The School shall continue the services of Paula Cooper who shall work with the Superintendent's office to ensure full compliance with the Act and regulations, including the approval of any unapproved teaching location. In providing these services, Ms Cooper shall fairly and completely report to the Superintendent any regulatory breaches by the School as soon as she becomes aware of them.

8. The Superintendent shall be at liberty to include any breach of these conditions in a Supplemental Notice to Revoke for consideration by the Tribunal at the full hearing.

COSTS

In its submissions the Applicant is seeking costs in the amount of $2,400.00. Costs before this Tribunal do not follow the event as they do in civil litigation. The costs provisions of the Tribunal's *Rules of Practice* are severely limited and import a punitive dimension. The costs rule, Rule 14, reads as follows:

> 14.1 Where a party believes that another party in the proceeding before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.
>
> 14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:
>
> (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
>
> (b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result there from is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
>
> (c) failing to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
>
> (d) knowingly presenting false or misleading evidence.
>
> 14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party to pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.
>
> 14.4 Where the Tribunal determines that an order for costs may be made under Rule 14.
>
> (1) the Tribunal when determining the appropriate award of costs shall consider all the circumstances, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of costs incurred by the party requesting costs, and the conduct of the party requesting costs; and
>
> (2) the amount of costs shall not exceed,
>
> (a) where the Tribunal has not commenced a hearing, the sum of 400.00; or
>
> where the Tribunal has commenced a hearing, the sum of $800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part day being considered a full day for the purpose of this calculation of costs.

In order to award costs against the Superintendent, the Tribunal must first conclude that he has acted frivolously, vexatiously or in bad faith. The Superintendent exercises a

statutory decision making power for the benefit of the Ontario public. The exercise of that power, simplicter, cannot support a finding that his actions have been frivolous, vexatious or in bad faith. There must be more. The Superintendent's staff acted properly on serious allegations and reported to the Superintendent. Acting on their report, the Superintendent made decisions within his jurisdiction for the protection of students. He described in his evidence the difficulty of balancing prejudice to the investigation with disclosure to the School. It is not for the Tribunal to second guess that decision with the benefit of hindsight.

The Superintendent's investigator testified concerning the vast amount of documents and the difficulty of preparing the list of allegations against tight time constraints. While, at the end of the day, the Tribunal may or may not agree with the conclusions that the investigation led to, it is not bad faith or frivolous or vexatious to come to conclusions that ultimately may be overturned. It is, in fact, the exercise of a duty the staff and Superintendent are required to carry out. This is not a case for costs.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude
Vice-Chair

RELEASED: April 27, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

NATIONAL TECHOLOGY AND MANGEMENT CORP. KNOW AS NATIONAL COLLEGE OF TECHNOLOGY AND MANAGMENT

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT, UNDER THE *PRIVATE CAREER COLLEGES ACT, 2005,* S.O. 2005, c.28, Sch. L

TO REVOKE REGISTRATION

TRIBUNAL: JANE WEARY, VICE-CHAIR

APPEARANCES: A. MINDULAI, Counsel, representing National Technology and Management Corporation o/s National College of Technology & Management

D. SALMON, Counsel, representing the Superintendent under the *Private Career Colleges Act 2005*

DATE OF HEARING: September 20, 2010 Toronto

DECISION AND ORDER

BACKGROUND

On August 18, 2009 the Superintendent under the *Private Career Colleges Act 2005,* (the"Act") issued a Proposal to Revoke (the "Proposal") the registration of National Technology and Management Corporation o/a National College of Technology and Management ("National") as a private career college. National duly appealed the Proposal to this Tribunal within fifteen days of receipt.

On February 24, 2010 National wrote to the Superintendent voluntarily surrendering its registration, noting it had already provided the Superintendent with its registration certificate as was required in a voluntary surrender pursuant to s.22 of the Act.

On April 30, 2010 the Superintendent issued a Motion seeking an Order for dismissal of National's appeal based on its having surrendered its registration (the "Motion").

On June 9 National wrote to the Tribunal advising it was withdrawing its earlier filed appeal.

On June 18, 2010 National wrote the Superintendent advising it was withdrawing its earlier voluntary surrender of registration.

On July 10, 2010 the parties argued a secondary motion before Vice-Chair Macklin of this Tribunal whose subsequent Order on a separate issue included the reference to the parties consent to re-instate National's appeal "…without prejudice to the Respondent's position that the Appellant's surrender of its registration still stands".

On September 20, 2010 the parties appeared before me on the appeal. Prior to commencing, the Superintendent's Motion for dismissal was argued.

DECISION

For the reasons provided orally at the conclusion of the Motion, it is the Tribunal's finding that it is without jurisdiction to proceed with National's appeal. A transcript of these reasons can be made available to the parties on request.

ORDER

The Motion brought by the Superintendent is successful. As a result, the appeal originally filed by National in 2009 is no longer available and these proceedings are thereby concluded before the Tribunal.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

RELEASED: September 28, 2010

This decision may also be available on Quicklaw.

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

Ontario

ONTARIO FIRE ACADEMY INC. KNOWN AS ONTARIO FIRE ACADEMY

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT, UNDER THE *PRIVATE CAREER COLLEGES ACT, 2005,* S.O. 2005, c.28, Sch. L

TO REFUSE REGISTRATION

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: HARRIS M. ROSEN, Counsel, representing Ontario Fire Academy Inc. known as Ontario Fire Academy (the “Applicant” or “OFA”)

MELANIE HERBIN, Counsel, representing the Superintendent, under the *Private Career Colleges Act, 2005* (the “Superintendent”)

DATES OF HEARING: January 28, 31, February 7, 8, 9 and 10, 2011 Toronto

REASONS FOR DECISION AND ORDER

This appeal is brought by the Applicant pursuant to subsection 19(3) of the *Private Career Colleges Act, 2005* (the "Act" or the “PCCA”) from two Notices of Proposal issued by the Superintendent, and dated June 28, 2010:

1. to refuse to register the Applicant as a private career college; and

2. to refuse to approve the Applicant's pre-service firefighting training program.

PRELIMINARY MATTERS

At the opening of the hearing on Friday, January 28, 2011, Counsel for the Superintendent brought a motion for:

1. An order dismissing the Applicant's request for a hearing into the Superintendent's refusal to approve its proposed pre-service firefighter program; and

2. An order that this Tribunal does not have jurisdiction to order the registration of the Applicant, if it is not a private career college within the meaning of the Act.

In her Factum, Counsel for the Superintendent acknowledges that this Tribunal has jurisdiction to hear an appeal from a Notice of Proposal to refuse registration. There is no provision, however, in the Act allowing an appeal from a Notice of Proposal to refuse registration to approve a program. The Applicant, therefore, cannot offer a "vocational program" under the Act (because the Superintendent will not approve it), so it cannot meet the definition of a private career college in the Act.

Counsel for the Applicant countered by arguing that there is a Notice of Proposal to refuse to register. Moreover, as the question of whether or not what the Applicant is offering is a "vocational program" is inextricably intertwined with the question of registration, this Tribunal has jurisdiction to consider both matters.

The Tribunal has carefully considered the arguments of counsel. The Tribunal agrees with Counsel for the Superintendent that the Act does not seem to allow an appeal from a Notice of Proposal to refuse a program and, had there not been a Notice of Proposal to refuse to register, there might have been some doubt as to the jurisdiction of the Tribunal.

Counsel for the Superintendent made the following circular argument: a private career college, with a "vocational program issue" is not one until registered under the Act; the Superintendent has refused to approve the Applicant's program, which this Tribunal cannot consider; therefore, this Applicant or, indeed, any other applicant with a "vocational program problem" cannot ever have a hearing before this Tribunal.

The Supreme Court of Canada has ruled on the powers of statutory tribunals. Chief Justice McLachlin stated in *R. v. 974649 Ontario Inc*.[1]

> …a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate …the powers of a statutory...tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions …
>
> Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the ...tribunal to accomplish its purpose…While these powers need not be absolutely necessary for the tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose…

The Tribunal refers to the well-known principle of statutory interpretation enunciated by Mr. E. A. Driedger:[2]

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1 [2001] S.C.C. 81 at paras. 70-71

2 E. A. Driedger, *The Construction of Statutes*, 1st ed., Butterworths, 1974, p. 67

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

The Tribunal has, accordingly, sought to divine the intention of the Legislature in enacting the Act.

The Act creates a comprehensive regulatory framework to govern private career colleges in Ontario. It has at least two objects:

1. To protect consumers, namely students, who enroll in such colleges; and

2. To provide a hearing for business persons seeking to operate a private career college for profit when they are refused registration by the Superintendent.

Counsel for the Superintendent says that although the Applicant is not entitled to a hearing before this Tribunal, it can go to the Divisional Court with its "vocational program problem". This, however, would not give the Applicant the full hearing, *e.g.* witnesses and cross-examination thereof, which the Applicant legitimately expects. The interpretation urged by Counsel for the Superintendent would seem to leapfrog over the plain language in the Act[3] and the Act[4] governing this Tribunal which provides for an appeal to the Divisional Court from a decision of this Tribunal.

The Superintendent's interpretation would usurp the adjudicative function of the Tribunal and transfer it to the Superintendent. This is not the intention of the Legislature as manifested in the text and scheme of the Act. It would, for example, relieve the Superintendent of the onus of proving, on a balance of probabilities, why he refused registration to the Applicant.

In conclusion, by express words in the Act, this Tribunal must hold a hearing and by necessary implication such hearing will include consideration of the Superintendent's refusal to approve the Applicant's program.

The Vice-Chair delivered his decision on jurisdiction verbally at the commencement of the continuation of the hearing on Monday, January 31, 2011. He said he would provide written reasons at the end of the hearing. The foregoing are his reasons.

CHRONOLOGY

The parties agree on the following brief chronology:

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3 *Private Career Colleges Act, 2005*, S.O. 2005, c. 28, Sch. L, subsection 19(3)

4 *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sch. G, sections 3 and 11

1. Mr. Matlashewski[5] submitted a pre-screening form of OFA to the Superintendent on August 19, 2008.

2. In or about Feb/mid-March 2009 - the Superintendent's office advised OFA that it must register under the Act and obtain program approval.

3. March 16, 2009 - OFA submitted a soft copy portion of application on the Registration Information for Career Colleges computer system.

   October 14, 2009 - The Applicant submitted the hard copy portion of its application to the Superintendent.

4. November 2, 2009 - matter assigned to Ms. Penfold (of the Superintendent's staff) for review.

5. November 16, 2009 - Ms. Penfold completes preliminary review and asks for further information and clarification.

6. November 9, 2009 to February 2010 - Ms. Penfold corresponds with Mr. Matlashewski on various issues as she works through the application for program approval and registration, including financial security.

7. January 8, 2010 - Ms. Penfold signs PCCA approval checklist form.

8. February 27, 2010 - Ms. Shepherd (Financial Analyst of the Superintendent's staff) signs PCCA approval checklist form; package delivered to Superintendent for review.

9. Late May 2010 - Mr. Matlashewski given a copy of the draft Policy Directive by the Superintendent's office.

10. June 1, 2010 - The Superintendent's office gave Mr. Matlashewski a copy of the Policy Directive.

11. June 1, 2010 to June 27, 2010 - discussions among counsel for the parties and the Superintendent.

12. June 28, 2010 - Superintendent issues Refusal to Register and Refusal to Approve Program.

UNDISPUTED FACTS

There are other facts about which there is no dispute. The Tribunal, therefore, finds the following to have been proven:

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[5] See page 10

1. The Policy Directive reads,[6] in part, as follows:

> COMPLIANCE
>
> PCCs intending to offer a pre-service firefighter training program must meet the following requirements:
>
> …
>
> Enter into a formal partnership with a local fire department that contributes to fire protection services as defined under the FPPA.[7] Through this partnership, the fire department agrees to provide advisory support on the safe delivery of firefighter training.
>
> AND
>
> Enter into a formalized agreement with the Ontario Fire Marshal (OFM) and the Ontario Association of Fire Chiefs (OAFC).

2. The firefighter program at the publicly funded Community Colleges was developed through a partnership with OAFC, the OFM, the fire service, and the Community Colleges.[8]

3. The Superintendent does not monitor the delivery of the firefighter program at the Community Colleges.[9]

4. IFSAC accreditation is coveted by firefighters. Firefighting is unregulated in Ontario.[10]

5. Firefighting is a municipal responsibility. Municipalities in Ontario are free to hire firefighters as they please. There are no criteria for such hiring.

PROVEN FACTS

The Tribunal commends counsel for the parties for their cooperation in settling the following facts which the Tribunal rules are proven:

1. Ms. Penfold may have read the Applicant's curriculum but she did not compare it to the Ontario Fire Marshal's.

2. The Superintendent under the Act did not read the OFA curriculum nor did the Deputy Fire Marshal, Dr. Barg[11], or Chief Beckett.

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6 Exhibit #6, Tab 10 – Ministry of Training, Colleges and Universities, Superintendent's Policy Directive #4, Approval of Pre-service Firefighter Training Programs

7 *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4

8 Exhibit #6, Tab 17

9 Exhibit #5, Tab 6, p. 13

10 Exhibit #6, Tab 17

11 See page 9

3. There is no safety concern for the general public with the OFA program.

4. There is no financial viability concern with Mr. Matlashewski or the OFA.

5. The OFA's program has International Fire Service Accreditation Congress ("IFSAC") certification.

6. Mr. Matlashewski spent substantial funds in support of his application.

7. Mr. Matlashewski tried to enter into a partnership with a number of fire departments without success.

8. It is not part of the Superintendent's mandate to get a fire department partner for the Applicant.

9. The public colleges that offer pre-service fire training came forward with their fire hall partners to go through the Ontario Fire Marshal ("OFM")/Ontario Association of Fire Chiefs ("OAFC")/Endorsement Review Board process.

10. The Superintendent would register the Applicant if its program complies with the Policy Directive.

11. The Superintendent believed that he was the sole arbiter of decisions relating to program approval and registration under the Act.

12. The Applicant was the first to apply for approval of a pre-service firefighter program.

13. Mr. Matlashewski attempted to contact/arrange a meeting with the Superintendent, at least twice in April 2010, but was not successful and did not speak to the Superintendent directly.

ISSUE

Is the Applicant entitled to registration under the Act?

THE CASE FOR THE SUPERINTENDENT

Counsel for the Superintendent filed a black binder of documents[12] and called five witnesses.

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[12] Exhibit #5

Allan Scott (“Mr. Scott”)

He testified that he is the Superintendent under the Act. He has been in that position since 2009. He has a secretariat of 30 people reporting to him. These people are engaged in a number of activities:

(i) a registration unit;
(ii) a compliance and enforcement unit; and
(iii) a quality and partnership unit.

He explained that there are over 600 private career colleges in Ontario with over 4,000 approved programs.

In February 2010, an inspector in the registration unit brought forward the application of the Applicant. Mr. Scott went to the website of the Applicant and contacted the Fire Marshal. Mr. Scott was concerned about proliferation of programs.[13]

This was the first application for this type of program and he spent time trying to educate himself about the current state of things.

He wanted training for firefighters to be the same whether public or private. He worked with colleagues which led to the Policy Directive of June 1, 2010. He wanted to replicate what students would get at a private college with what they would receive at the 14 Community Colleges which were then offering a firefighter program.

He said that he “was really challenged by this" and that he "wanted to get it right". He asked the Applicant to submit a new application which would comply with the Policy Directive and when that did not happen, he refused the Applicant’s registration.

He conceded that the Applicant had a major stumbling block in that he could not get a municipal fire department to partner with him. But Mr. Scott said that was not his responsibility.

On cross-examination:

(a) He denied that there was undue delay in processing the Applicant's application. On the contrary, he pointed out that it was only three months between the time he received the application and his decision.

(b) When confronted with his e-mail[14] about "proliferation” when there were then no Private Career Colleges offering a firefighting program, he said what he meant was "to get it right".

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13 Exhibit #6, Tab 17, p. 2
14 *Ibid*

(c) He conceded that he did not know the terms of the "formalized agreement" referred to in the Policy Directive.

(d) He again conceded that he had not read the curriculum of the Applicant nor did he know how it compared to the curriculum of the OFM. His position was that as the application did not comply with the Policy Directive, he had no jurisdiction to register the Applicant.

(e) He said that the problem with the Applicant's application was that without a "fire hall" partner there would be no one to supervise the training.

Kathy Penfold

She is an inspector for the Ministry of Training, Colleges and Universities (“MTCU”) primarily concerned with registration under the Act. Her duties include:

(i) ensuring compliance with the Act and regulations;
(ii) checking advertising;
(iii) responding to complaints.

In November 2009, Ms. Jeffers, an official in the MTCU, asked her to process the Applicant's application as soon as possible as there had been a delay.

She looked at the curriculum of the Applicant in the context of the application, communicated with Mr. Matlashewski and did the other normal things she would do with an application. She described the Applicant's submission as “a good one".

She signed off on the application in January 2010. The application then went to a financial analyst who signed off in February 2010. It then went to the Superintendent who had concerns and questions.

She told Mr. Matlashewski that although she had approved the application, it was part of a process and would not be finally approved until the Superintendent signed off on it. She did a site inspection of the Applicant's premises in early April 2010, but had little involvement after that.

Douglas Michael Crawford

He testified that he is the Deputy Fire Marshal of Ontario. He described the role of the Fire Marshal and the Deputy under the *Fire Protection and Prevention Act, 1997*. One of their duties is to develop training programs.[15] He discussed the roles of the various "stakeholders" being the OAFC, the Professional Firefighters Association (a bargaining group), the Firefighters Association, which supports volunteer firefighters, and the Ontario Association of Fire Training Officers.

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[15] FPPA, *supra*, para. 9(2)(d)

He said that in the late 1990s there was a need for a pool of qualified candidates for firefighting. This led to the program being developed and delivered through the Community Colleges.

He became aware in April 2010 of the Applicant's application but only had "high level" knowledge as to what was going on. He had no direct involvement in the preparation of the Policy Directive.

He did say that he did not see a need for a "host of privates". He also said that he did not want any deviation from the standards currently used by the public Community Colleges.

Rose Barg ("Dr. Barg")

She is the Acting Section Manager, Academic Standards and Evaluation, in the office of the OFM.

It was she who developed and implemented the Ontario-wide system for a certified firefighter program. She also worked with others to establish the pre-service firefighter training program with the Community Colleges.

It is a standard system which is also used to train officers through the Fire College (a section of the OFM). The Ontario program is IFSAC accredited.

Dr. Barg explained the delay in processing the Applicant's application. She said that she and others were trying to find a neutral third party assessor to consider the Applicant's application, but that, ultimately, the MTCU came back to the OFM and said that they preferred to work with them.

She worked on the criteria for the Policy Directive in the spring of 2010.

Dr. Barg conceded that in the fall of 2008, the OFM curriculum was working well and that the OFM did not want to go beyond that. Apparently, the Legislature added the regulation[16] providing for pre-service firefighter training without consulting the OFM. Dr. Barg expressed her annoyance with this in an e-mail[17] in January 2009 to Ms. Jeffers. By June 2010, however, the OFM was in favour of both public and private firefighting training programs.

Timothy W. Beckitt

He is the Fire Chief in Kitchener-Waterloo. He is also the President of the OAFC. He said that the OAFC works with the OFM to promote professionalism in the firefighting service.

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[16] PCCA, *supra*, footnote 3, Regulation 415/06, subsection 8(2)
[17] Exhibit #6, Tab 18

From and after 2001, he worked with Dr. Barg on the pre-service firefighting program. He had input into the development of the Policy Directive. He said that the OAFC supports the current pre-service firefighting program offered at the Community Colleges. He does not, however, know anything about the Applicant's program.

THE CASE FOR THE APPLICANT

Counsel for the Applicant called two witnesses and filed a book containing 46 documents.[18] He also filed a blue[19] and a black[20] binder consisting of the curriculum of the Applicant. He requested, Counsel for the Superintendent consented, and the Tribunal Ordered restricted access to the two binders under Rule 7 of the Tribunal's Rules of Practice.

Elizabeth Jeffers ("Ms. Jeffers")

She appeared under summons by Counsel for the Applicant. She joined MTCU in December 2008, as the Manager of the Private Institutions Section. In early 2009, she was responsible for handling the Applicant's file. She felt that she needed a neutral third party assessor of the Applicant's application. She worked with Dr. Barg in early 2009 and outlined three options in an e-mail:[21]

1. OFM to conduct an assessment of these programs;

2. OFM to recommend an assessor and/or assessment process to MTCU, perhaps using the OFM standard for such programs; or

3. MTCU to develop an assessment process and find a third party expert to review the programs prior to the Superintendent's approval.

The third party assessor discussion was not productive and MTCU ultimately decided to work with the OFM.

Ms. Jeffers was on leave between March and June 2010 so the Policy Directive was done in her absence. Moreover, she had not seen the Memorandum of Understanding[22] before the Policy Directive came out.

Larry Matlashewski ("Mr. Matlashewski")

He is a retired firefighter with 29 years of service as a firefighter, training officer, Captain and acting District Chief.

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18 Exhibit #6
19 Exhibit #3
20 Exhibit #4
21 Exhibit #6, Tab 31
22 Exhibit #6, Tab 6

He is accredited by IFSAC in Firefighting I and II, as well as in hazardous materials awareness and operations.

About three months prior to his retirement, he saw the need for a "fire school" to teach the practical side of firefighting.

On receipt from the MTCU of a disc on how to apply, he retained the services of a consultant to help him through the process. He also began to incur significant expenditures to buy equipment and establish his school. He purchased an IFSAC accredited program from a highly respected university in the United States.

Mr. Matlashewski gave details on his program, which the Tribunal will not repeat in this decision because of the Rule 7 order. He has tried repeatedly to get a fire department to partner with him without success. He posted security with the Superintendent (which has since been refunded). He has compared his program with the OFM one. In his opinion, the OFM has exceeded the National Fire Protection Association program to "get the hours in", i.e. more classroom work. He feels that he offers more than the OFM because his classes will be smaller and he offers more opportunity for the students to do practical work.

THE LAW

The Act:

Definitions

1. (1) In this Act,

> "Minister" means the Minister of Training, Colleges and Universities or such other member of the Executive Council to whom the administration of this Act may be assigned under the *Executive Council Act*;
>
> "private career college" means an educational institution or other institution, agency or entity that provides one or more vocational programs to students for a fee and pursuant to individual contracts with the students, but does not include,
>
> (a) a college of applied arts and technology established under any Act,
> (b) a university established under any Act,
> (c) a school as defined in subsection 1 (1) of the *Education Act*, or
> ...
> (e) a prescribed institution, agency or entity or an institution, agency or entity belonging to a prescribed class;
>
> "vocational program" means instruction in the skills and knowledge required in order to obtain employment in a prescribed vocation.

Superintendent

2. (1) There shall be a Superintendent of private career colleges who shall be appointed by the Minister.

Duties

(2) The Superintendent may exercise the powers and shall perform the duties conferred or imposed upon him or her by or under this Act.

Delegation

(3) Subject to the approval of the Minister, the Superintendent may delegate in writing any of his or her powers or duties under this Act to one or more persons employed in the Ministry, subject to such limitations, restrictions, conditions and requirements as may be set out in the delegation.

Prohibition against operating a private career college

7. (1) No person shall operate a private career college unless the person is registered.

Holding oneself out

(2) No person shall hold themself out as the operator of a private career college unless the person is registered.

Prohibition against providing vocational programs

8. (1) No person shall offer or provide a vocational program for a fee unless the person is registered and the provision of the vocational program has been approved by the Superintendent.

Registration

14. (1) The Superintendent shall register an applicant to operate a private career college and shall renew an applicant's registration if the Superintendent is satisfied that,

(a) it is in the public interest to grant the registration or to renew the registration;
(b) the applicant will operate the private career college in compliance with this Act and the regulations;
(c) the vocational programs that are provided, or are proposed to be provided, by the private career college meet, or are likely to meet, the requirements of this Act and the regulations;
(d) having regard to the applicant's financial position, the applicant can be expected to be financially responsible in the operation of the private career college;
(e) the past conduct of the applicant or, if the applicant is a corporation, of its officers and directors, provides grounds for the belief that the private career college will be operated in accordance with the law and with integrity and honesty; and
(f) the applicant is not carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Criteria for public interest

(2) In determining whether it is in the public interest to register a person or renew a registration under subsection (1), the Superintendent shall consider the prescribed criteria.

Several locations

(3) If an applicant intends to provide a vocational program at more than one location, the Superintendent may register the applicant to operate one private career college at the several locations.

Certificate of registration

(4) Upon registering a person to operate a private career college, the Superintendent shall issue a certificate of registration to the person.

Conditions

15. (1) A registration or renewal of a registration may be made subject to conditions specified by the Superintendent or prescribed by regulation.

Changes to conditions

(2) The Superintendent may at any time, at the written request of the registrant or on his or her own initiative, add a condition to a registration or change or remove a condition of a registration that he or she had previously specified.

Registrant to comply with conditions

(3) The registrant shall operate the private career college in accordance with the conditions applicable to the registrant's registration or renewal of registration.

Registration not transferable

16. A registration is not transferable to another person.

Expiry of registration

17. (1) A first registration under this Act expires on the date specified in the registration.

Same

(2) A renewal of a registration expires on the first anniversary of the date of the renewal.

Continuance pending renewal

(3) If a registration expires after the application for renewal is made but before the Superintendent makes a decision with respect to the application for renewal, the registration shall continue,

(a) until the renewal is granted; or

(b) if the Superintendent proposes to refuse the renewal under section 18,

(i) until the time for requiring a hearing by the Tribunal under subsection 19 (3) expires, or

(ii) if a hearing is required, until the Tribunal makes its order.

Refusal to register

18. (1) Subject to section 19, the Superintendent may refuse to register an applicant if he or she is not satisfied that all of the requirements described in subsection 14 (1) are met.

Revocation, suspension, refusal to renew

(2) Subject to section 19, the Superintendent may refuse to renew a registration or may suspend or revoke a registration if,

(a) the Superintendent believes that a requirement described in subsection 14 (1) is no longer met;

(b) the registrant has breached a condition of the registration;

(c) the registrant has failed to comply with a provision of this Act or the regulations;

(d) no students have enrolled in any vocational programs at the private career college for at least two successive periods of the college's registration under this Act; or

(e) the registrant has failed to pay a penalty imposed by notice of contravention under section 39.

Notice of refusal or revocation

19. (1) The Superintendent shall give the applicant or registrant notice in writing if he or she proposes to,

(a) refuse to register the applicant or refuse to renew the registrant's registration; or

(b) suspend or revoke the registrant's registration.

Content of notice

(2) A notice under subsection (1) shall set out the reasons for the proposed action and shall inform the applicant or registrant that the applicant or registrant is entitled to a hearing by the Tribunal if, within 15 days after service of the notice under this section, the applicant or registrant gives written notice to that effect to the Superintendent and the Tribunal.

Entitlement to hearing

(3) If an applicant or registrant receives notice of a proposed action under subsection (1), the applicant or registrant is entitled to a hearing by the Tribunal if, within 15 days after service of the notice, the applicant or registrant gives written notice to that effect to the Superintendent and the Tribunal.

Where no hearing

(4) If an applicant or registrant does not require a hearing by the Tribunal, the Superintendent may carry out the proposal specified in the notice.

Where hearing required

(5) If an applicant or registrant gives notice requiring a hearing under subsection (3), the Tribunal shall appoint a time for and hold a hearing.

Powers of Tribunal

(6) At a hearing under subsection (5), the Tribunal may, by order, direct the Superintendent,

(a) to carry out the proposal specified in the notice;

(b) to refrain from carrying out the proposal;

(c) to attach such conditions to a registration as the Tribunal considers appropriate; or

(d) to take such other action as the Tribunal considers appropriate.

Approval required to provide vocational programs

23. (1) It is a condition of every registration that the private career college only provide those vocational programs for which it has received the approval of the Superintendent under this section.

(2) An application for approval to provide a specified vocational program shall be in a form approved by the Superintendent and shall contain such information as the Superintendent may require.

(3) The Superintendent shall approve the provision of a specified vocational program by a private career college if the Superintendent is satisfied that,

(a) the program will provide the skills and knowledge required in order to obtain employment in a prescribed vocation; and

(b) the program is likely to meet the applicable standards and performance objectives set out in the Superintendent's policy directives.

Conditions

(4) The Superintendent may approve the provision of a specified vocational program by a private career college subject to such conditions as the Superintendent may specify and may, as a condition of the approval, specify performance indicators for the vocational program and standards and performance objectives that the vocational program must meet in addition to the performance indicators, standards and performance objectives set out in the Superintendent's policy directives.

Duration of approval

(5) Subject to a policy directive issued under clause 53 (1) (a), the approval to provide a specified vocational program shall be valid for a prescribed period or for a period determined in accordance with the regulations and may be renewed upon application.

Invalidity of approval

(5.1) Where an approval is revoked as the result of a policy directive issued under clause 53 (1) (a), a private career college shall immediately submit an application for approval of the vocational program if it intends to continue providing the program.

Changes to vocational programs

(6) A private career college shall not make a substantial change to a vocational program that it has been approved to provide without the further approval of the Superintendent.

(7) Subsections (2) to (5) apply with necessary modifications to the following:

1. An application to renew an approval.
2. An application for approval where an approval is revoked as the result of a policy directive issued under clause 53 (1) (a).
3. An application for approval of a substantial change to a program.

Non-vocational programs

(8) Nothing in this section affects the right of a private career college to provide programs that are not vocational programs.

Policy directives

53. (1) The Superintendent may issue policy directives,

(a) setting out standards, performance indicators and performance objectives for vocational programs or classes of vocational programs and governing the publication of information by private career colleges respecting the performance indicators and performance objectives applicable to their vocational programs;

(b) setting out credentials that private career colleges may grant, and the classes of vocational programs for which such credentials may be granted;

(c) exempting private career colleges, or any class of them, from the requirement that they obtain approval for a specified class of vocational programs under section 23. 2005,

(1.1) A policy directive issued under subsection (1) may revoke an approval for a vocational program or a class of vocational programs and an approval for credentials that a private career college may grant.

(1.2) The revocation of an approval is effective on the date specified in the policy directive or calculated in accordance with the policy directive that is no earlier than six months after the date the policy directive is issued under subsection (1) or on the date specified in the policy directive or calculated in accordance with the policy directive, if one of the following applies:

1. The policy directive introduces a new standard related to public health or public safety.

2. The policy directive revoking the approval relates to a vocational program that is regulated by a third party and,

i. the third party changes the entry requirements necessary to practise the vocation, and

ii. the changes are such that unless the private career college adopts the requirements prescribed by the third party, graduates from the program would not meet the entry requirements to practise the vocation.

(1.3) In the case of the revocation of an approval for a vocational program or class of vocational programs, the effective date of the revocation specified in the directive or determined in accordance with the directive applies despite any prescribed period for approval or the period for approval determined in accordance with the regulations.

(2) The policy directives are binding on private career colleges and every private career college shall comply with and be operated in accordance with the policy directives.

(3) A policy directive may be general or particular in its application.

(4) A policy directive may create different classes of persons, private career colleges, vocational programs and students and may contain different provisions in respect of each class.

(5) A policy directive issued under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

Regulation 415/06:

8. The following classes of programs are prescribed as programs that are vocational programs for the purposes of the Act and the regulations:
…

2. Programs in respect of fire protection or police work that prepare students for admission to training programs in those occupations prescribed under the *Fire Protection and Prevention Act, 1997* or the *Police Services Act*.

APPLICATION OF THE LAW TO THE FACTS

Counsel for the Applicant raised a number of arguments, all of which may be grouped under the category of "procedural fairness".

Unreasonable Delay

The Tribunal understands the frustration of Mr. Matlashewski, as a layman, with the time it took to get a Notice of Proposal from the Superintendent. There were delays but the Tribunal accepts the evidence of Mr. Scott, Ms. Jeffers and Dr. Barg in this context. MTCU felt that it needed an independent third party assessor to review the Applicant's application. When this proved impossible, they worked to develop the criteria which led to the issuance of the Policy Directive.

In any event, the Courts have set the bar high before relief will be granted under this head.

The Applicant needs to prove that the delay borders on oppression, negligence or bad faith on the part of the Superintendent. There must be so much prejudice to the Applicant attributable to the delay that it would be impossible to present the case.[23] Bastarache J. has said:[24]

> In order to find an absence of process, the court must be satisfied that, the damage to the public interest in the fairness of the administration process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted.

The evidence in this case does not come close to meeting the tests outlined above.

Improper Delegation

Counsel alleges that the Superintendent delegated his authority to the OFM without a written delegation as required under the Act.[25] The Tribunal rejects this allegation. Mr. Matlashewski's application was the first one to be received by the Superintendent. It was natural for him to turn to the OFM for help. The result was a collaborative effort[26] among a number of parties which led to the development of criteria and the Policy Directive.

Rule Change

Counsel complains that the Superintendent changed the rules on the Applicant by issuing the Policy Directive nearly two years after Mr. Matlashewski submitted his pre-screening form.

The Tribunal rejects this allegation for the simple reason that when the Applicant submitted his application, there were no rules and the Superintendent had to develop them.

The Policy Directive

<u>The "fire hall partner requirement"</u>

The Tribunal readily understands why a Community College would need a fire hall partner. The Community College needs such a partner to provide practical training and supervision to its students.

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[23] Guy Regimbald, Canadian Administrative Law, LexisNexis, 1st ed., p. 284
[24] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 S.C.J. No. 43 at para. 121
[25] PCCA, *supra*, footnote 3, ss. 2(3)
[26] Exhibit #6, Tabs 12, 13 and 16

It is not clear why Mr. Matlashewski, as an experienced firefighter with an IFSAC accredited program, needs such a partner. The Superintendent did say that the fire hall would supervise the training. He did not lead any evidence as to why that was necessary with this Applicant or why he, as the Superintendent, could not have developed some system of inspection to accommodate this Applicant. The Tribunal notes that the Superintendent agreed that there is no safety concern with the Applicant's program. Community Colleges have a "fire hall partner" so the Superintendent determined that Mr. Matlashewski should have one too. This was simply not fair to the Applicant. In so doing, the Superintendent raised an unnecessary and insurmountable barrier to Mr. Matlashewski. The action of the Superintendent, thus, interfered with Mr. Matlashewski's commercial freedom and his right to do business in Ontario.

The Vocational Program

It is common ground that when the Superintendent became aware of the OFM program at the Community Colleges, he decided to adopt it. Most of the witnesses for the Superintendent supported this decision as it would "replicate" the program at the Community Colleges and have a standardized system for firefighters at both Community Colleges and Private Career Colleges. The Tribunal acknowledges that consistency within Community Colleges on the program is laudable. However, there is no necessary connection between Community Colleges and Private Career Colleges. There is nothing in the Act which requires PCCs to be the same as publicly funded ones.

The Vice-Chair has read the two volumes of the Applicant's curriculum. It appears to be a comprehensive program with experienced instructors which has received the coveted IFSAC accreditation.

DECISION

The Tribunal finds, based on a careful analysis of the evidence, that the Superintendent, the OFM and the OAFC were not favourably disposed to Private Career Colleges. Their actions created a bureaucratic tangle for the Applicant, and, perhaps, unconsciously thwarted the intention of the Legislature to have firefighter training in Private Career Colleges. The Superintendent failed to respond to the unique situation presented by the Applicant in this case as follows:

(i) The Superintendent and the others developed a Policy Directive which may be charitably described as inflexible.

(ii) The Superintendent knew or ought to have known that the Applicant would have trouble finding a fire hall partner. Instead of working with the Applicant, the Superintendent rested on his position that it was not part of his mandate.

(iii) The only person for the Superintendent who read the curriculum of the Applicant approved it. Had the Superintendent and the others taken the time to read the Applicant's curriculum, they might have been able to reach a compromise and avoided this hearing.

(iv) The Superintendent anchored on the principle that the same criteria should be applied to Private Career Colleges as the Community Colleges. There is nothing in the Act to support such a position.

The Superintendent has failed to discharge the onus on him of establishing that the Applicant should be rejected for registration as a Private Career College. In the circumstances of this case, and given the facts established by the evidence and agreement, a licence should be granted to the Applicant.

The Tribunal is conscious, however, that the Superintendent needs time to, among other things, conduct a site inspection, be satisfied on security, insurance and the other acts and things the Superintendent, acting reasonably, does when licensing a Private Career College. Also, the Tribunal recognizes that the Superintendent has to regulate the Applicant. In this connection, the licence will be effective April 13, 2011. The Tribunal orders the Superintendent immediately to consider the curriculum of the Applicant. The Superintendent should have no difficulty approving the curriculum as a “vocational program” under the Act. After all, he has already agreed that there is no public safety concern with the curriculum and it is IFSAC accredited.

If the parties, after diligent effort, find areas which they cannot resolve they may re-attend before this Tribunal for directions.

ORDER

By the power vested in it under the Act, the Tribunal rejects the Proposal of the Superintendent, and orders the Superintendent to register the Applicant as a Private Career College, effective April 13, 2011.

LICENCE APPEAL TRIBUNAL

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Terrance Sweeney, Vice-Chair

RELEASED: March 23, 2011

This decision may also be available on Quicklaw.

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Decisions under the Private Sercurities and Investigative Services Act, 2005

Fiscal Year 2010 - 2011

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

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There have been no decisions released under this Act for the period selected.

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Fiscal Year 2010 - 2011

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- Ckumar Rajkumar
- Jaigo Paul also known as Paul Jaigo–Motion –Extension Of Time Ckumar Rajkumar-Motion for Stay
- Arturo Peralta
- Anton Jeeva Arulappu
- Alexandre Alves–Motion
- Ahmad Fahad Faqiri
- Anthony (Tony) Raco
- Royal View Romano Real Estate Services Ltd. and Benny Romano
- Ahmad Mirzakhalili
- Alexandre Jose Alves
- Gordon Simpson and 1567913 Ontario Ltd. c.o.b. as Diversified Development Realty - Pre-Hearing

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

CKUMAR RAJKUMAR

APPEAL FROM A DECISION OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c. 30, Sch. C

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: RONALD BIRKEN, Counsel, representing the Applicant, Ckumar Rajkumar

ROBERT MAXWELL, Counsel, and JONATHAN HURTER, Paralegal, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATES OF HEARING: April 26 – 29, 2010
May 3, 4, 6 & 7, 2010 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Ckumar Rajkumar, appeals from the Notice of Proposal of the Registrar dated November 13, 2009 to revoke the registration of the Applicant pursuant to the Registrar's powers under the *Real Estate and Business Brokers Act,* 2002, S. O. 2002*,* c. 30 Sch. C (hereinafter the "Act"). The appeal is pursuant to s. 14 of the Act.

The evidence in the hearing focussed on 12 real estate transactions, two in 2002 and ten in 2006 and 2007, where lending institutions advanced high ratio mortgages that went into default almost as soon as the transactions closed and there was significant loss on the subsequent power of sale. The Notice of Proposal also alleged false statements by the Applicant on renewal applications but these allegations were withdrawn at the conclusion of the hearing. The remaining reasons advanced by the Registrar for revocation are as follows:

1. 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 under section 10 (1)(a)(ii) of the Act;

2. The Applicant was knowingly involved in mortgage fraud schemes.

3. The Applicant conspired with other persons to obtain mortgages fraudulently on properties he traded at inflated prices, knowingly assisted in the submission of false or fraudulent documents, and withheld significant documentation that caused financial institutions to act to their detriment.

ADMITTED FACTS

All twelve transactions at issue in this proceeding use a similar structure. A purchaser and seller enter into an agreement of purchase and sale providing for the payment of a deposit to be held in trust by the Applicant's employing brokerage. Following the execution of the agreement of purchase and sale, the seller and purchaser enter into an amendment providing payment of the deposit directly to the seller. The Applicant purportedly witnessed all of the signatures of his clients on all of the documents. In most cases the amendment or a subsequent amendment, provided for an increase in the amount of the deposit payable to the seller. Put simply, the purchaser put the deposit at risk by eliminating the third party escrow conditions, and assumed a greater risk by paying more unsecured funds without receiving any consideration or having any juridical reason for doing so.

In all but one of the transactions the Applicant represented both the seller and the buyer under a dual agency agreement. In the sole remaining transaction, the Applicant testified that he declined the dual agency because he did not wish to travel to Hamilton to enter into the listing agreement. A colleague at his employing brokerage took the listing. The Applicant acted for the purchasers. It is worthy of note that in that transaction the Applicant, as selling agent, received approximately two thirds of the commission and the listing agent received one third.

It is admitted by the Applicant that the deposit amendments were never forwarded to the lending institution. In all but one of the cases, the documents did not find their way to the mortgage brokerage either. It is also admitted that the lending institutions would not have completed the transactions had they had the full documentation.

It is not disputed that each of the mortgages on these properties was a high ratio mortgage. This fact is important because high ratio mortgages are insured under a federal scheme and the lending institutions do not generally arrange for appraisals prior to the advance of funds. The two insurers, Canada Mortgage and Housing Corporation and Genworth, have their own appraisal system based on a computer database related to postal codes.

The facts disclose that the transactions were fraudulent from their inception. All of the transactions involved some level of false identification or proof of income and employment. In one transaction, the purchaser was using stolen identification, a fact admitted by the Applicant. In eleven transactions there were false employment letters. In four cases false employment letters were found by the Registrar's investigator in the Applicant's personal file at his office at the brokerage. The Applicant cooperated with the investigation and voluntarily turned over his file to the investigator.

DISPUTED FACTS

The essence of the dispute can best be highlighted by a review of one of the earliest transactions. The property, a two bedroom condominium near Lester B. Pearson International Airport in Toronto, was originally purchased in 1996 for $65,000.00. In 2002 the Applicant, acting for both purchaser and seller, brokered a sale transaction for $98,500.00 with a $3,000.00 deposit to be held in trust by his employing brokerage. One day later the agreement of purchase and sale was amended by a separate amending agreement providing that the $3,000.00 deposit be paid directly to the seller and that another $12,500.00 deposit was to be paid to the seller. The purchaser, who testified that she was simply a nominee for her brother, stated that she did not pay the original $3,000.00 deposit or the $12,500.00 extra deposit. She wished she had those kinds of funds. She left everything up to her brother. The Applicant stated that he was unaware if the extra deposits were ever paid.

Both seller and buyer used the same solicitor, who has now been permitted to resign from the Law Society of Upper Canada. The balance due on closing was $83,000.00 plus or minus the usual adjustments. The original agreement of purchase and sale was used to apply for a high ratio mortgage but the amending agreement was not disclosed. Accordingly, the lending institution approve a loan at 95% of the original purchase price and, after deducting the insurance fee, advanced in excess of $93,000.00, that is significantly more than the balance due on closing, leaving profits for the fraudsters. The solicitor, of course, did not notify his client, the lending institution, about the deposit amendment. This property sold under a power of sale twenty months later for $85,000.00.

It is the Registrar's position that the deposit provisions were merely a mechanism to reduce the purchase price and that the deposits were never paid. It is also the Registrar's position that the true fair market value of this property was around the $85,000.00 sale price in the power of sale transaction in 2004 and that the $98,500.00 sale price was inflated in furtherance of the fraud. The Applicant insists that the sale price reflected the true market value and that the purpose of the redirection and increase of the deposit funds was to enable the seller to find alternative accommodation for her daughter who was living there and, at the request of the purchaser, to convert a large laundry room to a third bedroom for rental purposes.

As stated above, with variations to suit the circumstances, the above structure characterizes all of the transactions at issue.

EVIDENCE

In addition to ten bound volumes of documents and twenty loose documents or bundles of documents comprising the 30 Exhibits filed by the Parties in this matter, the Tribunal heard evidence from the Real Estate Counsel of Ontario (RECO) investigator, mortgage brokers, sales agents, a purchaser, a seller and the Applicant. RECO is the office of the Registrar under the Act. One exhibit, Exhibit 12, consisted of a number of Will Say statements from lenders and some landlords that, by the consent of the parties, are admitted for the truth of their contents. The first witness was David Andrew, the RECO investigator. The Tribunal will review the evidence on a property by property basis and, using Mr. Andrew's evidence as a starting point and will combine the evidence of other witnesses as it applies to the various properties.

David Andrew is a part-time investigator at RECO. He has extensive experience in investigation having spent fifteen years as a Toronto police officer, much of it in fraud investigation, a number of years as a peace officer with the Financial Services Commission and thirteen years with RECO, initially in a full time capacity but for the last four years working part-time.

It is appropriate to start with a few general words about Mr. Andrew's investigation. As part of his investigation, Mr. Andrew reviewed the files received from the Applicant's employing brokerage. In each case, Mr. Andrew found those files to be complete with the agreement of purchase and sale and the deposit amendments. The brokerage's trade record sheets also reflected the fact that no deposit was held by it in each transaction. He reviewed the files of the lending institutions and cross-referenced the lending institution files with those of the brokerage. In each case, the deposit amendments were missing from the lender's files. He also reviewed and cross-referenced the files of the mortgage brokers involved in these transactions. Again, in each case, with one exception, the deposit amendments were missing. Finally, he made efforts to locate the sellers and purchasers and had very limited success in doing so. He spoke to one seller's family but a lack of English prevented an exchange of information. He spoke to the mother and brother of the purchaser of the airport condominium and the Hamilton property. He was unable to locate any other party involved.

Mr. Andrew also noted that the bulk of the documents in lenders' and mortgage brokers' files carried a fax header indicating that they had been faxed from the Applicant's employing brokerage. These documents included agreements of purchase and sale but also often included financial information. Of note: there were false bank statements, false employment letters, false pay stubs, false Revenue Canada notices of assessment and false identification. The Applicant testified that he was not responsible for sending documents from his office. He would give the package of documents to the purchasers

and they would use the office fax machine to communicate with mortgage lenders. If a client called in while he was away, he would advise the office assistant to send the fax but keep copies of everything for his personal file. He would put the copies in his personal file without looking at them. For documents he would send on his own business, he had a fax machine in his own office on the second floor. He had no need to attend at the first floor main office fax machine. Not a single document carries the fax header of the Applicant's personal fax machine.

On February 23, 2006 RECO received a complaint from the purchaser of the condominium described above. The complaint was forwarded by a lawyer acting on the purchaser's behalf as the purchaser had now moved to the United States. Mr. Andrew noted the structure of the transaction as set out above. He also noted that signatures on various documents, all witnessed by the Applicant, appeared to differ from each other. Finally, he noted that there was a line item in the lawyer's trust ledger for payment of $12,177.12 to an Ontario numbered company, 1099893 Ontario Limited.[1] A check on this company disclosed that the Applicant was both President and Secretary. The documents contained no written disclosure of an interest in the property by the Applicant.

In testifying on his own behalf with respect to this property, the Applicant stated that he had dealt with the purchaser directly and not with her brother. It was his evidence that she was planning to attend York University and was looking for a rental property in Toronto. He showed her properties in this particular development as well as properties in the Sentinel and Finch area. He testified that he had shown her approximately six properties and she chose to make an offer on the subject property.

As set out above, the Applicant justified the deposit amendment by stating that the seller needed $3,000.00 immediately to pay the first and last month's rent for her daughter, who was living there at the time of sale. The further $12,500.00 was justified on the grounds that the purchaser sought to have the seller make a number of changes to the property, and, in particular, to convert a large laundry room to a third bedroom to generate rental income. The Applicant persisted in his evidence about the interior work until the question arose about the payment of approximately $12,000.00 to the numbered company out of closing proceeds. At this point he insisted that that payment was for the interior work on the property, leaving the extra $12,500.00 deposit unexplained.

The purchaser testified that she met the Applicant once, at his office, in the presence of her brother. The Applicant spoke to her brother. She was not interested in the conversation. She does recall signing some documents and she did understand that mortgage financing would be involved, but she specifically denies signing all of the documents where the Applicant purported to witness her signature. She stated that the signature on the agreement of purchase and sale was not hers but it was her signature on the deposit amendment. She does not know of 1099893 Ontario Limited and did not

[1] The documents received by Mr. Andrew from the purchaser's lawyer are found at Ex 5 Tabs 1 through 7

retain them, or anyone else, to do pre-closing work in the property. She could not order work to be done as she has never seen the property and has no idea of its condition.

During cross-examination, the Applicant was taken to his listing of this condominium. It was pointed out to him that there was nothing in the description that indicated a laundry room. His answer was that it is implied in the notation that there are ensuite laundry facilities. He also listed the property for sale after the impugned sale. It was pointed out to him that the subsequent listings make no mention of a third bedroom or mention the laundry room. He took the position that his description had to match the condominium declaration. A new buyer would seek a status certificate and, if there was a difference between his description and the status certificate, he might be sued.

Almost simultaneously, the same purchaser purportedly entered into an agreement of purchase and sale dated March 28, 2002 to buy a property in Hamilton. In this transaction, she was purchasing the property in concert with her brother's fiancé. The sellers were her parents. The property in question was run as a business by her parents as a lodge for seniors. It had been purchased in 1998 for $168,000.00. The 2002 sale was at $228,000.00 with a deposit of $5,000.00 to the Applicant's employing brokerage. The day after signing the agreement of purchase and sale, on March 29, 2002, the sellers and purchasers enter into an amendment changing the deposit provisions. The new deposit provisions make the deposit payable to the sellers directly and add a provision for the payment of another $15,000.00. Again the parties use the same solicitor.

The purchaser testified that her total annual income was approximately $12,500.00. She stated that it arose from working in her parents business. Again, the transaction in question was to be dealt with by her brother who felt that his fiancé should also have her name on some property. As part of his investigation, Mr. Andrew came across an employment letter for the purchaser. The company was based in Alberta and had a branch office in Hamilton. The company advised Mr. Andrew that it had never heard of the purchaser and the purchaser advised the Tribunal that she had never heard of the company.

Of all of the documents in the transaction, the purchaser stated that the only signature that was hers was on a direction at closing to pay money to 1099893 Ontario Limited. She testified that the signatures on the agreement of purchase and sale and the deposit amending agreements witnessed by the Applicant were not hers.

The Hamilton transaction closed on or about May 13, 2002. Given a supposed deposit of $20,000.00, the balance due on closing subject to adjustments was $208,000.00. The financial institution did not receive the mortgage amendment provisions and advanced $224,722.50, well in excess of the required balance. On closing, a cheque for $2,140.15 was paid to 1099893 Ontario Limited. On December 1, 2006, the financial institution sold the property under power of sale proceedings for $184,000.00.

The Applicant testified that he met with the buyers in his office. The brother of the buyer who testified was also there. He witnessed the signatures of the two buyers. He knew very little about the property, having only seen it from the outside. He knew that the sellers were not living at the property. It was his evidence that the extra $15,000.00 deposit was for work to be done on the property. He then made two completely contradictory statements. In the first statement, he stated that he did not know that there was to be a mortgage on the property. In the second statement, immediately afterwards, he stated that the buyers wanted the offer prepared in the manner it was for financing purposes.

A complaint came to Mr. Andrew's attention from an alleged purchaser of a property in Vaughan. The alleged purchaser started receiving demands from a financial institution concerning mortgage arrears. Since she had never purchased a home in Vaughan, these calls were perplexing. It was determined that someone had managed to steal her identification and had used it in a fraudulent mortgage scheme.

The property in question had been purchased new in December 2004 for $383,900.65. The Applicant had assisted the buyer at that time and the builder had paid a referral fee of $1,000.00 to his brokerage, out of which he received commission. According to the Applicant, he had met his former client accidently one day at Yorkdale Shopping Centre and the conversation turned to real estate. That conversation led to a listing. The Applicant listed the property and ultimately an offer was agreed in the amount of $495,500.00 with a deposit of $5,000.00 payable to the Applicant's employing brokerage in trust. The agreement of purchase and sale was executed on August 8, 2006. On August 16, 2006 an amending agreement was executed making the deposit payable to the seller directly and increasing the deposit to $30,000.00. The unadjusted balance due on closing was $465,000.00. On the September 20 closing date, the lending institution advanced mortgage proceeds of $483,669.94. Seven months later, the property sold under power of sale proceedings for $425,000.00.

In explaining the changes in the deposit structure, the Applicant stated that the seller came to him after signing the agreement of purchase and sale and asked for a further deposit and payment of it directly to the seller. The seller's justification was that when he had purchased new from the builder he had paid the deposit directly to the builder and then had made subsequent deposit payments to the builder. Since he was behind in his realty taxes and utility bills and he was going to purchase a new home, he wanted the funds paid to him.

Bruno Mauti is a real estate agent and has been for 23 years. For 13 years he has been with Re/Max Excellence Realty in Vaughan. The bulk of his business is with institutional lenders selling under powers of sale. He was asked by the lending institution in the above transaction to list and sell the property when it took possession. The appraisal process he described involves him in producing a current market assessment (CMA) to determine the resale value based on research into market prices of comparable homes in the neighbourhood. The financial institution also hires its own independent appraisers. Taking the information from all sources into account, the

financial institution will advise Mr. Mauti the price to list the property. He was instructed to list this property at $435,000.00 on March 28, 2007. It sold on April 4, 2007 for $425,000.00.

In using comparable properties, Mr. Mauti noted that the subject property had a kitchen, living room, dining room, four bedrooms and an unfinished basement. He stated that, in that area, a finished basement may add $50,000.00 to the value of the property on a resale. He did not note any significant damage to the property but felt it could use a "paint job." The house was not staged for sale and conceded that lack of staging may affect the sale price adversely. He did caution that power of sale properties often generate bidding wars and often command high sales prices.

In reviewing the properties asserted by the Applicant as comparables, Mr. Mauti felt that they were not truly comparable properties. For the most part these properties had finished walk-out basements. One property never sold at the asking price. He did not believe that he could get the $495,000.00 list price for the subject property that the Applicant listed for, even in 2007 in a rising market. The one property which sold in 2008 for $503,000.00 had a finished basement. He felt this was a very good price for the property but noted that the market was "hot" in 2008.

The Applicant listed and sold a condominium in the east end of Toronto for $205,000.00. The property had been purchased by the seller on January 31, 2002 for $125,000.00. It was sold by the Applicant on March 31, 2006 for a net gain of $80,000.00 or 64% over a four year period. The original agreement of purchase and sale was dated on February 25, 2006 and provided for a $5,000.00 deposit payable to the employing brokerage in trust. By amendment dated the same day, the seller and buyer agreed to pay the deposit directly to the seller. The unadjusted balance due on closing was $200,000.00. Mortgage funds of $188,190.00 were advanced by the lending institution on closing. The property sold under a power of sale for $120,000.00 approximately 8 months later.

Mr. Andrew testified that he tried to locate the buyer without any success. He also received an employment letter with respect to this buyer. He attended at the address given on the employment letter. He confirmed with the landlord that the landlord has never rented to a company by that name. A Will Say statement of the landlord was admitted as evidence.

It is clear that, when testifying about this property, the Applicant had confused it with another listing. He used the first name of the other seller and the approximate listing price. When it was pointed out to him that he was using a name for the seller that was unrelated to his real name, he stated that, notwithstanding the difference in the names, that name is what he called the seller. He also sometimes called him by another nickname. The net result of the testimony is that the Tribunal has no confidence that it heard any evidence from the Applicant regarding this property.

The Applicant did produce MLS listing documents in support of his listing price. They were reviewed in the testimony of Kamyar Ghatan. Mr. Ghatan was a real estate agent with Home Life Plus Realty and was retained by the financial institution to sell the property under a power of sale. He now coaches real estate agents. He described the unit as a small two bedroom. He has sold a few other units in the building. He conducted a CMA on the condominium. The financial institution also conducted an independent appraisal and instructed Mr. Ghatan to list for $119,900 on November 21, 2006. The unit sold on November 30 for $120,000.00.

In carrying out his CMA, Mr. Ghatan, would use sales in the same building. If there are none in the building he would use sales in neighbouring buildings. He presented evidence about a number of comparables all in and around the $120,000.00 range. A number were on higher floors so would command a slightly higher price. He does not believe the $205,000.00 sale price in this case was reasonable.

On cross-examination Mr. Ghatan testified that he first visited the unit before it had been cleaned. The financial institution then assigned a property manager to do a clean up prior to listing. He visited the unit again after cleaning. He conceded that sometimes power of sale prices are less than an owner occupied property because the property is sold “as is” but stated that it is impossible to assign a specific percentage difference to each property.

The fifth property the Applicant listed was in Brampton. This property had been purchased by the seller on August 26, 2003 for $279,000.00. It was sold on May 31, 2006 for $382,500.00. This is the case where Mr. Andrew did speak with persons having the same last name as the seller but ran into difficulty with the use of the English language. The original agreement of purchase and sale provided a deposit of $10,000.00 to be held in trust. That agreement was subsequently amended on May 15, 2006 to provide for the payment of the deposit to the seller directly and to provide for an additional deposit of $44,500.00 payable directly to the seller. The unadjusted balance due on closing was $328,000.00 but the financial institution using the unamended agreement of purchase and sale advanced $374,821.31.

According to the Applicant, the buyer and seller were introduced by persons who had offices in the same building as the Applicant. Following the execution of the agreement of purchase and sale, the seller notified the Applicant that he was behind on his mortgage, realty taxes and utility bills and needed the deposit paid to him to clear off those debts. On May 15, the Applicant called the seller and the buyer and set up a meeting in his office. He conducted shuttle diplomacy, shuttling between the room holding the seller and the room holding the buyer until an amending agreement was reached. That agreement was for the payment of $10,000.00 original deposit directly to the purchaser plus an additional $44,500.00 deposit so the seller could buy a new house. When asked if he thought the additional $44,500.00 was ever paid, he stated that he did not believe it was.

The evidence of the Applicant concerning dealings with the mortgage brokerage is almost totally at odds with the evidence of the mortgage agent. It was the Applicant's evidence with respect to all mortgage financing that he had nothing to do with it. His only role was to confirm that mortgage financing had been approved so he could waive financing conditions. Magna Farinho has been a mortgage agent since 2004. She received three mortgage referrals from the Applicant. It was her evidence that on all three transactions she spoke only with the Applicant. She never met with the borrowers but received documents either by fax from the Applicant's office or by delivery. If she needed documents, she would call the Applicant and the documents would be delivered or faxed from his office. She affirmed that agreements amending the deposit conditions are material in the process of approving mortgages. She stated that she did not receive the amending agreements in this financing or in the other two. When asked about the absence of a fax header on the false employment letter and other documents, she stated that it was her belief that they were delivered from the Applicant's office at her request. They were dropped off at reception.

Larry Stewart has been a real estate agent for 23 years in the Brampton area. He testified about his involvement in the power of sale proceedings concerning this property. He listed the property on behalf of the financial institution on September 17, 2007. He described the house as a four bedroom house in a nice neighbourhood. It did not have a finished basement. He stated that a finished basement, especially an in-law suite, will add value.

In doing his CMA, he did not find many comparable properties. He did take the sale of the property at $382,500.00 into account. There were also appraisals done on behalf of the financial institution. Mr. Stewart stated that the banks will increase the listing price to try and get a better deal. In the end there was only one offer for $315,000.00 after the property was on the market for 38 days.

With regards to the state of the property when he first saw it, Mr. Stewart said it was tenanted. He noted leaks in the basement and broadloom that was marked or damaged. He conceded that tenanted properties are often in poorer condition that owner occupied properties. He did take issue with the Applicant's description of the property as having "loads of upgrades." To Mr. Stewart, upgrades include such things as new kitchen, high ceilings, finished basement, hardwood floors and granite countertops. He noted no upgrades in this property. He would not describe the property as an "amazing home" as the Applicant had.

The Applicant listed a second property in Brampton. This property had been purchased for $228,500.00 on April 30, 2003. The buyer and seller entered into an agreement of purchase and sale dated September 14, 2006 to sell the property for $314,500.00. A deposit of $5,000.00 was made payable to the Applicant's employing brokerage in trust. On the same day, the buyer and seller entered into an amending agreement making the

$5,000.00 payable directly to the seller. The unadjusted balance due on the closing date of November 27, 2006 was $309,500.00 and the financial institution advanced $306,991.31. The property was sold approximately seven months later under a power of sale for $289,000.00.

The Tribunal heard evidence from the seller in this transaction. She stated that she did receive the full purchase price and the deposit. It was her evidence that the purpose of paying the deposit directly to her was to make the house look good for the new purchasers. She testified that the buyers saw the property on two occasions. On the first occasion, seeing the property "as is," they decided to make an offer. On the second occasion, a few weeks after September 14, 2006, the buyer and seller entered into discussions about making it look good on closing. The seller was to purchase six new appliances and fix up the family room. The seller stated that she needed money to make the improvements so the deposit was directed to her for that purpose. She was specific in her evidence that there was no discussion about appliances when the agreement of purchase and sale was executed on September 14.

The Applicant gave testimony concerning the payment of the deposit directly to the vendor. In the Applicant's version of events the $5,000.00 was to fund much more extensive renovations including four appliances, new kitchen cabinets and sink and broadloom in the family room. The seller, according to the Applicant, was to hire a contractor to do the work. The discussions concerning these improvements occurred, according to the Applicant, on the same date as the agreement of purchase and sale was executed.

There was evidence concerning the delayed closing of this transaction. The transaction was originally scheduled to close on September 29th. It actually closed on November 27th. It was the Applicant's evidence that the seller had failed to make the required improvements on time so the deal fell through. He cancelled the listing on the brokerage books. The seller then acted on her own initiative to put the deal back together. She attended at the brokerage, met with the manager and negotiated a $2,500.00 reduction in the commission. The seller recalls the $2,500.00 rebate on commissions but cannot recall why the deal did not close as scheduled or why she received the rebate.

On February 6, 2006 the Applicant listed a property in Etobicoke for $415,900.00. The property had been purchased on October 8, 2004 for $355,000.00. On February 9, 2006 an agreement of purchase and sale was entered into for the sale of this property at a price of $414,500.00 with a $10,000.00 deposit payable to the Applicant's employing brokerage. On February 12th an amendment was signed making the deposit payable to seller and adding a requirement for a further $38,500.00 deposit payable to the seller. The unadjusted balance due on closing was $366,000.00. The financial institution advanced $380,511.00 on closing on March 29, 2006. Just over a year later, the financial institution sold the property under a power of sale for $340,000.00.

In explaining this transaction, the Applicant stated that the seller was reluctant to list the property and would not list until he had introduced a buyer. When he introduced the buyer, it turned out that the buyer and seller knew each other from having worked together. After having introduced the parties, the seller tried to go behind his back and do the deal privately. He advised her he would still have earned his commission so she decided to list. He explained the extra deposit as a requirement of the seller so she could purchase a new property.

While all but one of these transactions involved false employment letters, what is interesting in this transaction is the fact that the Applicant's personal file had three employment letters for this buyer. All were purportedly issued by a non-existent company and identified the buyer a master mechanic. In the first letter, the Applicant is shown as earning $92,000.00. It purports to be signed by "Andrew Wong." The second letter, dated a few weeks later, shows the income as $98,500.00. It also purports to be signed by "Andrew Wong." The third letter a few days after the second letter shows income of $92,750 and is again signed by "Andrew Wong." Since there is no company in the name of the alleged employer, there is also no individual named "Andrew Wong" involved in it. In addition, the signature on each letter is different from the other signatures. The Applicant recalls picking up these documents and putting them in his file but states that he never read them. Each letter is very short. He went on to state that, even if he had read them, it was not his business to clarify the differences or inform the mortgage company that there were three inconsistent employment letters.

There were also two different copies of the agreement of purchase and sale in the file. The first, as set out above, was dated on February 9, 2006. The Applicant witnessed the buyer's and seller's signatures. The second is identical in every respect except that it is dated on February 15, 2006. Again the Applicant witnessed the buyer's and seller's signature. The second agreement of purchase and sale was dated after the February 12 amendment regarding the deposit but still provides for the payment of the $10,000.00 to the Applicant's employing brokerage. The Applicant had no explanation for the two agreements.

Loreto Scrola testified concerning the sale of this house under the power of sale. He has been a real estate agent since 1998 and has been retained by a large law firm on a number of occasions to handle powers of sale. It is his practice to do a CMA and the law firm will conduct independent appraisals. There is no difference between the CMA he conducts on a power of sale or the CMA where the home is sold by the owner.

He described this property as being in rough shape. There was a warning sign inside the house warning of the presence of mould. A property management crew cleaned the house and Mr. Scrola did not see any sign of mould. His CMA and three appraisals were considered by the law firm and he was instructed to list the property at $357,900.00 on May 1, 2007. From his research and experience in the area he felt this price was "in the ballpark." A price of $340,000.00 was agreed with a buyer after eleven days. As stated above the transaction closed on June 19, 2007.

Mr. Scrola stated that, in preparing his CMA, he looked for comparable properties that had sold or were on the market in the area. He did not take into account the $414,000.00 sale price of this property in the impugned transaction. It was his evidence that that price was out of line with anything else.

On cross-examination, Mr. Scrola stated that the Applicant's description of the property in his earlier MLS listing was not an accurate description of the property. He did concede that a mould warning might significantly reduce the purchase price. He stated that there were 49 appointments to view the property but only one offer. The purchaser was a realtor.

On April 5, 2006 the sale of a townhouse listed by the Applicant in west Toronto closed for a purchase price of $387,500.00. This property had originally been purchased by the seller on July 8, 2003 for $299,000.00. The signatures on the agreement of purchase and sale were dated on March 14th but the confirmation of execution is dated March 15th. A $10,000.00 deposit was payable to the Applicant's employing brokerage but by amendment dated March 15th that deposit was made payable to the seller and a further $14,500.00 was also made payable to the seller. The unadjusted balance due on closing was $363,000.00. Mortgage funds in the amount of $378,222.75 were advanced on closing. Following power of sale proceedings and listing for a long time prior to sale, the property was finally sold by the financial institution for $278,000.00 on May 11, 2008.

The Tribunal heard evidence from two real estate professionals regarding their dealings with this property. The first real estate professional was Rina Loccisano. She is the broker of record at Vaughan Realty Inc. and has been a registrant under the Act since 1991. She had listed this property prior to the Applicant. She advised the Tribunal that the sellers wanted to list at $349,900.00. She advised them that this price was too high but took the listing in the hope that the sellers would reduce the price in due course. Her idea of a reasonable asking price was $299,000.00. There were no offers at $349,000.00 and the sellers cancelled the listing.

She then reviewed the area and prices for transactions at the time of the Applicant's listing. She described the area as close to railroad tracks and older housing stock. She reviewed a number of listings in the same townhouse complex and noted that most did not sell at much lower asking prices than the Applicant's listing. One property did sell for $355,000.00. Ms Loccisano does not believe this property was worth that amount. Numerous other properties listed just above and below the $300,000.00 mark failed to sell despite time on the market. One property sold under power of sale proceedings for $245,000.00.

The Agent retained by the financial institution to sell the property under the power of sale was Chris Kelos. Mr. Kelos advised the Tribunal that he has been a real estate agent for Coldwell Banker Case Realty for 25 years. He specializes in properties being sold pursuant to powers of sale. He sold approximately 250 such properties last year.

Mr. Kelos prepared a CMA for his client. He also stated that the financial institution would get independent appraisals and then decide on a list price. He was instructed to list the property at $319,000.00. After approximately four weeks he prepared a realtor's report for the financial institution and the price was reduced to $305,000.00 at his recommendation. There was a further reduction to $300,000.00 and then to $295,000.00. There were showings of the property at $295,000.00 but no offers were forthcoming. The property was on the market for 181 days at $300,000.00. Listings expired and were renewed. Mr. Kelos stated that he had four power of sale listings in the same development. Finally the financial institution transferred the property to the mortgage insurer. The listing agreement lapsed but an offer came in at $275,000.00 which was accepted by the insurer.

Mr. Kelos described the property as "substandard, tired, difficult neighbourhood." While he readily conceded that he had not viewed the property when it was listed by the Applicant, he took issue with the description of many upgrades, "too many to list." He found nothing that would qualify as upgrades in the house. Upgrades would not disappear from the house in the six months between the sale and his listing. He did not think a price of $387,500.00 was supportable; neither did the independent appraiser. Ms Loccisano felt only an extremely naïve purchaser would pay such a high price for the property.

According to the Applicant his only role in this transaction was to list the property at a price determined by the seller, $399,000.00, and then, when the buyer and the seller negotiated the price directly between themselves, to prepare the necessary paperwork. With respect to the deposit amendment, the Applicant stated that he called the seller on March 15, 2006 to advise him that the buyer had not brought in the $10,000.00. At that point the seller advised him that he wanted the deposit paid directly because he had rented appliances and he had to pay them off before closing. No reason was given for the additional deposit but it was the Applicant's position the seller and buyer agreed it so he included it in the amendment.

The Applicant defended the list price. He stated that the seller advised him that he had done a great deal of work in the property which raised it above the level of the other units in the development. He did not state that he had confirmed that this work was done or that he had conducted any research to see what effect this work might have on price.

What distinguishes this transaction from the other eleven is the fact that the deposit amendment was found in the mortgage broker's file. Mr. Andrew told the Tribunal that he had met with Patricia Giankas, the owner of the mortgage brokerage that handled the mortgage transaction. Ms Giankas also testified before the Tribunal and confirmed Mr. Andrew's evidence. When Ms Giankas retrieved the file and reviewed it with Mr. Andrew the deposit amendment was found in the file. Ms Giankas saw it for the first time at her meeting with Mr. Andrew. Ms Giankas identified the mortgage agent who had handled this transaction and advised the Tribunal that he was part of a group of

agents that had once worked for her. She had terminated the whole group because of complaints from the financial institution concerned in this transaction. It is common ground that the mortgage agent should have forwarded the deposit amendment to the financial institution but failed to do so.

The Applicant handled a commercial property in New Toronto. The property was originally purchased for $150,000.00 on December 1, 2004. According to the Applicant's listing in 2006, the original purchaser had "newly renovated" the property. As a result of the Applicant's listing, the property sold for $484,500.00 on May 1, 2006. The agreement of purchase and sale was signed on March 31, 2006 and provided for a $10,000.00 deposit payable to the Applicant's employing broker in trust. By amendment dated the next day, April 1, 2006, the deposit was made payable directly to the seller and a requirement for an additional deposit of $46,000.00 was added. The unadjusted balance due on closing was $428,000.00. The financial institution advanced $444,771.00 on closing on May 1, 2006. One year later, on May 11, 2007, the property was sold under power of sale proceedings for $278,000.00.

The Applicant's testified that the seller was referred to him by a business associate. The Applicant was informed that there was a lot of work done on the property. The seller did not want to list until the Applicant had a buyer. A few weeks later, the buyer was introduced to the Applicant by another associate. The Applicant advised the seller that he had a buyer. The buyer told the Applicant what price to put in the offer and an agreement was concluded.

With respect to the deposit, the Applicant testified that the seller wanted the deposit paid to him to pay off contractors who had potential liens against the property. He stated that the buyer asked him if the seller was reliable. The Applicant told the buyer that the referring party was reliable but he did not know the seller. He advised the buyer that if there were doubts about the security of the deposit, he should pay it either to the real estate brokerage or to a lawyer in trust. The buyer decided to make the deposit payable directly to the seller.

The Applicant defended the list and sale price of the property by providing a multiple listing for another property further east on the same street that sold for $527,000.00. Marcia Kim is a real estate agent who testified about her sale of the property under the power of sale proceedings. She noted that the property advanced by the Applicant as comparable was over twice the sixe of the subject property, had sitting long term tenants, generated an income of $60,000.00 per annum for annual expenses of $24,000.00 and had parking. She also noted that in that area, the further east the property the more valuable it is. She did not consider it comparable to the subject property.

Ms Kim testified that she had gone to view the property prior to listing. She described the ground floor as half finished. There were unfinished attempts to convert the second floor to two one bedroom apartments. There were construction materials stored in the property. She certainly did not see a "newly renovated" property. There was, in fact, a

renovation in progress. Based on what she saw, she did an evaluation by looking at other buildings in the neighbourhood and past sales on the Multiple Listing Service. She recommended a listing at under $250,000.00 but was instructed to list at $275,000.00.

Greg Houghton was a mortgage agent for a major bank. He handled the mortgage applications on this property. He testified that it was bank policy for him to meet with clients personally throughout the application and closing process. He only has a vague memory of this transaction and does not recall exactly who he met. He has no recollection of receiving the amendment regarding the deposit. He stated that if he had received the amendment it would have raised a “red flag” and he would have forwarded it to the bank underwriting department. It is admitted that the bank did not receive it. Mr. Houghton takes no issue with documents being forwarded to him from the employing brokerage’s fax machine. He stated that it was not unusual for clients to use the real estate office’s fax machine for some documents but it was unusual to receive confidential financial documents in that manner.

On June 27, 2003 the Applicant purchased an investment property in Barrie. He entered into an agreement of purchase and sale to sell the property for $384,500.00. Following the agreement of purchase and sale there was an amending agreement regarding the deposit but there appears to be an error on its face. The deposit of $10,000.00 was originally payable to the Applicant’s employing broker in trust. The amendment deleted that provision but the replacement clause re-inserted the provision. Effectively the amendment did nothing. The Applicant testified that the intent of the amendment was to pay the deposit directly to him and that he did receive it. He stated that no taxes had been paid on the property for three years and he wanted the deposit money to pay the taxes.

The unusual aspect of the sale is that a later amendment reduced the purchase price from $384,500.00 to $360,000.00. The Tribunal never received a clear explanation of the reduction in purchase price. The unadjusted balance due on closing was $350,000.00 and the financial institution advanced $349,940.81 on closing. The financial institution sold the property approximately nine months later for $310,000.00.

In his evidence the Applicant stated that, after the original agreement of purchase and sale was executed, the buyer advised him that the mortgage company wanted an appraisal of the property. He stated that he travelled to Barrie and met with the buyer and appraiser. The buyer then contacted him and advised him that the appraisal had come in at $360,000.00 so he wanted a reduction in purchase price. The Applicant stated that he was under no pressure to sell the house. It had been tenanted but was now vacant. He stated that he never had any problems getting new tenants. His explanation for the price reduction seems to be that the buyer wanted it so he granted it. He never saw the appraisal. The appraiser would not discuss the appraised value with him but did not contradict the value as stated by the purchaser.

Greg Houghton was the mortgage agent on the financing of this property. Again he has a hazy recollection of facts but recalls the buyer's name. He does not recall the person. He reviewed the false employment letter, the false pay stub and false bank account information and stated that they would have been relied on by the bank in granting a mortgage. He was surprised that these documents were faxed from the Applicant's employing brokerage. In his view these documents were private financial documents that he would assume the buyer would want to keep confidential. He did state that while he finds the transmission of these private documents from the brokerage to be unusual, it is not unusual to receive other documents from realtors' offices.

In January 2007 the Applicant listed a property in the west part of North York for $389.000.00. The seller had purchased the property on July 4, 2005 for $289,000.00. An agreement of purchase and sale was executed on January 24th and confirmed on January 25th for the sale of the property at $384,500.00. A deposit of $5,000.00 was made payable to the Applicant's employing brokerage in trust. There was a subsequent amending agreement making the deposit payable directly to the seller. The unadjusted balance due on closing was $379,500.00. The transaction closed on February 12, 2007 and the lending institution advanced $377,511.71. Six month's later, on October 12, 2007, the property was sold pursuant to a power of sale for $263,000.00.

The selling agent pursuant to the power of sale was Chris Kelos. He was asked to provide a letter of opinion on value to the financial institution. He conducted a CMA and recommended listing at $284,900.00. In the letter he noted that the impugned sale was a dual listing and that the impugned sale price could not be sustained. In his view, the impugned sale was fraudulent. He testified that when he is dealing with power of sale transactions, dual agency on the previous sale, that is where the real estate agent in the previous sale has acted for both the buyer and the seller, always raises red flags.

At the time Mr. Kelos listed the property there was a problem with a retaining wall. The City of Toronto had issued a work order requiring it to be fixed. There was an estimate of $16,000.00 to fix the problem and Mr. Kelos stated the plan was to fix the retaining wall prior to sale. He did not have a good recollection of this transaction so he could not recall if the retaining wall had been fixed. He also felt that to properly stage the house for sale might cost up to $30,000.00. He stated categorically that staging would not make this property worth $384,500.00.

Notwithstanding the lack of staging, Mr. Kelos did not feel the Applicant's 2007 list and sale price could be supported. He considered the property advanced by the Applicant as a comparable and testified that he did not feel it was comparable. He was aware of the location of the other property but stated that the listing was beyond 90 days from the date of sale of the subject property and there was not enough information to consider it a comparable.

The Applicant testified that he attended and inspected the property with the buyer. When he presented the offer he met separately with the seller and the offer was signed back at $384,500.00. The seller then met face to face with the buyer later that same

day because the seller wanted the deposit paid to him to cover first and last month's rent on a rental property.

The Applicant listed a property in the St. Clair Ave. W. and Dufferin Street area of Toronto for $439,900.00. The property had been purchased by the seller for $264,500.00 on October 1, 2004. On April 17, 2006 the seller and buyer executed an agreement of purchase and sale selling the property for $415,500.00 with a $10,000.00 deposit payable to the Applicant's employing broker in trust. The next day, April 18th, the buyer and seller executed an amendment to the agreement of purchase and sale directing that the deposit be made payable to the seller. The day after that, April 19th, the buyer and seller executed another amendment providing for the payment of another $27,500.00 directly to the seller. The unadjusted balance due on closing was $387,000.00. The financial institution advanced $404,158.84 on the closing date, May 12, 2006. The property was sold pursuant to power of sale proceedings for $235,000.00 on June 29, 2007. The condition of the property at the time of the power of sale will be dealt with by further evidence but, following extensive renovations, the property sold for $365,000.00 some months later.

The Applicant stated that he had known the seller since about 1980. He stated that the property had been "gorgeously renovated" and was vacant at the time of sale. According to the Applicant there had been $100,000.00 in upgrades between 2004 and 2006. There had been previous attempts to sell the property but the sitting tenant had not cooperated with respect to showing it. The tenant had finally been evicted for unpaid rents. According to the Applicant, the seller was in arrears on his mortgage payments and needed the $10,000.00 deposit to pay the mortgage arrears. The further $27,500.00 was to pay contractors and prevent liens.

It appears that the seller's solicitor had the original agreement of purchase and sale and not the deposit amendments. As the transaction progressed, the solicitor demanded that the $10,000.00 deposit be made payable to the brokerage in trust. $10,000.00 was deposited in the brokerage's account. It was then released to the Applicant. It is the Applicant's evidence that the seller signed a direction to release the funds to him and he simply picked up the cheque and delivered it to the seller.

Joe Volpentesta is the broker of record for Sutton Group Security Real Estate Inc. His offices are in the St. Clair and Dufferin area. He has been a registrant for approximately 25 years and is now responsible for approximately 45 agents. He testified concerning the power of sale proceedings for this property.

He stated that he attended the property with an appraiser from the law firm representing the financial institution. What he saw was a former marijuana grow operation. The interior was stripped to the brick walls and studs and the floor was plywood with exposed joists. There was no bathroom, kitchen or plumbing. The financial institution had cleaned up the premises and removed mould. He admitted in cross-examination that he had not seen the property in the condition as listed by the Applicant.

In preparing his CMA, Mr. Volpentesta stated that he valued the property in a finished condition and then deducted the estimated work needed to bring it up to liveable conditions. He allowed $120,000.00 for the remediation costs. He considered six properties to find a comparable price and listed for $199,000.00. There was great deal of interest in the property once listed, mainly from builders and contractors, with many offers. Finally, the property sold for $235,000.00.

In considering the Applicant's list price of $439,900.00, Mr. Volpentesta stated that there were less expensive properties on the market in the area at the time of listing. He went through those properties advanced by the Applicant as comparable properties. He noted that there were significant differences in each one. either they were larger lots, detached or closer to Bloor Street. It was his evidence that values in the area increase further south. One property was a triplex. He did not consider these properties as comparable to the subject property for evaluation purposes.

In answering general questions, both in examination-in-chief and in cross-examination, the Applicant told the Tribunal that he has been a registrant since 1988. He has always been an salesperson, never a broker. Prior to 2006 he did approximately seventy transactions per year. In 2006 that number dropped to fifty deals, forty in 2007 and approximately four in 2009. He has declared bankruptcy twice, the most recent discharge coming in April 2010. Over the years he has taken the required compulsory courses to keep his licence in good standing.

When asked in cross-examination if he was aware of mortgage fraud, he answered that he has been aware of the existence of mortgage fraud since 1994 or 1995. He is aware that financial institutions rely on agreements of purchase and sale and would not complete the transaction without it, but stated that he was unaware that misstatement of the purchase price in an agreement of purchase and sale would constitute mortgage fraud. As a result of this proceeding, he was now learning that this activity was mortgage fraud. He was also aware that financial institutions rely on employment letters and pay stubs.

Counsel took the Applicant to two decisions of the Law Society of Upper Canada. One relating to discipline proceedings in the mid-1990's related to eight transactions in and around 1991. The solicitor in that case had admitted his involvement in mortgage fraud where agreements of purchase and sale were used for financing but the buyer and seller would then enter into a side agreement providing purchase price rebates for "repairs and renovations." The side agreements, of course, never made it to the lender. The Applicant was identified in the factual disclosure as the agent for both purchaser and seller in all of the transactions. The Applicant was asked about two parties who were involved in several of the transactions. One was identified as the Applicant's spouse using her maiden name and a short form of her first name. The Applicant denied that the named individual was his wife. The second person had a most distinctive first and last name. The Law Society hearing panel stated that this person

had used several variants in the impugned transactions. The Applicant acknowledged that he knew someone by that name and did several real estate transactions with that person, but that he does not recall the impugned transactions. The Applicant was unaware that the solicitor had been disbarred. He was not called as a witness at the solicitor's hearing.

In the second case, heard in 2004, the Applicant acknowledged that he knew the solicitor and did refer clients to him. Again the solicitor agreed the facts put to the Law Society hearing panel. In it, the solicitor identified the Applicant as the real estate agent in a number of transactions that were substantially identical to those in the first case. The facts also disclosed large payments to 1099893 Ontario Limited, beyond those that might reasonably be expected from its involvement with the transactions. For instance, 1099893 Ontario Limited was a mortgage holder on one property in the amount of approximately $150,000.00. A number of months later, on the sale of the property, the company received approximately $230,000.00 from closing funds. The Applicant denied any knowledge of the transactions or the payments to 1099893 Ontario Limited despite the fact that he is the President and Secretary of the corporation.

In dealing with 1099893 Ontario Limited, the Applicant produced a document dated 1995 showing the removal of the sole officer and the substitution of the Applicant as President and Secretary. The Applicant stated that, despite this change, he had nothing to do with the company. His friend, the true owner, became ill and asked him to take over the company in trust. The Applicant was to make sure that the friend's wife and children got the company when he passed away. The company, according to the Applicant, invested in real estate and did renovations and repairs. The Applicant was not involved in its operation, had no corporate documents and received no money from the company

STATUTORY PROVISIONS

The applicable statutory provisions in the Act 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.
>
> **13.** (1) Subject to section 14, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 10.

> **14.** (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.
>
> **Parties**
>
> (6) The registrar, the applicant or registrant and such other persons as the Tribunal may specify are parties to the proceedings under this section.

ANALYSIS

It is clear from the case law that the Tribunal owes no deference to the Registrar's findings that the Applicant's registration should be revoked. This proceeding is not an appeal in the true sense, notwithstanding that the statute uses that language. It is, in fact, the first time when the evidence has been examined by an independent adjudicator. In this proceeding, the Registrar assumes the role of prosecutor and bears the onus of convincing the Tribunal that the Applicant should have his registration revoked. The wording of the statute reinforces the Registrar's onus. A qualified registrant is entitled to registration unless one of the exceptions applies. In the current case, the Registrar relies solely on the ground that the Applicant's past conduct provides reasonable grounds to believe that he will not carry on business in accordance with law and with integrity and honesty in the future.

The fraudulent scheme suggested by the Registrar has the following elements:

1. The Applicant listed properties at inflated prices;
2. The Applicant listed properties on the MLS service with untrue glowing descriptions of their condition to support the inflated purchase price;
3. The Applicant and accomplices produced agreements of purchase and sale purporting to transfer the properties at prices above their market value;
4. The Applicant and accomplices forwarded agreements of purchase and sale and the MLS listings at inflated prices to financial institutions in support of applications for high ratio mortgages;
5. The Applicant and accomplices forwarded false financial documents to financial institutions in support of high-ratio mortgages;
6. The Applicant and accomplices entered into separate amendments to the agreements of purchase and sale reducing the purchase price that were not forwarded to the financial institutions; and
7. Financial institutions were thus duped into advancing mortgage funds greater than the property or the true sale price would warrant.

Not stated, but implied in the scheme, is that the fact that the Applicant would pocket the ill gotten gains. The Applicant does not deny that the mortgages in question were granted on fraudulent documents or that each mortgage was, in fact, a fraud on the financial institutions. He denies any involvement.

The Tribunal is satisfied on the evidence of the real estate witnesses who handled the power of sale proceedings and the witness who had previously listed one of the subject properties that the Applicant's list price for each property was well in excess of the then current market value. Each of these witnesses reviewed the basis for their decision to recommend listing at the various prices in question. They stated that the financial institutions each had appraisals done in addition to their CMA. Often they recommended listings below the actual list price. In at least one case the property was on the market for over six months before an offer was received. In another, a bidding war resulted in a price well above list. Both of these processes indicate that fair market value has been realized on the sale. In the first case, fair market value was determined by dropping the price until there was interest in the property. In the second case, the bidding war resulted in buyers bidding in excess of list price until fair market value was reached.

Each of these witnesses reviewed those properties asserted by the Applicant as comparables. They pointed out features in the Applicant's comparable properties not available in the subject property. They identified the economic impact of such features on sale price. Several witnesses also noted that the Applicant's MLS listing property description of extensive upgrades did not accord with the property as viewed. They explained that upgrade items have some level of permanence, such as granite countertops or finished basements, which would not disappear between the Applicant's listing and their viewing the property a number of months later. A review of the MLS listings shows the Applicant used a script in his listings "loads of upgrades, too many to mention," which the evidence of these witnesses shows to be untrue.

The Applicant's own evidence discloses his knowledge of the use to which the clear unamended agreements of purchase and sales followed by amendments concerning the deposit, were put. In testifying concerning the 2002 sale of the Hamilton property, he stated that the parties needed the transaction to be documented in such a manner to secure financing. Indeed, the Tribunal can think of no other reason for structuring each transaction in such manner other than to mislead financial institutions.

In response to questions on cross-examination about producing full amendment agreements rather than amending a few words in an agreement of purchase and sale, the Applicant testified that it was easier for the clerical staff at his brokerage to type an amending agreement from scratch than to call up the original agreement of purchase and sale on the word processor and make minor changes. Counsel for the Registrar suggested to the Applicant that this evidence was "gibberish." The Applicant denied that it was but, his position clearly strains credulity.

In Mr. Andrew's evidence, and in the evidence of various mortgage brokers, it was pointed out that a large percentage of the documents sent to mortgage brokers or financial institutions were faxed from the Applicant's employing broker. Several documents are specifically identified as originating from the Applicant. He denied all knowledge of all documents sent in this manner. He denied that those documents purporting to originate with him did so. He stated that the handwriting on these

documents was not his. For her part, Magna Farinho stated that she spoke only to the Applicant when she needed documents and he would arrange for their delivery either by fax or by someone in person.

The Applicant's evidence in this regard simply does not have the ring of truth. To accept his evidence, the Tribunal must conclude, not only that twelve fraudsters independently devised a fraud scheme but also that these fraud fraudsters then, by happenstance, found the Applicant's over inflated listings and made offers through the Applicant acting for both the purchasers and the sellers. It was more convenient for the fraudsters to travel from all parts of the Greater Toronto Area to use the office fax machine without the Applicant's knowledge rather than attending directly at the offices of the mortgage broker in question or using the anonymity of a local business services store.

A review of the documents indicates that they are broadly in the same format. False employment letters were issued to several buyers from the same company. The format of the pay stubs is similar in several cases and the employee number is identical in two cases where the employer differs. The connection to all of these fraudulent transactions and fraudulent documents is the Applicant. The evidence leads the Tribunal to the compelling conclusion that the Applicant was actively involved in forwarding false documents to mortgage brokers and financial institutions.

As stated above, there is only one reason to structure each transaction with an agreement of purchase and sale followed by an amendment redirecting the deposit. The purpose is to mislead financial institutions regarding the true purchase price of the property. The Applicant has admitted that the amendments were not forwarded to financial institutions. His knowledge of the use to which these documents were put, as set out above, leads to the necessary conclusion that he was a party to the fraudulent schemes.

Finally there is the issue of profit. There is evidence from the lawyer's trust ledgers in the first case, the airport condominium, and the second case, the Hamilton sale, that the numbered company, 1099893 Ontario Limited, received funds on closing. The Applicant contradicted himself regarding the payment of approximately $12,000.00 to the numbered company on the closing of the airport condominium. At first he stated that the buyer had paid the seller the $12,500.00 deposit to carry out renovations on the property. When asked to defend the payout on closing, he identified those funds as funds for the renovation. The closing funds came solely form the mortgage advance. The Tribunal concludes that this payment was the Applicant's share of the profits of this transaction. His denials of involvement in the actions of the numbered company do not correspond with his role as President and Secretary, especially when he stated that the company was active in real estate investment. The Applicant would be required by his offices to sign and approve each and every transaction. The Tribunal did not have the benefit of the solicitors' files in the other transactions so it cannot comment on the distribution of closing funds.

The Tribunal is satisfied on the whole of the evidence that the Registrar has met the onus of demonstrating on a balance of probabilities that the Applicant has engaged in extensive mortgage fraud. Even taking the Applicant's evidence at its highest, the Applicant has admitted wilful blindness sufficient to satisfy the Registrar's onus. In addition to his admission of knowledge of the use to which the Hamilton documents would be put, the Applicant stated that he had no obligation to advise his purchaser clients of the inadvisability of redirecting deposits from the security of the closing escrow to the unsecured possession of the seller. He felt no obligation to advise his purchaser clients that they were under no obligation to agree with the seller that the deposit should be redirected or increased. Finally, and perhaps most shockingly, he stated that even if he was aware that false documents were being used in one of his transactions to secure mortgage financing, he would take no steps to advise the financial institution of the fraud. It was, he felt, none of his business.

The Tribunal finds that the past conduct of the Applicant provides reasonable grounds for belief that he will not carry on business in accordance with law or with integrity and honesty. Neither Party suggested that this was a case for the application of terms. Given the extent of the fraudulent schemes before the Tribunal, both in monetary and temporal terms, the Tribunal is of the view that terms would not be appropriate. The appropriate remedy is revocation.

ORDER

Pursuant to the authority vested in it by the provisions of section 14 (5) of the Act, the Tribunal orders the Registrar to carry out the provisions of the Notice of Proposal dated October 16, 2008 and the Supplementary Notice of Proposal dated November 13, 2009 to revoke the registration of the Applicant Ckumar Rajkumar.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude
Vice-Chair

RELEASED: May 21, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

JAIGO PAUL ALSO KNOWN AS PAUL JAIGO–Motion –extension of time

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 REGISTRATION

TRIBUNAL: TERRANCE SWEENEY, Vice-Chair

APPEARANCES: JACK F. FITCH, Counsel, representing the Applicant

KELVIN KUCEY, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar")

DATE OF HEARING: July 23, 2010 Toronto

ORDER

Mr. Jaigo Paul (the "Applicant") has brought a Motion for an Order granting an extension of time to file an Appeal from a Notice of Proposal dated May 7, 2010 to revoke the registration of the Applicant as a salesperson under the *Real Estate and Business Brokers Act, 2002* (the "Act").

The Applicant supported the Motion by filing a 54-paragraph affidavit.

Counsel for the Registrar cross-examined the Applicant at the Hearing and on the same day filed a Factum opposing the Motion.

FACTS PROVEN:

Many of the facts were not in issue for the purpose of this motion. The Tribunal accordingly, finds the following facts to have been proven.

1. The Applicant has been registered as a salesperson, with some interruptions, since 1989.

2. In 2005, the Applicant received a Notice of Proposal to revoke his registration, which was settled on terms under which he was allowed to continue as a salesperson.

3. The Applicant is not currently engaged in the trade or sale of real estate.

4. The Applicant was properly served with a Notice of Proposal to Revoke Registration on May 7, 2010.

5. The Applicant filed with the Tribunal, but did not serve the Registrar, with an incomplete Notice of Appeal on May 31, 2010.

6. The Registrar served the Applicant with a Final Notice on June 8, 2010.

7. Counsel for the Applicant called the Real Estate Council of Ontario (“RECO”) on June 10, 2010 and indicated that the Applicant wished to appeal.

8. By letter dated June 15, received by RECO on June 17, 2010, the Applicant evinced his intention to appeal.

9. The Applicant filed his appeal of the Proposal on June 23, 2010. This was one month after the expiry of the statutory time limit.

10 The Applicant had appealed the 2005 Proposal in a timely manner.

<u>The Allegations of the Registrar:</u>

The Notice of Proposal is 27 pages long. The Registrar alleged 10 different reasons why the Applicant's registration of the Applicant should be revoked. They may be broadly grouped under four heads:

1 The Applicant since 1991 has consistently given false information to RECO.

2. The Applicant breached the terms of the 2005 settlement of the Proposal.

3. The Applicant participated in fraudulent trading in real estate.

4. The Applicant deliberately, and over a long period, has used two identities: Jaigo Paul and Paul Jaigo to confuse RECO and the public.

The Cross-Examination of the Applicant:

Counsel for RECO vigorously cross-examined the Applicant on his affidavit for two hours. The testimony of the Applicant can be summarized as follows:

1. The confusion over his name was caused by RECO which, when he first applied for registration, incorrectly identified him as "Paul Jaigo". The Applicant "saw no harm in leaving it".

2. He was in a car accident in December 2009, and had a serious back operation in April, 2010. He was on drugs and was "in and out of it". This was a reason why he did not appeal in time. Counsel for the Registrar heaped scorn on this story and pointed out that this excuse was not in his affidavit.

3 He had tried to get another lawyer before he retained his current Counsel but that lawyer did not get back to him. This accounted for some of the delay.

4 He pointed out that he was not named in any of the Court documents wherein fraud was found.

5. He said he satisfied the judgment against him before November 2009.

6. He conceded that he did not report the charge brought against him by his wife in his 2009 application for renewal. This was because the charge was frivolous and an attempt to extort money from him. This was established by the fact that the charge was withdrawn.

THE LAW

Section 7 of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sch. G, reads, in part, as follows:

> Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal … 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 notice either before or after the expiration of the limitation of time so limited; and

The onus is on the Applicant to prove his case on a balance of probabilities.

The case law[1] has established that an Applicant must show:

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

[1] *Re Bilodeau and ONHWP* (1994), 25 CRAT 930

2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if he did so as soon as the true situation was apprehended;

3. That there is not some overriding prejudice to the Respondent in allowing the application;

4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

The foregoing, however, is tempered by the overarching principle that the Tribunal in its discretion may grant an extension if the "justice of the case requires".[2]

APPLICATION OF LAW TO THE FACTS

The Applicant swore in paragraph 47 of his affidavit that he intended to appeal the Registrar's Proposal. He said that he had a back operation in April 2010, and was on prescription drugs. This was part of the reason he did not appeal in time.

Counsel for the Respondent aggressively cross questioned him on this and asked why this information was not in his affidavit. The Applicant did not provide an answer to this question. The Tribunal has difficulty with the Applicant on this point. It stretches the bounds of credulity to imagine that something as important to the Applicant's case could have been omitted from his affidavit.

The Respondent did not, however, call any witnesses to challenge the assertions of the Applicant in his affidavit. The Applicant remained reasonably steadfast under cross-examination. The Tribunal, therefore, is left simply with the sworn testimony of the Applicant, which, if he is lying, will expose him to a potential perjury charge. Accordingly, the Tribunal, for the purpose of this Motion only, accepts the evidence of the Applicant on the first two heads of the test set above under THE LAW.

Counsel for the Respondent did not seriously suggest that there was any prejudice to the Registrar or the public in granting the Motion. The Tribunal finds that there would be none.

This leaves only the fourth head. The testimony of the Applicant, if believed, will afford him a defence at the hearing. The Registrar will have an opportunity to challenge him with witnesses and forensic evidence at a hearing.

The Tribunal is reluctant to deprive the Applicant of his livelihood without giving him an opportunity to defend himself at a full hearing. The Tribunal, in addition to finding for the Applicant on the four heads test, would have been inclined to exercise its discretion in his favour so that justice might be done.

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[2] *Frey v. MacDonald,* [1989] O.J. No. 236

ORDER

The Tribunal, by virtue of the authority granted to it under section 7 of the *Licence Appeal Tribunal Act*, hereby:

1. allows the Applicant's application and grants an extension of time to June 23, 2010.

2. as the Applicant filed his Appeal on that date, ORDERS that a Hearing on the merits of the Appeal be held on a date and at a time to be fixed by the Tribunal in accordance with the Tribunal's usual practice and procedures.

LICENCE APPEAL TRIBUNAL

_____
Terrance Sweeney, Vice-Chair

RELEASED: August 4, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

CKUMAR RAJKUMAR-Motion for Stay

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c.30, Sc. C

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: GARY R. CLEWLEY, Counsel representing the Applicant

ROBERT MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF MOTION: August 10, 2010 Toronto

REASONS AND DECISION

BACKGROUND

This is a motion by the Applicant requesting an Order granting a stay of the Decision of the Licence Appeal Tribunal (the "Tribunal") dated May 21, 2010, which directed the Registrar to carry out his proposal to revoke the Applicant's registration, pending the disposition of an appeal to the Division Court.

The grounds for the appeal set out in the Notice of Appeal dated June 18, 2010 are as follows:

1. The Tribunal misapprehended the evidence called at the hearing;
2. The Tribunal failed to consider other evidence called at the hearing;
3. The judgment of the Tribunal is unreasonable;
4. The reasons of the Vice-Chair are deficient;
5. The penalty imposed is harsh and excessive.

Counsel for the Applicant indicated that the grounds for appeal may be amended once he has reviewed the transcripts.

EVIDENCE

The evidence in support of this motion consisted of the affidavit of the Applicant sworn July 13th, 2010. The following is a summary of that evidence and the paragraph numbering is that of the Tribunal and does not relate to the paragraph numbering in the affidavit.

1. The Applicant has been licensed as a real estate salesperson since 1989 and has not previously been disciplined or suspended.

2. The Applicant has been advised by counsel that his appeal has merit.

3. Given the length of the hearing, a significant amount of time will be required for the preparation of the transcript and subsequent legal brief. Therefore, it is most likely that the appeal will not be heard until sometime in 2011, by which time the Applicant will have 'lost his career'.

4. Acting as a real estate agent is the Applicant's only source of income and he has dependants who rely on him for financial assistance. Other than a short career in the hotel business, selling real estate is the only profession the Applicant knows.

5. The Applicant's business is built on contacts and satisfied customers who make referrals. If he is excluded from the industry for any length of time these contacts will disappear and will quickly become the contacts of another sales representative.

6. If a stay is granted the Applicant is willing to submit every real estate transaction to the scrutiny of senior management of his Brokerage and will act in accordance with the principles and standards of the Act.

ANALYSIS

The issue before the Tribunal is whether it should exercise its discretion under s. 14(9) of the *Real Estate and Business Brokers Act, 2002*, (the "Act") to grant a stay of a decision of this Tribunal revoking the Applicant's registration under the Act.

The test to be applied in determining whether such relief should be granted is set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General*), [1994] 1 S.C.R. 311. This test has three stages which must be satisfied for an Applicant to succeed:

1. There is a serious question to be tried,
2. The Applicant will suffer irreparable harm if the relief is not granted,
3. The balance of inconvenience, i.e. which party will suffer the greater harm from the granting or refusal of the relief.

1. Serious question to be tried

The Applicant must show that he has raised a serious issue in the appeal. As this is a low threshold, it is sufficient that the Applicant's appeal is neither frivolous nor vexatious.

The first two grounds of appeal are that the Tribunal misapprehended the evidence called at the hearing and the Tribunal failed to consider other evidence called at the hearing. No specific details of these errors were given. Findings of fact will not be readily interfered with. On the contrary an appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence". [1] During the hearing the Tribunal was provided with evidence of twelve real estate transactions involving similar facts, many of which were not disputed and in fact conceded to have involved mortgage fraud. This evidence was reviewed in detail in the decision and the findings of the Tribunal with respect to the Applicant's role were clearly set out. It is difficult for this panel to understand in what way the Tribunal's findings were clearly wrong, unreasonable or unsupported, that the judgment as a whole was unreasonable , or that the reasons where deficient as alleged in the notice of appeal.

It was also suggested by Counsel that there was new evidence. However, the evidence was described as documents and statements that the Applicant had provided to his previous counsel for the hearing which were not put before the Tribunal. With respect, it is difficult to understand how this evidence, which was known and in the possession of the Applicant during the hearing, could be considered 'new' evidence.

The final ground of appeal alleges that the penalty imposed is harsh and excessive. The penalty of revocation is harsh but in the situation where a registrant is found to have engaged in fraudulent activity it is the penalty the Act permits in order to ensure the protection of the public.

Having considered the grounds for Appeal, it is not clear to the Tribunal that the Applicant has a serious issue to be tried. However, the Tribunal is hesitant to conclude that he has failed to meet the first test given the low threshold. Therefore, giving the Applicant the benefit of every doubt, the Tribunal will assume for the moment that the Applicant has passed the first test.

2. Irreparable Harm

The evidence of the Applicant is that if he is prevented from participating in the real estate industry while waiting for his appeal to be heard, he will lose his contacts, which are the basis of his business, and as a consequence his career will be destroyed. The Applicant is employed as a salesperson in a brokerage, the existence of which is not dependent upon his registration. He has been in the industry for 21 years, and undoubtedly has made hundreds if not thousands of contacts. However, the Applicant's

[1] H.L. v. Canada (Attorney General) {2005 1 S.C.R. 401, 2005 SCC 25, at para. 4 per Fish, J.

evidence on the impact of his absence from the industry for a finite period of time appears to the Tribunal to be simply speculative.

Although the Tribunal accepts the Applicant's evidence that selling real estate is his only source of income and assumes that being deprived of that income in the interim will have an impact of some kind, there was no evidence that the economic impact would amount to some irreparable harm.

Based on the evidence, the Tribunal is not satisfied that the Applicant will suffer irreparable harm if the relief is not granted.

3. Balance of inconvenience

The third test involves an assessment of which party will suffer the greater harm from the granting or refusal of the relief.

In making such an assessment the public interest must be considered. The Act which regulates the real estate industry is consumer protection legislation and the Registrar has the duty to ensure that the public is protected from registrants who act contrary to the public interest. Although the Applicant has suggested that the public's interest can be protected by the imposition of a condition that he shall submit all trade documentation to a member of the senior management of his brokerage, the Registrar argues that this is not sufficient and the Tribunal agrees. The business of a real estate salesperson is conducted in an independent manner and the condition being suggested would not provide the level of supervision required to truly protect the public. There was significant evidence at the hearing that the Applicant had knowingly played a role in mortgage fraud schemes, there was no suggestion to this panel that a failure to submit documentation played a part in that.

Given the facts of this case the Tribunal concludes that the harm to the public interest by granting the stay is greater than the harm the Applicant may suffer if the stay is not granted. Therefore the balance of inconvenience is in favour of the Registrar.

DECISION

The Applicant has failed to satisfy the Tribunal that he will suffer irreparable harm and that the balance of inconvenience lies in his favour. Therefore the motion of stay of the Tribunal's decision dated May 21, 2010, is denied.

LICENCE APPEAL TRIBUNAL

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Elizabeth L. Sproule, Vice-chair

RELEASED: August 20, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

ARTURO PERALTA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 200*2, S.O. 2002, c.30, Sch. C

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: THOMAS DELOREY, Counsel, representing Arturo Peralta, the Applicant

GEORGE DRAMETU, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATES
OF HEARING: June 7, 8, 9, 10 and 11, 2010 London

REASONS FOR DECISION AND ORDER

BACKGROUND

This matter is an appeal from a Notice of Proposal (the "Proposal") of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar" and the "Act"), dated November 23, 2009, to revoke the registration of Arturo Peralta ("Mr. Peralta" or the "Applicant") as a salesperson under the Act.

The grounds for the Proposal are in summation:

1) The past conduct of Mr. Peralta affords reasonable grounds for the belief that he will not carry on business in accordance with law, and with integrity and honesty.

2) Mr. Peralta has provided false information about criminal charges laid against him on his application for registration to the Registrar, and therefore breached section 10 of the Act.

i. For greater particularity, Mr. Peralta was convicted of unlawfully attempting to export firearms from the United States without a permit, consequently serving 30 months before he was deported to Colombia.

ii. Additionally, Mr. Peralta has an outstanding warrant for his arrest with respect to two felony charges in the State of Florida.

3) Mr. Peralta has provided false information on his applications for registration to the Office of the Registrar, specifically about having had his licence as a residential contractor suspended.

4) Mr. Peralta has knowingly traded properties at artificially inflated prices, assisted in the creation and/or submission of false or fraudulent documents in furtherance of real estate trades, and failed to deliver and/or deposit documents with the brokerage that employs him.

ISSUES

1) Does Mr. Peralta's conduct afford reasonable grounds for the belief that he will not carry on business in accordance with the law, and with honesty and integrity?

2) Did Mr. Peralta breach section 10 of the Act, and if so, does this breach disqualify him from registration?

EVIDENCE AND FACTS

The evidence of the Registrar consisted of documentation and the testimony of: Consumer A (given with the assistance of an interpreter), Paul Kash, Gerry Weir, Jeffrey John Chapman, Sandra Pineda, Jo Ann Swain, an Inspector with the Real Estate Council of Ontario ("RECO"), and Angela Volpe, Manager of the Registration Department of RECO.

The evidence of the Applicant consisted of documentation and the testimony of Mr. Peralta, Mr. Gary Robinson, realtor, and four individuals whom Mr. Peralta has assisted in the purchase and sale of real estate.

The following is a summary of the relevant evidence. It has been organized according to the issues where appropriate.

The Applicant was registered as a salesperson under the Act in March of 2006. He has been with his current employer since December 2006. He has completed all the mandatory RECO courses. Prior to this registration, he was employed in Canada as a home inspector and a building inspector.

Prior to immigrating to Canada, the Applicant had resided in the State of Florida for a number of years, where he studied construction and obtained the equivalent of a college degree. He was licensed to work in the construction industry in Florida in 1988.

Transaction involving Consumer A

RECO began its investigation of the Applicant following a complaint in November of 2006 from Gerry Weir, the Broker of Record of Sutton Group Preferred Realty Inc. ('Sutton Group"), which had employed the Applicant as a salesperson upon his registration. The complaint primarily related to a transaction involving Consumer A.

Consumer A met the Applicant sometime in 2005. Consumer A was a recent immigrant at the time and spoke little English. She asked the Applicant if she could buy a house given her non-resident status and he advised her that she could.

Consumer A attended a meeting at the home of the Applicant where she was introduced to Ms. Pineda, who was a mortgage consultant at the time. A discussion then took place as to Consumer A's employment and income.

Sometime later Mr. Peralta assisted Consumer A with an offer on a semi-detached home (the "Property"). Consumer A, according to her evidence, did not know what the asking price for the Property was but relied upon the Applicant. The Property was in fact listed for $124,900.00. Consumer A did not view the Property prior to submitting the offer because of the tenants; however, she was taken to view the adjacent property which was similar but in better condition. Consumer A testified that she was told by the Applicant that she would need to have twenty to twenty-five percent of the purchase price. She advised the Applicant that she would only have $5,000.00 for the purchase of the house. The Applicant indicated that he would help her out. An offer (the "Offer") in the name of Consumer A and her adult son was prepared by the Applicant, and ultimately it was accepted in the amount of $130,500.00[1].

There were a number of changes to the Offer: the date of closing changed, the irrevocable date of the Offer changed, and the date for satisfying the conditions of financing and inspection changed. Ultimately, it would appear that the Offer was conditional until May 3, 2006, and the transaction was to close on July 17, 2006. A waiver of the conditions was signed, but not until after the May 3, 2006 date.

In anticipation of the Applicant's assistance with the funds for the purchase, Consumer A (and her spouse) signed a promissory note for $15,000.00 on July 4, 2006, payable to the spouse of the Applicant on July 17, 2006, which was the closing date for the transaction. Upon signing the promissory note, the Applicant gave Consumer A a series of cheques, which she deposited into her account between July 4th and July 14th, 2006. This enabled her to provide the required closing amount of $19,575.00, and a bank statement showing the source of the funds.

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[1] Exhibit #3, Tab 8, page 6

Consumer A and her son also completed a "Gift Letter"[2], dated July 5, 2006. It was Consumer A's evidence that she did this with the Applicant and Ms. Pineda. This letter indicates that Consumer A and her son were going to receive a gift of approximately $19,000.00 from a relative who resides in Colombia. Consumer A testified that she was told that this letter may be required by the mortgage company, but indicated that she did not in fact have any expectation of receiving money from this relative. The Applicant denies any involvement with this Gift Letter. Ms. Pineda testified that a second Gift Letter dated July 17, 2006[3], the day of the closing, was filled out by herself, including the signature area for Consumer A, Consumer A's son and the donor. This Gift Letter was provided to the mortgagee to replace the previous Gift Letter, which was not in a form acceptable to the mortgagee.

In her testimony, Ms. Pineda acknowledged that she did not believe the first Gift Letter had been sent to the donor in Colombia for his signature, although her evidence indicates that she believed the money was coming from Colombia and not the Applicant. It was noted that the copy of the July 17, 2006 Gift Letter, received by the mortgagee, has Ms. Pineda's fax number at the top of the page after the word "To" and across the bottom of the page appears the Applicant's Brokerage's name and fax number, suggesting that it came via the Applicant's place of business. The evidence was not clear as to who faxed the document to the mortgagee; the Applicant denied seeing the second Gift Letter prior to being presented with it during RECO's investigation. He suggested that perhaps his daughter or his spouse could have faxed it from his brokerage without his instructions.

According to the Agreement of Purchase and Sale for the Property, the purchasers, Consumer A and her son, were to receive $15,000.00 back at closing for the purposes of "painting and upgrades". Consumer A testified that on the day of closing they were told by the Applicant that the bank would not be providing the funds for the "cash back". According to Consumer A, her husband, who spoke with the Applicant, indicated to him that if there was no cash back that they were not going to close. The following day, Consumer A found out that the transaction did in fact close. It was not clear to Consumer A at the time how this occurred. It would appear from the documentation that the purchase price was reduced from $130,500.00 to $115,500.00, and that the loan amount was correspondingly reduced from $110,925.00 to $98,175.00. These details were set out in an amendment to the mortgage commitment dated July 14, 2006. Consumer A stated that she did not see this document until well after closing. This is supported by the documentation which indicates that the amendment was "acknowledged and accepted" by Consumer A on November 18, 2006, four months after the closing.[4] Consumer A stated that she did not receive copies of any of the documents pertaining to the transaction until November 22, 2006.

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2 Exhibit #7
3 Exhibit #4, Tab 22, page 8
4 Exhibit #8

Consumer A also stated that she had not been aware the Offer to purchase had been conditional upon financing and an inspection. These conditions were apparently waived after the deadline. Consumer A explained that she simply signed what was given to her.

As it turned out the Property was not in a habitable state at the time of closing. It was not simply a matter of cosmetic repairs, which Consumer A stated she had been led to believe. Although Consumer A did not view the Property before closing, her husband did on May 11, 2006, in attendance with a contractor. The Property was not vacant at the time. There was no evidence that there was any other inspection done of the Property. In particular, no inspection appears to have been done before the waiver of the inspection condition.

Although Consumer A's original intention had been to buy a home to live in, after the closing the Applicant asked for repayment of half of the money he had lent. Consumer A advised that she would fix up the house and sell it, but did not have the funds to do so. The Applicant said that he could see to the repairs quickly and sell the Property. After a number of months, the work was still not done. Consumer A was in contact with the Applicant during this time to advise him that she was unable to pay her rent and the mortgage, and at one point to advise him that she was facing eviction. As a solution, the Applicant suggested that the Property be sold to an individual who would buy it "as is". An Agreement of Purchase and Sale was prepared by the Applicant but it was not agreed to by all the parties. Notwithstanding this, the Applicant continued to draft amendments to this agreement, first substituting another individual as purchaser and finally substituting himself as purchaser. Ultimately, an agreement was reached that the Applicant would take title to the Property, forgive the promissory note, assume the mortgage and make a lump sum payment to Consumer A and her son.

Title to the Property was transferred to the Applicant on December 8, 2006. At that time, there was still an outstanding institutional mortgage with Consumer A as the mortgagor. The Applicant made an application to assume the mortgage through Ms. Pineda, but was refused as he was not intending to live in the Property and the mortgagee did not accept the change of use. It was apparent from Ms. Pineda's testimony that she had not been given the complete Agreement of Purchase and Sale by the Applicant for submission to the mortgage lender. In particular, she had not received Schedule "A"[5] which set out several additional terms of the agreement, including a term that the seller agrees to repay a $15,000.00 promissory note and a $10,000.00 construction loan to the Applicant's spouse. There was also a term stating that the seller would receive $13,500.00 on closing. It was Ms. Pineda's evidence that it is important that the entire agreement be submitted to the mortgagee. Ms. Pineda also testified that she had not been aware of the promissory note executed by Consumer A in favour of the Applicant's spouse and had she known about it, she would not have sent "the [Gift] Letter" to the mortgagee. (It was not clear whether she was referring to the first or second version - the Tribunal understood her to mean either).

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[5] Exhibit #3, Tab 8, page 30

As the Applicant was not approved to assume the mortgage on the Property, the mortgagee continued to look to Consumer A for payment, and therefore, continued to take payments from Consumer A's bank account. Consumer A eventually retained independent counsel, (previously she had been dealing with a lawyer who acted for the Applicant as well), and demanded reimbursement and the completion of the assumption. The mortgage was eventually discharged in February 2007 and Consumer A was reimbursed for the mortgage payments she had paid, although Consumer A was not satisfied that reimbursement had been done in a timely manner.

Consumer A complained of the Applicant's conduct to Gerry Weir in November of 2006. A review of the brokerage file indicated that the file was incomplete and someone from the brokerage went with Consumer A and retrieved all the documents in her possession relating to the transaction. After reviewing the documents, Mr. Weir noted a number of irregularities and became concerned. He met with the Applicant and the Applicant's spouse, who was also a realtor with the brokerage, on December 5, 2006, and during that interview the Applicant denied having provided cash deposits to Consumer A. Mr. Weir terminated the Applicant and the Applicant's spouse during that meeting. He had no further contact with the Applicant other than to deal with transactions which had been pending at the time of the Applicant's termination.

The concerns which Mr. Weir had noted were numerous. The Offer price was above the listing price, notwithstanding that there were no competing offers. The Offer indicated appliances were included when in fact none were in the house. The Offer was confirmed accepted after the irrevocable date. It was only signed by one of the two buyers, and there was more than one waiver signed, both after the appropriate waiver dates, bringing the legal validity of the contract into question. In addition, the term in the agreement that there was to be a $15,000.00 refund to the purchaser, allegedly for the purpose of painting and upgrades, was problematic if the money in fact was being used for something different. Mr. Weir was of the opinion that rebates were acceptable, but not for down payments and he was concerned about mortgage fraud. In Mr. Weir's opinion, an agent providing the down payment defrauds lenders and puts consumers in an awkward position.

In his evidence, Mr. Weir reviewed the training that a registrant receives. It includes three courses which take five to six months to complete, and includes instruction on the writing of contracts and clauses. Then there are three articling courses, and a requirement that registrants complete 24 credits of continuing education every two years. In addition to this mandatory continuing education, Mr. Weir indicated that his brokerage does additional training. He noted that the Applicant attended two of the three meetings, wherein the Act was reviewed with the agents of his brokerage. Mr. Weir believed the Applicant was being mentored by a more experienced agent for whom the Applicant had been previously acting as an unregistered assistant and translator. He had not been aware that the relationship had deteriorated until several months after the Applicant had been employed as an agent. He acknowledged that the Applicant had been an exceedingly hard worker and had done an exceptionally high volume of sales for a recent registrant.

The Applicant's evidence was that he was given no orientation as to how the office worked and very little assistance at the beginning of his employment at Sutton Group. At the time of the Offer involving Consumer A, the Applicant had been involved in approximately 19 trades, although none of them had closed at that point.

After receiving the complaint and conducting an investigation, Ms. Jo Ann Swain met with the Applicant to discuss her findings on two separate occasions. The first meeting was on April 25, 2007, at the RECO offices. In that interview with Ms. Swain, the Applicant explained why the price for Consumer A's Property was higher than the asking price: they were trying to come up with a price on the house fixed and suitable for them to live in. When asked about the promissory note dated July 4, 2006, and due July 17, 2006 (the day of closing), the Applicant explained that Consumer A's financing had fallen through and she had asked him to lend them $15,000.00, in order to close the deal. The reason their line of credit was pulled was because their refugee claim had been denied. In the further particulars provided through his solicitor, the Applicant indicated that the financing did not come through for a reason connected with the employment of Consumer A's son.

Ms. Swain also asked the Applicant if he had disclosed to the mortgage lender that he had provided the down payment to Consumer A. The Applicant responded that the Agreement of Purchase and Sale indicated a rebate was going to the purchaser and a copy of this agreement was given to the financial institution. The Applicant also stated at that time that a home inspection was done to fulfill the condition of the Offer within the time frame. The Applicant denied that he was involved with the "Gift Letter", and stated that it had been done with Sandra Pineda, long before the Applicant was in the picture. The Applicant stated that he was informed by Consumer A's spouse on the day of closing, when it was known that the amount of the mortgage had been reduced, that Consumer A (and her son) were closing the deal with the Applicant's money and a line of credit.

In his oral testimony, the Applicant stated that the down payment was always an issue for Consumer A and her spouse. The Applicant had some discussions with them, wherein they said they had money coming form "Colombia or somewhere". At one point in his testimony, the Applicant indicated that he was looking for something for Consumer A in her budget, something she could afford and keep. A little later in his testimony, he explained that Consumer A and her spouse wanted to buy a property which they could buy, fix and sell, as they needed money.

The Applicant stated that the following occurred: he was contacted by Consumer A's spouse on the day of closing and was advised that the bank did not advance the money and therefore they could not close. The Applicant then advised him to "close the deal". Then sometime after this event, Consumer A's spouse called the Applicant and told the Applicant that he was not going to get the money to fix the house, and therefore the Applicant agreed to give $10,000.00 more for this purpose.

The Applicant also testified that the idea to lend the money came about because Consumer A and her family were potentially facing deportation and confirmed that a lawyer had advised them that if they had an investment in Canada, they would look better. The Applicant also testified that close to the closing date, the bank reduced the amount of the loan. When he met with Consumer A and her spouse, they mentioned that they had a line of credit but noted that they didn't have money coming from Colombia, and he therefore agreed to lend them the money. (The Tribunal notes that the "Gift Letter" was still provided to the lender, via the Applicant's office fax, on the day of closing). Lastly, the Applicant also testified that the amount of $15,000.00 was based on an estimate of the repairs plus a bit more.

Failure to Disclose

The Applicant applied for registration on or about March 16, 2006. In his application, he responded "No" to the following three questions:

5. Are there any unpaid judgments outstanding against you?

6. Have you had a registration and/or licence or professional status of any kind refused, suspended, revoked, or cancelled and/or have you been involved in any proceeding during which you resigned a registration or licence or professional status of any kind, or are there any proceedings pending?

7. Are there currently any charges pending, or have you been found guilty, pleaded guilty to, or been convicted of an offence under any law?

During her investigation, Ms. Swain was advised by Consumer A that she believed that the Applicant had previously been involved in real estate in Florida. Ms. Swain therefore did a variety of searches and obtained additional information about the Applicant, which he failed to disclose on his application.

A search through the Federal Bureau of Prisons - "Inmate Locator", indicated that an individual with the Applicant's name and approximate age had been released from prison on October 21, 1999.[6] The Applicant confirmed that he was that individual and that the conviction related to his time served for his conviction of exporting of firearms without a licence.

A search of the State of Florida Crime Information site indicated that there was an outstanding warrant for an individual with the same name and birth date as the Applicant. The offence was described as "Fraudulent Activities". The date of the warrant was April 22, 1996, and the reporting agency was the Miami-Dade County Police Department.

[6] Exhibit #4, Tab 32

A computer search of the "Miami-Dade County, Criminal Justice and Civil Infraction Cases", indicated that there were two counts of felony charges outstanding against one Arturo Peralta, with the same date of birth as the Applicant. The docket for the case indicated that the same day as the issuing of the warrant for his arrest, there had been a motion "to withdraw as attorney of record", suggesting that the accused had been previously represented in the matter. Ms. Swain noted that this warrant pre-dated the charges that led to the Applicant's prison term.

The Applicant, in the interview with Ms. Swain on June 13, 2007, explained that the warrant related to a shot gun purchase but he had assumed everything was dealt with by immigration. After the interview with Ms. Swain, the Applicant was provided with a copy of the interview as recorded by her and was given an opportunity to correct or add information. Through his solicitor at the time, the Applicant advised that background checks had been required and were submitted when he applied for refugee status and that "Permanent Residence and Citizenship" never advised about any warrant outstanding, and that he had no knowledge of a warrant until he was advised by RECO. In his oral testimony, the Applicant stated that he had no recollection of being in court, that he did not know what the warrant was about, and that when he was asked previously about this, he had simply speculated as to what it was about. His recollection was that he had attempted to purchase a shot gun but was unable to get it that day. He was told there was something "outstanding". He went to the Miami-Dade police department (North Miami Beach department), and there, according to the Applicant, a police officer looked up on a computer, went and called someone – and ultimately, the Applicant ended up buying the shot gun. The suggestion being, everything must be all right if he was able to buy the gun.

A search of the Department of Business and Professional Regulation for the State of Florida was also done. Ms. Swain was provided with a certified copy of a Construction Industry Licensing Board application submitted by the Applicant in 1988. She was also provided with a certified copy of a Final Order No. BPR-94-04508 dated July 26, 1994. This Final Order suspended the Applicant's licence to "practice contracting" for one year, and indefinitely thereafter until he paid a fine, costs and provided evidence that he had paid restitution to a judgement creditor.[7]

Notice of the Final Order, described above, references a number of cases which gave rise to an Administrative Complaint.[8] In summation, these cases involve non-compliance with inspection requirements, failing to complete projects without justification, and failing to pay a judgment relating to the construction business for which he was licensed. The Certificates of Service for the Motion for Final Order and the Final Order indicated that they were sent by certified mail to the Applicant in Opa Locka, Florida on June 20, 1994 and July 26, 1994, respectively.[9]

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7 Exhibit #3, Tab 14, page 14
8 Exhibit #3, Tab 14, page 19
9 Exhibit #3, Tab 14, pages 15 and 18

The Administrative Complaint, which ultimately led to the Final Order, was dated July 20, 1993, and indicated that the last known address for the Applicant was on Garden Road in Fort Lauderdale. In his interview with Ms. Swain, the Applicant stated that he had never been served regarding the Final Order, and noted that it had been sent to the wrong address. The correct address was, according to the Applicant, the one on Garden Road in Fort Lauderdale. It is noted that a copy of the Applicant's driver's licence issued December 15, 1993, indicates that at the relevant time for service, the Applicant's address was neither the Garden Road address nor the address of service, but an address in Miami Lakes.[10]

According to the information the Applicant provided Ms. Swain at the April 25, 2007 meeting, he resided in Fort Lauderdale, Florida, where he had a construction business, prior to coming to Canada, and nowhere else. At the second meeting on June 13, 2007 (at the premises of the Applicant's solicitor), the Applicant amended his answer as to what his occupation was prior to coming to Canada: he was trying to promote American products for the oil industry in South America. He and his spouse bought a farm in Colombia in respect of this business.

When asked why he did not disclose his U.S. conviction in response to question 7 on his application, the Applicant stated to Ms. Swain that he answered the question as "he understood it", which was that it was only referring to any law in Canada. In these proceedings, the Applicant testified that he had called a lawyer to clarify what question 7 meant and was told that it was referring to Canadian laws. The Applicant testified that when asked previously about charges outside of Canada, he had provided disclosure. As proof, he provided a copy of a "Notification of Claim to be a Convention Refugee", which he completed upon his arrival in Canada in 2000, and in which he disclosed his firearms conviction. In cross-examination, it was pointed out that the Applicant was also asked if he had ever been the subject of a deportation order, to which he responded "No". This was not correct; the Applicant testified that he must have "missed that question".

Ms. Volpe testified that disclosure on the application for registration provides the Registrar with some idea as to how a registrant will conduct themselves with the Registrar. The Registrar relies upon the information provided in making a decision to register an individual and if that information is not provided then the Registrar is making a blind decision. There are 58,000 registrants under the Act and the Registrar does not do searches. If question 7 is answered in the affirmative, then a registrant must provide a police check. The Applicant was advised of the results of the investigation and the concerns raised, and was invited to provide further information. The warrant, which the Applicant states he was not aware of, related to "Fraudulent Activities". Ms. Volpe pointed out that RECO is not privy to the information of other entities and relies on information from registrants.

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[10] Exhibit #3, Tab 15, page 1

With respect to the claims that gave rise to the suspension of his construction licence, the Applicant acknowledged in his testimony that he had done work for the consumers named in the cases referenced in the Final Order, but stated that he had not been aware that there were any complaints with those projects, and was not aware of the judgment obtained by one consumer. The expectation of the Registrar, as stated by Ms. Volpe, is that registrants should make themselves aware of issues concerning them. The Applicant should have known there was a problem with his construction licence.

Since his registration under the Act in March of 2006, the Applicant has had his licence renewed twice without restrictions. Ms. Volpe was not able to comment on why the Applicant's registration is without conditions. Her explanation for the length of time that has lapsed since the initial investigation and the concerns raised, was simply that there is a process that must be gone through.

Unreported Transactions

The real estate transaction involving Consumer A was made known to Sutton Group (the "Brokerage") when it was a "firm offer". The subsequent offers involving that Property, including that involving the Applicant himself, were not made known to the Brokerage. In Mr. Weir's opinion, they were then "private deals" of a nature not allowed by the Act. Mr. Weir also noted that the Applicant did not provide the required statement that all registrants must provide to parties to a transaction when they have a personal interest in the transaction. Mr. Weir could not comment if or what, if anything, was done with respect to the irregularities in the agreements submitted by the Applicant or whether they were brought to his attention. Mr. Weir pointed out that if the agreements were submitted to the Brokerage as a "firm" deal, then they could not have been altered in any event. The Applicant acknowledged that he did not provide the required statement disclosing his status as a registrant in dealing with Consumer A, but that was because he did not know he had to do so.

Mr. Weir was asked about an agreement of purchase and sale dated July 30, 2006. The Applicant had acted for the purchaser whose offer was accepted on August 3, 2006. The offer was subject to a condition of financing. Mr. Weir indicated that he had no knowledge of the transaction as it had not been submitted to the Brokerage. The realtor acting on behalf of the vendor in this transaction, Mr. Jeffrey Chapman, gave evidence that the trade was not completed due to the fact that it had been conditional upon financing, which was never waived. The Applicant had in fact told Mr. Chapman on three separate occasions that the financing had been approved, even after the conditional date had expired. Mr. Chapman found the Applicant's conduct "disappointing". In cross-examination, he acknowledged that he did not know what information the Applicant had been given by his client. The Applicant testified that this trade fell through and therefore was not submitted to the Brokerage.

There was one other transaction that, according to the testimony of Mr. Weir, was not filed with the Brokerage. This transaction came to light when the Applicant's daughter called the Brokerage seeking a copy of an agreement of purchase and sale for a trade which was entered into prior to the Applicant and the Applicant's spouse being terminated. The Applicant's evidence was that notwithstanding the Brokerage's initial position that it did not have the agreement in its files, eventually the Brokerage did produce it, and the transaction did close and he was paid his commission.

LAW

The Act states, in part:

> 10. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
>
> (a) The applicant is not a corporation and,
>
> (i) having regard to the applicant's financial position or the financial position of an interested person 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;

Ontario Regulation 580/05, Code of Ethics[11] states in part:

> 3. A registrant shall treat every person the registrant deals with in the course of a trade in real estate fairly, honestly and with integrity.
>
> 4. A registrant shall promote and protect the best interests of the registrant's clients.
>
> 5. A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgment and competence in providing those services.

Caselaw considered:

Magyar (Re) [2008] O.L.A.T.D. No. 495
Chow v. Registrar, Real Estate and Business Brokers Act, 2002 (2008) LAT, unreported
Runco (Re) [2008] O.L.A.T.D. No. 293

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[11] This regulation came into effect on March 31, 2006. Prior to this, similar rules of conduct were set out in RECO's By-law No. 10; see Rules 1, 2, 3, 10 and 42.

Registrar v. Griese, (1993) 25 C.R.A.T. 765 (Ont. Div. Ct.)
Barroso v. Registrar, Real Estate and Business Brokers Act [1990] 20 C.R.A.T. 1
F.H. v. McDougall [2008] S.C.J. No. 54

CONCLUSION

The first issue before the Tribunal is whether the Applicant's past conduct affords reasonable grounds to believe that the Applicant will not carry on business with honesty and integrity and in accordance with the law. It is the Tribunal's responsibility to reach its own decision on this issue after considering all the evidence presented by both the Applicant and the Registrar. The Tribunal owes no deference to the Registrar's opinion.[12]

The first alleged misconduct the Tribunal will address is that the Applicant failed to deliver or deposit documents with his brokerage. The Registrar has pointed to three instances where this has occurred. In one instance, the agreement of purchase and sale did not become binding and led to a dispute over the deposit. The Tribunal accepts the Applicant's evidence that he did not believe that he needed to provide that documentation to the brokerage given the circumstances. In the second instance, the evidence was that the Brokerage did not have the documentation. The Tribunal accepts the Applicant's evidence that it was found to be in the Brokerage's possession. The last instance involves the sale from Consumer A to the Applicant. There were a number of offers drafted by the Applicant in his involvement with Consumer A, which had no legal effect and will be discussed below. The final agreement of purchase and sale between the Applicant and Consumer A came about with the involvement of a solicitor, and after the problems with Consumer A were known to the Brokerage. The final agreement setting out the terms between the parties appears to be signed December 8, 2006, after the Applicant was terminated.[13] Given all the factors involving this transaction, the Tribunal is hesitant to rely upon it as the basis to conclude that the Applicant failed to deliver or deposit documents with his Brokerage, or that he was engaging in unreported trades.

It has been argued by Counsel for the Applicant that problems with Consumer A's transaction relates to competency. After considering the numerous errors committed in the construction and completion of the contract(s) involving Consumer A and the Property, including the failure to adhere to expiry dates, the signing of legally unenforceable agreements, the Tribunal is willing to find that these aspects were a result of the exceedingly low skills of the Applicant at the time. His current employer, Mr. Gary Robinson, a broker with 33 years experience, testified that he would have described the Applicant as "incompetent" when he first came to work with him in December of 2006. The Applicant himself acknowledges that he really did not know what he was doing with respect to the paper work.

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[12] *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O.J. No. 603
[13] Exhibit #3, Tab 8, page 37

Given that the Applicant completed the RECO education requirements it is difficult to understand why his level of competency was so low. However, Mr. Robinson is of the opinion that the Applicant is now exceedingly competent and that he understands how a real estate trade is to be carried out. This was also attested to by a number of consumers who provided testimony as to their satisfaction and trust in the abilities of the Applicant as a realtor. The Tribunal accepts that the Applicant's deficient skill in completing the documentation relating to real estate trades has been corrected.

However, the Applicant's conduct with respect to the transaction involving Consumer A still raises some serious concerns as to the honesty of the Applicant's conduct. The evidence of Consumer A and the Applicant conflicted on a number of points as to how this transaction unfolded and the role played by the Applicant. In the Tribunal's opinion, the version put forth by Consumer A was more consistent, logical and was supported by confirming evidence and therefore is preferred. Consumer A stated that she did not have enough money for the down payment for the Property, as she only had $5,000.00 and the Applicant agreed to loan her $15,000.00, making up the balance of the down payment. This allegation is supported by a promissory note dated July 4, 2006, for $15,000.00, payable to the spouse of the Applicant on the day of closing. The Applicant provided Consumer A with a series of cheques to deposit into her bank account. She was then able to provide a copy of a bank statement showing the source of the down payment to the mortgage lender.

After initially denying providing funds to Consumer A, the Applicant has provided various accounts as to why he provided Consumer A with $15,000.00. The common theme in each explanation is that it was only after Consumer A was in financial difficulties did he step in. The truth of the matter is that Consumer A did not have sufficient funds to purchase the Property from the outset and the Applicant knew this. He provided money in advance of the transaction in a manner so as to not appear to be the source of the funds, and he structured the transaction to ensure repayment on closing. The Applicant has argued that he did not intend to give the money as a down payment, but in view of the facts, the Tribunal does not find this credible. If the funds advanced had been for repairs, as suggested at some point in the Applicant's testimony, the promissory note would not have been made payable for the day of closing.

The Applicant has consistently portrayed his role as one of assistance to Consumer A, but the manner of his assistance crossed an ethical line that he should have known existed. He knew, or ought to have known, that a mortgage lender requires a purchaser to have a down payment that does not come from borrowed funds and he knew that the purchasers did not have this. Although his evidence was confusing as to how much in advance of the closing he knew this, it cannot be denied that the plan was in place by July 4, 2006, when he had Consumer A sign a promissory note. It has been suggested that because the mortgage lender was advised that there would be a rebate to the purchaser, they were not misled; however, the reason stated for the rebate, "for paint and upgrades" was in this instance not true based on the evidence before the Tribunal.

Ultimately, the lender refused to accept the contracted purchase price as the real market value and required that it be reduced, thereby avoiding any future harm.

How this agreed price reduction came about remains unclear, as Consumer A testified that she was not consulted in this regard. In any event, had the mortgage lender not taken this step, it may have suffered harm had it needed to act upon its security, as the agreed price of the house was inflated in view of its actual condition. The Applicant knowingly played a role in creating this risk, whether he did it for his benefit or that of another is irrelevant. Industry members and consumers rely upon registrants following the rules and acting in an honest and ethical manner.

It has been suggested by Counsel for the Applicant that Consumer A testified against the Applicant with malice. Consumer A clearly spoke critically of the Applicant, but credibly. From her perspective, the Applicant "helped" her buy an uninhabitable house that she could not afford to fix. This led to a lot of grief for Consumer A and for the Applicant. It could not have happened had the Applicant not attempted to circumvent the rules. Consumer A was not a sophisticated purchaser. She spoke little or no English at the time that she relied upon the Applicant, and the evidence indicates that her interests were not always protected. Nor was she kept informed, and as a result, it turned out very badly for her. The Tribunal understands that in the end, Consumer A has been compensated; however, there should not be an expectation that she is now without complaint about her experience with the Applicant. The Applicant has lamented his involvement with Consumer A as it has cost him money. In the Tribunal's opinion, the loss should fall to him as he did not live up to the professional and ethical standard expected of him.

The failure of the Applicant to disclose past criminal convictions and charges is also a serious concern. With respect to his criminal conviction for firearms exportation, the Applicant initially explained to Ms. Swain that he answered how he understood the question to mean, which was that "any law" meant "any Canadian law". It is difficult to understand why he would conclude this. However, in his testimony in these proceedings, he stated that he actually consulted a lawyer and was told that it meant only Canadian law. The Tribunal is of the opinion that had the Applicant actually sought and relied upon a legal opinion, he would have stated that to Ms. Swain either at the time of the interview when he was asked to explain his non-disclosure, or later in the letter sent by his Counsel, when he had an opportunity to add or amend his previous statements. The Tribunal finds that his embellished explanation in these proceedings was simply an afterthought and was not truthful. It is difficult for the Tribunal to accept that his initial non-disclosure was an honest mistake when his subsequent sworn testimony on the matter was not honest.

With respect to the outstanding warrant relating to the two felony charges, the Applicant has taken the position that he did not know about the warrant and had no recollection of going to court on the charges. It may be that he did not know of the warrant; however, it is difficult to understand how he did not know of the charges, given the evidence which indicates that he had legal representation at the time.

The Applicant has not stated that the charges did not occur; rather his position is that background checks were required when he applied for refugee status and he was never advised at that time about an outstanding warrant. Based on this experience, he questioned whether such a warrant exists.

The onus of proof is on the Registrar and the standard of proof is the balance of probabilities. Counsel for the Applicant, in argument, suggested that this standard is qualified in that the proof must be clear and convincing and based upon cogent evidence. This is not the Tribunal's understanding of the law as set out in *F.H. v. McDougall* [2008] S.C.J. No. 54.[14] There is only one standard and that is on a balance of probabilities. The evidence before the Tribunal is that the records of the Miami-Dade County Police Department indicate that there is an outstanding warrant for the Applicant, and that the warrant relates to two felony charges. In the Tribunal's opinion, this evidence is sufficient to conclude that it is more likely than not that there is a warrant outstanding for the arrest of the Applicant in the State of Florida on felony charges.

The Applicant has known about this allegation for three and a half years and could have provided contrary evidence by way of a clear police check from the State of Florida, if this information was in error. His evidence, that he did not have a recollection of going to court and his argument that had there been a warrant, it would have been raised by the immigration officials, is not persuasive.

With respect to the outstanding judgement and construction licence suspension in the State of Florida, the Applicant stated that he was not aware of the Final Order or the Motion for Final Order as he was never served. The Tribunal accepts that he did not receive these final notices. His address changed a number of times during this period and apparently the regulator did not have a current address at the time. Having not received the Final Order, he may not have known his licence was suspended. However, he does have a recollection of doing work for the individuals referred to in the complaints and judgment, which formed the grounds for the suspension. Although the Applicant has testified that he did not remember there being any problems, the Tribunal finds this incredible given that the complaints relate, for the most part, to his abandonment of projects without cause. The evidence before the Tribunal suggests that the Applicant did not meet his obligations, and therefore did not act professionally with respect to a number of consumers in the State of Florida, and then simply left the jurisdiction. This in itself does not speak well of the Applicant. The fact that he did not provide the regulator with an address to send him notice of the consequences of his conduct should not provide him with a means of so distancing himself from the facts that they can be ignored. If there was some explanation of circumstances which would put what transpired in Florida in a better light, the Tribunal did not hear it. The Tribunal heard explanations of "I don't remember" and "no one told me".

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[14] See paragraphs 40 and 46

The expectation of the public is that only reliably honest individuals become registrants. There are a number of factors regarding the Applicant which has shaken the confidence of the Tribunal that the Applicant is a reliably honest individual. These include his involvement in the transaction with Consumer A, in particular his undisclosed financing of it and all the steps he took to accomplish that: inflating the purchase price, including a false term (the rebate clause), failing to provide full disclosure to the mortgage lender in his application for assumption, and not being honest with the Regulator when asked about it. Other factors include his non-disclosure of his criminal record that he clearly knew about and his less than honest testimony about it, the outstanding warrant in Florida for felony charges that he ought to know about, and finally the fact that the Applicant has been a registrant in another regulated industry which ended in a wake of complaints and legal proceedings.

It has been noted that the Applicant has remained registered, without conditions, to date, and that there have been no further consumer complaints. It is also accepted by the Tribunal that the Applicant's competence in carrying out the requirements and duties of a real estate agent has vastly improved since the transaction involving Consumer A. These factors would have weighed in favour of the Applicant if there had been some evidence of acceptance that there is a difference between honest and dishonest conduct, and some insight into how his conduct with respect to Consumer A's transaction was not honest. The Applicant has expressed remorse for getting "personally" involved as it cost him money and jeopardized his registration; however, he has never acknowledged that what he did was wrong.

For the reasons set out above, the Tribunal concludes that the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law, and with integrity and honesty.

The second issue identified at the beginning of this decision relates to section 10 (iii) of the Act, and the impact of a false statement in an application for registration. Based on the evidence, the Tribunal finds that the Applicant knew at the time he completed his application for registration that he had been convicted of the criminal offence of exporting firearms without a licence, and therefore, his answer to question 7 was false.

The Applicant's answers to question 5 and 6 were also false, but it is not clear to the Tribunal that the Applicant knew of the actual licence suspension or judgment at the time. He ought to have known, and the concern that this lack of knowledge raises was addressed in the assessment of the Applicant's past conduct. Given the findings regarding the Applicant's past conduct, that it is grounds for revocation, the Tribunal does not believe it is necessary to opine on whether the false answer to question 7 would be sufficient on its own to warrant the Applicant's revocation.

ORDER

The Registrar is hereby ordered to carry out his Proposal to revoke the registration of the Applicant under the Act.

LICENCE APPEAL TRIBUNAL

_____
Elizabeth L. Sproule, Vice-Chair

RELEASED: August 25, 2010

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

ANTON JEEVA ARULAPPU

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: ALEEM A.K. BAKSH, Paralegal representing Anton Jeeva Arulappu

GEORGE P. DRAMETU, Counsel representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATES OF HEARING: July 14, 2010 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal by Anton Jeeva Arulappu (the "Applicant") to the Licence Appeal Tribunal (the "Tribunal"), arising out of a Notice of Proposal dated January 20, 2010, (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, pursuant to Subsections 14(1)(b) of the Act.

The Applicant was initially registered as a salesman in June 2005 and has been registered as a broker since February 2008. In January 2007, the Applicant was charged with "Theft over $5,000.00" and "Uttering Forged document". These charges were withdrawn in May 2008.

In August 2008, the Applicant was charged with "Possession Over $5,000 (x18)" and "Utter Forged document (x2)".This involves the alleged possession of 17 motor vehicles, a stolen gas generator and forged vehicle documents. This matter is before the Courts as his trial date is towards the end of 2010. The Applicant and his company Jenny Auto Sales Inc. was convicted under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "EPA*")*, for acts committed in January and April 2006.

ISSUE

The issues that this Tribunal has to decide are:

1) 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, and;

2) Whether or not the Applicant's registration should be revoked due to making false statements in his 2007 and 2008 applications for renewal of his registration.

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 the Registrar's Book of Documents, which the Tribunal marked as Exhibit #3, and Statement of Agreed Facts, Exhibit 6. The Applicant's evidence included a letter from his Broker of Record, which the Tribunal marked as Exhibit "4", the Applicant's university degree in engineering as Exhibit 5, and a copy of the Licence Appeal Tribunal Pre-Hearing Order in Applicant's OMVIC matter as Exhibit 7. The parties chose not to call any witnesses rather they proceeded on the basis of an agreed statement of facts and oral submissions. At the onset of the hearing, the Registrar's Counsel submitted that he would not be relying on paragraphs 25 to 28 of the Proposal.

The Tribunal analyzed the relevant documents, the agreed facts and submission of the parties, the summary of which is as follows:

<u>Registrar's position</u>

1. The Applicant was initially registered as a salesperson in June 2005. He was charged in January 2007 with "Theft Over $5,000.00" and "Utter a Forged document" (the "2007 charges"). He did not disclose these charges in the information he had supplied in his June 20, 2007 Application for renewal of his registration (Exhibit 3, Tab 5). Under subsection 34 (1) of O. Reg. 567/05 of REBBA (the "Regulations"), a registrant has 5 days to notify the Registrar, in writing, of any changes in the information supplied to RECO on an application. The above information was also a change in his June 24, 2005 application, by which he was initially registered. The Applicant conceded that while the criminal charges were eventually withdrawn on May 28, 2008, there was still a positive duty to disclose the charges on the application.

2. The Applicant was charged on August 28, 2008 (the "2008 charges") in York Region with "Possession Over $5,000.00 (X18)" and "Utter Forged document (X2)". The charges are still pending before the Courts for trial (Exhibit 3, Tab 9). The incident report (Exhibit 3, Tab 9, Pages 1 to 6) outlines 18 counts of the Applicant's possession of property of motor vehicles in value exceeding five thousand dollars, knowing that all of the property was obtained directly by the commission in Canada of an offence punishable by indictment contrary to

Criminal Code section 354(1)(a). Apart from this information the Registrar did not adduce any evidence with respect to the circumstances pertaining to the Applicant's role in the commission of the criminal activity.

3. The Applicant failed to notify the Registrar within five business days of a change in information after the Applicant was, in January 2008, charged under the *EPA*, for the offences committed in January and April 2006 (Exhibit 3, tab 9, page 21). The Applicant and his company Jenny Auto Sales Inc. were convicted of the offences in April 2009. The Applicant's representative advised that appeal of the conviction is still pending. However, he conceded that the Applicant had a positive duty to disclose the charges and conviction to the Registrar. Neither the Registrar nor the Applicant adduced evidence to appraise the Tribunal of the Applicant's role in his conviction under the *EPA*. The Registrar submitted the 'Information' (Exhibit 3 Tab 9, page 13), which outlines the charges against the Applicant, on the basis of which the Court convicted the Applicant.

4. The Applicant was initially registered as a salesperson with the Ontario Motor Vehicle Industry Council in May 2000; his registration was revoked in June 2007. The revocation of his registration was a change in the information submitted to RECO in the June 24, 2005 application. None of the parties adduced any evidence outlining the detail of the circumstances surrounding the revocation.

5. The Applicant had held himself out as a Professional Engineer in his various online advertisements. His representative conceded that although the Applicant had completed a Bachelor's Degree in Engineering in Sri Lanka, he was never a member of the Association of Professional Engineers of Ontario.

Applicant's Position

Prior to issuing the Proposal, the RECO staff had arranged a meeting with the Applicant on June 11, 2009, in the Registrar's office with respect to the investigation. The Applicant's representative relied upon the information contained in the staff notes of the meeting (Exhibit 3, Tab 10). The representative submitted that the Applicant did not realize the difference between getting charged and getting convicted. He further submitted that he did not have any intention of misleading the Registrar, as his understanding was that he was not convicted and presumed to be innocent until found guilty; he therefore, did not inform the Registrar about the charges. The relevant part of the meeting notes are:

> Mr. Arulappu – I am not ever charged in Canada. These are only an accusation – I am not ever convicted in Canada. This is only a pending charge. The final decision for this court case will be heard by end of next year or so.
>
> I was an owner of a used car dealership – Jenny Auto Services. I am the director for this company. Someone (previous employee) used my office business space to park some stolen vehicles. I wasn't aware that it was stolen vehicles. Not only that the previous employees may have the code number to get access to this property. I myself terminated my OMVIC licence. He repeated twice. No other issues with OMVIC. Got blamed for these accusations.
>
> Angela – Described – failing to disclose the info to the registrar 34(1). Any changes to

> the information the previous submitted application you must let the registrar know within 5 business days. When is the future POA date?
>
> Arulappu – only in July 2009. I didn't know that I have to let the RECO know within 5 days. I thought the matter was discharged in the court and I don't have to let RECO know about it.
>
> Angela – Do you have any other complaints or issues with your company "Jenny Auto Sales"
>
> Arupappu – never any complaints or no other issues.
> (Reproduced with errors and omissions)

The Applicant's representative submitted that the Applicant had an unblemished record as a realtor and relied upon the support letter received from the real estate broker he is associated with. The relevant part of the letter is reproduced below:

> I have known Anton Jeeva since he joined our office as a Real Estate professional in August 2007. I have had the opportunity to observe his work ethic and dedication to his business as a Realtor. He is a hardworking and enthusiastic about his work. He is regularly at the office during work hours and at times far late into the evenings.
>
> On many occasions I have seen his buyers and sellers meet him in the office on appointments and have noticed that they are extremely happy to have him as their agent. The office staff is happy with his work as is the management.
>
> I personally find him to be honest and up-front with all his transactions and paperwork that follow listings and sales. He makes an effort to attend all training seminars, office sales meetings and participate actively in office fund raising or such events.
>
> I sincerely hope that this letter will post a true picture of Anton Jeeva.
> (Exhibit 4)

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;

(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

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. 2002, c. 30, Sched. C, s. 14 (5).

ANALYSIS

The governing legislation, the Act, is a consumer protection legislation, which regulates the real estate industry 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 specific grounds. Those grounds are set forth in section 10 of the Act and the registrant 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 Registrar's counsel submitted that the past conduct of the registrant affords reasonable grounds for the belief that the Applicant will not conduct business in accordance with the law and with integrity and honesty. In support of this position the Counsel outlined Applicant's providing false information on his 2007 and 2008 applications for renewal of his registration, by failing to disclose his criminal charges. Furthermore, the Applicant's EPA conviction, revocation of MVDA registration and, more importantly, the Applicant's failure to notify the Registrar of all of the above within 5 days of his change of information provide additional grounds.

The Applicant's representative submitted that the Applicant has been a licensed real estate professional since June 2005, and did not have a single complaint with respect to serving his clients as a realtor. He further submitted that his Broker of Record is quite appreciative of Applicant's working as a realtor (Exhibit 4).

The Tribunal has to focus on the Applicant's past conduct keeping in view his professional and other 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."

In analyzing the past conduct the Tribunal notes that the Applicant's 2007 charges were withdrawn in May 2008 and the 2008 charges are still pending for trial. The Registrar did not adduce any evidence pertaining to the Applicant's involvement in the commission of the criminal offences. Therefore, the Applicant has every right to be presumed innocent until proven guilty, in the context of section 10(1)(ii) of the Act. Similarly, the Tribunal is not apprised of the circumstances surrounding the revocation of Applicant's MVDA license, and therefore, would not give much weight to this fact.

However, on the flip side the Applicant was convicted under the EPA, in January 2008, for distribution, in January 2006, of a Vehicle Emission Inspection Report indicating that a motor vehicle complied with the maximum emission standards, when the vehicle did not comply with those standards or had not been tested in accordance with EPA and its regulations. He was also convicted of submitting false or misleading information in a Vehicle Emission Inspection Report to the Ministry of Transportation. Exhibit 3 Tab 9, page 24-25 and Tab 8). The Registrar's allegations against the Applicant are two folds. First, the Applicant was found in violation of two counts of the EPA. Secondly, he did not update the Registrar about the change of information contained in his 2007 application to renew his license. The Applicant's representative submitted that the Applicant is innocent and has appealed the conviction and, therefore, the conviction should not weigh against him. As of this day the convictions against the Applicant stand and the Tribunal does not have jurisdiction to look beyond the conviction record. Although the Tribunal is fully entitled to look at the circumstances giving rise to the criminal charges for the purposes of mitigation, it is not entitled to do so for the purpose of re-litigation (*Registrar Motor Vehicles Act v. Jacobs, 69 O.R. (3d) 462 [2004*]. The Applicant did not adduce such evidence.

The Tribunal finds that the Applicant not only provided false information on his 2007 and 2008 applications to renew his license by concealing his criminal charges, he was not forthcoming with the Registrar during his June 2009 meeting regarding his charges and EPA convictions.

The Tribunal is also concerned about Applicant's holding himself as a Professional Engineer on his advertisements. The Applicant's representative submitted that the Applicant is a foreign engineering graduate on the basis of which he has used the designation of "P. Eng." on his real estate related advertisement to bolster his credentials. He further submitted that there is no evidence that the Applicant ever provided any services as a professional engineer. In the Tribunal's view, the Applicant should have been more careful and not assumed that his foreign degree in engineering would entitle him the designation of professional engineer. Evidently he did not think it appropriate to check into whether or not he could hold himself out in that way.

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 charges against the Applicant may not weigh much against him but it is the failure to disclose those charges to the Registrar in accordance with the Regulations and making a false statement in his two applications to renew his registration, which is troubling. The Tribunal agrees. As a realtor the Applicant is expected to deal with transactions involving the life savings of his clients, and require disclosure of pertinent information regarding the real estate. By failing in his disclosure obligations to the Registrar, the Applicant has called into question his ability to act as a realtor.

Considering all the aspects of this matter, the Tribunal finds that, on a balance of probabilities, 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.

The Tribunal also finds that in the absence of an acceptable explanation as to the reason for giving false information on his two applications the Applicant is in violation of S.10(1)(a)(iii) of the Act and his registration should be revoked.

ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

_____

Harinder S. Gahir
Vice-Chair

Released: August 11, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

ALEXANDRE ALVES–Motion

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 REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: Antonio F. Azevedo, Counsel, representing the Applicant

Kelvin Kucey, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF HEARING: July 27, 2010 Toronto

ORDER

On February 18, 2010, the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Act") issued a Proposal (the "Proposal") to Revoke the registration of the Applicant as a real estate broker under the Act. The Registrar served the Applicant with a Notice of Proposal which included various particulars on which the Registrar relied. The Applicant appealed to this Tribunal. The Tribunal set a date for hearing the appeal in September, 2010. A pre-hearing was held in March. The Registrar provided disclosure of material to the Applicant on March 1, 2010 in preparation for the pre-hearing.

On March 4th, the Applicant requested further disclosure of, what he assumed were, certain written communications between the Registrar and his employees following a meeting in December, 2009 between officials of the Registrar and the Applicant. The Registrar refused the request relying on litigation privilege.

In May, the Applicant requested a list of witnesses and their statements from the Registrar.

On June 3rd the Applicant prepared a Notice of Motion for (1) an "order staying the Registrar's Proposal …for failing and refusing to disclose relevant information", or (2) "in the alternative…an order compelling the Registrar to disclose …the information (already) requested plus all relevant information including a list of witnesses and their anticipated evidence", and (3) an order adjourning the then scheduled dates for the hearing.

The last requested order was provided on consent. This Motion thus dealt only with the first two requests in the Notice. The Registrar's Response was to request the Motion be denied relying on the Tribunal's Rules of Practice as well as common law.

EVIDENCE

The Applicant relied on affidavit evidence.

In his affidavit the Applicant asserted that he had been a registered real estate broker under the Act for five years. He acknowledged his failure to honestly answer questions on applications for registration renewal in 2005 and 2007 by misleading the Registrar's office of pending criminal charges and eventual convictions. He also admitted to having lied in responding to questions concerning his engagement in other employment. Realizing the error of his ways, he answered all questions truthfully in the most recent application of 2009. Following the Registrar's receipt of this application he was asked to attend an interview with Registrar's office staff. He understood that, following the meeting, the staff would report to the Registrar who would then decide what, if any, sanctions might be imposed including a possible proposal. One week later he was telephoned by the staff who advised the Registrar would be issuing the Proposal. Assuming the decision to issue the Proposal was partly based on communications between the Registrar and the interviewing staff, these communications were requested as part of the Registrar's disclosure. Neither these nor the request for witness statements were provided from the Registrar's Counsel when requested.

In his factum, the Applicant asserts as fact that the loss of his licence to act as a registered broker will mean the loss of his only income and his only skill such that he would have to re-train for any other employment.

Counsel for the Registrar advised the Tribunal that the Applicant had been provided with the names of witnesses during the pre-hearing. Given that no further or alternate witnesses were later anticipated by the Registrar, no further disclosure had been merited.

The Registrar makes a three fold argument against the Applicant's Motion:

(1) that the Tribunal Rules of Practice do not provide for the requested disclosure as it consists of evidence which the Registrar does not intend to rely upon. It is therefore beyond the authority of the Tribunal to order;
(2) the reliance by the Registrar on litigation privilege makes the documentation sought inadmissible. Any such document was clearly created after the Applicant's meeting with the Registrar's office, a meeting which the Applicant knew occurred to determine what sanctions might be initiated by the regulator against him and therefore prepared for the purpose of litigation; and
(3) the rules of natural justice do not require the Registrar produce the evidence requested.

THE LAW

The *Statutory Powers Procedure Act*, R.S.O. 1990, c.22 was relied upon by both parties.

Section 5.4 of the Act provides as follows:

> 5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceedings before all hearings are complete, make orders for,
>
> (a) the exchange of documents;
>
> (b) the oral or written examination of a party;
>
> (c) the exchange of witness statements and reports of expert witnesses;
>
> (d) the provision of particulars;
>
> (e) any other form of disclosure.
>
> (1.1) The tribunal's powers to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.
> (2) Subsection (1) does not authorize the making of an order requiring disclosure for privileged information.

Section 8 of the Act provides as follows:

> 8. Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

Section 25.1 of the Act provides as follows:

> 25.1(1) A tribunal may make rules governing the practice and procedure before it.

Pursuant to the *Licence Appeal Tribunal Act*, S.O. 1999, c.12, the Tribunal has all the powers "necessary" for carrying out hearings (s. 3) and is authorized to "make rules establishing procedures for hearings" (s. 6). However, under section 6(6) such rules do not prevail over the requirements set out for the Tribunal hearing procedures or parties' rights set out in the *Statutory Powers Procedure Act*. The Tribunal has established such Rules of Practice which specifically require the following disclosure:

> 6.3 Except for the report of an expert witness to which rule 6.4 applies or expedited hearings to which rule 6.5 applies, a party to a hearing at least ten business days before the pre-hearing, if one is scheduled, or the hearing shall:
>
> (a) disclose to all other parties the existence of every document and thing that the party will refer to or tender as evidence at the hearing
> (b) deliver a copy of such documents to the other parties, including those documents and things intended to be used or which might reasonably be anticipated to be used by a party solely for the purpose of cross examination of another party or another party's witness, and
> (c) disclose and make available for inspection by every other party all things other than documents that the party will refer to or tender as evidence at the hearing.
>
> 6.6 The tribunal may at any stage of the proceeding order a party:
>
> (1) to disclose to any other party the existence of all documents and things that the party will refer to or tender as evidence at the hearing;
> (2) to deliver to any other party at least ten days before the hearing or as otherwise ordered by the Tribunal copies of all documents that the party will produce or tender as evidence at the hearing; and
> (3) to make available for inspection or make available for testing subject to terms and conditions established by the Tribunal, any thing, other than a document, that the party will produce or tender as evidence at the hearing.

The following case law was also relied upon by Counsel for both the Applicant and the Registrar in submissions:

1. Standard of Disclosure:

In *R. v Stinchcombe*[1] the Supreme Court of Canada held that the Crown is obligated in criminal cases to disclose not simply that evidence on which it intends to rely in prosecution, but also relevant evidence which may rather favour the accused. The basis for this open approach is "…the recognition that the purpose of the criminal process is not to obtain a conviction but to lay before a jury what the crown considers to be credible evidence relevant to what is alleged to be a crime." (see *Boucher v. R*[2] cited at para 11). The Court specifically noted the general principal that:

[1] (1991) Carswell Alta 192)
[2] [1955] S.C.R. 16

> ….information ought not to be withheld if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege.[3]

In *Howe v. Institute of Chartered Accountants*[4] the Ontario Court of Appeal dismissed an appeal for judicial review of a disciplinary committee's refusal to order disclosure of a specified report. The Court concluded that the request was premature and so did not deal with the merits of the arguments advanced. In a lengthy dissent, Laskin J. reviewed disclosure requirements relevant to administrative tribunals from a natural justice perspective. He acknowledged that the *Stinchcombe* criminal standard of a high level of disclosure did not necessarily apply to administrative tribunals, noting each tribunal's disclosure requirements would vary depending on the type of proceeding, the applicable statutes and the effect on those who appear before it. Disciplinary proceedings, having serious consequences on a person's livelihood and reputation, call for a higher standard of disclosure than that mandated in the *Statutory Powers Procedure Act.*

Recognizing requirements of natural justice*,* of which the right to make full answer and defence is one, Laskin, J. quoted with approval the Court in *Christian v. Northwestern General Hospital*[5] , a decision of the Divisional Court, which, after referring to *Stinchcombe*, stated:

> The important principal enunciated by Mr. Justice Sopinka is that "justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address the issues *on the basis of complete information of the case to be met."* (emphasis added). (para 18)

Upholding the decision of the Board of Inquiry under the Ontario Human Rights Code to apply *Stinchcombe* disclosure requirements to its investigation into human rights complaints, the Court in *Northwestern General Hospital* held:

> *R v. Stinchcombe* also recognized that the "fruits of the investigation" in the possession of the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice be done. We are of the opinion that this point applies with equal force to the proceedings before a Board of Inquiry and that the fruits of the investigation are not the property of the Commission. (para. 19)

In the facts of *Howe* there were no rules providing for disclosure and/or production.

Finding that the report being sought was part of the investigation material upon which the discipline proceedings were predicated, Mr. Justice Laskin concluded its disclosure was required under the duty to act fairly. In doing so however, he delineated the investigation report from the "deliberations of the Professional

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[3] *Ibid*, para 22
[4] (1994)118 D.L.R.(4th) 129
[5] (1993) 67 O.A.C. 72 (Div Ct) leave to appeal denied

Conduct Committee" commenced as a consequence of the report and thus properly not sought as part of disclosure. The report had been prepared to assist that Committee assess competence and was prior to any misconduct complaint which only arose following the report. As a consequence, the report had clearly not been created in contemplation of future litigious purpose and there was thus no merit to an argument against disclosure based on litigation privilege.

In the 2006 Federal Court of Appeal decision of *Sheriff v. Canada (Attorney General)*[6] concerning bankruptcy trustees' disciplinary hearing before the Superintendent of Bankruptcy. The Court held that the lower court had erred in applying a lower standard of disclosure. Given that the trustees faced a possible suspension of licence to practice and injury to professional reputation, the Court held that the *Stinchcombe* high level of disclosure was the appropriate standard. The Court noted that the absence of statutory disclosure rules was a consideration in the case (para 35).

2. Litigation Privilege:

The dissenting judgment in *Howe* noted that litigation privilege had not been argued by the Respondent. Mr. J. Laskin acknowledged this was appropriate since the report in dispute had been prepared at an investigative stage for a conduct committee where neither the substantial nor dominant purpose was contemplated litigation. Such only occurred later when the report was provided to the disciplinary committee.

The Supreme Court of Canada had more recent occasion to consider the litigation privilege in its decision of *Blank v. Canada (Minister of Justice)*[7]. It found that the privilege is:

> …not directed at, nor restricted to, communications between solicitor and client. It contemplates as well communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And, to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. (para 27)
>
> …..
>
> Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship* and it applies indiscriminately to all litigants whether or not they are represented by counsel: see *Alberta Treasury Branches v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sina qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of privacy; yet the litigation privilege attaches nonetheless.(para 32)

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[6] [2006] 268 D.L.R. (4th) 543
[7] [2006] 2 S.C.R. 319

The Court held that the privilege, created to shield the report or communication undertaken in preparing for litigation, ceases once the litigation is finalized. In doing so, the Court considered whether the privilege attached to material created for the "sole", "dominant" or "substantial" purpose of litigation, concluding that the "dominant" purpose test had been adopted by both Canadian as well as British courts and was the more appropriate given the modern trend toward increased disclosure. (para 60)

3. Setting Aside Privilege:

In a 2005 appeal from a Master's decision rejecting a claim for litigation privilege over written statements from the plaintiff to his insurer following an accident, the Ontario Superior Court considered the privilege in *Kennedy v. McKenzie*[8]. Following a determination by the Court that litigation privilege was a class privilege which entails a prima facie presumption that such communications are inadmissible, the onus is on the party seeking admission to show why the privilege should not be protected. The Court held that the privilege was not absolute and can be set aside in appropriate circumstances (para 42). It then enumerated the following: (1) an accused requires the information to make full answer and defence to criminal charges; (2) the communications themselves are criminal or made with a view to facilitate a crime; (3) public safety is affected; (4) the privilege is waived; and (5) changes to the rules of procedure are made. However, in any of these circumstances the party challenging the privilege *must demonstrate that the materials being sought are relevant to the proof of an issue important to the outcome of the case and there is no reasonable alternative form of evidence that can serve that purpose.* (para 46)

Analysis and Decision:

1. What is the standard of disclosure required?

In section 6.3 of the Tribunal's Rules of Practice disclosure requirements are limited to those documents and materials upon which a party intends to rely for evidence. By virtue of subsection 6.6, the Tribunal is able to make additional orders for similarly intended material at any time during the hearing process as and when such become relevant to a party in presenting its case. Given that the Tribunal has established such material disclosure obligations for parties who appear before it, section 5.4 of the *Statutory Prowers Procedure Act* authorizes this Tribunal to provide additional disclosure orders, the only exception being that for documents or records subject to privilege.

The facts presented demonstrate that the Registrar properly complied with Rule 6 disclosing to the Applicant all the material on which it intends to rely in advance of the prehearing last March. These records include handwritten notations taken

[8] [2005] O.J. No. 2060; 17 C.P.C. (6th) 229.

by the Registrar's staff during their meeting with the Applicant in early December, prior to the issuance of the Proposal. The Applicant had also been given the names of the witnesses which the Registrar intended to rely upon but no witness statement had been provided, although requested.

This Tribunal accepts the argument that the *Stitchcombe* standard of disclosure is a higher standard than that stipulated in the Tribunal Rules and is not limited to only that material upon which a party intends to rely to present its case, but includes also that material which may be of assistance to determine the truth of the issue.

Further, the Tribunal also accepts that this higher standard is relevant to the hearing at issue, despite the fact that this is not a criminal proceeding, because the hearing will determine whether there are grounds to support the revocation of the Applicant's licence to continue to practice his livelihood. It also puts into issue the Applicant's good character, propriety of conduct and competence, and thereby has serious ramifications on his professional reputation.

It is significant that, once appealed as in this case, the Registrar's Proposal becomes simply a contemplated regulatory sanction, the grounds for which must be proved on evidence before this Tribunal. In considering the proposed sanction, the Tribunal is the trier of fact and owes no deference to the Registrar's opinion[9]*.* It is also of significance that the parties consist of a public regulatory authority seeking to revoke an individual's right to practice his employment based on consumer protection concerns. The hearing before the Tribunal involves a process of laying before the Tribunal credible evidence of what is the alleged wrong-doing and therefore "..the party alleging the wrong doing should not withhold information which would impair the right of the accused to make full answer and defence."[10]

The dissent in *Howe,* is helpful in determining the effect on administrative tribunal disclosure requirements of natural justice considerations in light of current judicial trends toward greater disclosure standards. It supports the earlier cited decisions of both the Ontario Divisional Court and the federal Court of Appeal by placing the criminal disclosure standard set out by the Supreme Court in *Stinchcombe* into the administrative law context. Given the disciplinary nature of the issues before this Tribunal, the ramifications on the individual of the Tribunal's decision and the authority given the Tribunal to order additional disclosure beyond that limited to what a party may use in evidence, it would appear that all relevant investigative material should be disclosed even if that material is not relied upon by the Registrar.

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[9] *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales [2003]O.J. No. 603*
[10] *Supra,* fn. 3

Finally, such additional disclosure does lie within the purview of this Tribunal to order under s. 5.4 of the *Statutory Powers Procedure Act*.

2. Does litigation privilege apply?

Notwithstanding the finding that this Tribunal has a broad authority to order additional disclosure, such must exclude evidence which is privileged. The exception, specified in the *Statutory Power Procedures Act,* has also been recognized by court decisions which recognize natural justice requirements for a higher standard of disclosure. The question for this proceeding is therefore to determine whether the information being sought is legitimately protected by the litigation privilege claimed.

The facts establish that the material which is being sought was not, as in *Howe,* or *Northwest General Hospital*, prepared during the investigation into the Applicant's conduct. That material has been provided in the form of notes taken by the Registrar's staff at the time. If it actually exists, the material which the Applicant now seeks came to be during later discussions within the Registrar's office over what consequent administrative sanction was to be proposed. Any such proposed sanction carries with it the Applicant's right to appeal to this Tribunal. The discussions, which the Applicant knew were to determine the appropriate sanctions the Registrar would propose against him based on the earlier investigation results, are akin to the Professional Conduct Committee deliberations referenced by Laskin J in *Howe.*[11]

It is clear that these discussions took place in contemplation of litigation and, given that sanctions were their aim, for the "dominant purpose" of such potential litigation. They are therefore to be properly protected by the "zone of privacy" referenced by the Supreme Court in *Blank*.

3. Can the privilege be set aside?

There is no suggestion that the sought-after material evidences criminal or abusive action or that public safety is affected. There is clearly no waiver of the information made by the Registrar. No changes have been made to rules governing the disclosure which would affect the privilege found to exist in this case. The only remaining ground for setting aside the privilege as held by the Court in *Kennedy v. McKenzie* is that the evidence is required to allow the Applicant to make a "full answer and defence".[12]

Counsel for the Applicant submitted that the speculated material might demonstrate conflicting views amongst personnel in the Registrar's office as to appropriate sanction and thereby establish some impropriety or unfairness in the decision to propose revocation of his client's licence to continue practice.

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[11] *Supra,*, p. 5
[12] See also dissenting judgment in *Howe*

The Tribunal finds that, even were this speculation to be true, it is not necessary for the Applicant's defence or argument against the Proposal in the setting of this Tribunal given that the role of this Tribunal at the hearing to determine the appropriate sanction is "unfettered" by the decision of the Registrar to issue the proposal (*Coates)*. Whatever the considerations and influences existed for the Registrar in preparing the Proposal, the Tribunal approaches the question independently as to appropriate sanction. The Tribunal's decision is based only on the evidence presented, and argument put forward by the parties, before it at the hearing. As a consequence, even were the material sought established to be what the Applicant contends in speculation it may be, as set out by Ducharme, J. in the *Kennedy* decision,[13]

> "It is not relevant to the proof of an issue important to the outcome of the case…"

For these reasons, the Motion of the Applicant is rejected.

Although not argued, the Tribunal finds that willsay statements by the witnesses would enhance to ability of the parties to properly prepare for the hearing and reduce elements of surprise thereby allowing the parties to meet the case fully – see *Northwestern General Hospital*[14]. Both parties are therefore ordered to exchange willsay statements for those witnesses on whom they intend to rely ten days in advance of the Hearing date.

Costs:

At the conclusion of the motion argument, Counsel for the Registrar requested costs be ordered against the Applicant alleging the motion was frivolous and vexatious, given that the Tribunal Rules properly dispose of the issues.

The Tribunal has determined the Motion was not frivolous. Neither was it vexatious, given the Applicant's good faith efforts to argue and support the position taken by the Applicant regarding possible material which he surmised might benefit his position. The Tribunal's jurisdiction governing the livelihood and professional reputations of applicants has drastic potential ramifications and parties are entitled to pursue the best and most favourable evidence in their efforts to promote their positions before it.

The Tribunal's authority to order costs under Rule 14 of the *Rules of Practice* is limited to situations where some form of bad faith can be concluded on a party's part. This is not the situation here. No costs are ordered.

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[13] *Supra*, fn 8 para 46
[14] *Supra,*p.4

Order:

The Applicant's motion is denied, save for the willsay statements which are to be exchanged by the Parties as specified above.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice Chair

RELEASED: August 18, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

AHMAD FAHAD FAQIRI

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: Ahmad Farhad Faqiri, self-represented

Tim Snell, Counsel, representing the Registrar, *Real Estate and Business Brokers Act 2002*

DATE OF HEARING: September 3, 2010 Toronto

REASONS FOR THE DECISION AND ORDER

BACKGROUND

This is an appeal by Ahmad Farhad Faqiri (the "Applicant") to the Licence Appeal Tribunal (the "Tribunal"), arising out of a Notice of Proposal dated May, 7, 2010, (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 Salesperson, pursuant to Subsections 14(1)(b).

In July 2007, the Applicant applied to the Registrar to become registered as a salesperson. At that time the Applicant had a criminal record having been convicted in March 2004 of spousal assault and thereafter in December 2004 of spousal assault and having uttered a threat to cause death, both in regard to his ex-wife. The Applicant did not disclose on his application another charge of sexual assault, which was still pending before the courts, but the Registrar became aware of the charge through a background check of the Applicant. In November 2007, the Registrar registered the Applicant subject to certain terms and conditions. The Registrar issued the Proposal after the Applicant was convicted in July 2009 of the sexual assault charge.

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 the Applicant, this Tribunal finds that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

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 tendered the following documents:

Registrar's Book of Documents	Exhibit 3
Transcript of Guilty Plea Proceedings	Exhibit 4
Transcript of Trial Proceedings	Exhibit 5
Transcript of Trial Continuation	Exhibit 6
Reasons for Judgment	Exhibit 7
Transcript of Sentencing	Exhibit 8

The Applicant's evidence included his testimony and testimony of his Broker. He also tendered the following documents:

Reference letters	Exhibit 9
Letter from Probation Officer	Exhibit 10

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. 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.

Mr. Schlotzhauer reviewed the Registrar's Book of Documents, past conduct of the Applicant and specifically the concerns of the Registrar with respect to the Applicant's charges and subsequent convictions.

In July 2007, the Applicant applied to the Registrar to become registered as a salesperson. In his application the Applicant disclosed that, in March 2004 he was convicted upon pleading guilty of (spousal) assault under section 266 of Criminal Code (the "March 2004 conviction"). He served 15 days in intermittent jail and probation for two years. In October 2004, he was charged and subsequently upon pleading guilty in December 2004 was convicted of committing assault and to have knowingly uttered a threat to cause death both in regard to his ex-wife, under sections 266 and 264.1 (1)(a) of the Criminal Code (the "December 2004 conviction").

During the processing of the Applicant's application for registration, the Registrar obtained a CPIC search of the Applicant (Exhibit 3 Tab 5), which revealed his pending charge of sexual assault under section 271(1) of the Criminal Code, which he had failed to disclose on his application for registration. Upon review of the CPIC search results, the Registrar's office sent a letter to the Applicant on September 11, 2007 (Exhibit 3 Tab 6) asking him to provide written explanation regarding:

- The circumstances surrounding the assault convictions

- The circumstances surrounding the Uttering Threat Conviction, the pending Sexual Assault charge and reasons why this was not disclosed on his application.

- And to provide a copy of the Judge's Reasons for Sentencing in reference to the two Assaults and Uttering Threat convictions.

Mr. Schlotzhauer referred the Tribunal to Exhibit 3, Tab 8, which is the Applicant's response about the pending charge. The Applicant informed the Registrar that at the time of completing the RECO application he had a misunderstanding as one of his lawyer's assistants had advised him that the charge was withdrawn. Explaining the circumstances surrounding the charge to the Registrar, the Applicant denied that it was ever a sexual assault and clearly denied his involvement. Prior to registration under the Act, the Applicant was self-employed in the business of property renovations. The Applicant was doing a paint job at his customer's house in April 2007 when the customer had made the allegation that the Applicant had taken hold of her jaw and kissed her when she did not want to be kissed. On the basis of these allegations the police had charged the Applicant.

Mr. Schlotzhauer further testified that upon reviewing the circumstances of the Applicant, and during the pendency of the Sexual Assault charge, the Registrar in November 2007, registered the Applicant subject to the following terms and conditions, which he was required to sign:

1) Pursuant to subsection 10(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 salesperson:

   a) I agree to inform the Office of the Registrar, immediately in writing, of the outcome of the matter pending before the courts;

   b) 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 Sentencing in my case

   c) I understand should the charges before the court result in a conviction, the Registrar will review my file and may take further administrative action;

   d) I agree to inform the Office of the Registrar of any new charges under the Criminal Code, *Narcotics Control Act,* other federal statutes and provincial statures including *the Highway Traffic Act;*

   e) I understand that if any complaints are lodged against me, I am to immediately notify the Registrar in writing of such complaints;

   f) I agree not to apply for any transfer of my registration without prior approval of the Registrar. I understand that if 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 conditions duly signed by my new broker.

2) I hereby acknowledge 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.

Mr. Schlotzhauer testified that the Registrar received information that the Courts convicted the Applicant of the sexual assault in July 2010. He referred the Tribunal to the Sentencing report of Honorable Justice S. Armstrong dated July 3, 2009 (Exhibit 8), which made the following finding with respect to the Applicant's conduct:

> ….. I found that you took hold of (name deleted) jaw and kissed her when she said she did not want to be kissed. Then you grabbed hold of her wrist and held onto it until she removed your fingers and fled through the front door of her house. That constitutes a sexual assault. Sir, while the actual activity, the actions, the kissing and the grabbing, may be at the lower end of the scale of assaults, particularly sexual assaults, it is nonetheless important to me that this happened in her own house.
>
> ….. Sir, when I turn to your circumstances, it is true, you are an educated man, you have come to Canada, you are employed. You appear to be doing well as a real estate agent, but from what

> I read in the pre-sentence report, which was confirmed by what you said to me when I gave you the opportunity to address me, was that your personal life is very different. You portray yourself as a victim of these situations that you have found yourself in now three times, which have resulted in criminal convictions.
>
> That was obviously a concern of the probation officer who wrote the report. Not only in the part that the Crown read to me, but on page 5, "of concern to the writer was that Mr. Faqiri denied/minimized his current offence and his prior offences. He paints himself in a positive light, almost victim-like, while denying blame" He suggests that this is something you should address through a counseling and treatment program. I agree with him. That is exactly what I deduce from the way you present yourself today in court.

Mr. Schlotzhauer went on to testify that even after the conviction and sentencing in the sexual assault case, the Applicant maintained his innocence and blamed others for his conviction. In a letter to the Registrar's office (Exhibit 3, Tab 20), the Applicant wrote:

> ":….I did not plead guilty to a charge which was not true, and I was prepared to wait for 3 years (for trial). This is why the police and the crown got more and more tough on me. They acted in a prejudice way towards me that I don't know the reason, and the judge became influenced by them. (reproduced with errors and omissions"

Mr. Schlotzhauer went on to testify that the Registrar has concerns with respect to the Applicant's past conduct as the latest charge involves incidents pertaining to Applicant's customer. Moreover, he added that his second domestic assault had also taken place at his wife's workplace. He stressed that in his opinion the Registrar cannot impose conditions on the Applicant's registration as none would be practical and the Registrar nor the Broker will have control over the Applicant who would be working independently. He testified that the safety of the consumers of Ontario is paramount and that the Applicant's integrity cannot be trusted in view of his criminal convictions.

Testimony of Broker of Record

The Applicant's Broker of record testified in support of the Applicant. The Broker has been operating his Brokerage for the last seven years. He has presently forty-five registered realtors and five support staff. The Broker has found the Applicant to be a polite person and could not associate the Applicant's sexual assault conviction with what the Applicant has been showing in his office. In cross examination, the Broker testified becoming aware of the Applicant's sexual

assault charge in around July 2010, but did not have complete detail of the circumstances surrounding the charge. He agreed with the Respondent's counsel that it will be a concern for him if the alleged sexual assault had happened at a customer's home.

Testimony of the Applicant

While testifying, the Applicant stressed that he has been working as a realtor for the last three years without any complaint. He referred the Tribunal to Exhibit 11, emphasizing that he had shown about 500 properties to his potential clients and had no issues. He stressed that he has been doing business with honesty and integrity. With respect to the reference letters he had submitted (Exhibit 11) he did not discuss the matter of sexual assault with his referees as the sexual assault charge was very difficult for him and his family. He was scared to disclose it to the people he knew as he was concerned about his reputation. Concerning his business as a realtor, the Applicant testified that he has tried to stick to the REBBA code of conduct and acted for his clients in an ethical manner. He assured the Tribunal that there is very little chance that he will repeat his behavior which led to his convictions.

In cross examination the Applicant testified that real estate is the only business he can do as he does not have the ability to do the renovation business due to his allergies and other health problems. He admitted falsely accepting responsibility at the time of pleading guilty in April 2004 and December 2004 convictions.

Applicable Legislation

> 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. 2002, c. 30, Sched. C, s. 4 (1).
>
> 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,

(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, 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). 2002, c. 30, Sched. C, s. 10 (1); 2004, c. 19, s. 18 (4-6).

Request for information

(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. 2004, c. 19, s. 18 (7).

Conditions

(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. 2002, c. 30, Sched. C, s. 10 (2).

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 two grounds namely, the Applicant's criminal convictions and his denial of involvement in circumstances leading to the convictions. The Registrar did not pursue the allegation of making a false statement in the Application, as the explanation for the same was accepted by the Registrar at the time of conditionally registering the Applicant in November 2007. The Tribunal finds that this issue was appropriately dealt with at the time of Applicant's registration and the Tribunal does not need to revisit it at this time.

Dealing with the matter of criminal convictions and revocation of license Vice-Chair, Macklin in Re Nagy, [2009] O.L.A.T.D. No. 325 held:

> .. The Act's consumer protection purpose indicates that where the issue on an appeal relates to past criminal conduct, that conduct must be assessed in relation to the ability of the party in question to conduct the business of being a realtor and serve the interests of consumers.

The Tribunal has taken a consistent view that if the criminal record in question is in relation to crimes of dishonesty such as fraud, theft or robbery, it will be difficult for a registrant facing revocation to maintain registration. That is because crimes of dishonesty by definition bear directly on the prospect of the registrant being able to conduct the business of real estate in accordance to law and with integrity and honesty.

Even if the criminal conduct in question does not relate to crimes of dishonesty but rather relates to a breach of general criminal laws, registrant's still face considerable, albeit less onerous, obstacles in seeking to maintain their registration. That is because an inability to abide by the general laws of the land provide a strong indication that the registrant will be unable to abide by the specific laws and regulations related to realtors (see Re McCarthy, [2007] O.L.A.T.D. No. 10).

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 for such determination as, "It is the totality of the past conduct considered in the light of more current circumstances, which form the basis of relief."

The Registrar's Counsel submitted that the Applicant's recent past record as a realtor does not outweigh his negative past conduct as the Applicant has been under the scrutiny of the criminal justice system and still under probation. However, he conceded that the Applicant has some goodwill and accomplishments. The Tribunal is of the view that the evidence of Applicant's spotless profession record would weigh in favor of the Applicant if it is accompanied by some evidence of repentance or remorse by the Applicant with respect to his prior criminal record. The problem is that the latter evidence is missing. Although, the Applicant feels ashamed by his 2009 conviction, he did not take responsibility of the events leading to his convictions. He did not file any appeal of the 2009 conviction.

Moreover, the Applicant during his cross examination admitted that he had falsely accepted responsibility and lied to the Courts at the time of pleading guilty in April and December 2004 in order to get out of jail. If the Applicant is believed, he certainly entered a "plea of convenience" in order to avoid proceeding to trial and get out of jail. He admitted being represented by a counsel at the time of pleading guilty in December 2004. The discrepancy between the plea of guilt and the position presently adopted by the Applicant leads the Tribunal to one of the two possible conclusions. If the Applicant was truthful and candid with the Courts in admitting the essential ingredients of the charges, then he has now abandoned that truth in favor of an explanation which he believes will be more favorable to his position with the Registrar and the Tribunal. Alternatively, if he is being truthful in these proceedings as to his innocence with respect to incidents leading to spousal convictions, then the Tribunal must conclude that at the time of entering a guilty plea on two occasions, he knowingly misled the Courts for his convenience.

Neither scenario is favorable to the Applicant. As a realtor the Applicant is expected to deal with transactions involving the life savings of his clients, and require a candid disclosure of pertinent information regarding the real estate. Having failed in his duty to present truthful information to the Courts, and blaming others for his criminal convictions, the Applicant has called into question his ability to act as a realtor with integrity and honesty.

The Registrar's Counsel submitted that the Applicant is on probation until November 2011 and has not demonstrated that he is rehabilitated. The Tribunal agrees with the Counsel and places little weight to the testimony of the character witnesses.

Considering all the aspects of this matter, the Tribunal finds that, on balance, there is sufficient evidence to make a finding that, at present, 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.

ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out his Proposal, to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

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Harinder Gahir, Vice-Chair

Released: September 30, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

ROYAL VIEW ROMANO REAL ESTATE SERVICES LTD. and BENNY ROMANO

APPEAL FROM A DECISION OF THE REGISTRAR UNDER *THE REAL ESTATE AND BUSINESS BROKERS ACT, 2002* S.O. 2002, c.30, Sch. C

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: JENNIFER DYCK, Counsel representing Royal View Romano Real Estate Services Ltd. and Benny Romano

GEORGE DRAMETU, Counsel representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF PRE-HEARING: October 26, 2010 Toronto

ORDER

A pre-hearing was in this matter commenced on October 5, 2010, continued on October 19, 2010 and on October 26, 2010 in the presence of Jennifer Dyck, Counsel representing Royal View Romano Real Estate Services Ltd. and Benny Romano (the "Applicants") and George Drametu, Counsel representing the Registrar, *Real Estate and Business Brokers Act, 2002* ("the Registrar").

The Tribunal makes the following order respecting the hearing:

1. The parties to this matter are the Applicants and the Registrar.

2. The parties have resolved the issues this in this matter in accordance with the Minutes of Settlement executed by the parties and dated October 26, 2010, a copy of which is attached to and forms part of this order.

3. Royal View Romano Real Estate Services Ltd. will not conduct any trade in real estate during the period October 26, 2010 to December 23, 2010 either as a

listing or selling brokerage with the exception of properties currently listed by the brokerage.

4. The hearing in this matter, no longer being necessary, is therefore cancelled and the proceedings before this Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

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Mary Ann Spencer, Member

RELEASED: October 27, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ANTHONY (TONY) RACO

APPEAL FROM A DECISION OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c. 30, Sch. C

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: FRANK DATILLO, Agent, representing the Applicant, Anthony (Tony) Raco

KELVIN KUCEY, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATES OF HEARING: September 30 & October 1, 2010 Windsor

REASONS FOR DECISION AND ORDER

The Applicant, Anthony (Tony) Raco, appeals from the Notice of Proposal of the Registrar to revoke his registration pursuant to the Registrar's powers under the *Real Estate and Business Brokers Act, 2002, S. O. 2002, Chap. 30 Sch. C* (hereinafter the "Act"). Mr. Raco's name on his birth certificate is Antonio Raco, his name on his real estate registration is Anthony (Tony) Raco, and he uses Tony Raco in the conduct of his business. The appeal is pursuant to s. 14 of the Act.

STATUTORY PROVISIONS

The Applicable statutory provisions 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, or
>
> (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;
>
> 13. (1) Subject to section 14, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 10.
>
> 14. (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.
>
> Parties
>
> (6) The registrar, the applicant or registrant and such other persons as the Tribunal may specify are parties to the proceedings under this section.

The Registrar relies on subsection 10. (a) (ii) and (iii). The Registrar also relies on the failure of the Applicant to notify it of changes in the information given on application forms within five days of the change occurring. The requirement to give notice is set out in Ontario Regulation 597/05 as follows:

> 34. (1) If there is a change to any of the information that was included in the registrant's application under section 3, the registrant shall notify the registrar, in writing, within five days after the change takes place and shall set out the nature of the change.

Finally, the Registrar relies on the failure of the Applicant to comply with conditions placed on his registration concerning notice of the outcome of court proceedings.

EVIDENCE

The Tribunal heard evidence from three witnesses. Angela Volpe is the Manager of Registration at the Registrar's office. Kelly Zlotnik is the broker of record at Deerbrook Realty, the Applicant's current employing broker. The Applicant also testified. There is no substantial dispute regarding the facts upon which the Notice of Proposal is based. The Registrar and Mr. Raco dispute the inferences to be drawn from the facts. The facts are as follows:

In and around 1990, Mr. Raco was the owner of a car tire business that got into financial difficulties and failed. He filed for personal bankruptcy on February 16, 1990 and was discharged on July 26, 1990. Shortly thereafter he started teaching middle school classes with the Windsor – Essex Catholic District School Board. His teaching career continued until 2006. In 2006, anticipating his retirement from teaching in a few years, Mr. Raco decided to seek a post-retirement career in real estate. He passed the requisite courses and was registered to sell real estate on September 6, 2006. Approximately one hour after he had sent his registration cheque to the Real Estate Council of Ontario (RECO), the office of the Registrar under the Act, Ontario Provincial

Police arrived at the school where he was teaching and arrested him on sexual assault charges arising from activity as a teacher dating back to the period 1991 to 1993.

In his application for registration signed by him on August 24, 2006, Mr. Raco was asked if he was at that time or if he had been a bankrupt. He answered "No." Registration is effective for two years. Mr. Raco was asked the same question about his bankruptcy in his 2008 renewal application. He answered "No" a second time. The Notice of Proposal was issued on May 25, 2010. On his 2010 renewal form, Mr. Raco did answer the bankruptcy question in the affirmative.

On September 7, 2006, the day after Mr. Raco was arrested; someone at his employing brokerage sent a fax to RECO attaching a newspaper report detailing Mr. Raco's arrest. On September 18, RECO wrote to Mr. Raco seeking clarification of the identity of the person referred to in the newspaper article. By letter dated September 26, Mr. Raco's lawyer forwarded details of the charges to RECO on Mr. Raco's behalf. The Registrar decided to continue Mr. Raco's registration on terms and the proposed terms were forwarded to him and his broker. In the meantime, Mr. Raco had changed brokerages and it was not until November that both he and his employing broker executed the terms. Mr. Raco changed brokerages on two occasions thereafter, once as a result of a merger of two brokerages and once to return to his original brokerage. On each occasion he executed the terms document, as did his employing broker.

The conditions placed on the Applicant required him to immediately report to RECO his conviction on any of the charges. There is also a condition requiring him to forward reasons for judgment and the sentencing reasons. Until January 2007, the Applicant forwarded updates to RECO, the last advising RECO that a preliminary hearing date had been set for June, 2007. Thereafter, there was no further unsolicited communication between the Applicant and RECO. According to the Applicant, he then decided to undertake the reporting function himself because his lawyer was charging for doing something he was capable of undertaking. The Applicant was convicted in October 2009 and was sentenced to six months incarceration plus three years probation in February 2010. He commenced the period of incarceration but was released on bail of $20,000.00 pending appeal after serving one month and one day. The appeal is currently scheduled to be heard in January 2011.

The Applicant failed to notify RECO of any information relating to his conviction and sentencing until contacted by RECO following his release on bail. According to Angela Volpe, RECO's knowledge of the conviction and incarceration of the Applicant came from an anonymous tip received on the day of the Applicant's release. Ms Volpe also testified that RECO never did receive the reasons for judgment or the reasons for sentencing from Mr. Raco. RECO's legal department ordered them when revocation proceedings were contemplated.

Following the charges in 2006, the Applicant was terminated from his teaching position, allegedly for cause. The Applicant advised that this termination is currently the subject of three grievances under the collective agreement. The Ontario College of Teachers

also took steps to investigate the Applicant's behaviour but the College and the Applicant have entered into a standstill agreement pending the outcome of the criminal proceedings.

The Applicant put forward Kelly Zlotnik as a character witness. In addition to being the current broker of record at Deerbrook Realty, Ms Zlotnik was the broker of record in August 2006 when she executed the Applicant's application form. In September 2006 Ms Zlotnik ceased to be broker of record for about a year while she attended school. She stated that she had met the Applicant formally about 18 months ago when he had returned to work for the brokerage. She was aware of him prior to that date but had not really met him or talked to him. She said the Applicant is a good professional real estate agent. He is successful. She stated that she had never received any client complaints regarding the Applicant. She is aware of his criminal convictions but feels he can be a good real estate agent despite them.

It was her initial testimony that she had not met the Applicant in August 2006. He had been hired by the office manager. She had simply executed the form when requested. When it was drawn to her attention that, in executing the application form, Ms Zlotnik certified that she had discussed the Applicant's answers with him and satisfied herself that they were true, Ms Zlotnik stated that she reviewed the application form and relied on the Applicant's answers. When asked if she was comfortable with the fact that the Applicant had been untruthful to her by incorrectly answering question 4 by failing to disclose his earlier bankruptcy, Ms Zlotnik did not consider the Applicant's untruthful answer to be "malicious." She then justified this answer by saying that in her view, "malice" means "intent to lie" and she was of the view that the bankruptcy was completely forgiven after seven years.

Overall, Ms Zlotnik was of the opinion that it is not her job to weed salespeople out of the profession. In her view, as long as someone is registered to sell real estate and pays all accounts regularly, then, absent customer complaints, she has no problem hiring that person to sell for her brokerage. Notwithstanding that fact, she does not believe that people should lie and ultimately she conceded that aspects of the Applicant's behaviour disclose that he may not carry on business with integrity and honesty and in accordance with the law.

In his testimony on his own behalf, the Applicant stated with respect to the concerns raised by the Registrar over several non-reporting aspects of his behaviour that he now knows his behaviour was irresponsible. He stated that he acknowledges that his failures are his fault and no-one else's and that he will take particular care in the future to ensure compliance with all of his disclosure obligations under the Act. In support of this position, he pointed out that he had made full disclosure of his bankruptcy in his 2010 renewal application.

With respect to the bankruptcy in 1990, the Applicant stated that he thought that his discharge wiped the bankruptcy from his record. He noted that he had been granted credit since and the bankruptcy has not shown up in any credit report. He misread the

question in 2006 and again in 2008 but since seeing the importance put on a correct answer by RECO and having now understood the question, he will ensure full disclosure.

In response to his failure to report his arrest, conviction and sentencing to RECO in a timely manner, the Applicant seemed to take several different stances in his evidence. Firstly, he was of the view that RECO must have been aware of his trial, conviction and sentencing because it was well reported in the news in Windsor. He was sure the Windsor Real Estate Board would have advised RECO. He was also of the view that RECO had been advised by his counsel and by Ms Zlotnik. At the various times of his arrest, conviction and sentencing, the Applicant testified that his life was in such turmoil that he failed to address his mind to his obligation to report facts to RECO. He now acknowledges his fault and has learned from his mistakes. He is also aware of the five day reporting rule, something Ms Zlotnik described as common knowledge in the industry.

The Applicant insists that he is innocent of the charges for which he was convicted. He has pinned all of his future hopes on his upcoming appeal. While the Tribunal did not get into the grounds of the appeal in any great detail, it is clear that the Applicant felt that he did not get good representation at trial; that the judge incorrectly used similar fact evidence; and the Applicant's lawyers failed to put him in the stand to testify. He stated that, in the event that the appeal is unsuccessful he will have to accept and deal with his conviction for sexual assault.

ANALYSIS

It is clear from the case law that the Tribunal owes no deference to the Registrar's findings that the Applicant's registration should be revoked. This proceeding is not an appeal in the true sense, notwithstanding that the statute uses that language. It is, in fact, the first time when the evidence is examined by an independent adjudicator. In this proceeding, the Registrar assumes the role of prosecutor and bears the onus of convincing the Tribunal that the Applicant should have his registration revoked. The wording of the statute reinforces the Registrar's onus. A qualified registrant is entitled to registration unless one of the exceptions applies.

Until recently, there had been a trend in the case law to suggest that, when the Tribunal was considering the status of someone already registered, the standard of proof, while being on a balance of probabilities, required clear and cogent evidence to support the Registrar's position. While the Tribunal would hate to think that it arrived at any decision absent clear and cogent evidence, it is now clear that the only standard of proof is proof on a balance of probabilities.

In his evidence, the Applicant stated that he takes responsibility for his actions with respect to numerous failures to report facts to the Registrar. To his credit, he did not testify that he had forgotten about his bankruptcy after a lapse of 16 years. He was well

aware that he had been bankrupt but was under the impression that the discharge in July 1990 somehow wiped his bankruptcy from the record. With respect to his failure to honour the conditions of his registration, the Applicant testified that he was under great stress due to his conviction on charges he categorically denies having committed and was more focussed on preparing an appeal than notifying the Registrar of events.

While the Tribunal notes the substance of these answers, it doubts the sincerity of them. It appeared that the Applicant's position was tailored to respond to the Registrar's argument that the Applicant has a track record of deflecting criticism of his own actions by citing the failure of others. In cross-examination, the Tribunal noted that the Applicant attempted to deflect answers to questions asked by counsel by giving long and unresponsive answers. He also reversed himself on at least one occasion because it ended a line of probing questions. Counsel for the Registrar questioned the Applicant about his dealings with Kelly Zlotnik in 2006. Both Ms Zlotnik and the Applicant had previously testified that they had barely met in 2006. When the Applicant was asked about the fact that Ms Zlotnik had certified to the Registrar on the form that she had reviewed the Applicant's initial application with him, the Applicant maintained his initial testimony for some time before suddenly changing his testimony to state that he had met with Ms Zlotnik in 2006 and had reviewed the details of his application form with her. The revised answer resulted in the Applicant's acknowledgement that he had lied to Ms Zlotnik.

The Applicant maintains his innocence with respect to his criminal convictions. The Registrar invites the Tribunal to review the reasons for judgment where the judge finds the Applicant's refusal to acknowledge his wrongdoing is an aggravating factor in sentencing. In the Registrar's view, the refusal to acknowledge the wrongdoing shows that the Applicant lacks integrity and honesty.

The Tribunal notes that the impugned behaviour occurred between 1991 and 1993. Had conviction followed shortly after the charges as happens in the normal course, it is likely that both the Registrar and this Tribunal would focus on the Applicant's behaviour in the years following his conviction to determine if there was a history of continued rehabilitation. The Applicant argues that the Tribunal should consider the period between the impugned behaviour and the laying of charges in 2006 to show that he has no propensity for criminal behaviour. The Tribunal accepts the Applicant's proposition.

The offences of which the Applicant stands convicted are extremely serious. The Applicant was in a position of trust in his capacity as a school teacher having care of adolescent students. This Tribunal must focus on the trust reposed in registrants by the Province of Ontario to carry on the business of real estate with integrity and honesty and in accordance with the law. Where there is a history of breach of trust, the Tribunal places a heavy emphasis on such evidence. The statutory test, however, requires the Tribunal to look at the whole of the Applicant's past behaviour. Against the 1991 to 1993 behaviour, the Tribunal must consider that the Applicant taught middle school for a further 13 years without incident.

The Tribunal does not accept the proposition that acknowledgement of guilt is a necessary prerequisite to registration. An analogy may be drawn to the case of Guy Paul Morin and his murder conviction following his second trial. Mr. Morin steadfastly maintained his innocence in the face of the conviction until new evidence on appeal demonstrated Mr. Morin's innocence beyond a shadow of a doubt. Applying the Registrar's requirement that Mr. Morin acknowledge guilt following conviction, he would be disqualified from any career requiring provincial registration until the ruling of the court of appeal, not on the seriousness of the conviction, but on his refusal to accept responsibility. The cases of David Milgarde and Donald Marshall also come to mind. Acknowledgement of guilt is one factor the Tribunal must consider in assessing the character of an applicant before it to determine whether the applicant warrants the public trust. It is not, on its own, the deciding factor.

In reviewing the whole of the evidence before it, the Tribunal finds that the Applicant provided false information to the Registrar regarding his bankruptcy in his initial application form in 2006 and again in his renewal form in 2008. He did not provide full disclosure to the Registrar concerning his bankruptcy until his 2010 renewal. By that time the Registrar had advanced the failure to advise as a ground for revocation. The Tribunal also finds that the Applicant did not inform the Registrar within five days of changes to the information in his application forms. He failed to advise the Registrar of the proceedings pending at the Ontario College of Teachers within five days. He failed to inform the Registrar of the initial charges in 2006 within five days. He failed to advise the Registrar of his conviction and sentencing within five days.

In 2006, following the initial charges, the Registrar extended the principle of presumption of innocence to the Applicant by imposing terms and conditions of registration that were not, on their face, onerous. The terms simply required the Applicant to keep the Registrar advised of the progress of the criminal proceedings and, if a conviction was entered, to provide reasons. The Applicant failed to comply with the imposed terms and conditions.

From the factual findings set out above, the Tribunal concludes that there are reasonable grounds for belief that the Applicant will not carry on business with integrity and honesty and in accordance with law. He has also provided false information to the Registrar in an application. There are grounds for the revocation of his registration. This however does not end the matter. In the recent case of *Lapcevich v. Registrar, Real Estate and Business Brokers Act, 2002*, 2010 ONSC 1145, the court held that the Tribunal must find grounds for revocation as a threshold issue before it can order revocation or apply conditions to registration. In other words, a finding of grounds for revocation does not automatically trigger revocation. It triggers the powers of the Tribunal set out in s. 14(5) of the Act to craft a remedy consistent with the impugned behaviour. The Tribunal may order the Registrar to carry out the proposal, substitute its opinion for that of the Registrar and attach conditions to registration. It remains for the Tribunal to consider if this is a case for conditions attached to registration.

Of note in this analysis is the fact that the Applicant provided false information in two applications. The Divisional Court considered this issue under the *Liquor Licence Act*, R.S.O. 1990 chap L.19 in the case of *Registrar of Alcohol and Gaming v. Hosseini-Rad* 2004 CanLII 34450 (ON S.C.D.C.). The registrant in that case had provided false information concerning a criminal record in his application for licensing under the Act. The court stated, at paragraph 13:

> We are of the view that once the Board has made a finding under s. 6(2)(e) that the respondent made a false statement on his application, there is no discretion in the board to grant a licence, with or without conditions.

While the *Liquor Licence Act* does not contain a provision similar to s. 14 (5) of the Act granting the Board discretion to impose conditions when faced with false disclosure, the case highlights the great importance of full disclosure in registration cases. As has been said by this Tribunal in the past, the initial application form represents a first test of integrity. The Applicant has failed that test.

The Applicant also failed to honour the conditions imposed on his registration by the Registrar. He has failed to comply with the regulatory burden of timely notification of changes in his information. His stance throughout his testimony was that he has now taken the time to fully appreciate the obligations he assumed when he entered into a real estate career and will ensure full disclosure and compliance in the future. The Act, however, directs the Tribunal to review the Applicant's past behaviour not his promises of future compliance. Such promises are easily given but it is in past behaviour that the true character is revealed. Given that the Applicant has been subject to terms and conditions of registration and has proved himself unable to comply, the Tribunal can have no confidence that the Applicant will comply with terms and conditions it may impose.

ORDER

Pursuant to the authority vested in it by the provisions of section 14 (5) of the Act, the Tribunal orders the Registrar to carry out the provisions of the Notice of Proposal dated to revoke the registration of the Applicant, Anthony (Tony) Raco.

LICENCE APPEAL TRIBUNAL

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D. Gregory Flude, Vice-Chair

RELEASED: October 18, 2010

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

AHMAD MIRZAKHALILI

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR UNDER *THE REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REFUSE REGISTRATION

TRIBUNAL: DOUGLAS R. WALLACE, Vice-Chair

APPEARANCES: KOUROSH FARROKHZAD, Counsel, representing the Applicant

GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real Estate and Business Brokers Act 2002*

DATES OF HEARING: September 29 and 30, 2010 Ottawa, ON

REASONS FOR DECISION AND ORDER

This hearing arises out of a Notice of Proposal issued by the Registrar, *Real Estate and Business Brokers Act 2002* (the "Registrar" and the "Act" respectively). The Notice of Proposal proposed to refuse the registration of Ahmad Mirzakhalili ("the Applicant"), as a salesperson under the Act.

FACTS

The facts in this case are not seriously in dispute. When the Applicant submitted his application on August 20, 2008, he had recently been convicted of arson and fraud arising out of a fire at premises leased by him and operated as a tanning salon. He left the questions on the application form, relating to criminal convictions and bankruptcy, blank, noting that further details were being provided by letter and answered the question regarding, whether he was then or would be engaged or employed in any other business, in the negative. The attached letter set out the nature of the three convictions and advised that they were being appealed. It also

indicated that the Applicant had made a declaration in bankruptcy in December 2007.

A copy of the Applicant's Declaration of Bankruptcy was received by the Registrar's office two days after the Application. It showed that the Applicant had operated several businesses during the proceeding five years apart from the tanning salon business. These businesses included self-employment as an interpreter, ownership of a restaurant and ownership of a car dealership. The Registrar's Office requested further details regarding both the convictions and the bankruptcy and received the following documents in September:

(a) Notice of discharge of the Applicant in bankruptcy effective September 19, 2008.
(b) A transcript of the Reasons for Decision given by the Trial Judge on convicting the Applicant in May 2008 of the three offences noted in his application.
(c) A copy of the Conditional Sentence Order imposed at the time sentencing the Applicant in September 2008.
(d) Copies of the documents filed on appeal of the Applicant's conviction

A transcript of the Trial Judge's Reasons sentencing the Applicant to a two year conditional sentence to be served in the Community was provided by the Applicant's solicitors as soon as it became available. The solicitors for the Applicant also advised the Registrar that the Court of Appeal had, on December 16 2009, increased this sentence to twelve months incarceration from that date. With credit for the time already served and the statutory remission of sentence the Applicant served approximately eight months in prison, being released on parole on August 18, 2010,

The Registrar's review of these documents revealed that in addition to the three criminal convictions arising out of the fire, the Applicant had a conviction for theft under $1,000 in 1988 that had not been disclosed in his application or the accompanying letter. He also noted that the Applicant had not noted any previous or current employment in his application.

Mr. Brian Schlotzhauer, the Deputy Registrar, testified that the facts noted above led him to conclude that he could not recommend the Applicant's registration. He was concerned that the offences were serious, involving as they did, a threat to the personal safety of others in the vicinity of the fire and a fraudulent attempt to gain monetary benefit from his own wrong doing. He felt that the offences would seriously undermine the trust that clients must have in their real estate salespersons and that this was particularly so given the fact that the Applicant had only been out of prison for one month, would be on parole for three months more and on probation for a further period of two years. A second concern related to the Applicant's failure to provide accurate responses to the questions on his application form relating to previous employment and his 1988 conviction for theft.

Following the Registrar's Proposal to refuse the registration of the Application on August 20, 2009, the Registrar made enquiries of the Ontario Motor Vehicle Industry Council (OMVIC) to determine the status of any licence held by the Applicant under the provisions of the Motor Vehicle Dealers Act.

Thaya Gengatharan, the Registration Manager for OMVIC, testified that that Applicant had been registered as a salesperson under that Act from 1999 to October 23, 2009. She produced three applications by the Applicant for registration or renewal of his registration during this period. In 2005 the Applicant applied as president of his own numbered company. He indicated that there were no pending charges against him and that he had never been found guilty or convicted under any law. This was a false statement, as at the time the application was completed the Applicant had been convicted of theft under $1,000. In 2007 the Applicant renewed his application, this time as president of Zimmer Auto Haus. Again, he indicated he had not been charged or convicted under any law, whereas in fact he had been convicted at this time of the theft charge and charges were pending against him for arson and fraud. Finally, the Applicant applied in November 2009 while a salesperson with B & R. Imports. He did not answer the questions on the application relating to either convictions or bankruptcy. She had no record of receiving any additional information from the Applicant with respect to this application. Each of the applications contained a warning indicating that it is an offence to knowingly provide false information on the application.

On reviewing these applications with Ms. Gengatharan the Registrar issued a Supplementary Notice of Proposal indicating that he was relying on the false statements in these applications as further and supplementary reasons for refusing the registration of the Applicant.

The Applicant did not dispute his 2008 convictions for arson and fraud. He testified, however, that he had pleaded not guilty to the charges at the time of his trial and still maintained his innocence. He also indicated that although he was still serving his sentence for these crimes, he had shown industry and model behaviour between the time of his conviction and the date of the hearing. He pointed to the 250 hours of community service he provided after his conviction and prior to his incarceration. This time was largely spent assisting his church in such areas as the print shop, renovations to an office toilet, and providing assistance in the church's work with the underprivileged and handicapped. He also took a number of courses at Algonquin College between January 2008 and June 2009 obtaining his licence as a Home Inspector and obtained a passing grade in July 2008 in the Real Estate College course mandated by the RECO. During the entire period, he strictly complied with all conditions of his release on bail prior to trial, as well as the conditions imposed by the Court for serving his sentence in the Community and was recognized as a model prisoner while in prison.

The Applicant provided an explanation for his failure to provide more complete information on his application for registration under the Act and earlier applications for registration with OMVIC. With respect to the application which is the subject matter of this hearing, the Applicant testified that his failure to disclose a prior conviction for theft was due to two facts; first, he had in mind that the preceding section of the Application asked for details of employment during the preceding two years only and expected that the question relating to convictions was similarly limited

to those occurring during the proceeding two years. Secondly, the Trial Judge on his trial for the arson and fraud charges indicated that he was disregarding the theft charge when considering his sentence as it was for a minor offence which occurred 20 years previously. The Applicant explained that he did not disclose his employment as an interpreter or some work assisting others in home renovations as these jobs were of an unplanned and infrequent nature and did not require a licence. His employment in the restaurant and car repair business were not disclosed as he was not engaged in these businesses at the time of his application and did not anticipate being engaged in them any further should his application for registration be accepted. He did not reveal that he was registered with OMVIC as he had not been actively engaged in that business for some time.

With respect to the applications for registration with OMVIC, the Applicant admitted that the 2005 application was a “mistake” in failing to declare his 1988 theft conviction. The 2007 application was also wrong in failing to declare both the 1988 theft conviction and the pending charges for arson and fraud. Finally, he explained that although the 1999 application failed to note either his recent bankruptcy or any criminal convictions, a letter had been sent to OMVIC revealing this information. He produced a copy of a similar letter submitted in support of an application for registration as a mortgage broker, but did not have a copy of the letter he said he sent to OMVIC.

The Applicant called two witnesses to testify on his behalf. The first, his wife, testified that she arrived in Canada with her husband in 1986. In their culture it was very important for the husband’s honour to be the breadwinner and take care of his family. The Applicant did this by engaging in a number of jobs including pizza delivery, taxi driving, auto mechanics, restaurant and garage ownership and home inspection. Since the charges against her husband she has had to shoulder the burden of paying the bills and has obtained employment in the public health field with the City of Ottawa. Her husband has a reputation among their friends as honest, caring, compassionate, and hardworking. He also has a passion for real estate and she believes he would be successful in this field if registered.

The second witness called on the Applicant’s behalf was a real estate agent who met the Applicant some 13 to 14 years ago while the Applicant was working in a car dealership. He was also a neighbour and a friend, helping the Applicant with the real estate course required prior to applying for registration. He considered the Applicant to be family oriented, friendly, and involved with the community and his church, and very trustworthy. He was confident that the Applicant was honest and trustworthy although he was unaware of his criminal charges or that the Applicant had been convicted of arson.

THE LAW

An Applicant's entitlement to registration is set out in section 10 of the Act as follows:

> 10. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
>
> (a) the applicant is not a corporation and,
>
> (i) having regard to the applicant's financial position or the financial position of an interested person in respect of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business,
>
> (ii) the past conduct of the applicant or of an interested person in respect of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty, or
>
> (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;

This Tribunal's right to hold a hearing and make an order is set out in section 14 (5) of the Act.

> 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.

ISSUES

1. Based on the past conduct of the Applicant, are there reasonable grounds to believe that he will carry on business in accordance with law and with integrity and honesty?
2. Is the Applicant disentitled to registration by reason of making a false statement or providing a false statement in his application for registration?

ANALYSIS

The Act makes it clear that there is a presumption that most people who apply for registration are entitled to be registered. Disentitlement is the exception rather than the rule and is limited to three cases. (1) Where the Tribunal is satisfied on the balance of probabilities that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business (2) Where the past conduct of an Applicant provides reasonable grounds to believe that the Applicant will not carry on business in accordance with law and with integrity and honesty and (3) Where the Applicant made a false statement in an application for registration. Counsel for the Registrar did not make any submission based on the financial position of the Applicant, leaving the Tribunal to consider grounds (2) and (3).

The Divisional Court in *First Place Fine Car Sales Inc. and Dominic Cerullo v. Ontario*

(Motor Vehicles Dealers Act), [2007] O.J. No. 1043) clearly stated that in determining whether there are reasonable grounds to believe that the Applicant will not carry on business in accordance with law and with integrity and honesty the Tribunal owes no deference to the opinion of the Registrar. Rather, the legislation requires the Tribunal to make its own decision based on the evidence before it. Further, the Tribunal must come to its conclusion based solely on a review of the entirety of the Applicant's past conduct.

Only if the Tribunal is satisfied on the balance of probabilities that this conduct provides reasonable grounds to believe the Applicant will not conduct himself in the prescribed manner may his application be refused on this ground.

The Tribunal has considered all aspects of the Applicant's conduct set out in the factual summary above. Of particular concern, of course, is the seriousness of the most recent criminal offences. Justice Power describes the seriousness of these crimes at page 4 of his Reasons and Sentence in these words:

> ….the charges and the findings of guilt related to a fire or an explosion, at a Tanning Studio situated in the shopping mall in the south end of the city of Ottawa and a subsequent attempt to defraud the insurer of the tanning studio equipment. There is no doubt whatsoever that the offences are serious ones. Indeed, the explosion in question occurred shortly after 1:00 a.m. in the morning when to the knowledge of both of you people were working late in the adjoining premises, a framing shop.
>
> While they were not injured, these people could have been seriously injured or even worse, by the explosions. They were lucky and you were lucky that they were not injured. You acted recklessly, and you were motivated by financial gain.

The Court of Appeal took an even more serious view of the offences when reviewing the sentence imposed by Justice Power:

> In our view, the circumstances of the arson committed by the respondents are every bit as grave and reprehensible as the circumstances in *Hirnschall.* The arson was well-planned-gasoline was acquired, deadbolts to a door were unlocked, debris was cleared away from a door to permit entry, a motion sensor was moved, and a burglar alarm was bypassed. Incredibly, the respondents followed through on their plan to blow up and burn down their own store even when they discovered that people were working late in the adjoining framing shop in the strip mall. There is no doubt that the explosion and fire jeopardized the lives of these people. …..Moreover, it needs to be underlined that arson always jeopardizes the lives of fire fighters and other emergency personnel who respond to fires.

Although the Applicant denied committing the charges both at trial and before this Tribunal, this Tribunal is required by law to accept the court's finding as to guilt. It also agrees with the court's view as to the seriousness of the crimes.

Given the seriousness of the crimes, what does it say about the Applicant's honesty, integrity and ability to act in accordance with the law? In the Tribunal's opinion the crimes constitute clear evidence that the Applicant, at least at the time he committed the crimes (2006), lacked those qualities the Act requires for registration. The

question then becomes whether there has been any evidence of a change in character in the intervening four years.

The Tribunal recognizes that one may change, and accepts the view recently expressed by Vice-Chair Flute in *Goulart (Re), [2008] O.L.A.T.D. No.112,* that evidence of a fundamental change may be demonstrated over a relatively short period of time even when an Applicant is still on parole. It finds, however, that such cases must be the exception to the rule expressed in *Ripani* 18 C.R.A.T.356 and more recently in *Rubin (c.o.b. Affordable Auto Sales) (Re) [2000] O.LO.A.T.D. No. 337,* to the effect that registration will normally not be granted following a conviction until after the sentence has been served and parole of probation have been completed. The Tribunal does not find any such extenuating circumstances here. In the Tribunal's opinion, insufficient time has elapsed in this case for the Applicant to demonstrate any meaningful change in character since the time of his conviction.

The Applicant relied on *Billy wing-Yu Chow o/a Billy Chow and Royaland Real Estate Ltd.* [2008] O.L.A.D. where Vice-Chair Hareinder Gahir ordered the Registrar not to carry out his proposal to revoke the registration of an Applicant who was still on parole following his conviction on a number of charges for possession of prohibited substances and trafficking in cocaine. A number of facts in the case before Vice-Chair Gahir's distinguish that case from the case before this Tribunal. Perhaps the most important is the fact that Vice-Chair Gahir was dealing with an Applicant who had been licensed for 19 years without incident and who cooperated fully with the police at the time or his arrest and immediately accepted responsibility for his actions.

The Tribunal similarly finds the cases of *Dahan (Re), [2006] O.L.A.T.D. No.222*, *Gattral (Re)* [205] O.L.A.T.D. No.3 and *McDonald (Re), [2008] O.L.A.T.D.* No*. 268* distinguishable on the facts.

In arriving at its opinion that the past conduct of the Applicant affords reasonable grounds to believe that the Applicant will not carry on business in the manner prescribed by section 10 of the Act, the Tribunal considered aspects of the Applicant's past conduct other than his recent convictions. On the positive side, it considered evidence by his wife and a neighbor that they considered him honest and trustworthy. The Applicant's wife was, understandably, far from an objective observer of her husband's character however, and the impact of the neighbor's evidence was considerably weakened by the fact that, although he purported to know the Applicant well, he was unaware of the Applicant's convictions, let alone details of the circumstances that led up to them. In the end result, the Tribunal was left with convictions for serious crimes for which the Applicant has shown no remorse and no demonstrated evidence of any acts indicating that he has changed.

The Tribunal also considered the evidence that the Applicant was not entirely honest in completing applications for registration for both the renewal of his licence under the Ontario Motor Vehicle Dealers Act and his application for registration under the Real

Estate and Business Brokers Act. In the Tribunal's opinion an examination of the applications under both these acts reveals a pattern of dishonesty at the worse or disregard for the importance of accuracy at the best. Although some omissions, such as a reference to past part-time employment, may have been inadvertent or due to an imperfect mastery of the English language, other omissions, such as any reference to his most recent criminal charges, can only be viewed as dishonest. Taken together, they constitute additional grounds to believe that the Applicant cannot be relied on to conduct his business in accordance with the law and with integrity and honesty.

The Tribunal turns now to a consideration of section 10 (1)(a)(iii) of the Act. This section states that everyone is entitled to registration unless he has made a false statement or provided a false statement in an application for registration. The Tribunal has no difficulty finding that the Applicant made a number of false statements in his applications for registration under the Ontario Motor Dealers and Vehicles Act. It is doubtful, however, that these are the registration applications referred to in this section of the Act. The Tribunal finds that the Applicant also made a false statement in his application for registration under the Real Estate and Business Broker's Act however, and that this is the application referred to in this Act. The question on the application whether he had been found guilty of any offence under any law was clear and unambiguous and deserved a direct and honest answer. The notation "letter attached" was tantamount to saying "Only those offences set out in the attached letter". This statement was not true. He had been convicted of a previous offence of theft, which was not revealed either on the application itself or on the attached. letter.

In *Ontario v. Hosseini-Rad* [2004] O.J. No.1273 the Ontario Superior Court of Justice, Divisional Court heard an appeal from a decision of the Board of Alcohol and Gaming Commission which had held that a failure to disclose a criminal conviction in an application under the Liquor Licence Act did not prevent the issuance of a licence with conditions attached. In allowing the appeal , the Divisional Court held that the wording of the Act, similar to the wording in section 10 (1)(a) (iii) of the Real Estate and Business Brokers Act, removed any discretion in the Board to grant a licence once the Board found an application contained a false statement..

The Tribunal notes that the Act does not indicate that the false statements need be intentional or of such fundamental importance that they would affect the Registrar's decision whether to grant registration. It is not up to the Applicant to decide whether the information is or is not important enough to be revealed. There is a clear requirement to reveal all information requested and where, as here, this is not done an applicant is not entitled to registration.

In the result, the Tribunal finds that the past conduct of the Applicant affords reasonable grounds to believe that the Applicant will not carry on business in accordance with the law and with integrity and honesty. It also finds that the Applicant is disentitled to registration by reason of a false statement in his application for registration under the Act

ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

_____
Douglas R. Wallace, Vice-Chair

Released: October 22, 2010

The hearing may also be available on QuickLaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ALEXANDRE JOSE ALVES

APPEAL FROM A DECISION OF THE REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c. 30, SCHEDULE C

TO REVOKE A REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: ANTONIO AZEVEDO, Counsel, representing the Applicant, Alexandre Alves

KELVIN KUCEY, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATES OF HEARING: September 15, 16, 17, 2010
January 10, 11, 13, 14, 31, 2011 Toronto

DECISION AND ORDER

This is an appeal by the Applicant, Mr. Alexandre Alves, to the Licence Appeal Tribunal ("Tribunal") from a decision by the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Act") to revoke Mr. Alves' registration as a broker.

FACTS

Mr. Alves began working as a teller at a bank during his last year in high school. By the time he was attending University, he had risen through the rank of Head Teller to become the "Officer in Charge" on the evenings and Saturdays when he worked, having access to the vaults and responsibility for the tellers and their cash. The bank paid part of his tuition and when he graduated, he joined the bank full time. Although his family was in the real estate business and his uncle owned a brokerage that employed his father and other members of his extended family, Mr. Alves did not consider a career in

real estate. He was recruited by the mortgage brokerage subsidiary of the bank and became a mortgage broker. He worked there for five or six years before joining a smaller company, which will be referred to as “Premiere”, in early 2007. In late 2006 and early 2007 he also formed his own mortgage brokerage company. This was done primarily to “grandfather” his business under the new mortgage broker legislation and was done with the knowledge of Premiere. Mr. Alves’ mortgage brokerage did do some mortgage transactions which were of a different nature than the bulk of Premiere’s business.

In 2003, while employed at the mortgage subsidiary, Mr. Alves also became registered under the Act as a real estate salesperson, in his words, “to see what the business was like”. He joined his uncle’s firm and at the earliest opportunity, in 2005, he raised his designation under the Act from real estate salesperson to associate broker. At that time, he was dividing his time evenly between real estate and the mortgage brokerage business and his income, too, was split between both endeavours. According to people who have worked with Mr. Alves, or have managed him, he was and is a hard worker, well liked and respected within both the real estate and mortgage brokerage businesses. At some point, his uncle told Mr. Alves of his plan that Mr. Alves might ultimately become the broker of record for the family business. A broker of record is the manager of the firm, having responsibility for the business and for ensuring that both the business and the employees are operating in accordance with the Act. In July, 2006, when his uncle planned an extended trip, Mr. Alves was made broker of record for the company, becoming the manager of a business that generates approximately $1 million dollars a year in commissions and employs about 26 people, including his father. He continued working as a mortgage broker both with Premiere and with his own business. He was 29 years old.

Beneath this impressive career trajectory, problems were beginning to emerge – problems that Mr. Alves did not fully disclose to his family or old friends. In 2003 and 2004, Mr. Alves began “experimenting”, as he put it, with cocaine. He took the drug 10 to 15 times over a period of 6 or 7 months. As he testified, he did not buy cocaine but when it was put in front of him, he would use it.

On a day after he had taken cocaine, he had what was later diagnosed as an anxiety attack. The attacks persisted and grew severe enough that he went to a hospital emergency ward. At first, he resisted treatment with the anti-depressant he was prescribed but ultimately he did take it for 6 months or so until, in his words, he learned to control the disorder. He testified that when he is in a busy, noisy location and among strangers he will sometimes freeze, become sweaty and feel the urge to run to a familiar place. He has been told he suffers from chronic anxiety disorder and that this condition will be with him for the rest of his life. Because of the close association in time, he blames his cocaine use for the disorder. There was some evidence given that cocaine may be a trigger for anxiety attacks but Mr. Alves testified that he has been advised that the two are unconnected. Although he testified that he is now dealing with the disorder without drugs, it did emerge during the hearing that he carries a very strong sedative

with him for use if the situation becomes unmanageable. The Tribunal accepts the advice of his counsel that he was not taking the sedative at the time of his testimony.

In 2005, when Mr. Alves had to renew his registration as a real estate salesperson, he faced a dilemma. At that time, he was earning about half his income from his employment as a mortgage broker and was spending about half his time in that role. However, he was unsure if he could be both a mortgage broker and a real estate salesperson under the Act. Some of his friends had suggested there would be a problem but he felt that both activities were permitted and in any event, he wasn't hurting anyone. So he, in his words, "was lazy" and "took the easy way out". He falsified his renewal application by answering "No" to the question: "Are you, or will you be, engaged or employed in any other business, occupation or profession?" On this form, above the signature space, there is printed in bold letters: "Warning – It is an offence to knowingly provide false information on this application." The application must be signed by the applicant and certified by the broker of record for the employing brokerage, in this case Mr. Alves' uncle. To obtain his uncle's signature, Mr. Alves folded the form open at the signature page and presented it for signature. His uncle did not ask to see the whole form because he trusted Mr. Alves. When asked why he did not ask his uncle if he could be both a mortgage broker and a real estate salesperson at the same time, Mr. Alves was at a loss to answer. He finally suggested, "sometimes I think I know it all".

Some three months later, Mr. Alves applied to upgrade his registration from salesperson to real estate broker. The step from salesperson to broker can be a big one. In his uncle's firm, there are only four brokers, including Mr. Alves and his uncle; the rest of the realtors are registered as real estate salespersons. Again, Mr. Alves had the opportunity to ask his uncle, his knowledgeable friends or the Real Estate Council of Ontario ("RECO"), the organisation charged with enforcing the Act, whether he could legitimately be both a real estate broker and a mortgage broker. Again, he chose to falsify his application form rather than learn the truth.

In the summer of 2006, Mr. Alves met a young single mother who shall be referred to as "L.R.". This was just as Mr. Alves was ending his use of the prescription medicine he was taking for his anxiety and just as he was assuming the responsibilities as broker of record for his uncle's firm. Mr. Alves describes L.R. as a tough woman from a tough part of town. The two were attracted to each other and he described the relationship as a love/hate one; when they were together, they fought and when they were apart they wanted to be together. A psychiatrist who testified on his behalf characterised the relationship as "toxic".

In April, 2007, Mr. Alves and L.R. went to a wedding together. A fight started between the couple and continued off and on both at the wedding and in the car after. It culminated in Mr. Alves slapping L.R. and shoving her head into the dashboard and the window, causing her nose to bleed. Despite this, Mr. Alves and L.R. renewed the relationship. Again a fight developed and this time, Mr. Alves forced L.R. into his apartment, held her against her will and vandalised her property. Using the SIM card

from her cell phone, which he had destroyed, he sent a vulgar and angry text to a number of people in her address book, including L.R.'s boss. The boss, concerned about her safety, reported the incident to the police. Mr. Alves was arrested on July 26, 2007 at work and placed on strict bail conditions. He was obliged to live with his parents, accept a curfew and a restraining order to prevent him from approaching L.R.

Ten days following his arrest, he applied to renew his registration as a real estate broker. At this time, he was still acting as broker of record for his uncle's firm and he had learned that it was acceptable to conduct business as a mortgage broker while registered. He truthfully answered the question about his other employment. However, he answered no to the question: "Are there currently any charges pending or have you been found guilty, pleaded guilty to, or been convicted of an offence under any law?" In explanation, Mr. Alves testified that he was in complete disarray after the arrest. He was surprised at how seriously these events were being taken and hoped the charges would go away. He also feared losing his registration. Not only did he falsely answer the question, he certified his own falsehood as broker of record. It is a requirement under Regulation 597/05 of the Act that changes to the information contained in an application for registration must be reported to RECO within five days. Mr. Alves failed to meet this requirement at any time in the period at issue, from 2005 to 2008.

In March, 2008 almost a year after his arrest, Mr. Alves falsely denied any criminal charges against him in his application to the Superintendent of Financial Services under the *Mortgage Brokerages, Lenders and Administrators Act, 2006* to renew his licence as a Principal Broker.

There was a plea bargain and he was ultimately convicted, in May, 2008, of three offences under the *Criminal Code*: assault causing bodily harm, mischief and harassment. L.R. gave a victim impact statement of how Mr. Alves' conduct had affected her, leaving her fearful and anxious. Mr. Alves was given a conditional sentence of 60 days of "house arrest" with permission to work, a restraining order vis à vis L.R., a probation order for 22 months, an order to complete a spousal abuse intervention program and to perform 50 hours of community service. Mr. Alves has completed the conditions of his sentence. He testified a number of times that he just wanted to get this incident behind him and get on with his life. At the proceedings, the Court understood that Mr. Alves would complete the spousal abuse prevention plan in lieu of continuing to see the psychiatrist who had interviewed him in the months leading up to the trial and who had prepared a report on his behalf. However, in a statement to the Court, Mr. Alves advised that he would continue with the counselling; he did not, nor was it a condition of his sentence.

Following his conviction, the Superintendent of Financial Services issued a Notice of Proposal to refuse to issue a mortgage broker's licence to Mr. Alves. Following a hearing by the Financial Services Tribunal in September, 2008, Mr. Alves' licence was refused on the grounds that his conviction of three offences under the *Criminal Code* and his false statement on his application form gave reasonable grounds to believe that Mr. Alves was unsuitable to be licensed as a mortgage broker. Mr. Alves re-applied for

a license as a mortgage agent and was advised in December, 2010 that a license as mortgage agent will be forthcoming. A mortgage agent designation under the *Mortgage Brokerages, Lenders and Administrators Act, 2006* is a junior designation to that of mortgage broker.

The Financial Services Tribunal forwarded a copy of its decision to RECO. It was only then, in the fall of 2008, that RECO learned of the criminal charges and conviction. In the fall of 2008, after a phone conversation with a representative of RECO, Mr. Alves disclosed his criminal record. RECO began an investigation which resulted in the decision by the Registrar to propose the revocation of Mr. Alves' registration as a real estate broker in February, 2010.

The psychiatrist who had interviewed Mr. Alves in the months leading up to Mr. Alves' criminal conviction and who had prepared a report on his behalf gave evidence. His testimony was that much of Mr. Alves' conduct in the period of 2006 to 2007 can be attributed to his toxic relationship with L.R. The psychiatrist's evidence was of little assistance. He met with Mr. Alves in only three hour long sessions leading up to the preparation of his report. Thereafter, the psychiatrist met with Mr. Alves only briefly, when Mr. Alves requested follow up letters or reports. Moreover, the doctor's evidence does not explain the cocaine use or the false statements that Mr. Alves gave on his applications to RECO in the time before his relationship with L.R.

Eight character witnesses testified on Mr. Alves' behalf and the Tribunal found their testimony to be credible. These witnesses portrayed Mr. Alves as, in the words of two of them, a "go-to guy" in his circle of family and friends and at work. Growing up, he was the reliable person who could be counted on to do errands, pick people up and to protect them and look after them. At work, he is hard working and respected. He frequently mentors junior associates and his friends turn to him for advice. The various character witnesses testified that they were "shocked" and "surprised" when, following his criminal charges, Mr. Alves told them of his criminal conduct and the false statements he had made to RECO and to the Superintendent of Financial Services. Witnesses re-iterated that "this is not Alex," meaning Mr. Alves, or "this is not the Alex I know". None of the witnesses condoned Mr. Alves' behaviour. One witness stated that he was disturbed by new information he learned during the cross-examination and would not necessarily want to associate with a person who had done these things. However, he remains friends with Mr. Alves because Mr. Alves has never done anything to him to cause him to reconsider the relationship. Only one of these friends and family members had met L.R. and that one meeting was brief and social in nature. Several witnesses testified that Mr. Alves is in a new and stable relationship with a woman to whom he is engaged. His fiancée also gave evidence.

Several witnesses testified that they had retained Mr. Alves as their real estate agent and they were pleased and impressed with the service he offered. There is no evidence of any complaint against Mr. Alves arising from the conduct of his real estate business.

Among these character witnesses are three whose testimony was particularly helpful. The first of these was Mr. Donald MacVicar, co-founder and part owner of Premiere, the mortgage brokerage Mr. Alves joined on leaving the bank. It was Mr. MacVicar who recruited Mr. Alves into the mortgage brokerage business initially and Mr. Alves was one of the first recruits at Premiere when that company expanded into Ontario. As Mr. Alves' sales manager at the bank and as the head of Premiere, Mr. MacVicar believes he got to know Mr. Alves very well both at work and in out-of-work settings. Mr. MacVicar has met Mr. Alves' father, brother and a number of his cousins. He describes the family as "very tight" and Mr. Alves as "very well brought up". He believes that Mr. Alves was "very, very respected" at the bank and at Premiere.

Mr. MacVicar learned from Mr. Alves of his criminal charges about three years ago and found that behaviour not in line with the character of Mr. Alves as he knew it. Neither were the falsehoods Mr. Alves told on his various application forms to both RECO and the Superintendent of Financial Services. Mr. MacVicar believes that the false statement to the Superintendent of Financial Services may have been a misunderstanding as this was a new form, not well understood in the industry.

Mr. MacVicar told Mr. Alves that he would stand by him in his troubles and he is preparing to retain Mr. Alves as a mortgage agent as soon as his licence is issued. Like all mortgage agents and brokers, Mr. Alves would be an independent contractor working for Premiere. However, Mr. MacVicar noted that he does invest in his mortgage brokers and agents with technology, coaching and training. Moreover, it is his reputation as an owner of Premiere that is at stake when he retains a mortgage agent or broker. Mr. MacVicar testified that he does not question Mr. Alves' integrity.

Mr. MacVicar's evidence was that he had seen the impact that Mr. Alves' conduct has had on him and the remorse that Mr. Alves has demonstrated. Mr. MacVicar believes that life experience changes people and it has changed Mr. Alves "profoundly" over the past two to three years. Mr. MacVicar describes Mr. Alves as a different person because of what has occurred. Mr. Alves had taken his business and his success for granted but that is no longer the case. Mr. Alves has new priorities; his business and his relationships are his focus. Mr. MacVicar stated that he had always found Mr. Alves to be mature for his age and he believes that Mr. Alves is now significantly more mature and that this shows in every aspect of his life. He concludes that Mr. Alves has learned "over and over again that what he did was wrong". Mr. Alves understands that from now on, his compliance will have to be "clean". He describes Mr. Alves as a great mortgage broker and a great human being.

Mr. Alves' uncle, the owner and broker of record at the family brokerage where he works, also gave evidence. Mr. Manuel Alves is soon to be 73 years old and has been in the real estate business in Canada since 1966. He has not had a complaint registered against him with RECO in that time. Mr. M. Alves has worked from the outset with two of his brothers, including Mr. Alves' father. The business is small and depends on "good word" rather than advertising. When Mr. M. Alves heard from Mr. Alves of his criminal conduct and his falsehoods to RECO and the Superintendent of Financial

Services, he thought it could not be possible. He testified that this was a different person than the one he thought he knew. There is no history of domestic violence in the Alves family, which is large and close knit. Mr. M. Alves believes that this misconduct occurred because Mr. Alves was young and believed he had the whole world in his hands. Now, according to Mr. M. Alves, he is more mature. Now, when he must make a decision, Mr. Alves pauses to consider the consequences. He wants to be correct when he makes a decision.

When Mr. M. Alves was asked whether Mr. Alves sought his advice on matters, Mr. M. Alves testified that it is more usually he who goes to Mr. Alves for advice and translation because English is not Mr. M. Alves' first language, because Mr. Alves has a college education and because he trusts Mr. Alves. Mr. Alves continues to work in his uncle's real estate business and Mr. M. Alves testified that Mr. Alves remains a candidate to head the business in time. Whether that happens or not depends primarily on whether one of Mr. M. Alves' children decides to enter the business. Mr. Alves testified that the real estate business was a "mad world" with intense competition. It is a high pressure business. In this environment, Mr. Alves is well liked in the firm and is bringing in new business.

Mr. M. Alves does not condone Mr. Alves' behaviour and says he was betrayed by Mr. Alves presenting him with a form that contained a deliberate falsehood. Mr. M. Alves also testified that the requirement to report changes in financial or other conditions to RECO within five days was well understood in the industry and that he tells everyone in his business about this requirement. Despite Mr. Alves' conduct, Mr. M. Alves would bet his life that Mr. Alves would never deceive the public for money. He continues to trust Mr. Alves "one hundred per cent".

A man who will be referred to as Mr. "A.M." to protect his privacy, also gave evidence. He is a contemporary of Mr. Alves and has known him since kindergarten. The two men were at high school together for three years and have remained close, talking a few times a week and socialising regularly. Mr. A.M. currently holds a responsible management position in local government. Mr. A.M. testified that he has been aware for some time that Mr. Alves suffers from an anxiety disorder and that occasionally he must leave a restaurant or other crowded place. Mr. A.M. believes that this condition has improved and is bothering Mr. Alves less. Mr. A.M. has used Mr. Alves twice as a real estate agent and found him very professional. He felt that Mr. Alves displayed "a lot of integrity" during the transactions. Among other things, Mr. Alves was adamant that Mr. A.M. and his family should not buy a home unless they were fully comfortable with it.

Mr. Alves told Mr. A.M. of the criminal charges and his false answers after he was released from arrest. At some point, Mr. Alves told him of his cocaine use, with apparent embarrassment. Mr. A.M. was shocked by the criminal and other misconduct and felt this was completely out of character for Mr. Alves. He said that no one in Mr. Alves' circle of friends saw this coming. Within that circle, Mr. Alves does not have the reputation as a habitual liar nor is Mr. A.M. aware that Mr. Alves has ever hit another

woman. Mr. A.M. is at a loss to explain what happened. He does not condone the behaviour and concludes that Mr. Alves made bad decisions and big mistakes but that his entire life should not be defined by this period. He described Mr. Alves as disappointed by what he had done and Mr. Alves appeared to Mr. A.M. to accept responsibility for his actions.

Mr. A.M. describes Mr. Alves as a likeable and low key man with a wide circle of friends. He also describes Mr. Alves as a reliable friend and one he completely trusts. Mr. A.M. testified that he would give Mr. Alves his life savings to hold. Mr. A.M. recounted an event which occurred when he was 16 or 17 years old. At that time, the main social activity within his circle of friends was to go to parties at the homes of friends. On the night of one such party, which Mr. A.M. described as a major social occasion, Mr. A.M. was dressing for the event when he found himself suddenly struck down by a herniated disc in his neck from a prior neck injury. He was on the floor, partially dressed and alone. He was able to phone Mr. Alves who had just arrived at the party. Mr. A.M. felt that many of his friends would have said something like, " . . .that's tough, let me know how it works out for you." Mr. Alves, on the other hand, left the party, came back to Mr. A.M.'s home, got him dressed, drove him to the hospital and spent Friday evening in the hospital with him. Mr. A.M. insisted that Mr. Alves should be judged on his lifetime reputation not only on the years in issue. Mr. A.M. concludes that Mr. Alves has paid his debt, that he has taken ownership of his actions and that in the process he has matured.

DECISION

Under the Act, a qualified applicant is entitled to be registered to sell real estate unless one of the conditions of section 10 of the Act applies. The two subparagraphs of that section which are relevant in this case are subparagraphs 10(1)(a)(ii) and 10(1)(a)(iii) which read:

> (ii) the past conduct of the applicant . . . . affords reasonable grounds for the belief that the applicant will not carry on business in accordance with the law and with integrity and honesty, or
>
> (iii) the applicant . . . . makes a false statement . . . . in an application for registration or renewal of registration.

Section 13 of the Act provides:

> 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.
>
> 13(2) Subject to section 14, the registrar may,
>
> (a) approve the registration or renewal of registration on such conditions as he or she considers appropriate: and
> (b) at any time apply to a registration such conditions as he or she considers appropriate.

Section 14 of the Act provides for an appeal to the Tribunal from the decision of the Registrar under section 13 and subsection 14(5) provides:

> (5) If a hearing is requested, the Tribunal shall hold a 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.

There are two issues before this Tribunal. Do either of subparagraphs 10(1)(a)(ii) or 10(1)(a)(iii) apply in this case and if so, what should the consequences be to Mr. Alves?

There appears to be no dispute that Mr. Alves has breached subparagraph 10(1)(a)(iii). Mr. Alves made several false statements on his applications for renewal ranging over a period of three years from 2005 to 2008. The false statements were made knowingly and with the intent to deceive RECO. RECO relies on the honesty of registrants in self-reporting and it is made clear on the form itself and in the Act that a false statement on an application is a serious matter. The fact that Mr. Alves did not report changes to his status as required under subsection 34(1) of Regulation 597/05 of the Act underscores his intent to mislead RECO.

Mr. Kucey, counsel for the Registrar, argues that this is the end of the matter. In his submission, the wording of subparagraph (10)(1)(a)(iii) is tantamount to a strict liability offence and, on making a finding that this subparagraph applies, the Tribunal has no discretion to do anything other than revoke Mr. Alves' registration. In support of this proposition, Mr. Kucey cited the Divisional Court decision in *Re: Registrar of Alcohol and Gaming v. Hosseini-rad,* Court File No.: 29/03, dated March 23, 2004. In the *Hosseini-rad* case, the Court considered the language of subsection 6(2)(e) read in conjunction with subsection 10(2) of the *Liquor Licence Act,* R.S.O. 1990, Ch. L.19. The relevant sections of the Liquor Licence Act read as follows:

> 6(2) Subject to subsection (4) or (4.1), an applicant is entitled to be issued a licence to sell liquor except if …..
>
> (e) the applicant or an employee or agent of the applicant makes a false statement or provides false information in an application under this Act
>
> 10(2) Subject to subsection (5), an applicant for a licence to deliver liquor is entitled to the issuance of a licence unless the applicant is disentitled for any ground under clauses 6(2)(a) to (g).
>
> 10(3) An application for a licence shall be considered by the Registrar and the Registrar may,
>
> (a) approve the application if the applicant is not disentitled under subsection (2); or
>
> (b) issue a proposal to refuse to issue the licence.

In considering whether the Liquor Control Board of Ontario erred in granting a licence subject to terms and conditions where the applicant had made a false statement on his application, the Court concluded:

> We are of the view that once the Board has made a finding under s. 6(2)(e) that the respondent made a false statement on his application, there is no discretion in the Board

> to grant a licence, with or without conditions. Nowhere in the statutory or regulatory framework is such a discretion conferred. On the contrary, s.10(2) makes the determination absolute. Such an applicant is disentitled to a licence.

Mr. Kucey also cited two decisions of this Tribunal, *Re: Shiwsankar,* [2009] O.L.A.T.D. No. 360 and *Re: Raco*, [2010] O.L.A.T.D. No. 255, wherein the Tribunal determined that it did have some discretion regarding whether to revoke a registration or not in the case where a false statement is made on an application. Mr. Kucey argued that the Tribunal in these cases was in error on this point.

Mr. Kucey acknowledged that the Registrar does, in practice, exercise discretion in electing whether or not to proceed with a proposal to revoke a registration on the grounds of a false statement. However, Mr. Kucey argued that this was a "discretion of first instance" meaning that the Registrar, as an investigator, had the discretion of whether or not to act on the results of his investigation. Once the Registrar has elected to proceed with a proposal to revoke, Mr. Kucey argues, the discretion of first instance is extinguished and no discretion exists in the Tribunal.

Mr. Azevedo, counsel for Mr. Alves, argued that section 10 of the Act must be read in conjunction with section 13. Section 13 contains discretionary language which permits the Registrar to either revoke or suspend a registration or to impose terms and conditions on a registration and entitles the Registrar to form an opinion as to whether section 10 disentitles an applicant to registration, in Mr. Azevedo's submission.

Mr. Azevedo also submits that interpreting subparagraph (10(1)(a)(iii) as a matter that removes the discretion from the Registrar, and by extension the Tribunal, is inconsistent with other provisions of the Act. For example, Mr. Azevedo cited several decisions of the discipline committee established under section 21 of the Act to hear cases of alleged breaches of RECO's code of ethics. In these cases, registrants were subjected to fines and the requirement to take educational courses for serious breaches of the code of ethics, including the defrauding of customers. In Mr. Azevedo's submission, it was so anomalous that one registrant would face revocation for a false statement made on an application and another would face a fine and an educational requirement for defrauding his customers that this result could not have been the intent of the legislators. Mr. Azevedo argued that where a person's livelihood is at stake, caution must be used in interpreting a provision of the Act as creating something akin to a strict liability offence.

The question of how to interpret subparagraph 10(1)(a)(iii) is an important one, not only for this case but because a number of statutes that the Tribunal deals with involve similar wording. The Tribunal is grateful to counsel for their assistance.

The argument that the Registrar has some form of "discretion of first instance" is not a persuasive one. The office of the Registrar, like the Tribunal, is a creation of statute and has no inherent jurisdiction. Either the Registrar has a power under the Act or some other statute or he does not. To determine what discretion the Registrar, and by

extension the Tribunal, has in dealing with section 10, it is necessary to read section 10 in conjunction with section 13.

Unlike the other provision of section 10 that is relevant to this case, subparagraph 10(1)(a)(iii) is not a matter of opinion but of fact. The language of this subparagraph appears to remove opinion or discretion in the determination of whether the subparagraph has been breached. There is a body of law that permits some defences to strict liability statutory provisions but it is not necessary to consider these cases here as Mr. Alves concedes that he intended to mislead the Registrar with his false statements. Subsection 13(1) gives the Registrar four options if he concludes that a Registrant is not entitled to registration under section 10 of the Act. He may refuse to register; he may suspend a registration; he may revoke a registration or he may refuse to renew a registration. Section 13(1) applies to the entirety of section 10. No explicit restriction on the Registrar's discretion exists if a finding of fact is made under subparagraph 10(1)(a)(iii).

Subsection 13(2) of the Act also gives the Registrar the authority to impose conditions on a registration. It seems clear in reading the two sections together that the Registrar may both suspend a registrant and impose conditions on the registration. Less clear is whether the Registrar might impose conditions under subsection 13(2) in lieu of a suspension, revocation or refusal to issue or renew a registration under subsection 13(1). This question was not canvassed during argument and for the reasons noted below, it is not necessary to decide the point in this case.

The Board under the *Liquor Licence Act* does not have the same discretion that the Registrar is granted under section 13(1) of the Act. Under section 10(3) of the *Liquor Licence Act,* the Board has only two choices: to approve an application unless the applicant is not entitled under section 6 or to deny the application. The case of *Hosseini-rad* may be distinguished from the present one on that ground.

The next question is whether Mr. Alves is disentitled to registration on the grounds of subparagraph 10(1)(a)(ii), that is, does Mr. Alves' past conduct afford reasonable grounds for the belief that he will not carry on business in accordance with the law and with integrity and honesty.

There are three areas of concern. The first relates to Mr. Alves cocaine use. This is clearly an illegal act and, although it does not appear to have impinged on his ability to conduct his business, the Tribunal has repeatedly held that it is the lack of regard for the law and the lack of personal integrity that are relevant, not whether the illegal behaviour involved the regulated business. In this case, Mr. Alves does appear to have both suffered from his cocaine use and to have repented of it. He believes, and there was some evidence to suggest, that the cocaine use was a contributing factor in the triggering of his chronic anxiety disorder. Mr. Alves appeared to both the Tribunal and to Mr. A.M., his friend since childhood, to be embarrassed by his cocaine use. There is no evidence that Mr. Alves has taken cocaine since his first anxiety attack in 2004 and there appears to be little likelihood of re-offence. The cocaine use, taken on its own and

considered in light of Mr. Alves' determination not to take the drug again, does not in itself represent sufficient grounds to revoke Mr. Alves' registration.

The second area of concern is Mr. Alves' conduct during his relationship with L.R. His conduct was clearly inexcusable. Mr. Kucey sought to portray Mr. Alves as unremorseful and pointed to a statement he made during the relationship in which he held L.R. responsible for his conduct. However, the various character witnesses, in particular Mr. MacVicar and Mr. A.M., testified that Mr. Alves has repeated accepted responsibility for and expressed remorse about his conduct, as he did during the hearing. Mr. A.M. is correct in noting that Mr. Alves has paid his debt to society. He has successfully completed a course in avoiding domestic violence. He is now in a stable relationship. Without in any way wishing to condone Mr. Alves' conduct, he appears at little risk for re-offence and this ground, on its own, would not constitute grounds for revocation.

The third area of concern is Mr. Alves' repeated false statements on his application forms, both to RECO and to the Superintendent of Financial Services. This is not only a separate ground for sanction under section 10 but also relates to the test in subparagraph (10)(1)(a)(ii). Mr. Azevedo argued that Mr. Alves had demonstrated a form of "institutional lack of integrity", meaning he had given a lesser weight to the importance of integrity to an organisation like RECO than he would have to an individual. This argument does not persuade. Mr. Alves worked in a position of responsibility in a bank from the time he was a student. He would have understood the importance of truthful dealings with an institution. As well, Mr. Alves did not deceive the Registrar alone. He wilfully deceived his uncle, who trusted and relied on him. He also involved his uncle in his deception of RECO by permitting him to sign a false application. When asked why he did this, Mr. Alves was unsure. He acknowledged that he had "taken the easy way out."

The pattern of "taking the easy way out" emerges repeatedly in Mr. Alves' conduct. Mr. Kucey attempted to portray Mr. Alves as a man who carefully controlled the impressions that others had of him, skilfully hiding his true nature from them. There is no convincing evidence of this. Mr. Kucey pointed to the fact that Mr. Alves did not tell his friends of his misconduct or permit them to witness the dysfunctional nature of his relationship with L.R. but the explanation for that appears to be simpler. By all accounts, Mr. Alves was raised to understand the difference between right and wrong. He would have known that his friends would not condone his criminal conduct or his lying on the application forms, as indeed they did not. So he avoided confrontation by not telling them until after his criminal charge. He took the easy way out. When faced with the possibility that he would not be able to both deal in real estate and broker mortgages, he again took the easy way out and lied. Again, following his criminal charge and conviction, he took the easy way out by failing to disclose his criminal charge and conviction to either RECO or the Superintendent of Financial Services.

One of the troubling aspects of Mr. Alves' conduct is that to this day, he can describe his misconduct but he cannot explain it. He has no insight into what caused him to

behave in ways that have shocked his family and friends. What he wants now is simply to put these incidents behind him and move on. His friends appear willing to comply. However, it seems clear that once again, Mr. Alves seeks the easy way out. He feels genuine remorse and regret for what has happened. The Tribunal was impressed with the evidence of two men, Mr. MacVicar and Mr. M. Alves, who are prepared to put their own professional reputations on the line by continuing not only to employ Mr. Alves but to trust him implicitly. These men testify that Mr. Alves has matured and changed "profoundly" as a result of what has happened. However, there are aspects of his personality that in the past have manifested themselves in unacceptable behaviour. Until Mr. Alves truly understands why he, a man who others look up to and respect, behaved in such uncharacteristic ways, he remains at risk of falling short of the conduct expected under section 10 of the Act.

In the recent Divisional Court decision in *Lapcevich v. Registrar, Real Estate & Business Brokers Act,* 2010 ONSC 1145, the Court found that the Tribunal had to make a necessary threshold determination that one of the provisions of section 10 of the Act applies in order to have the jurisdiction to do anything other than reject the Registrar's Proposal. However, having made a determination that one of the grounds set out in section 10 applies, the Court appears to say that the Tribunal has the jurisdiction to revoke a registration or to impose conditions.

As noted above, there are clear violations of subparagraph 10(1)(a)(iii). Additionally, taking the totality of Mr. Alves' criminal conduct and his repeated falsehoods on his applications combined with Mr. Alves' lack of insight into his behaviour, there are reasonable grounds for the belief that Mr. Alves will not meet the standard in subparagraph 10(1)(a)(ii). Thus the threshold determination identified in the *Lapcevich* case is met. However, it does not follow that revocation is the only, or indeed the appropriate, remedy. The Tribunal notes that the character witnesses of Mr. Alves, many of whom have amassed track records of impressive accomplishments, testified that Mr. Alves has a long standing reputation as a reliable, mature man of a protective nature. There has been no criticism of his real estate practice. Two men, who impressed the Tribunal with their credibility, stand ready to employ Mr. Alves. As well, Mr. Alves has, we are told, matured considerably and changed profoundly as a result of facing the consequences of his misconduct.

The Tribunal is of the view that terms and conditions may be constructed that will minimise the risk of Mr. Alves' conduct falling short of the standard set out in subparagraph (10)(1)(a)(ii) in the future. These terms and conditions, if complied with, will address the concern that Mr. Alves will not conduct his business in accordance with the law and with integrity and honesty based on his past performance. It must be emphasised that without the evidence Mr. Alves' past conduct in the years leading up to 2004 and the years following 2008, this conclusion would not have been possible. As Mr. A.M. testified, we cannot judge Mr. Alves on the basis of these troubled and troubling years alone. Neither can the Tribunal afford to dismiss them.
Mr. Alves has indicated his willingness to undergo counselling to attempt to understand what has caused him to behave in criminal, deceitful and injurious ways and has

consented to this as a condition of his continuing registration. The Tribunal believes that this is an important step. Mr. Alves agreed to pursue counselling for a period of two years. He will have to find a counsellor who is appropriate to his needs and he agreed that the psychiatrist who testified on his behalf is not an appropriate counsellor.

While Mr. Alves is in counselling, it is important that he work in an environment where people know of his past and can appropriately scrutinise his conduct and offer assistance as needed. It will be a term of his continued registration that Mr. Alves not change employers for the next two years without the consent of the Registrar. This will apply both to his work as a realtor for Mr. M. Alves and to his work as a mortgage agent for Premiere. It is also important that Mr. Alves not take on too many responsibilities while he is confronting his past and learning from it. Therefore, it will be a condition of his registration that he not apply to be a broker of record for two years.

Mr. Alves will also require ongoing education. One element that appeared during the hearing was Mr. Alves' incomplete understanding of what was required of him in terms of reporting. It will be a term of Mr. Alves' registration that he successfully complete two RECO approved courses a year for the next two years in areas relating to the ethical conduct and management of a real estate practice. In reviewing the decisions of the Discipline Committee of RECO, the Tribunal notes that Discipline Committee refers to a "Real Property Law" classroom course offered by the Ontario Real Estate College. This would appear to be an appropriate course for Mr. Alves to complete.

The above conditions address the concerns under subparagraph 10(1)(a)(ii) of the Act but there remains the issue of Mr. Alves' pattern of falsehoods to RECO. The cocaine use and the egregious behaviour towards L.R. are unlikely to be repeated for the reasons noted above. However, it is critical that Mr. Alves understand how serious his deceptions of the Registrar are. Although Mr. Alves appears remorseful, there is no tangible evidence of changed behaviour as regards future compliance with reporting requirements. Some reasonable period of suspension is appropriate. In determining what a reasonable suspension period is, the Tribunal considered a number of factors, including Mr. Alves' reputation for reliability and the fact that character witnesses found him to be a man of integrity. The Tribunal believes that a suspension of three months will be sufficient to impress on Mr. Alves the seriousness with which the Tribunal regards attempts to mislead the RECO under the Act.

ORDER

Accordingly the Tribunal, acting pursuant to subsection 14(5) of the Act, hereby directs the Registrar not to carry out his Proposal dated February 18, 2010 to revoke the registration of Alexandre Alves. The registration of Mr. Alves will be subject to the following terms and conditions.

1. The Registration of Mr. Alves will be suspended for a period of three calendar months, beginning March 1, 2011.

2. Mr. Alves will seek qualified professional counselling to help him understand and manage the factors that have caused him to conduct himself in ways that violate the standard of conduct set in section 10 of the Act. He will remain in counselling for two years. Mr. Alves will have until June 30, 2011 to locate a suitable counsellor and will advise the Registrar when his counselling begins. Thereafter, if Mr. Alves changes counsellors, he must advise the Registrar.

3. For two years following the conclusion of the suspension of his registration, Mr. Alves will not join any real estate brokerage other than the one currently headed by Mr. M. Alves or any mortgage brokerage other than the one currently headed by Mr. MacVicar without the written consent of the Registrar. A copy of this Order shall be sent by the Registrar to both Mr. M. Alves and Mr. MacVicar.

4. Mr. Alves will not apply to be a broker of record for a period of two years following the conclusion of the suspension of his registration.

5. In each of the calendar years 2011 and 2012, Mr. Alves will successfully complete two courses that are authorised by RECO and that address issues of regulatory compliance and the ethical conduct of the real estate brokerage business. One of these courses will be the Ontario Real Estate College's "Real Property Law" classroom course. One or more of these courses may be taken during the suspension of Mr. Alves' registration. Mr. Alves will provide RECO with confirmation of his successful completion of these courses by the end of each calendar year.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice-Chair

Released: February 14, 2011

This decision may be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

GORDON SIMPSON AND 1567913 ONTARIO LTD. c.o.b. as DIVERSIFIED DEVELOPMENT REALTY – Pre-hearing

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c. 30, Sch. C

TO REVOKE REGISTRATIONS

TRIBUNAL: DAVID B. CARYLL, Member

APPEARANCES: MICHAEL WILCHESKY, Counsel, representing Gordon Simpson and 1567913 Ontario Ltd. c.o.b. as Diversified Development Realty (the "Applicants")

ROBERT MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar")

DATE OF PRE-HEARING: February 28, 2011 Toronto

ORDER

A pre-hearing was held in this matter on February 28, 2011, before this Tribunal, in the presence of Michael Wilchesky, Counsel for the Applicants, and Robert Maxwell, Counsel for the Registrar.

The parties discussed the need for inspection of the Applicants' books and records by the Registrar, and a date was agreed to for the inspection. The Applicants were informed of the risk of immediate suspension of their licences for failure to comply.

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicants and the Registrar.

2. The hearing is scheduled to take place at 9:30 a.m. on **Monday, May 30, 2011 through Thursday, June 2, 2011, inclusive**, at the Travelodge London South, London West Room, 800 Exeter Road, London, Ontario, and will continue on **Monday, June 6, 2011 through Wednesday, June 8, 2011, inclusive, and Friday, June 10, 2011**, at the Tribunal's Chambers, 1 St. Clair Avenue West,

12th Floor, Toronto, Ontario. The hearing dates are peremptory on the Applicants.

3. The issues to be addressed at the hearing are as set out in the Registrar's Notice of Proposal dated August 19, 2010, to revoke the registrations of the Applicants.

4. The Applicants shall make the appropriate records and documents available for inspection by the Registrar on **Wednesday, March 30, 2011**, during normal business hours.

5. The Registrar may review, or make arrangements for another broker to review, any business transactions conducted by the Applicants.

6. If the appeal is resolved before the dates scheduled for the hearing in this matter, all parties shall advise the Tribunal in writing immediately, and the hearing will then be cancelled. If the Applicants are withdrawing their appeals, the Applicants' written notice should clearly state that the appeal is being withdrawn and a copy of that notice should be sent to the Registrar as well as to the Tribunal.

7. All parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Tribunal's Rules of Practice.

8. Any party seeking an adjournment must comply with the practice direction as set out in Rule 12 of the Tribunal's Rules of Practice.

9. The service and filing of summons shall be in accordance with Rule 4 of the Tribunal's Rules of Practice. In particular, such a request should be made in a timely fashion and should include:

   a. the name and contact information of the person being served;

   b. the documents or things the person is required to bring to the hearing; and

   c. the reason for wanting the person to attend the hearing.

LICENCE APPEAL TRIBUNAL

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David B. Caryll, Member

RELEASED: March 16, 2011

This decision may also be available on Quicklaw.

LAT <http://www.ontario.ca/lat/Pages/default.aspx> > English
<http://www.ontario.ca/lat/english/Pages/default.aspx> > Decisions under Travel Industry Act, 2002

Decisions under the Travel Industry Act, 2002

Fiscal Year 2010 - 2011

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

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- In the Matter of the Registration of Golden Pacific (Markham) Travel Ltd. <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/may/5934.tia.GoldenPacific(Markham)TravelLtd.consent.order.pdf>
- K. Walsh & Associates Travel Services Inc.-Order <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/jun/5922.TIA.KWalsh.ORDER.pdf>
- Muhammad Anwar Alvi o/a All Nation Travel & Tours <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/jun/5915.tia.AlvAllNationTravel.pdf>
- 440629 Ontario Inc. o/a Adriatic Travel Agency and Tours <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/jun/5902.tia.adriatic.pdf>
- Zafaris Travel Inc. <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/jul/6066.tia.zafaristravel.consent.pdf>
- In the Matter of the Registration of Leego Canada Inc. o/a Leego Tours <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/jul/6039.tia.Leego.consent%20order.pdf>
- Wine Escapes Inc. o/a Boutique Escapes <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/jul/6017.TIA.%20Wine%20Escapes.pdf>
- K. Walsh & Associates Travel Services Inc. <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/jul/5922.TIA.%20K.Walsh.%20Final.pdf>
- Jetmax Holidays Inc.-Pre-Hearing-Settlement <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/aug/6088.Tia.Jetmax.%20pre-hearing.pdf>
- In the Matter of the Registration of Marie A. Soriano and Manuel M. Maniquis o/a Royal Vacations Travel And Tours <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/aug/6064.tia.RoyalVacations.consent%20order.pdf>
- 7n Canada Inc. o/a Jubilee Travels and Tours-Dismissal <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/aug/6165.tia.Jubilee%20Travels.dism.order.pdf>
- 1737830 Ontario Inc. o/a Ports of Call Travel Services <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/aug/5979.tia.Ports%20of%20Call.pdf>
- 1427286 Ontario Inc. o/a Voyages Rozon Travel Plus-Consent Order <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/aug/5966.tia.consent%20order.pdf>
- In the Matter of the Registration of Soltice Visions Limited o/a Kingsway Cruiseshipcenters <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/oct/6152-TIA.PDF>
- Julie Bevan o/a Cosmopolitan Travel <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/oct/6147-tia-Julie%20Bevan%20oa%20Cosmopolitan%20Travel.pdf>

- In the Matter of the Registration of 1213466 Ontario Inc. o/a Mccarten Travel American Express
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/oct/6132-tia-McCarten%20Travel%20American%20Express-consent%20order.pdf>
- Rainbow Tour & Reception Inc. - Order
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/feb/6254.tia.Rainbow%20Tour%20Reception%20Inc.Interim%20Order.pdf>
- 1301869 Ontario Inc. o/a Barbara's Travel Agency
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/mar/6166.tia.Barbara%27s%20Travel%20Agency.pdf>
- Canadian Imperial Bank of Commerce – Claim
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/mar/6226.tia.claim.CIBC.pdf>
- Rainbow Tour & Reception Inc.-Order
  <http://www.ontario.ca/lat/english/Documents/Decisions/2010/tia02/mar/6254.tia.Rainbow%20Tour%20Reception%20Inc.order.pdf>

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, c.30, Sch. D

IN THE MATTER of the REGISTRATION of
GOLDEN PACIFIC (MARKHAM) TRAVEL LTD.

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 10 of the Act

TO REVOKE REGISTRATION
- Proposal dated: February 17, 2010

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal pursuant to section 11

GOLDEN PACIFIC (MARKHAM) TRAVEL LTD.
- Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*
- Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal (the "Tribunal") by Golden Pacific (Markham) Travel Ltd., the Applicant, and the Registrar under the *Travel Industry Act, 2002,* for issuance of a Consent Order of the Tribunal without a hearing, pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act, 2002,* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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: May 3, 2010

This order may also be available on Quicklaw.

SCHEDULE 'A'

GOLDEN PACIFIC (MARKHAM) TRAVEL LTD.

Applicant

AND

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

Respondent

MINUTES OF SETTLEMENT

WHEREAS Golden Pacific (Markham) Travel Ltd. located at 1661 Denison Street, Unit T37, Markham ON L3R 6E4, is a travel agent registered on September 16, 1992, Registration No. 4094959, under the *Travel Industry Act*, *2002* ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of Golden Pacific (Markham) Travel Ltd. on February 17, 2010, for the reason that Golden Pacific (Markham) Travel Ltd. is and has been carrying on activities that are in contravention of the Act and the Ontario Regulation 26/05 made under the Act (the "Regulation");

AND WHEREAS Golden Pacific (Markham) Travel Ltd. has appealed the Notice of Proposal to the Licence Appeal Tribunal on March 2, 2010;

AND WHEREAS the reason the Notice of Proposal dated February 17, 2010 was issued was the history of the Registrant's filing its financial statements late;

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. Golden Pacific (Markham) Travel Ltd. (hereinafter referred to as the "Registrant") The Registrant shall file any and all final financial statements for each fiscal year prepared by a public accountant licensed under the *Public Accountancy Act, 2004* and accompanied by a Review Engagement Report or an Audit Opinion as required by the Regulation within 3 months after the end of the fiscal year.

3. The Registrant shall respond to TICO inquiries and requests in a timely manner. The Registrant shall advise TICO of changes outlined in sections 16 and 17 of the Regulation within the time prescribed in those sections.

4. The Registrant shall, at all times, maintain the minimum working capital as required by section 24 of the Regulation. If based on the financial statements submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with s. 24 of the Regulation, the Registrant shall take necessary steps to correct its working capital position and submit the proof thereof within 30 days from the request by the Registrar.

5. The shareholders shall ensure that shareholder loans and/or advances to Golden Pacific (Markham) Travel Ltd. will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event Golden Pacific (Markham) Travel Ltd. decides to discontinue operations, any claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans can be repaid.

6. The Registrant shall provide a minimum 10 days written notice to the Registrar when it considers closing or terminating its TICO registration.

7. The Registrant waives its right to a hearing before the Licence Appeal Tribunal currently set for June 9, 2010.

Golden Pacific (Markham) Travel Ltd. and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

Golden Pacific (Markham) Travel Ltd. further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS DAY OF , 2010

Mr. Simon Kan, President

Golden Pacific (Markham) Travel Ltd.

I have the authority to bind the corporation

Mr. Michael Pepper

Registrar, *Travel Industry Act, 2002*

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

K. WALSH & ASSOCIATES TRAVEL SERVICES INC.-Order

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002,* S.O. 2002, c. 30, Sch. D

TO REVOKE A REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: KIMBERLEY WALSH, Agent, for the Applicant,

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act*, *2002*

DATE OF HEARING: May 21 & June 11, 2010 Toronto

INTERIM REASONS FOR INTERIM DECISION AND ORDER

The Applicant appeals from the Notice of Proposal to Revoke Registration issued by the Registrar on February 10, 2010, pursuant to s. 10 of the *Travel Industry Act, 2002,* S.O. 2002, c. 30, Sch. D (the "Act"). The sole ground set out in the Notice is a chronic shortfall in working capital. The Notice does refer to three complaints of slow payment, two relating to agents allegedly employed by the Applicant and one relating to a customer of one of those agents. The Applicant denies that the agents were employed by it yet maintains that all of the complaints were dealt with on an *ex gratia* basis, as goodwill gestures. This aspect of the Notice was not pursued in argument.

The undisputed facts indicate that the Applicant has a year-end of June 30 in each calendar year. Pursuant to the regulations, it has been required to submit financial statements to the Registrar within 90 days of its year-end, or by September 28. It submitted its 2006/2007 year end financial statements on September 26, 2007. These statements indicated gross sales of $23,165,183.00. The Act and regulations require a registrant to maintain a minimum level of working capital depending on sales. In the case of the

Applicant, the minimum working capital requirement was $100,000.00. The financial statements indicated working capital of $1,961.00. The Registrar wrote to the Applicant on October 15, 2007, advising it that a capital injection of $98,039.00 was required to bring the Applicant into compliance with legislation. On October 31, 2007, the Applicant provided evidence that its working capital position had been corrected to comply with the legislation.

From November 2007 through May 2008, the Applicant provided quarterly financial statements to the Registrar covering the periods ending September 30, 2007, December 31, 2007 and March 31, 2008. Each of these statements showed negative working capital: -$102,173.00, -$92,450.00 and -$104,358.00 respectively. By October 28, 2008, when the Registrar received the year-end financial statements for the year ending June 30, 2008, the negative working capital amount was -$295,275.00. Sales in that year indicated that the Applicant was required to maintain $50,000.00 in working capital so, as of June 30, 2008, it had a working capital shortfall of $345,275.00. From the interim financial statements for the period ending September 30, 2007 up the date of the hearing, the Applicant has remained in a negative working capital position.

Kimberley Walsh testified that she has been in the travel business for 22 years, initially as a sole proprietorship but since December 1995 through the Applicant as a corporation. It was her evidence that she has been recognized and respected in the industry as an innovator. She pioneered the use of telephone agents operating from home, trained the first such agents, and now has between 100 and 150 such agents listed under her aegis. The industry respect is reflected in the manner in which the Registrar dealt with her following receipt of the June 30, 2008 financial statements. The Registrar met with Ms Walsh and discussed the problem with the working capital. Ms Walsh advised of strategies to deal with the problem starting with an investment of $100,000.00 of shareholder money and that the October 2008 statements would show an improvement.

The Registrar received the October 2008 statements on December 3, 2008. There was a significant improvement in the negative working capital position. It had increased from -$295,275.00 at the end of June to -$134,331.00 at the end of October 2008. Based on the improvement, the Registrar advised the Applicant that it was to file monthly financial statements so its working capital position could be monitored. Through to the end of January 2009, there was a steady increase in the Applicant's working capital. From a low of -$134,331.00 at the end of October 2007 it increased to -$68,559.00 at the end of January 2008. Thereafter, it began to deteriorate and by the time of the receipt of the year-end financial statements on October 15, 2009 working capital had decreased to it lowest level of the year, -$231,459.00. The financial statements for December 31, 2009, received by the Registrar on April 5, 2010 show a further decrease to -$293,034.00 for a total working capital shortfall of $343,034.00.

In December 2009, the Applicant advised the Registrar that it was seeking solutions to its problems. There were three potential investors and Ms Walsh stated that she needed time to work with them to find the best deal. In the interim, the Registrar decided to issue a Notice of Proposal to Revoke Registration. The Proposal is dated February 10, 2010.

Ms Walsh's efforts at finding a solution came to fruition with an agreement with a major travel company, Uniglobe Enterprise Travel Limited, to assume all of her financial management. The Applicant has surrendered its IATA agency status and is no longer subject to the Bank Settlement Plan requirements of IATA agency. All consumer funds are now paid directly to Uniglobe and Uniglobe handles payment to suppliers. The Applicant does not handle consumer trust funds and has no need of a trust account. As of the year-end statement in June 2010, she will have no revenue. Her working capital requirement will be the minimum $5,000.00.

At the resumption of the hearing on June 11, the Applicant provided financial statements up to the end of April 2010. Ms Walsh also advised the Tribunal that there have been significant equity injections into the Applicant such that its working capital has greatly increased from -$293,034.00 at the end of December to -$106,000.00 at the end of May, 2010, an improvement of $187,000.00 in 6 months. She advised the Tribunal that expected improvements resulting from cost cutting are now beginning to show on the balance sheet and there has been an upswing in business.

ANALYSIS

The applicable statutory 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,
>
> (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
>
> (iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty;
>
> **Refusal to register, etc.**
>
> **10.** (1) Subject to section 11, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 8.

Notice re: refusal, suspension, etc.

11. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(b) suspend or revoke a registration

Content of notice

(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.

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.

Working capital requirements are set out in Ontario Regulation 26/05 as follows:

24. (1) This section applies on and after January 1, 2006.

(2) A registrant who had sales in Ontario during the previous fiscal year of an amount shown in Column 1 of the Table to this section shall maintain a working capital of at least the amount shown in Column 2 opposite the first-named amount.

(3) A registrant's working capital shall be calculated in accordance with generally accepted accounting principles and shall not include,

(a) the value of any security provided under subsection 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.

TABLE

Column 1	Column 2
Sales in Ontario during previous fiscal year	Minimum working capital
$500,000 or less	$5,000
More than $500,000 but not more than $750,000	10,000
More than $750,000 but not more than $1,000,000	15,000
More than $1,000,000 but not more than $2,000,000	20,000

More than $2,000,000 but not more than $5, 000,000	25,000
More than $5,000,000 but not more than $10,000,000	35,000
More than $10,000,000 but not more than $20,000,000	50,000
More than $20,000,000	100,000

The Registrar argues that the Applicant's history of chronic deficiencies of working capital indicates that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business. The Registrar also argues that by failing to comply with the working capital requirements of the Act the Applicant will not be operating in accordance with law. The Applicant counters that it is conceded by the Registrar that no consumer funds were ever at risk from the Applicant's operations and that the legislation is designed to protect consumers.

The difficulty with the Applicant's submission is that it renders nugatory the regulations establishing minimum working capital requirements. Without limiting the types of possible financial irresponsibility that might attract sanctions under the Act, failure to maintain a minimum working capital in accordance with the requirements of the regulations is financially irresponsible. The purpose of the regulations is to ensure that registrants have sufficient working capital to meet their ongoing operational commitments without the temptation of accessing customer funds improperly. For the past several years the Applicant has managed to avoid that temptation but it requires only a minor change in circumstances for the Applicant to be unable to fulfil its financial obligations, putting consumer funds at risk. For instance, the financial statements indicate significant bank indebtedness. Should the lending institution become uncomfortable with the continued losses and call its loans, it is likely that the Applicant would end up in receivership. The Tribunal concludes that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business with a significant working capital shortfall. It is also the case that the failure to correct the working capital position despite being given almost two years to do so, provides reasonable grounds for belief that the Applicant will not carry on business in accordance with law.

The Registrar was at pains to point out that it does not question either the integrity or the honesty of Ms Walsh in her capacity as the sole shareholder of the Applicant. The Tribunal formed a similar opinion of Ms Walsh. Her company has been caught in a major recession but throughout she has struggled to protect consumers. The Tribunal has been impressed with the efforts of Ms Walsh on behalf of the Applicant to identify and rectify those areas where consumer funds might be at risk. She is of the opinion that she has fully protected consumer funds by the arrangement with Uniglobe. The Registrar still has concerns. The Registrar's concerns are not unfounded since, even assuming consumer funds

are fully protected, the Applicant still has a working capital shortfall in whatever form it continues in its business. The Applicant cannot be allowed to continue in business with a working capital shortfall.

Taking into account the Registrar's concerns and the fact of a working capital shortfall at the present time, Tribunal hereby adjourns this proceeding to a date after July 15, 2010, which it will set and communicate to the parties by letter. The sole issue at that re-attendance will be to determine if the Applicant is in compliance with its working capital obligations. The Parties may lead evidence and make submissions on that point only. Following the re-attendance, the Tribunal will issue its final order.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude, Vice-Chair

RELEASED: June 18, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MUHAMMAD ANWAR ALVI O/A ALL NATION TRAVEL & 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: LYNDA TANAKA, Chair

APPEARANCES: ISFAL IMAM MALLICK, Paralegal, representing the Applicant, Muhammad Anwar Alvi o/a All Nation Travel & Tours

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF HEARING: May 31, 2010 Toronto

REASONS FOR DECISION

A hearing was held in the appeal by Muhammad Anwar Alvi O/A All Nation Travel & Tours (the Applicant) from a Notice of Proposal of the Registrar dated February 3, 2010[1] (Notice of Proposal) and the Supplementary Notice of Further and Other Particulars dated May 25, 2010[2] (Supplementary Notice) to revoke the Applicant's registration as a travel agent pursuant to the *Travel Industry Act, 2002* (the Act).

For the reasons given below, the Tribunal directs the Registrar to carry out the Proposal.

[1] Exhibit 1
[2] Exhibit 3

FACTS

The Applicant has been registered as a travel agent either as a sole proprietor or as a partner of a travel business for almost 10 years. Briefly stated, the Registrar alleges that the Applicant has a history of not maintaining working capital and of filing his financial statements late, contrary to the requirements of the Act[3]. Further the Registrar alleges that he has grave concerns about the Applicant's financial position and his ability to carry on business in accordance with law and with integrity and honesty[4].

The Applicant agrees with the statements of the history of the Applicant's filings with TICO and acknowledges that the financial statements have been late and that there have been deficiencies in the working capital. The Registrar in his recent Supplementary Notice[5] relies on the failure of the Applicant to file his December 31, 2009 financial statements by March 31, 2010 as required by the legislation. In addition there are concerns as to proper qualifications and staffing of persons at the agency who may be dealing with the public, specifically the availability of a manager properly trained and knowledgeable about trust account requirements.

The Applicant's defence is, in summary, that he was relying for his financial records and matters on an employee who died suddenly in February. The employee was responsible for the financial records and books of the business. The Applicant asks that his licence not be revoked and he will file his 2009 financial statements by July 2, 2010. No offer was made to file the trust reconciliations requested for a three month period in 2009.

The Registrar relies on the evidence of Hans Reitkneckt, the Financial Inspection Co-ordinator for the Travel Industry Council of Ontario (TICO), who is responsible for supervision of the staff who review the financial records and filings of the registrants. He identified a document brief of correspondence[6] exchanged between the Applicant and TICO staff in which the requests for financial statements were made and the Applicant either did not respond or responded with inadequate information.

Since 2006 the Applicant has been consistently late in filing his financial statements as required under the Act, has had a deficiency of working capital on three occasions in that period. Most recently he has not complied with a direction to provide trust reconciliations for his trust account for the months of July, August, and September 2009.

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[3] Exhibit 1 p. 12, para 25
[4] Exhibit 3, p. 4, para. 6
[5] Exhibit 3
[6] Exhibit 3

The history of the filing of financial statements which are due on or before March 31st of the following year is as follows:

Financial Statements for December 31, 2006	Filed June 4, 2007
Financial Statements for December 31, 2007	Filed May 15, 2008
Financial Statements for December 31, 2008	Filed June 22, 2009
Financial Statements for December 31, 2009	Not filed as of May 31, 2010

The history of the requirement of providing additional working capital is as follows:

Notification of deficiency June 26, 2007	Corrected August 22, 2007
Notification of deficiency July 2, 2008	Corrected July 14, 2008
Notification of deficiency July 6, 2009	Corrected October 22, 2009

The Applicant's sales figure as shown on the financial statements has not varied significantly over the past three years and is in the range of just over $1,200, 000 to just under $1,350,000[7].

Mr. Reitknecht's staff attempted to conduct on-site inspections. Exhibit 3, Tab 4 is an inspection report of a visit on January 17, 2008 for the purpose of following up on an injection of working capital made in August 2007. The inspector concluded that she could not verify that withdrawals from the trust account for refunds were or were not paid to travellers and that until year end financial statements were received, she could not confirm that the required working capital has been maintained.

Another inspector attended at the premises in January 2010. His efforts are documented in emails identified in Tab 9 of Exhibit 3. The owner was not on site and the inspector was told that the owner was away in Pakistan by an individual at the office on both occasions that the inspector visited. There was no licensed manager on site. None of the people on site could be identified as being licensed to provide travel services to the public. The inspector concluded that he could not do an onsite inspection unless the owner was there. The inspector also pointed out that he could not confirm any deficiencies in working capital in the absence of the financial statements.

Mr. Reitkneckt also testified that the Applicant provided inadequate information concerning the trust accounts, and the documents in Exhibit 3 indicate some contradictions with regard to the trust account. For instance, the inspector in his email of January 28, 2010, 4:08 pm[8] reports that the "owner" (the Applicant) has stated that he only accepts credit card payments and that there were no cash collections for July, August and September, 2009 but the September trust bank statement shows three deposits used to cover airline ticket purchases and to

[7] Exhibit 4, Tabs 2 and 5, Financial Statements
[8] Exhibit 3, Tab 9, last page

cover refunds to consumers. Therefore the Applicant's statement to TICO as to the lack of cash payments by customers cannot be correct.

TICO directed the Applicant to a guideline and information for registrants on the requirements of trust account reconciliation. The information is available on the website of TICO. The Applicant was specifically directed to the guideline and that information in a letter from TICO to the Applicant dated November 17, 2009 after the Applicant had not responded with the trust reconciliation required in the letter from TICO dated September 9, 2009[9].

The Applicant testified as to his long standing involvement in the industry and the sudden death of the individual he relied on for attending to the financial management of the agency. This individual went to Pakistan in November 22, 2009 and returned at least once in the period up to his death in February, 2010. No evidence was led that a replacement has been hired. The Applicant assured the Tribunal that he would make good any shortfall of working capital revealed by the financial statements and that he would have his financial statements for the fiscal year ended December 31, 2009 ready and filed with TICO by July 2, 2010. He has taken the salesperson course and passed the exam[10]. He did not take the manager exam, even though the licence for the agency is held in his name. He disputed that there was anything in the salesperson's exam or course information on trust accounts.

The Applicant was questioned about reconciliation of his trust account. It was clear from his evidence that he could not distinguish between trust account reconciliation and the need to maintain adequate working capital as required under the regulations enacted under the Act. Though he assured the Tribunal that he would top up any deficiency in working capital, he did not provide any assurance that he would undertake the trust account reconciliation – his view was that providing copies of his bank statements of the trust account was all that was needed.

THE LAW

The Act provides in section 8:

> 8. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,…
>
> (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;

Section 11(5) of the Act provides for the Tribunal's jurisdiction as follows:

[9] Exhibit 4, Tabs 7 and 8
[10] Exhibit 5

11. (5) If a hearing is requested, the Tribunal shall hold the hearing and may by order direct the registrar to carry out the registrar's proposal or substitute its opinion for that of the registrar and the Tribunal may attach conditions to its order or to a registration.

O. Reg. 26/05 under the Act provides explicit requirements for monitoring of the financial health of a travel agent and protection of consumers in sections 22 and 24:

22. (1) Every registrant shall file with the registrar the financial statements required by this section for each fiscal year.

(2) A registrant who had sales in Ontario of less than $10 million during the previous fiscal year shall file, within three months after the end of the fiscal year,

(a) annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act, 2004*; 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*.

(3) A registrant who is a travel agent and had sales in Ontario of $10 million or more but less than $20 million during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) semi-annual financial statements within 45 days after the end of each fiscal half-year.

(4) A registrant who is a travel agent and had sales in Ontario of $20 million or more during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) quarterly financial statements within 45 days after the end of each quarter during the fiscal year.

(5) A registrant who is a travel wholesaler and had sales in Ontario of $10 million or more during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) quarterly financial statements within 45 days after the end of each quarter during the fiscal year.

(6) Financial statements required under this section shall include a statement of sales in Ontario made during the period to which the financial statements refer, a balance sheet, an income statement and a reconciliation of the trust accounts maintained under section 27.

(7) If additional information is necessary to provide an accurate and complete review of the registrant's financial position, the registrar may require that the registrant file audited financial statements that consolidate or combine the registrant's financial statements with,

(a) the financial statements of another registrant; or

(b) if the registrant is a corporation, with the financial statements of another person who is a shareholder associated with the registrant.

(8) If the registrar has reason to believe that a registrant is in financial difficulty, the registrar may require that the registrant provide to the registrar a written statement of the registrant's current net working capital, and the registrant shall do so within the time the registrar specifies.

(9) The registrar may require that a statement provided under subsection (7) or (8) be verified by affidavit.

24. (1) This section applies on and after January 1, 2006.

(2) A registrant who had sales in Ontario during the previous fiscal year of an amount shown in Column 1 of the Table to this section shall maintain a working capital of at least the amount shown in Column 2 opposite the first-named amount.

(3) A registrant's working capital shall be calculated in accordance with generally accepted accounting principles and shall not include,

(a) the value of any security provided under subsection 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 Table in the regulation indicates that where a travel agent's sales are between $1,000,000 and $2,000,000 in the previous fiscal year, the minimum working capital is $20,000.

The policy basis of the regulation is to provide the regulator with the ability to monitor the financial health of travel agents on a regular basis so as to avoid the insolvencies and bankruptcies which are so damaging to consumers and to the industry. It is the nature of a regulated industry that certain requirements for continued registration must be met for the mutual advantage of the industry and the consumer.

ANALYSIS

It is clear from the evidence that the Applicant has not complied with the regulatory requirements to permit effective oversight of his business as a registrant. He also is not sufficiently knowledgeable about his requirements as a registrant. He does not understand what trust reconciliation is and what needs to be done, and from his answers with respect to the examination he recently passed, he seems to be content to remain ignorant.

The Act and TICO's administration of it are intended to protect the public and the industry. Trust accounts consist of customer funds. The regulator needs to be able to oversee the handling of those funds. The Tribunal does not accept the Applicant's position that it is up to the Registrar to provide any more training and information on trust account reconciliation to him.

The failure to provide the trust reconciliations requested and the failure to understand or make any effort to understand what is needed to do such a reconciliation is very disturbing. Even if the Applicant himself is unwilling or unable to do the reconciliation, he has an obligation to his customers and to the Registrar to ensure that the reconciliation is done by someone who is knowledgeable and qualified and to provide the requested information to the Registrar within the dates requested. He has not done so. On this ground alone, the Tribunal would direct the Registrar to carry out the proposal.

With respect to the working capital requirements, the amount of working capital required under the regulations is directly tied to the sales revenue of a travel agency. The Applicant has had the same level of sales for the purpose of the working capital requirements for the past few years and, given the broad range of sales ($1,000,000 to $2,000,000) that attracts the $20,000 requirement, he should be able to manage his business to ensure that that amount is always maintained. The regulator should not have to "chase" him to do so, if he is paying attention to his financial situation. Therefore his explanations as to the deficiencies in working capital do not persuade the Tribunal that he will act in the future so as to have satisfactory working capital in place at all times.

With respect to the submission of financial statements, the Applicant has apparently taken insufficient steps to ensure that at the time of the hearing the statements were even in draft form. The Applicant did not call the accountant to provide any corroboration that the statements were in the process of being prepared. He is proposing that he file the statements by July 2, 2010, a date later than any previous filing of financial statements. This is not evidence of a business that seeks to abide by its regulatory requirements and cure past defaults.

The Applicant relies on a statement in the inspector's January 12, 2010 email that

> "I don't think the agency is a financial risk, but compliance issues do need to be addressed."[11]

While the inspector's observation in this regard may well be correct (that the agency is not a financial risk), the issue is the compliance with filing requirements and the ability of the regulator to assert the oversight required by the statute. Despite several attempts by the regulator, the Applicant has not corrected his practice of not filing his financial statements on time. The 2009 statements are the fourth consecutive set of financial statements that are not filed in time. The Applicant is not just a "little late" – as of the date of the hearing, he has refused or neglected to correct his non-compliance, even under threat of revocation of his licence, for two full months and proposes to file the statements even later than in previous years.

The Applicant has conducted his business such that he is not currently in compliance with the Act and he has a history of not complying. The Registrar has proven on the balance of probabilities that the past conduct of the Applicant gives reasonable grounds to believe that he will not act with financial responsibility and he will not act in accordance with the law; specifically he will not comply with the regulatory requirements related to financial information and disclosure required by the Act and regulations.

DECISION AND ORDER

Pursuant to its powers under the Act, the Tribunal directs the Registrar to carry out his proposal to revoke the Applicant's registration.

LICENCE APPEAL TRIBUNAL

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Lynda Tanaka, Chair

RELEASED: June 10, 2010

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

[11] Exhibit 3, Tab 9, 2nd page, email at 10:14 am.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

440629 ONTARIO INC.
O/A ADRIATIC TRAVEL AGENCY AND TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002,* S.O. 2002, c. 30, Sch. D

TO REVOKE A REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: CHRISTOPHER PHILLIPS, Agent, for the Applicant,

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act*, *2002*

DATE OF HEARING: May 17, 2010 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from the Notice of Proposal to Revoke Registration issued by the Registrar on February 1, 2010 as augmented and amended by the Notice of Further and Other Particulars dated May 6, 2010. There are a number of grounds alleged for the revocation. It is alleged that the Applicant has been chronically below the working capital requirements set out in the *Travel Industry Act*, *2002*, S. O. 2002, c. 30, Sch. D (the "Act") and Ontario Regulation 26/05 passed pursuant to the Act. The second ground is that the Applicant has consistently failed to perform the statutorily required trust account reconciliations or to properly manage the trust account. It is alleged, but was not seriously argued as a separate ground, that the Applicant sold travel services to the public at a time when it had no registered travel counsellors on staff and without a qualified and approved office manager on staff. Finally, it is alleged that the Applicant has failed to abide by the terms and conditions of its registration. The argument concerning the use of unqualified staff was largely consumed by the argument concerning the breach of the terms and conditions of registration.

This is the Applicant's second appeal to the Tribunal. The Registrar issued a Notice of Proposal to Revoke Registration dated July 10, 2008. The Applicant's appeal to this Tribunal was heard on November 10 and December 8, 2008 and the decision was released on January 19, 2009. The Tribunal set terms and conditions of registration. It is worthy of note that the Tribunal did not find sufficient grounds to revoke the Applicant's registration at that time, but the Tribunal imposed terms and conditions on the registration. The Registrar alleges that the Applicant has breached the Tribunal's order.

The imposed terms and conditions are as follows:

1. The Applicant will submit to an inspection of all its banking and other business records with 10 days of release of this decision or at a time specified by TICO [The Travel Industry Council of Ontario, the office of the Registrar under the Act].

2. The Applicant shall have a manger, approved by TICO, employed on a full time basis, at the Applicant's place of business with [sic] 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 three month 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 [sic] 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 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 allegations in the earlier Tribunal hearing closely mirror the allegations in the current hearing. They are:

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 regulation,
4. Failure to ensure the agency office was properly managed and supervised, and
5. Two consumer complaints.

The Registrar alleges that the Applicant failed to provide interim financial statements as required by the terms and conditions imposed by the Tribunal. The Registrar further alleges that, when the interim financial statements were finally provided in March 2010, they showed chronic under-capitalization. The Registrar further alleges that, following an inspection of the Applicant's operations on January 2010, it was discovered that the Applicant was not doing monthly trust reconciliations as required by the Act. It is also alleged that the office was not properly managed from July 1, 2009 to the present.

EVIDENCE

The Tribunal heard evidence from Hans Reitknecht, TICO's Financial Inspections Coordinator, and Christopher Phillips, a director of the Applicant. Mr. Reitknecht is a Certified Management Accountant. He has held the position of Financial Inspections Coordinator since January 2009. He supervises a staff of inspectors who review and inspect registrants to determine financial compliance with the Act and regulations. Mr. Phillips is a Certified General Accountant. He has been involved with the Applicant since it was purchased from the previous owner in December 2006. Originally, he was not involved on a day to day basis but over the last number of months he devotes himself fulltime to running the Applicant.

There were only two areas where their evidence differed in any material respect. They differed on the subject of trust reconciliations and they differed on the subject of delivery of the interim financial statements as required in the terms and conditions imposed by the Tribunal.

There is no dispute in the evidence that the Applicant did appoint a qualified manager within 14 days of the release of the Tribunal's earlier decision. Difficulties arose with respect to the manager because of legislative changes which came into effect on July 1, 2009. Prior to that time, managers were not required to have passed qualifying exams. Effective July 1, 2009, managers had to have passed at least the travel counsellor exam. There is also an exam for office managers but persons who had at least two years management experience were grandfathered and did not have to pass the management exam. The Applicant's manager sat the travel counsellor exam twice and failed. The result was that from that date forward there was no qualified approved manager or travel counsellor working in the agency office. Mr. Phillips has recently passed both exams and has applied to be the approved office manager but he has not yet been confirmed in that position. He is currently the only person working at the agency.

Mr Reitknecht reviewed the annual financial statements of the Applicant for the years ending December 31, 2008 and December 31, 2009. He noted that both sets of financial statements had been received in early April of their respective years. The filing deadline is March 31 but Mr. Reitknecht took no issue with receipt within a week or so of that date. He noted that in 2008 the Applicant had sales of $434,301.00. Pursuant to the regulations, registrants with sales up to $500,000.00 are required to maintain a working capital of $5,000.00. The 2008 year end statements indicated a working capital of $243.00 requiring a capital infusion of $4,757.00.

The 2009 financial statements were delivered to counsel for the Registrar on April 8, 2010. They indicate sales of $544,766 and working capital of $1,980.00. For sales between $500,000.00 and $750,000.00 the working capital requirement is $10,000.00. Accordingly, the Applicant required a capital infusion of $8,020.00. On both occasions when these facts were brought to the attention of the Applicant, the required capital infusion was made. Mr. Phillips confirmed with Mr. Reitknecht in cross-examination that the first time be working capital shortfall for the year ending 2009 was communicated to the Applicant was in the Notice of Further Particulars in these proceedings. Mr. Phillips produced a bank slip which, he stated, indicated a deposit of the required working capital infusion.

In reviewing the requirement set out in the Tribunal's earlier order that the Applicant file interim financial statements, Mr. Reitknecht treated the 2008 year end statements as being in compliance with the condition for quarterly financial statements for the last quarter of 2009. He stated that, thereafter, TICO did not receive interim financial statements as required by the Tribunal until March 31, 2010 when the Applicant sent interim financial statements as part of its disclosure in this proceeding. Mr. Phillips insisted in his testimony that he had faxed the interim statements to TICO in a timely manner. He could produce no fax cover sheet, fax transmission report or covering letter in support of this position. He took the view that, if he had failed to comply with the Tribunal's order it was TICO's responsibility to advise him. In Mr. Phillips view, the lack of communication from TICO is indicative of the fact that it did receive the interim financial statements.

Mr. Reitknecht reviewed the manner in which financial statements are received by TICO. He described the TICO office as small with about 20 staff members. Since a great deal of TICO's effort is focussed on financial compliance, Mr. Reitknecht stated that everyone in the office is aware of the importance of financial statements and ensures that they are delivered to the appropriate recipient when received. The first step when such documents are received is that they are logged into the computer. They are then put into either Mr. Reitknecht's mail slot or a colleague's mail slot for action. While conceding that it is possible but unlikely that one fax may get lost due to a paper jam or some other misadventure, Mr. Reitknecht was of the view that it is impossible that all three sets of financial statements would be lost by TICO.

The interim financial statements show working capital of minus $6,396.81 and minus $7,098.07 for the periods ending March 31 and June 30, 2009 respectively. $10,000.00 is the minimum required working capital based on the 2008 year-end financial statements. Capital infusions of $16,396.81 and $17,098.07 would be necessary to bring these numbers into compliance with the regulations. The period ending September 20 shows working capital of $16,310.28. Mr. Reitknecht was sceptical of this number. He identified a cheque in the amount of $22,000.00 that was received and recorded as revenue. These funds should have been deposited into the trust account on account of prepaid travel services but they were, in fact, deposited into the general account. There appeared to be no offsetting liability for this cash. He did not accept this interim financial statement as being credible.

Mr. Phillips confirmed in his evidence that Mr. Reitknecht had good grounds for scepticism. He stated that the cheque for $22,000.00 had been received from a new business client whom he did not trust. He was of the opinion that the client was actually trying some form of fraudulent activity. He deposited the funds in the general account in the full expectation that the cheque would not clear. In October, he discovered that the cheque had not cleared. According to Mr. Phillips, the $22,000.00 had been included in the September 30 interim financial statement by error. When asked why he did not correct the error, he first justified it by stating that the statements related to the September 30 period, before the cheque had bounced. When it was pointed out to him that he allegedly forwarded the interim financial statements at the end of October, after he knew the cheque had failed to clear, he stated that he could not make a correcting entry and backdate it before September 30 and that the interim financial statements were a snapshot of the accounts as of September 30, inclusive of the error. He had no explanation for failing to send an explanatory note concerning the error to the Registrar with the September 30 interim statements.

Taking into account the $22,000.00 error in the September 30 interim financial statements, the Applicant had a negative working capital position at the end of September, 2009 in the approximate amount of $5,700.00. A capital infusion of approximately $15,700.00 was required to comply with the working capital requirements of the legislation.

Mr. Phillips testified that each time a working capital deficiency was brought to his attention he took steps to rectify it. He was asked if he was aware at the time he prepared the interim financial statements that they indicated a working capital deficiency throughout 2009. He stated that he was aware but seemed surprised by the concept that maintaining sufficient working capital is an ongoing, not a once yearly, obligation. Mr. Phillips testified that he was under the impression that his working capital had to be at sufficient levels only when the annual financial statements were filed.

The Registrar's evidence concerning trust accounting comes from three inspections by TICO financial inspectors. The first inspection occurred on October 2, 2007. With respect to trust accounting the only issue recorded on the section under "Trust Accounting." It appears that Mr Phillips was using his credit card to pay for client travel services. He would then reimburse himself from the trust account. It was pointed out to Mr. Phillips that the correct method was to pay the credit card company directly from trust rather than make payment to the cardholder for later payment to the credit card company.

A second inspection was carried out on February 6, 2009 in response to the Tribunal's decision. In what appear to be contrary findings, the inspector stated the following:

> The Registrant complies at the present time with TICO regulation regarding trust accounting. I have reviewed banking records for the months from September 2008 till December 2008 and the Registrant did not maintain properly the trust account. The trust account was not reconciled on a monthly basis with the customer deposits/obligations…..The trust account for the month of January 2009 was properly reconciled with the customer deposits/obligations.

It appears that, at least by January 2009, the Applicant knew the proper procedure for trust account reconciliation.

An inspection was conducted on January 12, 2010. The trust accounting findings were extensive but were premised by the following opening paragraph:

> Except for one supplier payment from the general account, during the six months of bank statements (June through November) I reviewed, suppliers (for airfares) are paid from the trust account and customer funds are deposited to this account.

The inspector identified the Applicant's increasing tour business as a source of concern with respect to accounting for client funds. According to the evidence, the problem with tours may arise out of the need to pay for services before the tour has been fully booked. The concern of Mr. Reitknecht was that clients were being asked to pay by credit card for the airfare of a potential client who had not signed up for travel.

In his evidence, Mr. Phillips stated that the reason for the use of client credit card payments for tickets other than their own was to accommodate the clients' desire to use a credit card. As a rule, the Applicant does not permit the use of credit cards because of the commission deducted by the credit card company. Certain clients, however, enjoy cardholder benefits such as free cancellation insurance or travel health coverage. In such cases, the Applicant will use the client's credit card to purchase airline tickets directly from the airline companies where there are no commission deductions charged to the Applicant. To cover the full price of the trip, it is necessary to purchase more than one ticket with the credit card and the client is given full credit for all amounts charged on the card. According to Mr. Phillips, the transaction is only consummated with the full knowledge and

permission of the client. When this practice was put to him in cross-examination, Mr. Reitknecht could not immediately identify any way in which it was a breach of the regulations.

The concluding remarks of the "Trust Accounting" section of the inspection report state:

> The registrant needs to do monthly trust reconciliation, and to pay all tour costs from the trust account. There needs to be adequate documentation that transfers from trust to general accounts are appropriate. He also needs to be careful when making debit purchases for overhead that these are from the general account.

It was Mr. Phillips' evidence that the Applicant had carried out monthly trust account reconciliations in exactly the same format as the January reconciliation found to be acceptable by the inspector in February 2009. He stated that he has continually asked TICO for a precedent trust reconciliation format that he can use. TICO has never delivered a precedent or clear guidelines on the correct content of reconciliations. He did respond when questioned that he had successfully completed the travel manager course at the Canadian Institute of Travel Counsellors and that course covered trust accounting. Nonetheless he feels TICO have not provided him sufficient guidance concerning its requirements for trust reconciliations.

One final item identified in the January 2010 inspection concerned a working capital deficiency that may have been brought about by a shareholder withdrawal of $2,170.00. The inspector identified a cash withdrawal of $2,170.00 in mid-June 2009 and noted that the reason for the withdrawal was not clear and might represent a diversion of working capital. The Applicant pointed to two entries in early June where the bank had dishonoured a cheque for $2,170.00. Mr. Phillips testified that the cash withdrawal was to replace the cheque. Mr. Reitknecht was sceptical, not because the Applicant's position was unreasonable, but because there seemed to be no record of the purpose of the cash withdrawal. In his view, the similarity of the amounts is insufficient, from an analytical accounting point of view, to establish a commonality of recipient. Mr. Phillips testified that the inspector had been given full back up. If that is so, then the entry in the report is puzzling indeed.

In concluding his evidence, Mr. Phillips stated that the Applicant's business is on the increase. A change in focus to tours has brought new sources of revenue. He believes that, given a little more time, he will have turned matters around. He stated that he is willing to work with the Registrar to address trust reconciliation issues and that he now has a better understanding of his regulatory duties and obligations. He points to the lack of customer and supplier complaints as evidence of the fact that the Applicant is not a danger to consumers.

FACTS FOUND PROVEN

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

1. Since 2007, the Applicant has not maintained the appropriate levels of working capital.

2. Failure to maintain the appropriate levels of working capital is a breach of the Applicant's obligations as set out in section 23 of Ontario Regulation 26/05.

3. On each occasion when it has been brought to the attention of the Applicant by the Registrar that it had insufficient working capital, the Applicant has taken steps to bring its working capital into compliance with its obligations.

4. The Applicant prepared interim financial statements for the periods ending March 31, June 30 and September 30, 2009.

5. The Applicant did not deliver the interim financial statements referred to in 4. above to the Registrar in accordance with the terms and conditions attached to its registration by this Tribunal in its earlier decision until March 24, 2010 as part of the Applicant's disclosure in this proceeding.

6. The Applicant was aware from the interim financial statements that it had a working capital deficiency throughout 2009 but took no steps to rectify the deficiency.

7. The September 30, 2009 interim financial statement was inaccurate because it included in revenue an amount of $22,000.00 that should properly have been deposited in trust.

8. The Applicant took no steps to rectify the error in the September 30 interim financial statement despite discovery of the error in October 2009.

9. The Registrar was not misled by the inaccurate September 30 interim financial statement as it was not delivered to the Registrar until after the issuance of the Notice of Proposal dated February 1, 2010.

10. The Applicant operated its office without qualified managerial staff from July 1, 2009 until March 2010 and permitted unqualified staff to sell travel services to the public in contravention of the Act and regulations.

11. The Applicant did not withdraw the sum of $2,170.00 in June 2009 from its working capital. The sum involved was to replace a dishonoured cheque.

12. The Applicant has generally segregated funds into trust funds and general account funds and has not misapplied client trust funds.

13. The Applicant has not carried out monthly trust reconciliations in a format that is acceptable to the Registrar. In particular, the Applicant has not properly reconciled transactions relating to tours arranged by the Applicant.

Of the findings set out above, the only one seriously disputed between the parties concerns the delivery of interim financial statements. The Tribunal prefers the evidence of Mr. Reitknecht over that of the Applicant. Mr. Reitknecht described the procedure for receipt of financial statements. He testified that a large part of the work of TICO is the receipt and review of financial statements from registrants. All of TICO's relatively small staff are aware of the importance of and are recipients of financial statements. The Applicant's evidence was less than convincing. He provided no evidence that the statements had been faxed. There were no fax transmission records, cover pages or even covering letters. The only covering letter accompanying the interim financial statements is dated March 24, 2010. The focus of his evidence was not on steps he had taken but to blame TICO for steps it did not take. Finally, the Tribunal accepts that it is highly improbable that TICO would lose not one but all three interim financial statements.

ANALYSIS

The applicable statutory 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,
>
> (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,
>
> (f) the applicant is in breach of a condition of the registration;

Conditions

(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 10, as are ordered by the Tribunal or as are prescribed.

Refusal to register, etc.

10. (1) Subject to section 11, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 8.

Notice re: refusal, suspension, etc.

11. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(b) suspend or revoke a registration

Content of notice

(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.

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.

The Registrar argues that the Applicant's history of chronic deficiencies of working capital indicates that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business. The Registrar notes that the failure to ensure that the Applicant was managed by an approved qualified manager for in excess of 9 months is in breach of the terms and conditions of registration previously imposed by the Tribunal. The Applicant is also in breach of the conditions of registration by failing to forward interim financial statements.

The Applicant counters that it has always made the necessary capital infusions when working capital deficiencies have been brought to its attention. The Applicant points to an increase in its business and the new sources of revenue that are just now beginning to show in its income. Mr. Phillips has now passed the required exams and is qualified to act both as a travel counsellor and an office manager. Going forward, Mr. Phillips states, the Applicant now fully understands its obligations concerning working capital and can ensure ongoing compliance. Mr. Phillips also states that he is willing to work with TICO to develop a format for trust accounting that is acceptable to TICO. The purpose of

the Act, according to Mr. Phillips, is the protection of consumers. There is no evidence that consumer funds were ever at risk and therefore no grounds for concern.

The Tribunal must disagree with the Applicant's submission concerning risk to consumers and grounds for concern. The Act and regulations establish the statutory definition of financial fitness by requiring varying minimum levels of working capital depending on total sales. While registrants may carry more than the minimum working capital, to fall below the minimum results in risk to consumer funds. There is a significant risk that a poorly capitalized registrant will apply consumer funds in an improper manner to meet its operating overhead. There is no evidence that the Applicant has improperly applied consumer funds to overhead but its chronic negative working capital creates a financial position where it is clear that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business.

This expectation is exacerbated by the Applicant's move into arranging tours. There was evidence that the tour business will require more capital to be tied up to secure airfares and services before clients purchase tour packages. At present, the Applicant appears to be funding such services from his credit card and from the credit cards of clients by paying for travel services for other tour participants. While the Tribunal acknowledges Mr. Reitknecht's perplexity when asked to comment on this practice, the heart of the trust accounting system requires client funds to be used only for client travel. To use a credit card to purchase services for a third party runs counter to that system.

The Tribunal's finding that the Applicant did not forward the interim financial statements establishes that it is in breach of a condition of registration. The Registrar asks the Tribunal to conclude that the Tribunal's earlier condition that the Applicant employs a properly approved manager within 14 days of the earlier decision was an ongoing obligation. That is, the Applicant was not only required to employ a manager within 14 days but, thereafter, to ensure that an office manager was on staff and present at the agency during business hours. The failure to replace the office manager in a timely manner when she failed the travel counsellor exam was, according to the Registrar, a breach of the conditions imposed by the Tribunal. It is a breach of the Act. This Tribunal cannot read the earlier decision in such a manner that it requires literal compliance. It requires, going forward, that the Applicant maintain a properly qualified manager at all times in compliance with the Act. It gave the Applicant a dispensation of 14 days to achieve that compliance.

Having found from the Applicant's financial position that it cannot reasonably be expected to be financially responsible in the conduct of its business and having found that the Applicant has breached conditions of its registration, it remains for the Tribunal to consider whether the imposition of further conditions is an option.

The Applicant submitted that he now knows the working capital requirements and will ensure that they are met going forward. He also stated that he is prepared to work closely with TICO to ensure regulatory compliance, especially regarding trust reconciliations. The difficulty for the Tribunal arises from the fact that these submissions are virtually identical to the submissions made at the earlier hearing.

In light of the fact that the Applicant has been given an opportunity to address problems and in the face of Mr. Phillips' undertaking to ensure compliance with conditions previously imposed by the Tribunal, the Tribunal has no confidence that the Applicant will abide by a further set of conditions. There is but one remedy left: revocation.

DECISION

Pursuant to the authority vested in it by section 11. (5) of the Act, the Tribunal orders the Registrar to carry out the Proposal dated February 1, 2010 to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude, Vice-Chair

RELEASED: June 4, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ZAFARIS TRAVEL INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002,* S.O.2002, c.30, Sch. D

TO REVOKE REGISTRATION

TRIBUNAL: DAVID B. CARYLL, Presiding Member

APPEARANCES: MEHDI ZAFARI, representing the Applicant

SOUSSANNA KARAS, Counsel representing the Registrar, *Travel Industry Act, 2002* (the "Registrar")

DATE OF PRE-HEARING: July 12, 2010 Toronto

ORDER

A pre-hearing was held in this matter on July 12, 2010, in Toronto before this Tribunal in the presence of the Mehdi Zafari, Agent for the Applicant, and Soussanna Karas, Counsel for the Registrar.

Following the resolution of all the outstanding issues in this matter, and with the agreement of the parties:

1. The Tribunal orders that the proceedings in this matter are hereby concluded on the basis of the *Minutes of Settlement* filed with the Tribunal at Attachment "A".

2. The scheduled August 6, 2010 date for the hearing is cancelled.

LICENCE APPEAL TRIBUNAL

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David B. Caryll, Member

RELEASED: July 13, 2010

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

SCHEDULE 'A'

ATTACHMENT "A"

Licence Appeal Tribunal

ZAFARIS TRAVEL INC.

Applicant

AND

REGISTRAR, TRAVEL INDUSTRY ACT, 2002

Respondent

MINUTES OF SETTLEMENT

WHEREAS ***Zafaris Travel Inc.*** located at **257 Finch Ave East, Toronto, ON M2N 4S1,** is travel agent registered on November 2, 2007, Registration No. 50016072 under the *Travel Industry Act, 2002* ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of ***Zafaris Travel Inc.*** on April 26, 2010, for the reason ***Zafaris Travel Inc.*** is and has been carrying on activities that are in contravention of the Act and the Ontario Regulation 26/05 made under the Act (the "Regulation");

AND WHEREAS ***Zafaris Travel Inc.*** appealed the Notice of Proposal to the Licence Appeal Tribunal on May 13, 2010;

AND WHEREAS the Notice of Proposal dated April 26, 2010 was issued due to the history of Registrant's filing its financial statements late and working capital non-compliance.

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. The Registrant shall file any and all annual financial statements for each fiscal year prepared by a **public accountant** licensed under the ***Public Accountancy Act,***

2004 and accompanied by a Review Engagement Report or an Audit Opinion as required by the Regulation within 3 months after the end of the fiscal year.

3. The Registrant shall respond to TICO inquiries and requests in a timely manner. The Registrant shall advise TICO of changes outlined in sections 16 and 17 of the Regulation within the time prescribed in those sections.

4. The Registrant shall, at all times, maintain the minimum working capital as required by section 24 of the Regulation. If based on the financial statements submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with section 24 of the Regulation, the Registrant shall take the necessary steps to correct its working capital position and submit proof thereof within 30 days from the request by the Registrar.

5. The shareholders shall ensure that shareholder loans and/or advances to ***Zafaris Travel Inc.*** will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event ***Zafaris Travel Inc.*** decides to discontinue operations, any claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans can be repaid.

6. The Registrant shall provide a minimum 10 days written notice to the Registrar when it considers closing or terminating its TICO registration.

7. The Registrant waives its right to a hearing before the Licence Appeal Tribunal currently set for August 6, 2010.

Zafaris Travel Inc. and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

Zafaris Travel Inc. further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS 12 DAY OF Jul , 2010

Mehdi Zafari

Mr. Mehdi Zafari, President

Zafaris Travel Inc.

I have the authority to bind the corporation

Mr. Michael Pepper

Registrar, *Travel Industry Act, 2002*

S. KARAS, Legal Counsel
TICO

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, c.30, Sch. D

IN THE MATTER of the REGISTRATION of
LEEGO CANADA INC. O/A LEEGO TOURS

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 10 of the Act

TO REVOKE REGISTRATION
- Proposal dated: March 26, 2010

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal pursuant to section 11

LEEGO CANADA INC. O/A LEEGO TOURS

- Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal (the "Tribunal") by Leego Canada Inc. o/a Leego Tours, the Applicant, and the Registrar under the *Travel Industry Act, 2002,* for issuance of a Consent Order of the Tribunal without a hearing, pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act, 2002,* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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: July 26, 2010

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

SCHEDULE 'A'

Licence Appeal Tribunal

LEEGO CANADA INC. o/a LEEGO TOURS

Applicant

AND

REGISTRAR, TRAVEL INDUSTRY ACT, 2002

Respondent

MINUTES OF SETTLEMENT

WHEREAS ***Leego Canada Inc. o/a Leego Tours*** located at **150 Beverley Street, Unit 1A, Toronto, ON M5T 1Y5,** is travel agent registered on March 18, 2008, Registration No. 50016494, under the *Travel Industry Act*, *2002* ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of ***Leego Canada Inc. o/a Leego Tours*** on March 26, 2010 ("NOP"), for the ***Leego Canada Inc. o/a Leego Tours*** is and has been carrying on activities that are in contravention of the Act and the Ontario Regulation 26/05 made under the Act (the "Regulation");

AND WHEREAS ***Leego Canada Inc. o/a Leego Tours*** appealed the Notice of Proposal to the Licence Appeal Tribunal on April 22, 2010;

AND WHEREAS the NOP was issued as a result of the history of Registrant's filing its financial statements late and working capital non-compliance.

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. The Registrant shall file any and all annual financial statements for each fiscal year prepared by a **public accountant** licensed under the ***Public Accountancy Act, 2004*** and accompanied by a Review Engagement Report or an Audit Opinion as required by the Regulation within 3 months after the end of the fiscal year.

3. The Registrant shall respond to TICO inquiries and requests in a timely manner. The Registrant shall advise TICO of changes outlined in sections 16 and 17 of the Regulation within the time prescribed in those sections.

4. The Registrant shall, at all times, maintain the minimum working capital as required by section 24 of the Regulation. If based on the financial statements submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with s. 24 of the Regulation, the Registrant shall take the necessary steps to correct its working capital position and submit proof thereof within 30 days from the request by the Registrar.

5. The shareholder shall ensure that loans and/or advances to ***Leego Canada Inc. o/a Leego Tours*** will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event ***Leego Canada Inc. o/a Leego Tours*** decides to discontinue operations, any claims against the *Ontario Travel*

Industry Compensation Fund are to be fully satisfied before shareholder loans can be repaid.

6. If the October 31, 2010 financial statement reflects a working capital deficiency which resulted from the withdrawal of the shareholder advances, a Notice of Proposal to Revoke Registration will be issued immediately and no settlement discussions would be held.

7. The Registrant shall provide a minimum 10 days written notice to the Registrar when it considers closing or terminating its TICO registration.

8. The Registrant waives its right to a hearing before the Licence Appeal Tribunal currently set for August 4, 2010.

Leego Canada Inc. o/a Leego Tours and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

Leego Canada Inc. o/a Leego Tours further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS DAY OF , 2010

Mr. Guangqiang (Bryan) Li, President	Mr. Michael Pepper
Leego Canada Inc. o/a Leego Tours	**Registrar, *Travel Industry Act, 2002***

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

WINE ESCAPES INC. O/A BOUTIQUE ESCAPES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002,* S.O. 2002, c. 30, Sch. D

TO REVOKE A REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: NO-ONE appearing for the Applicant,

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act*, *2002*

DATE OF HEARING: July 19, 2010 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from the Notice of Proposal to Revoke Registration issued by the Registrar on March 19, 2010, pursuant to s. 10 of the *Travel Industry Act, 2002,* S.O. 2002, c. 30, Sch. D (the "Act). The sole ground set out in the Notice is a chronic shortfall in working capital.

No-one appeared for the Applicant at the hearing despite good service of the notice of hearing. The Tribunal heard evidence from Mary-Ann Harrison. Ms Harrison is a Chartered Accountant. Currently she is the Director of Operations and Chief Financial Officer for the Travel Industry Council of Ontario (TICO), the office of the Registrar under the Act. Her current duties include oversight of all compliance issues. She meets weekly with TICO's inspectors to review the files of defaulting registrants. She reviewed the financial filings of the Applicant since the financial year 2006 to the latest financial year 2009.

The Applicant's financial year end is October 31 each year. Pursuant to regulation, it must file financial statements with TICO by January 31 each year. The 2006 financial

statements were received on February 5, 2007. They indicate sales of $906,596.00. The regulations require a registrant with sales of $906,506.00 to have a working capital of $15,000.00. The Applicant's financial statements showed a negative working capital of $20,308.00. TICO wrote to the Applicant on February 26, 2007, pointing out the working capital shortfall and requiring correction by way of a capital injection of $35,308.00. The Applicant was given until March 12, 2007, to correct the deficiency. On March 12, 2007 the Applicant contacted TICO and advised that it would purchase two GICs in the name of the company, each for approximately $10,000.00. The first would be purchased on March 15, 2007 and the second by April 15, 2007. It provided evidence of the purchase of both GICs by April 18, 2007. There was still a shortfall in the region of $15,000.00. The Applicant appeared to labour under the misunderstanding that cash on hand in a bank account is working capital. This misconception was cleared up and the Applicant deposited $7,500.00 on September 18, 2007 and a further $7,500.00 on November 1, 2007. Thus, it took nine months for the Applicant to correct its working capital deficiency.

Ms Harrison reviewed the 2006 financial statements and identified the source of the working capital shortfall in 2006. At the end of 2005 shareholder loans stood at $119,783.00. The 2006 financial statements showed that approximately $90,000.00 of the shareholder loans had been repaid.

The 2007 financial statements were received on March 14, 2008, and showed sales of $1,244,761.00. This level of sales required a working capital of $20,000.00. The balance sheet showed working capital of $8,586.00. Acting on the belief that the $7,500.00 deposit on November 1, 2007 was not shown on the October 31 year-end statements, the Registrar advised the Applicant that it had a working capital shortfall of $3,914.00. After a number of letters from TICO, the Applicant made a deposit of $4,000.00 by way of a GIC on June 3, 2008. Shareholder loans showed a slight increase over 2006 but did not reflect the $35,000.00 that had been deposited in response to TICO's concerns in the previous year. It appears that approximately $33,000.00 of the $35,000.00 had been taken back out of the company.

The 2008 financial statements were due on January 31, 2009. They were not received until March 30, 2009, after TICO threatened to bring revocation proceedings. The Applicant had sales in excess of $1 million so required a working capital of $20,000.00. Its working capital was $9,979.00 requiring an injection of $10,021.00. Despite letters from TICO about the shortfall on April 22, May 26 and July 28, 2009, the Applicant took no steps to remedy the shortfall until it purchased a GIC in the amount of $5,021.00 on August 11, 2009. A further deposit of $5,000.00 was made on September 18, 2009. Again, the amount due to shareholders does not reflect the level of deposit made in the year suggesting that funds were withdrawn after deposit.

The 2009 financial statements were received on February 1, 2010. They indicate sales in excess of $1 million requiring the Applicant to have a working capital of $20,000.00. The Applicant's working capital was negative $14,346.00. The Applicant was required to inject new capital in the amount $34,346.00. Faced with chronic working capital

problems and slow action to remedy them on the part of the Applicant, the Registrar issued the Notice of Proposal to Revoke on March 19, 2010.

The Applicant's Notice of Appeal was filed on April 12, 2010 and an explanation letter was received by the Tribunal on April 13, 2010. In the letter the Applicant undertook to make up the shortfall, at the latest, by early in the week of April 19, 2010. It failed to do so. The matter went to a pre-hearing conference on June 23, 2010. At the pre-hearing the Applicant undertook to correct the deficiency by July 9, 2010. It failed to do so.

A review of the Applicant's 2009 financial statements indicates that its cash assets dropped over the year from $81,000.00 to $16,000.00 and its shareholder loans dropped from $32,000.00 to $5,057.00. It suggests that the shareholders are stripping assets from the company. Overall assets dropped from $154,000.00 to $81,000.00. The Tribunal has real concerns that consumer funds are at risk.

ANALYSIS

The applicable statutory 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,
>
> > (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
> >
> > (iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty;
>
> **Refusal to register, etc.**
>
> 10. (1) Subject to section 11, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 8.
>
> **Notice re: refusal, suspension, etc.**
>
> 11. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,
>
> (b) suspend or revoke a registration
>
> **Content of notice**
>
> (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.

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.

Working capital requirements are set out in Ontario Regulation 26/05 as follows:

24. (1) This section applies on and after January 1, 2006.

(2) A registrant who had sales in Ontario during the previous fiscal year of an amount shown in Column 1 of the Table to this section shall maintain a working capital of at least the amount shown in Column 2 opposite the first-named amount.

(3) A registrant's working capital shall be calculated in accordance with generally accepted accounting principles and shall not include,

(a) the value of any security provided under subsection 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.

TABLE

Column 1	Column 2
Sales in Ontario during previous fiscal year	Minimum working capital
$500,000 or less	$5,000
More than $500,000 but not more than $750,000	10,000
More than $750,000 but not more than $1,000,000	15,000
More than $1,000,000 but not more than $2,000,000	20,000
More than $2,000,000 but not more than $5, 000,000	25,000
More than $5,000,000 but not more than $10,000,000	35,000
More than $10,000,000 but not more than $20,000,000	50,000
More than $20,000,000	100,000

The Registrar argues that the Applicant's history of chronic deficiencies of working capital indicates that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business. The Registrar also argues that by failing to

comply with the working capital requirements of the Act the Applicant will not be operating in accordance with law.

Following review of all the evidence, the Tribunal concludes that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business with a significant working capital shortfall. The repeated working capital deficiencies provide reasonable grounds for belief that the Applicant will not carry on business in accordance with law.

DECISION

At the conclusion of the hearing, given its concerns about exposure of consumer funds to loss, the Tribunal gave an oral decision ordering the Registrar to revoke the Applicant's registration with these reasons to follow. Pursuant to the provisions of s. 11 (5) of the Act, the Tribunal confirms the oral decision and orders the Registrar carry out his proposal dated March 19, 2010 to revoke the Applicant's registration.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude, Vice-Chair

RELEASED: July 23, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

K. WALSH & ASSOCIATES TRAVEL SERVICES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002,* S.O. 2002, c. 30, Sch. D

TO REVOKE A REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: KIMBERLEY WALSH, Agent, for the Applicant,

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act*, *2002*

DATE OF HEARING: July 16, 2010 Toronto

FINAL DECISION AND ORDER

In reasons released on June 18, 2010, the Tribunal reviewed the facts of this matter and found that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business with a significant working capital shortfall. It also found that the failure to correct the working capital position despite being given almost two years to do so provided reasonable grounds for belief that the Applicant will not carry on business in accordance with law. Because of the Applicant's efforts to bring itself into compliance with the working capital requirements of the *Travel Industry Act*, *2002* (the "Act"), and the steps it had taken to protect consumer funds, the Tribunal adjourned the hearing to give the Applicant thirty days to provide evidence that it had brought itself into compliance with the working capital requirements.

At the resumption of the hearing the Applicant produced an income statement showing income for the two month period from May 1, 2010 to June 30, 2010.[1] The statement

[1] Ex 6

indicated a profit for the period of $285,674.03. According to Kimberley Walsh, who testified on behalf of the Applicant, all of this profit was left in the company and the Applicant's working capital is now approximately $160,000.00. It is required to have a working capital of $50,000.00. It was Ms Walsh's evidence that the Applicant has now fully recovered from the economic downturn of the last several years and is viable once again.

On cross-examination, Ms Walsh was asked why she had not provided the Applicant's balance sheet. She stated that she is generally ignorant of accounting functions and relies on her accountant. She stated that her accountant was away on vacation. He had left on June 27, 2010 and was not expected to return until July 31, 2010. In the interim she was receiving assistance from another accountant but certain areas of the computer based accounting system were "locked out" so it was impossible to prepare an interim balance sheet. She did not bring the accountant who prepared the income statement to testify because she was not sure she was permitted to do so.

Mary-Ann Harrison testified for the Registrar. She is a Chartered Accountant and the Chief Financial Officer of the Travel Industry Council of Ontario, the not-for-profit corporation charged with ensuring compliance with the Act and regulations. She stated that no conclusions can be drawn concerning the working capital position of the Applicant from an income statement. She pointed out that there can be major swings in the capital position over a short period. She pointed to the Applicant's interim financial statements from April 2009 showing a negative working capital of approximately $100,000.00. In the year-end June 30, 2009, financial statements working capital had deteriorated to negative $231,000.00. Ms Harrison did concede that there could be a positive change over a short period too, but asserted that there was simply insufficient information to conclude that a positive change had occurred.

ANALYSIS

Following on the findings in the June 18, 2010 decision that the Registrar had satisfied the onus of demonstrating that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business and that there were reasonable grounds for belief that the Applicant will not carry on business in accordance with law, the Applicant was given the opportunity to provide clear and cogent up-to-the minute evidence that it was in compliance with the working capital requirements. The Tribunal must conclude that it has failed to do so.

In the face of Ms Walsh's admitted lack of knowledge of accounting matters, the Tribunal prefers the evidence of Ms Harrison that the income statement provides little or no information about the Applicant's working capital. The Applicant has been aware, since June 18, 2010, that it had to provide evidence of its working capital position. Its accountant was available to address the issue for the next nine days or to brief the replacement accountant on the manner in which a current balance sheet could be produced. It appears no steps were taken to ensure the proper financial reports were generated.

DECISION

In light of the Tribunal's findings as set out in its reasons released on June 18, 2010, the Applicant having failed to provide evidence of an improved working capital position at the hearing on July 16, 2010, pursuant to the provisions of s. 11 (5) of the Act, the Tribunal orders the Registrar to carry out its proposal dated February 10, 2010 to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude, Vice-Chair

RELEASED: July 23, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

JETMAX HOLIDAYS INC.-pre-hearing-settlement

APPEAL OF A PROPOSAL OF THE REGISTRAR UNDER *THE TRAVEL INDUSTRY ACT, 2002,* S.O.2002, c.30, Sch. D

TO REVOKE REGISTRATION

TRIBUNAL: DAVID B. CARYLL, Presiding Member

APPEARANCES: BIN LIAO, Agent, representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF PRE-HEARING: August 10, 2010 Toronto

ORDER

A pre-hearing was held in this matter on August 10, 2010, in Toronto before this Tribunal in the presence of Bin Liao, Agent for the Applicant, and Soussanna Karas, Counsel for the Registrar.

Following the resolution of all the outstanding issues in this matter, and with the agreement of the parties:

1. The Tribunal orders that the proceedings in this matter are hereby concluded on the basis of the *Minutes of Settlement* filed with the Tribunal and attached as Schedule “A”.

2. The scheduled September 3, 2010 date for the hearing is cancelled, and the proceedings before the Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

_____

David B. Caryll, presiding Member

RELEASED: *August 17, 2010*

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

JETMAX HOLIDAYS INC.

Applicant

AND

REGISTRAR, TRAVEL INDUSTRY ACT, 2002

Respondent

MINUTES OF SETTLEMENT

WHEREAS *Jetmax Holidays Inc.* located at 4438 Sheppard Ave East, Unit 322, Toronto, ON M1S 5V9, is a travel agent registered on August 8, 2007, Registration No. 50016008, under the *Travel Industry Act*, *2002* ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of *Jetmax Holidays Inc.* on May 12, 2010 ("NOP"), for the reason *Jetmax Holidays Inc.* is and has been carrying on activities that are in contravention of the Act and the Ontario Regulation 26/05 made under the Act (the "Regulation");

AND WHEREAS *Jetmax Holidays Inc.* appealed the Notice of Proposal to the Licence Appeal Tribunal on May 21, 2010;

AND WHEREAS the NOP was issued for a failure of the Registrant to appoint a manager/supervisor who would attend to the business of the Registrant during its hours of operation and who would meet the eligibility requirements of section 15 of the Regulation.

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. The Registrant shall ensure that its office is managed/supervised during the business hours by a manager/supervisor who meets the eligibility requirements of section 15 of the Regulation and is approved by the Registrar, *Travel Industry Act, 2002*. If Mr. Philip (Bin) Liao, who is currently a manager of the record, continues to manage the office of the Registrant, he shall ensure that his other employment or contractual obligations do not intervene with his duties as a manager of the Registrant.

3. Due to the close location proximity between Jetmax Holidays Inc. and Jet Plus Travel Inc. and intermixed relationships between the agencies, the Registrant shall ensure that there is clear disclosure to its customers on all communications, invoicing and signage of its name, contact information, TICO registration number, and other information necessary for the consumer to distinguish between the two agencies.

4. The Registrant shall file any and all annual financial statements for each fiscal year prepared by a public accountant licensed under the *Public Accountancy Act, 2004* and accompanied by a Review Engagement Report or an Audit Opinion as required by the Regulation within 3 months after the end of the fiscal year.

5. The Registrant shall respond to TICO inquiries and requests in a timely manner. The Registrant

6. shall advise TICO of changes outlined in sections 16 and 17 of the Regulation within the time prescribed in those sections.

7. The Registrant shall, at all times, maintain the minimum working capital as required by section 24 of the Regulation. If based on the financial statements submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with s. 24 of the Regulation, the Registrant shall take the necessary steps to correct its working capital position and submit proof thereof within 30 days from the request by the Registrar.

8. The shareholders of the Registrant shall ensure that loans and/or advances to *Jetmax Holidays Inc.* will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event *Jetmax Holidays Inc.* decides to discontinue operations, any claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans can be repaid.

9. The Registrant shall provide a minimum 10 days written notice to the Registrar when it considers closing or terminating its TICO registration.

10. The Registrant waives its right to a hearing before the Licence Appeal Tribunal currently set for September 3, 2010.

Jetmax Holidays Inc. and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

Jetmax Holidays Inc. further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS DAY OF , 2010

Mr. Philip (Bin) Liao, President

Jetmax Holidays Inc.

I have the authority to bind the corporation

Mr. Michael Pepper

Registrar, *Travel Industry Act, 2002*

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, c.30, Sch. D

IN THE MATTER of the REGISTRATION of
MARIE A. SORIANO and MANUEL M. MA NIQUIS O/A ROYAL VACATIONS TRAVEL AND TOURS

AND IN THE MATTER of the PROPOSAL of the Registrar under the *Travel Industry Act, 2002* made pursuant to section 10 of the Act

TO REVOKE REGISTRATION
- Proposal dated: April 22, 2010

AND IN THE MAT TER of a re quirement for a hearing respecting the s aid Propos al pursuant to section 11

MARIE A. SORIANO and MANUEL M. MANIQUIS O/A ROYAL VACATIONS TRAVEL AND TOURS

- Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal (the "Tribunal") by Marie A. Soriano and Manuel M. Maniquis o/a Roya l Vacations Travel and T ours, the Applicant, and the Registrar under the *Travel Industry Act, 2002,* for issuance of a C onsent Order of the Tribunal without a he aring, pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settl ement signed by the Applicant and the Registrar under the *Travel Industry Act, 2002,* as to the dis position of t hese proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the cons ent 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: August 18, 2010

This decis ion may also be available on Quicklaw at a later date

MARIE SORIANO & MANUEL MANIQUIS
O/A ROYAL VACATIONS TRAVEL & TOURS

Applicant

AND

REGISTRAR, TRAVEL INDUSTRY ACT, 2002

Respondent

MINUTES OF SETTLMENT

WHEREAS ***Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours*** located at **238 Sammon Avenue Toronto, ON M4J 1Z5,** is travel agent registered on December 3, 2003, Registration No. 50012112, under the *Travel Industry Act*, 2002 ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of ***Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours*** on April 22, 2010, for the reason that ***Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours*** is and has been carrying on activities that are in contravention of the Act and the Ontario *Regulation* 26/05 under the Act (the "Regulation");

AND WHEREAS ***Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours*** has appealed to the Licence Appeal Tribunal on May 11, 2010;

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. ***Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours*** (hereinafter referred to as the "Registrant") undertakes to deliver to the Registrar monthly Trust Reconciliations (a reconciliation showing total receipts from customers for travel services sold less payments for the related travel services compared to trust funds held in the Trust Account)) for each month starting August 2010 until December 2010. The Trust Reconciliations are to be submitted within 30

days from the end of the each month.

a. Trust reconciliations for August 31, 2010 are to be provided by September 30, 2010;
b. Trust reconciliations for September 30, 2010 are to be provided by October 31, 2010;
c. Trust reconciliations for October 31, 2010 are to be provided by November 30, 2010;
d. Trust reconciliations for November 30, 2010 are to be provided by December 31, 2010;
e. Trust reconciliations for December 31, 2010 are to be provided by January 31, 2011;

3. The Registrant shall, at all times, maintain the minimum working capital as required by s. 24 of the Regulation. If based on the reports submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with s. 24 of the Regulation, the Registrant shall make necessary steps to improve its working capital position and submit the proof thereof within 30 days from the request by the Registrar.

4. The Registrant shall maintain a trust account to protect customer funds pursuant to and in accordance with Section 27 of the Regulation, as amended, and such account shall be designated as a *Travel Industry Act* trust account.

5. The Registrant shall file any and all final financial statements for each fiscal year prepared by the **Public Accountant** licensed by the **Public Accountants Council of Ontario** and accompanied by the Review Engagement Report as required by the Regulation on or before the legislated due date.

6. **Marie Soriano and Manuel Maniquis** shall ensure that partner loans and/or advances to ***Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours*** are not withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event ***Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours*** decides to discontinue operations, any claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans then in existence are to be repaid.

7. The Registrant shall notify the Registrar within **five days** of the change of manager, change of address, change of officers/directors and a change in the name or number of an account or in the choice of financial institution in which the account is required to be maintained as per Section 17 of the Regulation 26/05.

8. The Registrant shall ensure that all its employees and contractors, engaged in the sale of travel services or providing advice to consumers in respect of the sale of the travel services, have met the required educational standards, in accordance with section 12 of the Regulation.

9. The Registrant waives its right to a hearing before the Licence Appeal Tribunal currently set for September 3, 2010.

Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS 10th DAY OF August, 2010

Ms. Marie A Soriano, Partner

Marie Soriano & Manuel Maniquis o/a Royal Vacations Travel & Tours

Witness

Mr. Michael Pepper

Registrar, *Travel Industry Act, 2002*

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, c.30, Sch.D

7N CANADA INC. O/A JUBILEE TRAVELS AND TOURS-dismissal

IN THE MATTER of an APPEAL by
7N CANADA INC. O/A JUBILEE TRAVELS AND TOURS

AND IN THE MATTER OF the PROPOSAL TO REVOKE REGISTRATION of the Registrar, *Travel Industry Act*, 2002
made pursuant to section 11 of the *Travel Industry Act, 2002*

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

7N CANADA INC. O/A JUBILEE TRAVELS AND TOURS

Applicant

-and-

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Travel Industry Act,* 2002, S.O. 2002, c.30, Sch.D (the "Act"), 7n Canada Inc. o/a Jubilee Travels and Tours (the "Applicant") initiated an appeal under section 11(5) of the Act from a Proposal of the Registrar, *Travel Industry Act, 2002*, in terms of which the Registrar proposed to revoke the registration of the Applicant;

The Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999, and 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 11 of the *Travel Industry* A*ct, 2002* this Tribunal directs the Registrar to carry out his proposal.

LICENCE APPEAL TRIBUNAL

_____
Lynda Tanaka, Chair

Released: August 9, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1737830 ONTARIO INC. O/A PORTS OF CALL 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: MARC D'AMOURS, Vice-Chair

APPEARANCES: ELI SAAB, Agent, representing the Applicant, 1737830 Ontario Inc. o/a Ports of Call Travel Services

SOUSSANNA KARAS, Counsel, representing the Registrar, Travel Industry Act, 2002

DATE OF HEARING: July 9, 2010 Ottawa

REASONS FOR DECISION

A hearing was held in the appeal by 1737830 Ontario Inc. O/A Ports of Call Travel Services (the Applicant) from a Notice of Proposal of the Registrar dated March 9th, 2010[1] (Notice of Proposal) to revoke the Applicant's registration as a travel agent pursuant to the *Travel Industry Act, 2002* (the Act).

For the reasons given below, the Tribunal directs the Registrar to carry out the Proposal.

FACTS

The Applicant has been registered as a travel agency since November 22, 2007. The Registrar alleges that the Applicant has not maintained the minimum working capital as required by the governing *Regulations*. This was the only issue raised by the Respondent which is one of the allegations of the mentioned Notice of Proposal.

The Applicant acknowledges that there is a shortfall of the working capital. The Applicant states that he wants to sell his assets and move forward.

[1] Exhibit 2

At the outset, the Applicant indicated that he had entered into an agreement with a potential purchaser to sell the corporation's assets and therefore there was no risk to the industry to pursue the hearing. The Applicant could not, however, produce or introduce any documentation which would confirm the sale of the assets. The Respondent argued that the Applicant had sufficient time to produce these legal documents, and, that in the event of the sale of assets, the new owner would still need to qualify for registration.

Given the absence of any proof of the sale of the assets, the Tribunal determined that the hearing would proceed. If, at any time, prior to the completion of the hearing, the Applicant could have produced an agreement of purchase and sale then it would have been considered at that time. The Applicant seemed not to oppose this approach.

The Registrar relies on the evidence of Hans Reitkneckt, the Financial Inspection Coordinator for the Travel Industry Council of Ontario (TICO). He is a certified management accountant. He identified a document brief[2]. It includes inspection reports, TICO letters, a Notice of Proposal to revoke registration dated June 23, 2009, the Applicant's Financial Statements, and correspondences between the parties.

The Financial Inspection coordinator testified that an Inspection Report was prepared on March 12, 2008 in regards to a visit by the inspector, Jack Foster. The report noted that a loan of $30 000 paid to one A.S. on December 18, 2007 produced a shortfall in the working capital. This deficiency was remedied on April 7, 2008 and confirmation sent by fax to the Respondent. A subsequent visit, on September 16, 2008, confirmed that the deposited amount had not been withdrawn.

The Applicant's financial statement was to be produced by November 30, 2008. The Respondent made two requests for the Applicant's financial statements which were eventually produced on January 16, 2009. These revealed that the Applicant's 2008[3] sales was $7 070 066 therefore requiring a working capital of $35 000. Working capital is succinctly assets minus liabilities. The financial data included on the balance sheet showed a deficit of $55 949. This coupled with the working capital requirement of $35 000,00, that means that, the Applicant, therefore, had to deposit an amount of almost $91 000 to comply with *Regulations*.

On January 23, 2009, the Applicant was notified to comply with the statutory regulations by February 6, 2009. On that day, the Applicant provided written proof of a deposit of $91 000. On June 10, 2009, however, an inspection showed that the amount deposited had been withdrawn that same day. On June 23, 2009, the Respondent, therefore, issued a Notice of Proposal to revoke registration based on the working capital shortfall. On July 15, 2009, the Registrar, by letter, withdrew its Notice of Proposal satisfied that the Applicant had invested in the corporation and deposited funds of $91 000.

On December 3, 2009, the Respondent received the Applicant's 2009[4] Financial Statements. It showed that $91 000 was a GIC securing a loan of the same amount. Accounting principles dictate that this has a nil effect in regards to working capital. Further, the Applicant's sales for that period were $7 224 965,.thus requiring a minimum

[2] Exhibit 1
[3] For the financial period of September 1, 2007 to August 31, 2008
[4] For the financial period of September 1, 2008 to August 31, 2009

working capital of $35 000. The Applicant's balance sheet indicated a negative working capital of $88 819.. Therefore, the Applicant was required to deposit an amount of $123 819.00 in order to comply with the *Regulation*. To this day, that shortfall has not been remedied.

The Applicant testified that he wants to sell his assets and move on. He does not have the funds to invest in the corporation. He has sought financial assistance and he has not succeeded in finding investors or purchasers.

The Applicant strongly states that notwithstanding the corporation's financial situation, not one consumer has suffered from this predicament. There is no evidence to indicate otherwise.

THE LAW

The Act provides in section 8:

> 8. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,…
>
> (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;

Section 11(5) of the Act provides for the Tribunal's jurisdiction as follows:

> 11. (5) If a hearing is requested, the Tribunal shall hold the hearing and may by order direct the registrar to carry out the registrar's proposal or substitute its opinion for that of the registrar and the Tribunal may attach conditions to its order or to a registration.

O. Reg. 26/05 under the Act provides explicit requirements for monitoring of the financial health of a travel agent and protection of consumers in sections 22 and 24:

> 22. (1) Every registrant shall file with the registrar the financial statements required by this section for each fiscal year.
>
> (2) A registrant who had sales in Ontario of less than $10 million during the previous fiscal year shall file, within three months after the end of the fiscal year,
>
> (a) annual financial statements with a review engagement report by a public accountant licensed under the Public Accountancy Act, 2004; 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.
>
> (3) A registrant who is a travel agent and had sales in Ontario of $10 million or more but less than $20 million during the previous fiscal year shall file,
>
> (a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and
> (b) semi-annual financial statements within 45 days after the end of each fiscal half-year.

(4) A registrant who is a travel agent and had sales in Ontario of $20 million or more during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) quarterly financial statements within 45 days after the end of each quarter during the fiscal year.

(5) A registrant who is a travel wholesaler and had sales in Ontario of $10 million or more during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) quarterly financial statements within 45 days after the end of each quarter during the fiscal year.

(6) Financial statements required under this section shall include a statement of sales in Ontario made during the period to which the financial statements refer, a balance sheet, an income statement and a reconciliation of the trust accounts maintained under section 27.

(7) If additional information is necessary to provide an accurate and complete review of the registrant‘s financial position, the registrar may require that the registrant file audited financial statements that consolidate or combine the registrant‘s financial statements with,

(a) the financial statements of another registrant; or

(b) if the registrant is a corporation, with the financial statements of another person who is a shareholder associated with the registrant.

(8) If the registrar has reason to believe that a registrant is in financial difficulty, the registrar may require that the registrant provide to the registrar a written statement of the registrant‘s current net working capital, and the registrant shall do so within the time the registrar specifies.

(9) The registrar may require that a statement provided under subsection (7) or (8) be verified by affidavit.

24. (1) This section applies on and after January 1, 2006.

(2) A registrant who had sales in Ontario during the previous fiscal year of an amount shown in Column 1 of the Table to this section shall maintain a working capital of at least the amount shown in Column 2 opposite the first-named amount.

(3) A registrant‘s working capital shall be calculated in accordance with generally accepted accounting principles and shall not include,

(a) the value of any security provided under subsection 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 Table in the regulation indicates that where a travel agent‘s sales are between $5,000,000 and $10,000,000 in the previous fiscal year, the minimum working capital is $35,000.

The policy basis of the regulation is to provide the regulator with the ability to monitor the financial health of travel agents on a regular basis so as to avoid the insolvencies and bankruptcies which are so damaging to consumers and to the industry. It is the nature of a regulated industry that certain requirements for continued registration must be met for the mutual advantage of the industry and the consumer.

ANALYSIS

The Applicant has, almost since registration, been in a working capital shortfall. A loan granted to A.S. put the Applicant in a deficit situation and attempts to remedy that position proved fruitless.

The Respondent performed three inspections and all of them revealed that the Applicant was not complying with the statutory regulations in regards to the working capital minimum. Furthermore, the inspection reports were supported by the corporation's financial statements.

The Applicant has attempted to comply with the minimum working capital requirements without success. The Act and TICO's requirements are intended to protect the public and the industry. There is no discretion allowed to the Registrar or to this Tribunal. Fortunately, the Applicant's financial position has not affected its customers or the industry.

Therefore, the Registrar has proven on the balance of probabilities that the past conduct of the Applicant gives reasonable grounds to believe that he will not act with financial responsibility and he will not act in accordance with the law; specifically he will not comply with the regulatory requirements related to working capital minimum required by the Act and regulations.

DECISION AND ORDER

Pursuant to its powers under the Act, the Tribunal directs the Registrar to carry out his proposal to revoke the Applicant's registration.

LICENCE APPEAL TRIBUNAL

_____
Marc D'Amours, Vice-Chair

Released: August 19, 2010

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1427286 ONTARIO INC. O/A VOYAGES ROZON TRAVEL PLUS-Consent Order

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002,* S.O. 2002, c.30, Sch. D

TO REVOKE REGISTRATION

TRIBUNAL: MARC D'AMOURS, Vice-Chair

APPEARANCES: SUZANNE HOCQUARD, Agent, representing 1427286 Ontario Inc. o/a Voyages Rozon Travel Plus

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF HEARING: July 9, 2010 Ottawa

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal (the "Tribunal") 1427286 Ontario Inc. o/a Voyages Rozon Travel Plus, the Applicant, and the Registrar under the *Travel Industry Act, 2002*, for issuance of a Consent Order of the Tribunal without a hearing, pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act, 2002*, as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

_____

Marc D'Amours, Vice-Chair

RELEASED: August 5, 2010

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

Schedule "A"

Licence Appeal Tribunal

1427286 ONTARIO INC. o/a
VOYAGES ROZON TRAVEL PLUS

Applicant

AND

REGISTRAR, TRAVEL INDUSTRY ACT, 2002

Respondent

MINUTES OF SETTLEMENT

WHEREAS ***1427286 Ontario Inc. o/a Voyages Rozon Travel Plus*** located at **1 Main Street Hawkesbury, Ontario, K6A 1A1,** is travel agent registered on December 11, 2000, Registration No. 50008874, under the *Travel Industry Act*, *2002* ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of ***1427286 Ontario Inc. o/a Voyages Rozon Travel Plus*** on March 1, 2010, for the reason ***1427286 Ontario Inc. o/a Voyages Rozon Travel Plus*** is and has been carrying on activities that are in contravention of the Act and the Ontario Regulation 26/05 made under the Act (the “Regulation”);

AND WHEREAS ***1427286 Ontario Inc. o/a Voyages Rozon Travel Plus*** appealed the Notice of Proposal to the Licence Appeal Tribunal on March 18, 2010;

AND WHEREAS the Notice of Proposal dated March 18, 2010 was issued as a result of the history of Registrant’s filing its financial statements late and working capital non-compliance.

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. The Registrant shall file any and all annual financial statements for each fiscal year prepared by a **public accountant** licensed under the ***Public Accountancy Act, 2004*** and accompanied by a Review Engagement Report or an Audit Opinion as required by the Regulation within 3 months after the end of the fiscal year.

3. With respect to the financial statement for the year ending April 30, 2010, the Registrant shall ensure the following:

    a. The financial statement prepared in accordance with paragraph 2 above, are filed with TICO no later than July 30, 2010;
    b. Any shareholder injections subsequent to April 30, 2010 are verified and acknowledged by the accountant in his notes to the financial statement;
    c. The working capital position is calculated based on the Registrant's annualized sales calculated for 9 months (September 1, 2009 to April 30, 2010). For example, if the sales for 9 months are $1,000,000, the sales for the working capital purposes are $1,333,333;
    d. If the working capital based on the above calculation is deficient, appropriate correction is made within the 30 days from the request from the Registrar.

4. If the April 30, 2010 financial statement reflect a working capital deficiency (including any subsequent shareholder injections), a Notice of Proposal to Revoke Registration will be issued immediately and no settlement discussions would be held.

5. The Registrant shall respond to TICO inquiries and requests in a timely manner. The Registrant shall advise TICO of changes outlined in sections 16 and 17 of the Regulation within the time prescribed in those sections.

6. The Registrant shall, at all times, maintain the minimum working capital as required by section 24 of the Regulation. If based on the financial statements subsequent to April 30, 2010, submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with s. 24 of the Regulation, the Registrant shall take the necessary steps to correct its working capital position and submit proof thereof within 30 days from the request by the Registrar.

7. The shareholders of the Registrant shall ensure that loans and/or advances to ***1427286 Ontario Inc. o/a Voyages Rozon Travel Plus*** will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event ***1427286 Ontario Inc. o/a Voyages Rozon Travel Plus*** decides to discontinue operations, any claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans can be repaid.

8. The Registrant shall provide a minimum 10 days written notice to the Registrar when it considers closing or terminating its TICO registration.

9. The Registrant waives its right to a hearing before the Licence Appeal Tribunal currently set for July 9, 2010.

1427286 Ontario Inc. o/a Voyages Rozon Travel Plus and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

1427286 Ontario Inc. o/a Voyages Rozon Travel Plus further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS DAY OF , 2010

Ms. Suzanne Hocquard,
President

1427286 Ontario Inc. o/a Voyages Rozon Travel Plus

I have the authority to bind the corporation

Mr. Michael Pepper

Registrar, *Travel Industry Act, 2002*

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, c.30, Sch. D

IN THE MATTER of the REGISTRATION of
SOLTICE VISIONS LIMITED O/A KINGSWAY CRUISESHIPCENTERS

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 10 of the Act

TO REVOKE REGISTRATION
- Proposal dated: June 23, 2010

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal pursuant to section 11

SOLTICE VISIONS LIMITED O/A KINGSWAY CRUISESHIPCENTERS

- Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

- Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal (the "Tribunal") by Soltice Visions Limited o/a Kingsway Cruiseshipcenters, the Applicant, and the Registrar under the *Travel Industry Act, 2002,* for issuance of a Consent Order of the Tribunal without a hearing, pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act, 2002,* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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: October 4, 2010

This decision may also be available on Quicklaw

SCHEDULE 'A'

SOLSTICE VISIONS LTD.

o/a Kingsway Cruiseshipcenters

Applicant

AND

REGISTRAR, TRAVEL INDUSTRY ACT, 2002

Respondent

MINUTES OF SETTLEMENT

WHEREAS ***Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters*** is a travel agent registered on June 9, 2006, under the *Travel Industry Act*, *2002* ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of ***Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters*** on June 23, 2010 ("NOP"), for the reason ***Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters*** is and has been carrying on activities that are in contravention of the Act and the Ontario Regulation 26/05 made under the Act (the "Regulation");

AND WHEREAS ***Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters*** appealed the Notice of Proposal to the Licence Appeal Tribunal on July 8, 2010;

AND WHEREAS the NOP was issued for a failure of the Registrant to maintain a minimum working capital contrary to section 24 of the Regulation.

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.
2. The Registrant shall file any and all annual financial statements for each fiscal year prepared by a **public accountant** licensed under the ***Public Accountancy Act, 2004*** and accompanied by a Review Engagement Report or an Audit Opinion as required by the Regulation within 3 months after the end of the fiscal year.

3. The Registrant shall, at all times, maintain the minimum working capital as required by section 24 of the Regulation. If based on the financial statements submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with s. 24 of the Regulation, the Registrant shall take the necessary steps to correct its working capital position and submit proof thereof within 30 days from the request by the Registrar.

4. The Registrant shall respond to TICO inquiries and requests in a timely manner. The Registrant shall advise TICO of changes outlined in sections 16 and 17 of the Regulation within the time prescribed in those sections.

5. The shareholders of the Registrant shall ensure that loans and/or advances to ***Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters*** will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event ***Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters*** decides to discontinue operations, any claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans can be repaid.

6. The Registrant waives its right to a hearing before the Licence Appeal Tribunal currently set for October 29, 2010.

Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS DAY OF , 2010

Mr. Mitchell Champagne, President

Solstice Visions Ltd. o/a Kingsway Cruiseshipcenters

I have the authority to bind the corporation

Mr. Michael Pepper

Registrar, *Travel Industry Act, 2002*

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

JULIE BEVAN O/A COSMOPOLITAN TRAVEL

APPEALFROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, C. 30 SCH. D

TO REVOKE REGISTRATION

TRIBUNAL; JANE WEARY, Vice-Chair

APPEARANCES; JULIE BEVAN, representing the Applicant o/a Cosmopolitan Travel

SOUSANNA KARAS, Counsel representing the Registrar, Travel Industry Act, 2002

DATE OF HEARING: ` September 13, 2010 TORONTO

REASON FOR DECION AND ORDER

The Applicant, Julie Bevan o/a Cosmopolitan Travel, appeals from a June 22, 2010 Proposal of the Registrar under the Travel Industry Act, 2002 (the "Act") to revoke its registration.

EVIDENCE

The Tribunal heard testimony from Mary-Ann Harrison, a Chartered Accountant, who is Director of Operations and Chief Financial Officer for the Travel Industry Council of Ontario (TICO). TICO is the statutorily designated body for regulation of the travel industry in Ontario under the Act.

Ms Harrison's employment duties include the responsibility to oversee financial and non-financial issues arising with registrants. In 2008, she was thus involved

in the issuance of a Registrar's Proposal to Revoke the Registration of the Applicant. The 2008 Proposal alleged inadequate trust accounting by the Applicant as well as consumer complaints leading the Registrar to conclude the Applicant was not a suitable registrant. The Applicant appealed the Proposal to this Tribunal. In its August 13, 2008 Order, the Tribunal found there were insufficient grounds to establish the Registrar's conclusion that the Applicant's registration should be revoked. The Tribunal ordered the Applicant to follow increased reporting requirements than those required under the legislation for a twelve month period by which time the Tribunal surmised the Applicant would be adequately familiar with compliance requirements[1].

Ms Harrison stated that the ensuing trust reconciliations prepared and submitted to TICO by the Applicant did pose concerns regarding accuracy. TICO therefore ordered a regulatory inspection of the Applicant in December of 2008, where the inspector noted his efforts to further explain financial information requirements that the Applicant had failed to provide. Although TICO continued to accept the submissions prepared by the Applicant until August, 2009, problems were identified in the documentation again in January, 2009 when the trust account reconciliation information submitted failed to disclose outstanding financial obligations at month's end. The same month statements include the highly unusual reference to "owner's contribution". Ms Harrison queried whether this implied the Applicant was extending credit to customers in the trust account she held pursuant to the legislation for pre-paid travel services. The issue was a distinct possibility given the Applicant's evidence at the prior Tribunal hearing, where it was disclosed that a specific large corporate client required on-going service despite only making monthly payments. Neither that practice, nor the other possibility of inadequate cash flow, is acceptable in a registrant's trust account maintained under the Act.

Ms Harrison expressed further concern with the Applicant's 2008 Year End Financial Statements filed on March 31, 2009. The accounts receivable portion makes up the bulk of the working capital in the amount of $28,494.00 – a highly significant sum for a small company operation[2]. This raised the question as to why so many customers owed the Applicant funds in an industry where generally consumers pay up front for the service.

It was only a month or so later that TICO received a complaint from a registrant, AC Vacations, expressing concern that the Applicant had doctored a consumer's hotel booking in St. Lucia in April 2009. Trust reconciliation records later provided by the Applicant showed that funds from the consumer were credited in May; however no booking was actually made until September [3].

[1] Exhibit 2, Tab 14
[2] Exhibit 2, Tab 4
[3] Exhibit 3, Tab 1

In October of 2009, an inspection of the Applicant by TICO found the Applicant was in contravention of a number of regulatory obligations. One of these involved using a prepaid credit card to finance both general and trust account activity. The result of which was that it was not possible to determine whose money is being used to pay off the credit obligation monthly. Further, as the Applicant used the same invoice number for all transactions, it was not possible to determine whose money was allocated to which transaction. The Inspector also concluded the Applicant was in rent arrears and therefore there were "serious cash flow" issues with the business.

TICO decided to wait until it received the Applicant's financial records for the period ending October 31st, 2009 to determine whether there appeared to be any risk to consumer funds. These documents were filed in January and reassured the regulator. However, the next financial filing of the Applicant, due in March 2010, was over 6 weeks late and indicated a drop in sales of over $100,000.00 – a significant sum. Although the working capital minimum required was met, it again, like the 2008 statements filed in March 2009, consisted almost entirely of accounts receivable which meant there was no liquidity in the business operation[4].

Ms Harrison also gave testimony of two separate consumer complaints received by TICO in June and July of this year concerning the Applicant. One complaint concerned consumer "A" who advised tickets he had purchased last December for travel in mid-June had not yet been made available to him. Further, the carrier, Lufthansa, had advised him no valid tickets were in existence. Documentation he provided TICO demonstrated his credit card had been debited the arranged amount by the Applicant in December, 2009. In attempting to assist the consumer, TICO found the Applicant's reliance on internally generated documentation made its efforts more difficult. Her documents demonstrated an accounts receivable credit in the same dollar amount of over $7,000.00 paid by "A" in October, 2009[5]. The Applicant explained the credit company had failed to process the whole amount it debited the consumer which forced the Applicant to only purchase half the tickets required. The Applicant failed to provide any evidence she had made any effort to contact the relevant banks and/or credit card companies inquiring as to the outstanding funds –either at the time, nor even later as the departure dates grew closer. A credit reference on her statements in June of $3,514.00, which the Applicant alleges to be the balance owing, is not identified to corroborate her position. Further, the initial partial payment which the Applicant alleges appears in her own records as a credit to "David" – nothing to do with the consumer "A". While, in the end the consumer did indeed receive the proper tickets and completed the travel as booked, Ms Harrison concluded that, such was a result of TICO's involvement in the consumer's complaint. She also concluded, at the very least, all the Applicant's

[4] See Financial Statements for y/e 2009 Exhibit 2, Tab 3
[5] Exhibit 4, Tab 2

account receivable information is suspect, given the clear inadequate and improper recording in this instance.

The second consumer complaint was received by TICO at the end of July, after the issuance of the Proposal. It involved consumer "C" who had two similar debits made on his credit card for travel booked with the Applicant and, further, was without any tickets two weeks prior to departure. Further, like consumer "A", "C" had not had the second debit refunded or the tickets issued despite communication with the Applicant. Ms Harrison testified that, after much work TICO was able to get "C" the travel tickets despite the airline advising that the infant with whom he was traveling had no valid booking. "C"'s credit card was eventually refunded the overcharge in mid August. A review of the Applicant's records established the consumer money had been debited in April, 2010 when Applicant received the funds. While no tickets were issued until TICO became involved in July, the trust account records supplied by the Applicant illustrate a balance in the trust account at the end of April of $24.28[6], begging the question of where "C"s monies had been placed.

This incident triggered the issuance by the Registrar of a Notice of Further and Other Particulars on August 10, 2010. Given the concerns of TICO that consumers appeared to be at risk, the Registrar issued an Immediate Suspension of the Applicant's registration under the Act. At the time the Applicant was contacted by TICO staff who explained the effect of the Suspension was that she was not to act as a travel agent although she could complete booking arrangements already initiated by consumers. Notwithstanding this clear advice, both verbal and in writing by TICO, two supplier complaints were received by Ms Harrison's office in September that the Applicant appeared to be arranging new bookings.[7]

In cross examination, Ms Harrison conceded that the Applicant's filings of financial information had improved, although she maintained there was still inadequate information in the Applicant's business generated documents to establish where certain monies originated in credit card prepaid accounts. The TICO representative also conceded that other registrants had suffered in profit margins over the last twelve months due in part to the current economy.

Ramina Yafima is an employee of Transat Holidays where she is in the accounts receivable department dealing with account collections and at-risk service agencies. Before Transat, she had been employed with Conquest Vacations for 17 years.

Ms Yafima advised she had become quite familiar with the Applicant over a number of years due to on-going credit and payment issues. As a result of this, she termed the Applicant a "high-risk" agency. Her company records had placed

[6] Exhibit 3, Tab 4
[7] Exhibit 2, Tabs 9 and 12

the Applicant on alert back in 2008 when there had been an incident whereby the Applicant had attempted to pay for Transat Holiday services she had booked with a credit card belonging to a third party. Transat had also advised TICO of its concerns with the Applicant at that time. It had also blacklisted the Applicant from using its services.

Nonetheless, Ms Yafima referenced documents she supplied[8] demonstrating the booking of travel services on June 16th, 2010 for travel the following day. This booking had been made in the name of "Julie" at a travel retailer in Montreal which was also flagged a "high risk" retailer by her employer and therefore automatically generated investigation. Ms Yafima discovered the retailer phone number to be out of business and, further, that no person by the name of "Julie" was employed by that office. Her staff made further inquiries which included listening into recorded telephone exchanges and concluded that the Applicant had made the booking in the name of the Montreal retailer and provided Transat Holidays with the 514 exchange. When Ms Yafima contacted the Applicant, she denied having booked the service using a Montreal telephone exchange.

A second incident took place on August 11, 19 and 24 of this year where a "Julie" at a third party travel agency "M Travel" made three separate bookings with Transat Holidays[9]. She had recognized the Applicant by her voice and had contacted "M Travel" to advise no further bookings would be accepted by Transat from the Applicant.

In cross examination, Ms Yafima confirmed that the Applicant had been advised she was banned from using the Transat system well before the booking of June – in part due to her constant last minute payments and number of NSF cheques.

Jaana Hyytiatnen works in Passenger Sales and Administration for Finnair out of Toronto. In this capacity she is responsible for passenger concerns throughout Canada.

Ms. Hyytiatnen testified she was familiar with the Applicant. She explained that Finnair operates five flights weekly from Toronto in the summer and that this past summer she began receiving a series of emails from the European office that an unusual pattern was developing, whereby Toronto-based passengers would show up at the airport with etickets but no corresponding reservations. Ms Hyytiainen was able to track the problem to the Applicant to whom she attempted to explain reservations could not be made when reservation requests were returned unavailable at the price she requested. Despite her efforts, problems continued to surface such that, by September, her manager had contacted the Applicant to request that she stop using Finnair in the future.

[8] Exhibit 2, Tab 7
[9] Exhibit 3, Tab 6

Ms Hyytiatnen explained that, once an agent makes an online request for a ticket at a certain price, there may be a delay before the information comes back as to whether that ticket at that price is available. However, the Applicant's reservations were generally made in one month, but not paid for and tickets issued for several months later when the price originally available was no longer available. While this does happen from time to time, it is not usual. Ms Hyytiatnen explained it did happen to one agent twice this summer who immediately contacted Finnair to request assistance for the passenger. In the Applicant's case, four separate incidents occurred with no apparent recognition by the Applicant there was even a problem.

This summer another ticket booked through the Applicant resulted in a fiasco, whereby an unaccompanied minor was sold a ticket when no available seats for that category were available on the plane. The result was that the minor was stranded overseas. When investigation determined this was another sale by the Applicant, Ms Hyytiatnen commenced a complaint to TICO only to discover the Applicant's registration had been suspended at the time of the sale.

In cross examination, Ms Hyytiatnen denied the reservations problems experienced by the Applicant could be due to a "glitch" in the system as she noted all reservations by all agents would then be similarly affected, which was not the case. The witness also surmised that the Applicant was not diligent in her efforts to assist the unaccompanied minor stranded in a foreign capital as her only response had been that she had "forgotten". Ms Hyytiainen pointed out that such incident had never occurred before in her experience due to the extreme diligence shown by agencies where minors are concerned.

The Applicant testified. According to the Tribunal Order of 2008, the Applicant took over the running of the agency from her father in 2002, having worked with him for some twenty years before that. She is not inexperienced in the service industry .

She explained that, as a credit card merchant, she had run into some problems with the processing of certain passenger payments. One of these involved "A" whose credit card payment of $7,080 in December, 2009 in fact was only posted to her in early January for half the amount. As a result, in February she was only able to purchase half the tickets required. When the balance of the funds was finally posted to her account in June, the price earlier available was no longer offered and she was forced to do some scrambling to find the consumer all six tickets for the monies paid. The Applicant acknowledged she had not advised the customer of the problem in payment, nor alerted him as to the issues with ticketing.

In explaining her recording of the payments made and received, the Applicant testified that, since "A" had initially worked with her on possible reservation itineraries as early as October, she had initially posted his eventual payment of

$7080.00 as an account receivable in October, despite no payment actually being due for another two months.

The Applicant admitted she never makes immediate purchase of tickets when the sale is completed with the consumer. Since there is no deadline she is required to follow, she simply keeps checking as to when funds are due before finalizing reservations.

This delay in finalizing ticket purchases may have contributed to the inability of consumer “C” to obtain the tickets at the price initially negotiated. However, the Applicant claimed that the real fault in the ticket issue lay with the consolidator which had the wrong return date and failed to include an infant ticket. She, in turn, had made the error of double billing the consumer, which she corrected immediately once she was made aware of the problem. In the end, the customer had received the services he had booked at the price he had wanted. When asked by the TICO Counsel as to where “C”s ticket payment funds were prior to August when TICO’s intervention resulted in the ticket purchase, the Applicant advised she had used the funds to purchase a ticket for another client. Although she claimed to have compensated her trust fund for that payment with her own funds, there was never an input into the trust account representing “C”s eventual monies even at the end of August.

The Applicant’s evidence as to the Finnair concerns was that the information on ticket prices and availability on her system was contradictory to the information posted on Finnair’s. This was a situation which both she and Finnair were attempting to resolve. As concerns the minor travel fiasco, she maintained that it was caused by her forgetting to request the designation and that it was a simple error in follow-up.

The Applicant’s response to the allegations of providing travel services while suspended were that the travel arrangements were for individuals for whom she had commenced bookings prior to suspension. She had only operated through “M Travel” to be on the safe side.

At the conclusion of September 13th’s hearing day, all testimony had been provided by the witnesses and all evidence led by both parties; cross-examination was completed. Arrangements were made for argument submissions to be delivered in writing. These were provided as ordered by the end of the business day on September 27, 2010.

THE LAW

The Act provides in part 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, [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.

ANALYSIS and DECISION

The Applicant took over running her father's original travel business in 2002. Revocation of her registration was initially proposed by the Registrar in 2008 for improper records and accounting as well as allegations of improper practice from other industry servers. Her appeal to this Tribunal from that Proposal was successful in that her registration was upheld, subject to the condition she meet more frequent and detailed financial reporting requirements for a twelve month period. In making this Order the 2008 Tribunal found the Applicant's past behaviour included false insistence as to payments in the post which demonstrated a lack of integrity, but concluded this was an aberration in an otherwise unblemished record and not, therefore, indicative of future dishonest behaviour.

The Applicant claimed her failures to meet TICO trust reconciliation requirements were due to TICO's inconsistent contradictory information to her. A similar justification of ignorance or misunderstanding was used by the Applicant in explaining her failure to meet reporting requirements was accepted by this Tribunal in 2008. Since then, she has had the benefit of time as well as assistance to her in the form of information and advice from TICO inspectors as far back as December 2008. The evidence included notes of various TICO inspectors assigned to the Applicant since the 2008 Tribunal Order detailing how and where her records were deficient and were all signed by the Applicant. The Tribunal finds her continued justification is no longer credible. Which client

money is where is a necessary component of regulated trust funds. Despite over two years to come into compliance the Applicant has failed to do so.

In her submissions, the Applicant still does not appear to understand how her failure to adequately identify funding in her banking records has caused her numerous problems. Her justification is that the bank records do not identify where funds have originated. This is not the issue. It is the Applicant who is required to identify the funds. While maintaining a working capital with credit may be acceptable, the fact remains that consumer funds are not to be used to pay general expenses until their service has been purchased. She herself admitted that the consumer payment from "A" did not occur until December 31 and yet appears in her reconciliation statements provided to TICO as an account receivable for October.

Her allegations that the actual credit was processed to her benefit in three separate amounts on three separate dates between December 2009 and June 2010 is bizarre and incapable of corroboration through her own records. It is, furthermore, suspicious given no evidence of any attempt on her part to demand an explanation as to why the delay and unusual partial payment from the credit merchant facility. A reasonable professional individual would surely be motivated over six months to document efforts to obtain funds owing and upon which their business relied to provide a client with service. The Tribunal concludes that not only are her accounts receivable financial records false, but, further, that her own testimony is not believable.

Explanations provided by the Applicant in her written submissions that "A"s flights were purchased and confirmed by the carrier but cancelled by that same carrier by mistake are not credible given her statement that final payment for the flight was not received by her until June when she had to then purchase the tickets through a Vancouver agency in order to get the same price quoted her in December.

The Applicant admitted that the funds used by consumer "C" to pay for travel services were not maintained in her trust account as required. She provided conflicting excuses for this occurrence – to TICO originally that she was very busy; in submissions to the Tribunal that family members were ill – in either case she was unable to deal with the matter. The Tribunal finds these excesses irrelevant to the issue. The fact she was otherwise preoccupied on one or two days when TICO was contacted by the Consumer fails to explain why consumer funds received by her on April 20 for services not provided until August do not appear maintained in her trust account bank records at the end of April.

Two flight providers, Transat and Finnair, will no longer work with the Applicant due to repeated late payments and apparent cash problems on the one hand, and repeated improper booking/reservation activity resulting from delayed payment procedures on the other.

The evidence also established a problem with a minor's travel booking which,in and of itself, can happen without any fault attributable to the agent. In this case the evidence of Ms Hyytiatnen made it obvious the flights had been booked in March when seats were available, but tickets were not actually purchased and issued until August when the minor seats were no longer available. This pattern fits the Applicant's practice of delayed payment and ticket issue and, in this scenario, resulted in children stranded at a foreign airport.

The Applicant continues to not understand the ramifications of her practice to delay payment for prior reservation, despite the earlier Tribunal proceedings, the attempts of TICO inspectors to advise her of compliance requirements, the blacklisting of her agency by Transat, and the frustration of Ms Hyytiatnen who also made attempts to explain risks inherent on relying on reservation requests.

The above improper practice also explains why Ms Bevan feels justified in arranging travel services for customers after her August 10, 2010 Suspension by the Registrar. She argues the tickets had been reserved prior to the date of Suspension. However, the arrangements were not booked until after the Suspension order at which point the Applicant was required to provide a valid TICO registration number which required her to use a different agency number then her own suspended number.

The Tribunal is also persuaded that the Applicant purposely provided Transat with a false Montreal identification number in attempting to book services for clients when she knew she was blacklisted by the company. This evidence of dishonesty is also again repeated in her testimony that she worked with MTravel to be on the safe side, when the evidence showed she could not make a travel booking without a TICO number which she no longer possessed after her Suspension by the Registrar in mid-August, 2010.

The Tribunal thereby concludes that the Applicant has not been honest in the carrying on of her business activity. It finds a similar dishonesty in her financial records such that TICO is not able to follow those records to ascertain which monies belonging to whom are where at any specific time. The Applicant continues to act outside the requirements of trust account procedures pertaining to consumer funds. Such requirements have been determined by the legislature to be necessary protection for consumers dealing with provincial travel professionals.

The Tribunal finds that the Applicant's evidence was self-serving in that, in every instance some justification for the improper activity is put forth. In not one of these, is the real concern addressed. Indeed, the Applicant still does not appear to understand the threatened impact on consumers directly attributable to her non-compliance and dishonest activity.

Considering all of these factors, and cognizant of the Applicant's earlier opportunity to achieve compliance following the Tribunal's decision of 2008, the Tribunal concludes that the compliance demonstrated by the Applicant falls short of that required by the Act. Such failures provide reasonable grounds for the belief she will not carry on her business in accordance with law or with integrity and honesty.

ORDER

Pursuant to the authority vested in it by subsection 11(5) of the Act, the Tribunal orders the Registrar to carry out the Proposal dated June 22, 2010.

LICENCE APPEAL Tribunal

_____
Jane Weary, Vice-Chair

RELEASED: October 13, 2010

This decision may also be available on Quicklaw.

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, c. 30, Sch. D

IN THE MATTER of the REGISTRATION of
1213466 ONTARIO INC. O/A McCARTEN TRAVEL AMERICAN EXPRESS

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 10 of the Act

TO REVOKE REGISTRATION
- Proposal dated: June 3, 2010

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal pursuant to section 11

1213466 ONTARIO INC. O/A McCARTEN TRAVEL AMERICAN EXPRESS
- Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*
- Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal (the "Tribunal") by 1213466 Ontario Inc. o/a McCarten Travel American Express, the Applicant, and the Registrar under the *Travel Industry Act, 2002*, for issuance of a Consent Order of the Tribunal without a hearing, pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act, 2002,* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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: October 29, 2010

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

SCHEDULE 'A'

1213466 ONTARIO INC. o/a

MCCARTEN TRAVEL AMERICAN EXPRESS

Applicant

AND

REGISTRAR, TRAVEL INDUSTRY ACT, 2002

Respondent

MINUTES OF SETTLEMENT

WHEREAS ***1213466 Ontario Inc. o/a Uniglobe McCarten Travel American Express*** located at **121 Dundas Street East, Suite 205, Belleville, ON, K8N 1C3**, is a travel agent registered on November 26, 1997, Registration No. 4562542, under the *Travel Industry Act*, *2002* ("the Act");

AND WHEREAS the Registrar issued the Notice of Proposal to Revoke Registration of ***1213466 Ontario Inc. o/a Uniglobe McCarten Travel American Express*** on June 3, 2010 ("NOP"), for the reason ***1213466 Ontario Inc. o/a Uniglobe McCarten Travel American Express*** is and has been carrying on activities that are in contravention of the Act and the Ontario Regulation 26/05 made under the Act (the "Regulation");

AND WHEREAS ***1213466 Ontario Inc. o/a Uniglobe McCarten Travel American Express*** appealed the Notice of Proposal to the Licence Appeal Tribunal on June 23, 2010;

AND WHEREAS the NOP was issued for a failure of the Registrant to maintain a minimum working capital contrary to section 24 of the Regulation.

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. The Registrant shall file any and all annual financial statements for each fiscal year prepared by a **public accountant** licensed under the ***Public Accountancy Act, 2004*** and accompanied by a Review Engagement Report or an Audit Opinion as required by the Regulation within 3 months after the end of the fiscal year.

3. The Registrant shall, at all times, maintain the minimum working capital as required by section 24 of the Regulation. If based on the financial statements submitted by the Registrant, the Registrar concludes that the working capital of the Registrant is not in compliance with s. 24 of the Regulation, the Registrant shall take the necessary steps to correct its working capital position and submit proof thereof within 30 days from the request by the Registrar.

4. The Registrant shall advise the Registrar within 5 business days in the event the debt of $22,260.03 (or any part thereof) owing as of October 3, 2010 by the Registrant to Ms. Aman has been repaid.

5. The Registrant shall respond to TICO inquiries and requests in a timely manner. The Registrant shall advise TICO of changes outlined in sections 16 and 17 of the Regulation within the time prescribed in those sections.

6. The shareholders of the Registrant shall ensure that shareholder loans and/or advances to ***1213466 Ontario Inc. o/a Uniglobe McCarten Travel American Express*** will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Act and the Regulation. In the event ***1213466 Ontario Inc. o/a Uniglobe McCarten Travel American Express*** decides to discontinue operations, any claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans can be repaid.

7. These Minutes of Settlement may be executed by the parties in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument.

The parties acknowledge that they have read, understand and will comply with the terms of these Minutes of Settlement.

1213466 Ontario Inc. o/a Uniglobe McCarten Travel American Express further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms of these Minutes of Settlement and their legal effect and impact and further undertakes to comply with them.

SIGNED THIS DAY OF OCTOBER, 2010

Ms. Sherri McCarten, President

1213466 Ontario Inc. o/a Uniglobe Mc-Carten Travel American Express

I have the authority to bind the corporation

Mr. Michael Pepper

Registrar, *Travel Industry Act, 2002*

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

RAINBOW TOUR & RECEPTION INC. - Order

APPEAL F ROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, c. 30, Sch. D

TO REVOKE A REGISTRATION

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: JANE TRUE, Agent, represent ing Rainbow Tour & Reception Inc. (the "Applicant")

SOUSSANNA KARAS, Counsel, representing the Reg istrar, *Travel Industry Act*, *2002* (the "Registrar")

DATE OF HEARING: February 11, 2011 Toronto

ADJOURNMENT ORDER

At the outset of the hearing, the Applic ant requested an adj ournment to permit further steps to be taken to refinance the com pany. The Registrar opposed the adjournment on the grounds that t he allegations against the Applicant raised serious concerns about the protection of consumers pending a final resolution of the matter by this Tribunal.

In its submissions, the Applicant stated that it intends t o take a number of steps in the near future that will r esult in an adequate cash infusion to ensu re the company has adequate working c apital. As of February 11, 2011, those steps had not been taken although discussions had been entered into. The Registrar pointed to allegations concerning shortfalls in the trust acc ount, which, when added to the allegation s concerning inad equate working capital, cre ate a real possib ility t hat the Ap plicant may become bankrupt before any refinancing is completed to the detriment of consumers.

Having considered the submis sions of t he parties, the matter is adjourned on the following terms:

1. The Applicant will not enter into any new business from February 11, 2011, until the final determination of this matter by the Tribunal;

2. Within 10 days of the date of this order, the Applicant will provide the Registrar with reconciliations of its trust account for the months ending November 30 and December 31, 2010, and by February 28, 2011, it shall provide the Registrar with a reconciliation of its trust account for the period ending January 31, 2011. Trust reconciliations shall include a copy of the bank statement for the relevant period;

3. By February 28, 2011, the Applicant shall provide the Registrar with unaudited financial statements for the first three quarters of its current fiscal year;

4. By February 18, 2011, the Applicant shall list its premises on Lundy's Lane in Niagara Falls for sale, and shall bring such listing agreement with it to the hearing together with a valid agreement of purchase and sale, if such agreement of purchase and sale exists by the date of the hearing; and

5. The hearing is hereby adjourned and shall recommence at 9:30 a.m. on **Monday, March 21, 2011**, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

_____
David Gregory Flude, Vice-Chair

RELEASED: February 16, 2011

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1301869 ONTARIO INC. O/A BARBARA'S TRAVEL AGENCY

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, c. 30, Sch. D

TO REVOKE REGISTRATION

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

APPEARANCES: BARBARA BOUVIER, Agent, representing 1301869 Ontario Inc. o/a Barbara's Travel Agency (the "Applicant")

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002* (the "Registrar")

DATES OF HEARING: January 31 and February 9, 2011 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND

The Applicant filed an appeal from the Notice of Proposal (the "Proposal") issued by the Registrar on June 22, 2010, under the *Travel Industry Act, 2002*, S.O. 2002, c. 30, Sch. D (the "Act") to revoke the Applicant's registration as a travel retailer. The basis for the Proposal is that the Applicant is and has been carrying on activities which are in contravention of the Act and regulations, specifically, the Applicant's failure to comply with three requirements of the legislation, the first being to file financial statements prepared by a licensed public accountant within 90 days of fiscal year-end, the second being to maintain a specified amount of working capital and the third being to properly maintain and manage a trust account for all money received from customers for travel services.

THE EVIDENCE

The Tribunal heard the evidence of two witnesses: Mr. Hans Reitknecht on behalf of the Registrar, and Ms. Barbara Bouvier for the Applicant.

The Registrar's Evidence

Mr. Reitknecht is the Financial Inspection Coordinator with the Travel Industry Council of Ontario ("TICO"). TICO is the statutorily designated body for the regulation of the travel industry in Ontario and is the office of the Registrar under the Act. Mr. Reitknecht is a Certified Management Accountant with more than 35 years of experience in various roles in a number of industries. He joined TICO approximately two years ago. His duties include oversight of the financial compliance requirements of the Act.

His department reviews filed financial statements from registrants and follows up on deficiencies. Mr. Reitknecht oversees a staff of inspectors who conduct compliance inspections at registrant's premises.

Mr. Reitknecht reviewed the documents in Exhibit C, the Document Brief of the Registrar. He noted that the Applicant had been registered since October 30, 1998. It is operated from premises in Cornwall, Ontario, and its sole director, manager, owner and contact person is Barbara Bouvier.

Mr. Reitknecht reviewed the history of dealings with the Applicant over the period of several years spanning from 2005 to the present.

Mr. Reitknecht had compiled a five year report and it showed that the Applicant had a history of late filing of the financial statements, specifically for the 2005, 2007 and 2009 fiscal years. The witness stated that for the 2010 fiscal year, financial statements had not yet been produced. The Applicant's fiscal year ends on July 31. According to the Act and regulations, financial statements are due 90 days after the fiscal year-end. In the case of the Applicant, statements are due on October 30 of each year.

Mr. Reitknecht's review of the financial records of the Applicant showed that sales had been fairly consistent over the years, with a modest increase in certain years. The sales dictate the working capital that each agency requires. The Applicant had sales between $1M and $2M during the material time; thereby the registrant must have a minimum working capital of $20,000. The Applicant had only been compliant once in five years (in 2006). All other years, the working capital of the Applicant has been negative. The witness noted that in 2009, the working capital was short by $43,688.

In relation to trust accounting, the Applicant is responsible for a reconciliation of customer obligations, the segregation of funds received from customers and may only use trust monies for purchase of travel services for that customer.

This witness testified that for the five years he reviewed, he found no information showing compliance by the Applicant in terms of reconciliation of the trust account or any other aspect of trust accounting.

In order to illustrate how the Proposal came to be issued to the Applicant, Mr. Reitknecht referred to a long record of correspondence and other communications with the Applicant dating back to 2007, which also included on-site inspections and reports there from.

The financial statements for the year-end 2007 showed a negative of $6,698 in working capital. A letter dated December 21, 2007, was sent to the Applicant advising that a minimum injection of $26,698 was required and proof needed by January 4, 2008. No response was received by January 4, 2008. Another TICO letter was sent on January 16, 2008, advising that the situation had to be corrected and a response received by January 30, 2008. A Registrar's letter dated February 15, 2008, was sent registered mail giving a final deadline of February 29, 2008, and notice was given that failure to comply would result in revocation of the Applicant's registration.

A letter was received on March 1, 2008 from the Applicant. The letter, signed by Barbara Bouvier, stated that the first two letters had not been received, that the Applicant did receive a Registrar's letter on February 22, 2008, but did not open it until seven days later, and that the Applicant could not meet the deadline and was requesting an extension.

The Registrar sent another letter on April 11, 2008. Prior to this letter, TICO tried to contact the Applicant twice by telephone and left messages with staff. Any return calls were during off hours and there had been no confirmation received showing that the working capital had been corrected. This letter gave a deadline of April 23, 2008, for correction of the working capital. On April 22, 2008, Ms. Bouvier left voice-mail messages at the TICO office, stating that she was unable to meet the working capital requirements at this time and asked to have until July 31 (the year-end) to have the matter resolved. On April 28, 2008, a Registrar's letter was sent confirming that the working capital deficiency had not been corrected and asking for interim financial statements (as at January 31, 2008) to be submitted by May 30, 2008. After this series of letters, the Applicant did not correct the working capital deficiency or provide an interim financial statement by May 30, 2008. A Notice of Proposal (to revoke the Applicant's registration) was issued on June 12, 2008.

A financial statement for year-end 2008 was received on October 17, 2008. The working capital was negative $4,537 on the basis of sales in the $1M to $2M range; thus, working capital of $20,000 was required and the shortfall was therefore $24,537. There was a note by the accountant stating that after the year-end of July 31, 2008, the shareholder advanced $28,500 to the corporation as additional working capital.

Mr. Reitknecht stated that he was satisfied with this note and stated that the Applicant provided deposit slips which showed the deposit of additional working capital on October 8 in the amount of $18,500 and on October 21 another $10,000. This brought the working capital into compliance and a letter dated October 24, 2008, from Counsel for the Registrar to the Tribunal advised that TICO was withdrawing the Notice of Proposal to Revoke Registration.

Three months after the correction, an inspection was scheduled. The conclusion of the inspector was that the working capital was in a shortfall of $6,037, which was the result of $10,000 being returned by the bank to the shareholder. This $10,000 stayed in the account, on paper, for only six days. As to trust account reconciliation, the inspector concluded that the Applicant was not reconciling trust funds, explained this to Ms. Bouvier in person and gave her a copy of the written findings from the inspection.

This inspection prompted a letter from the Registrar of April 20, 2009, requiring correction of the working capital deficiency, requesting interim financial statements and giving a deadline of April 30, 2009. After further correspondence from the Registrar and some deposits made by the Applicant, there was still a working capital shortfall of $1,037 on June 30, 2009. Mr. Reitknecht stated that the Registrar has no discretion in this regard under the Act.

Interim financial statements for the period ending April 30, 2009, were eventually sent to the Registrar, which showed $30,045 in working capital deficiency. The Applicant was asked to correct the situation by August 27, 2009. On August 25, 2009, the Applicant sent an e-mail requesting an extension of time to September 30, 2009. On September 1, 2009, a Notice of Proposal to Revoke Registration was issued.

From that date to December 29, 2009, the Applicant provided proof of deposits in order to correct the working capital deficiency. As a result, the Notice of Proposal was withdrawn in February 2010.

An inspection was conducted on May 7, 2010. The inspector concluded that the working capital was short more than $11,000, and that the Applicant was not compliant with trust accounting, having issued cheques to Ms. Bouvier and to pay Ms. Bouvier's municipal property taxes from the trust account and having deposited customer monies into the general account. A letter was sent to the Applicant on May 20, 2010, setting out the compliance issues and the requirements on trust accounting and rectification of working capital deficiency with a due date of June 18, 2010. On June 17, 2010, Ms. Bouvier requested until the year end to fully rectify the situation. The Registrar did not grant the extension of time. It issued the Notice of Proposal to Revoke Registration on June 22, 2010, which is the subject Proposal.

Mr. Reitknecht testified that up to the first hearing date, the Applicant was attempting to show that the working capital deficiency had been corrected. However, no financial statement for the year ending July 31, 2010 or trust reconciliations had been provided to the Registrar and it was not clear that the working capital deficiency had, in fact, been corrected.

Further, the Applicant had a history of correcting a working capital deficiency for only a short period of time before funds were withdrawn creating a nearly chronic situation of non-compliance. For all the reasons given, Mr. Reitknecht stated that the Proposal should be enforced and the Applicant's registration should be revoked.

The Applicant did not have any questions for Mr. Reitknecht.

The Applicant's Evidence

Ms. Barbara Bouvier testified on behalf of the Applicant. She is the sole director, manager and owner of the Applicant. As of the first hearing date, the Applicant still did not have financial statements prepared for the year-end of July 31, 2010. Ms. Bouvier explained that the accountant felt they were not complete and he was not prepared to release them or come to the first hearing day. As such, she was requesting an adjournment to February 9, 2011, in order to have the accountant present and to produce all the documentation that the Registrar had previously requested.

Ms. Bouvier was reminded by Counsel for the Registrar that the outstanding documents included: financial statements for 2010 including trust account reconciliations as of July 31, 2010, trust reconciliations to December 2010, official bank statements for January 2011, December 2010 and November 2010 for both general and trust accounts. This Tribunal also explained the necessity of having all witnesses present on the return date of the hearing and advised of the availability of a summons to witness. The hearing was adjourned to February 9, 2011.

On the return date, Ms. Bouvier appeared without the Applicant's accountant. Ms. Bouvier advised the Tribunal that she and the accountant had participated in a conference call with Counsel for the Registrar the previous day but that the Applicant could not satisfy all the requests and the accountant would not be attending at the hearing. She presented copies of bank statements, deposit slips, correspondence and trust reconciliations prepared by her and continued to give evidence as follows.

Ms. Bouvier acknowledged that she has a history of non-compliance with TICO requirements and that she has not acted in a timely manner. She stated that this resulted from a bad turn in her personal life which caused great financial and psychological stress. She believes that she has now pulled herself out of her personal issues and is willing and able to set things right.

The agency has been operating with a manual finance system and she will switch over to an automated system with the accountant's assistance. Both the general account and trust account of the agency are now positive. Deposits have been made and slips shown to Counsel for the Registrar showing that the working capital situation has been corrected. Ms. Bouvier asked the Registrar and this Tribunal for the opportunity to prove she can correct everything and carry on with her travel agency. She points to the agency's history of satisfied customers and no complaints on file.

Counsel for the Registrar had some questions for Ms. Bouvier on cross-examination. Ms. Bouvier explained that the recent injections of working capital came from personal sources such as the sale of her jewellery, the repayment of sums from her ex-husband and monies from a personal loan given to her against her home. When questioned about the trust reconciliations, it became clear that the amounts did not match up with bank statements, that commissions were not shown and that the witness could not explain how these reconciliations actually performed the function of reconciling the amounts in the trust account. Ms. Bouvier could not advise of the current capital in the Applicant's company. She stated that the accountant was not prepared to provide either year-end financial statements for 2010 or interim statements for the present year. When asked why the accountant could not produce these financial statements, the witness stated that she began to provide documents to the accountant in October 2010 and has given more documents to him since, but the accountant does not appear to have all the information he needs in order to prepare these statements.

Conclusions on Evidence

This Tribunal found both witnesses to be credible.

However, the Registrar's evidence of the Applicant's continued late filing of financial statements (with no filing of a 2010 statement) and the failure to provide trust reconciliations as well as the chronic deficiencies in working capital was not challenged by the Applicant in any material way.

THE LAW

The Act sets out the requirements for registration. Section 8 enumerates a number of categories where the Registrar may refuse registration. By virtue of section 10, a ground for refusal of registration as set out in section 8 is also a ground to revoke an existing registration. The applicable provisions of section 8 state:

> 8. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
>
> (d) the applicant is a corporation and,

(ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,

(iv) the past conduct of its officers or directors or of an interested person in …the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or

(e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;

10. (1) Subject to section 11, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 8.

O. Reg. 26/05 under the Act provides explicit requirements for the monitoring of the financial health of a travel agent and protection of consumers in sections 22 and 24, as follows:

22. (1) Every registrant shall file with the registrar the financial statements required by this section for each fiscal year.

(2) A registrant who had sales in Ontario of less than $10 million during the previous fiscal year shall file, within three months after the end of the fiscal year,

(a) annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act, 2004*; 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*.

(3) A registrant who is a travel agent and had sales in Ontario of $10 million or more but less than $20 million during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) semi-annual financial statements within 45 days after the end of each fiscal half-year.

(4) A registrant who is a travel agent and had sales in Ontario of $20 million or more during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) quarterly financial statements within 45 days after the end of each quarter during the fiscal year.

(5) A registrant who is a travel wholesaler and had sales in Ontario of $10 million or more during the previous fiscal year shall file,

(a) annual financial statements with an audit opinion from a licensed public accountant within three months after the end of the fiscal year; and

(b) quarterly financial statements within 45 days after the end of each quarter during the fiscal year.

(6) Financial statements required under this section shall include a statement of sales in Ontario made during the period to which the financial statements refer, a balance sheet, an income statement and a reconciliation of the trust accounts maintained under section 27.

(7) If additional information is necessary to provide an accurate and complete review of the registrant's financial position, the registrar may require that the registrant file audited financial statements that consolidate or combine the registrant's financial statements with,

(a) the financial statements of another registrant; or

(b) if the registrant is a corporation, with the financial statements of another person who is a shareholder associated with the registrant.

(8) If the registrar has reason to believe that a registrant is in financial difficulty, the registrar may require that the registrant provide to the registrar a written statement of the registrant's current net working capital, and the registrant shall do so within the time the registrar specifies.

(9) The registrar may require that a statement provided under subsection (7) or (8) be verified by affidavit.

24. (1) This section applies on and after January 1, 2006.

(2) A registrant who had sales in Ontario during the previous fiscal year of an amount shown in Column 1 of the Table to this section shall maintain a working capital of at least the amount shown in Column 2 opposite the first-named amount.

(3) A registrant's working capital shall be calculated in accordance with generally accepted accounting principles and shall not include,

(a) the value of any security provided under subsection 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.

ANALYSIS

The statute provides a right to registration or continued registration unless a registrant runs afoul of one of the exceptions set out in section 8. The impact of this section is to place the onus in this hearing squarely on the Registrar to establish that the Applicant should have its registration revoked.

The Registrar is entitled to no deference before this Tribunal. It is for the Tribunal to hear the evidence and arrive at a decision based on it, unfettered by any decision of the Registrar.

This Tribunal holds that the Registrar has established that the Applicant should have its registration revoked.

It appeared to be Ms. Bouvier's position on behalf of the Applicant that she did not know any better and that she should now be given a chance to take the necessary steps to be in compliance in the future. She noted in her evidence that there has never been a consumer complaint against her, so consumers are safe booking travel with the Applicant.

The Applicant was given more than three years to take the appropriate steps. It failed to do so. The evidence supports a conclusion that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business. The failure to maintain the statutory minimum working capital, file financial statements in a timely manner, reconcile the trust account and the repeated attempts to ignore the requirements of the Act and the advice of the Registrar, indicate that there are reasonable grounds for belief that the Applicant will not carry on business in accordance with law or with integrity and honesty.

DECISION

Pursuant to the authority vested in it by subsection 11(5) of the Act, this Tribunal orders the Registrar to carry out his Proposal dated June 22, 2010, to revoke the Applicant's registration.

LICENCE APPEAL TRIBUNAL

_____
Shu-Tai Cheng, Vice-Chair

RELEASED: March 30, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

CANADIAN IMPERIAL BANK OF COMMERCE – Claim

APPEAL FROM A DECISION OF THE BOARD UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, c. 30, Sch. D

TO REFUSE A CLAIM FOR COMPENSATION

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: LAURIE A. MacFARLANE, Counsel, representing the Canadian Imperial Bank of Commerce ("CIBC"), the Applicant

SOUSSANNA KARAS, Counsel, representing the Travel Industry Council of Ontario, the administrative authority under the *Travel Industry Act, 2002*, the Respondent

DATE OF HEARING: February 24, 2011 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appealed to the Tribunal from a decision of the Board of Directors of the Travel Industry Council of Ontario ("TICO") under the *Travel Industry Act, 2002* (the "Act") refusing its claim from the Travel Compensation Fund (the "Fund") with respect to a refund of the cost of travel, pursuant to section 57 of O. Reg. 26/05 (the "Regulation").

FACTS and EVIDENCE

The parties submitted an agreed statement of facts.

In addition, the Applicant called three witnesses: Lisa Doyle-Pask, Senior Director of Corporate Services, Polly Ko, Director of Product Manager, both of CIBC, and Cheryl Nicholson, Managing Director of Merit Travel Group Inc. ("Merit").

The Respondent called two witnesses: Michael Pepper, President, Chief Executive Officer ("CEO") and Registrar of TICO, and Lori Furlan, a Claims Co-ordinator with TICO.

Summary of the Agreed Facts

TICO is mandated to administer the Act and O. Reg. 26/05, the Regulation made under the Act. Its Board of Directors (the "Board") administers and manages the Fund. The Board meets regularly to review and determine claim eligibility and eligible amount.

Conquest Vacations ("Conquest"), a tour operator registered with TICO, voluntarily terminated its registration with TICO on April 15, 2009, and filed an assignment in bankruptcy on April 27, 2009.

CIBC offers credit card products which have a points' reward program. Points can be redeemed for travel services, among other things. CIBC entered into a contract with Merit, an Ontario travel agent registered with TICO, whereby CIBC will reimburse Merit for the points redeemed by a CIBC credit cardholder who purchases travel services from Merit. The contract provides that CIBC will reimburse Merit the actual cost of the portion of any travel services "paid" for by CIBC cardholders, using reward program points, at a certain rate (the "Payment Rate")[1]. The Payment Rate may be revised by CIBC in its sole discretion based on the value of the points awarded to the cardholder.

The redemption of points is based on the terms and conditions of the agreement between CIBC and its cardholder, and these terms and conditions provide, in part, that reward points have no monetary value and cannot be exchanged for cash or credit. The terms and conditions also provide that once the rewards points are redeemed, they are non-refundable, non-exchangeable and non-transferable. However, should the travel supplier fail to provide travel services to the cardholder, CIBC or Merit may attempt (but is not required) to arrange a suitable replacement or may choose (but is not required) to credit the redeemed points back to the cardholder.

In order to complete a transaction involving reward points, a cardholder contacts Merit by phone, to a travel agent or on-line through a booking engine. The cardholder makes the travel arrangements they desire and then pays for the travel by credit card or points or a combination of both. The credit card portion is processed as a regular credit card transaction by forwarding the credit card information to the supplier; here it was Conquest. The points' portion of the transaction is recorded by Merit on its accounting system.

Merit sends an automatic file daily with the details of each points' transaction, including the number of points to be processed and the cash value of the transaction to be settled by CIBC.

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[1] Exhibit #4, tab 1

From this file, a report is generated which shows CIBC how much it owes Merit for each cardholder redemption pursuant to its agreement with Merit. Then CIBC sends a wire transfer settlement to Merit, daily, based on the transactions in the file and the corresponding settlement report. Merit then issues a cheque to Conquest for the portion "paid" by the consumer with their reward points, less Merit's commission.

As a result of CIBC cardholders purchasing travel services through Merit, from Conquest, using a combination of reward points and credit cards, CIBC paid Merit the amount of $15,117.85.

When Conquest went bankrupt, CIBC reinstated all reward points back to its cardholders.

Mr. Michael Pepper is the CEO, President and the Registrar of TICO. Mr. Pepper is entitled to attend and participate in the Board's meetings in his capacity as an advisor. He does not have a voting privilege at the Board's meetings. On May 26, 2009, Mr. Pepper sent CIBC an e-mail dealing with CIBC's eligibility to claim under the Fund.

Summary of relevant testimony and other evidence

A copy of Mr. Pepper's e-mail of May 26, 2009, was submitted into evidence by the Applicant.[2] It is addressed to Lisa Doyle-Pask and the subject line reads "Re: Additional TICO clarification for CIBC". The e-mail reads:

> Yes, I did communicate with Merit on this issue. In the scenario in question CIBC would be covered by the Ontario Travel Industry Compensation Fund up to the maximum per person ($5,000) and maximum per event ($5 million), in the event of the failure of Merit, provided that Merit receives payment directly from CIBC and documents each transaction with an invoice. CIBC would have to demonstrate that it did in fact make payments for the travel services being purchased for it's (*sic)* clients and this procedure would facilitate a claim/claims in the event of such a failure. Under such a scenario, the end consumer, being the receiver of the gift certificate, would not be eligible to make a claim for reimbursement, but CIBC would be eligible.

Mr. Pepper indicated that his understanding at the time he provided this information was that CIBC would be the client, paying funds to Merit, and would receive an invoice. So that each transaction would have documentation which would indicate the name of the customer, details of the travel, the money paid by CIBC and an invoice would be issued from Merit to CIBC. He understood that CIBC clients would exchange points and that CIBC would purchase travel arrangements on their behalf. His response related to whether CIBC, as a client of Merit, would be covered in the event of Merit's failure. It was not Mr. Pepper's understanding that the CIBC clients would make the bookings and then CIBC would forward money to Merit. In this situation the "customer" was the consumer dealing directly with the travel agent.

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[2] Exhibit #3, Tab 2

Mr. Pepper opined that a corporation can be protected if it is acting as a customer. In this case, CIBC is repaying for the "points" portion but the consumer is dealing with Merit and that is why CIBC is not the customer. Mr. Pepper was asked by the Tribunal how it could have been structured differently so that CIBC could have been covered at the same time as not contravening the Act: he was not able to provide an answer.

Ms. Furlan explained that the Applicant's claim was denied on the basis of two main principles: 1) that it was not the consumer who made the booking and 2) that points are not eligible for compensation pursuant to section 57(3) 6. of the Regulation. It was concluded that CIBC did not enter into an agreement with Merit for travel arrangements. There were arrangements and invoices between Merit and Conquest, and Merit and the consumer. CIBC was simply an "afterthought", in her words. A proper invoice has to outline all the details of the travel arrangements. Ms. Furlan pointed out that commissions were not covered, and a total of $2,164.35 has been retained by Merit. Ms. Furlan made reference to paragraph 25 of the terms and conditions of the relevant Applicant's rewards program, which states in part:

> Once rewards are redeemed, they are non-refundable, non-exchangeable and non-transferable (unless you are advised otherwise).[3]

According to documentation disclosed by the Applicant, its customers have been credited back their points and money portion for the travel arrangements which were not provided.[4]

ISSUES

Is CIBC a "customer" who is entitled to make a claim for compensation to the Fund under section 57 of O. Reg. 26/05?

Is CIBC a "customer" who is eligible for compensation from the Fund under the circumstances detailed above?

THE LAW

The Act states:

> **Interpretation**
>
> 1. (1) In this Act,…
>
> > "travel agent" means a person who sells, to consumers, travel services provided by another person; ("agent de voyages")

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[3] Exhibit #4, Tab 2
[4] Exhibit #3, Tab 5

"travel services" means transportation, sleeping accommodation or other services for the use of a traveller, tourist or sightseer; ("service de voyages")

"travel wholesaler" means a person who acquires rights to travel services for the purpose of resale to a travel agent or who carries on the business of dealing with travel agents or travel wholesalers for the sale of travel services provided by another person; ("voyagiste")

Prohibition against acting as a travel agent or travel wholesaler unless registered

4. (1) No person shall act or hold himself, herself or itself out as being available to act,

(a) as a travel agent unless the person is registered as a travel agent under this Act; or

(b) as a travel wholesaler unless the person is registered as a travel wholesaler under this Act.

Compensation Fund

41. (1) The Travel Industry Compensation Fund established under the *Travel Industry Act* is continued.

Regulations

(2) The Fund shall be administered and managed in accordance with the regulations.

The entitlement to claims on the compensation fund by a customer, and exclusions, are provided in the O. Reg. 26/05 in section 57:

Reimbursement of customer

57. (1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

(a) the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent;

(b) the customer has made a demand for payment from,

(i) the registered travel agent and the appropriate registered wholesaler,
(ii) any other person who has received the customer's money, and
(iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance; and

(c) the customer has not been reimbursed by,

(i) those of the registered travel agent and the appropriate registered wholesaler, who under section 25 of the Act are liable to make the reimbursement, because they,

(A) are unable to pay by reason of bankruptcy or insolvency,

(B) have ceased carrying on business and are unwilling to pay, or

(C) have ceased carrying on business and cannot be located,

(ii) any other person who has received the customer's money, or

(iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

(2) A reimbursement under subsection (1) is limited to the amount paid to or through any registrant for the travel services that were not provided.

(3) Despite subsection (1), a customer is not entitled to be reimbursed for:

1. Travel services that were not provided because an end supplier, other than a cruise line or airline, became bankrupt or insolvent or ceased to carry on business.

2. A payment to or through a registrant for any travel services that were provided or for which alternate travel services were provided or made available.

3. A payment for travel services that were available, but were not received because of an act or a failure to act on the part of the customer or of another person for whom the travel services were purchased.

4. Counselling fees paid to a travel agent.

5. Travel services that were to be received as a prize, award or goodwill gesture.

6. Travel services that the customer obtained with a voucher, certificate, coupon or similar document that the customer did not pay for.

7. Travel services that the customer did not pay for with cash or by a cheque, credit card or other similar payment method.

8. Insurance premiums.

9. A claim that is based on the cost, value or quality of the travel services or alternate travel services.

10. A claim in connection with which travel services were provided under section 68 or 69.

11. Consequential or indirect damages incurred as a result of the failure to provide the travel services.

(4) If the travel services were not provided because an end supplier who is an airline or a cruise line became bankrupt or insolvent or ceased to carry on business, subclauses (1) (b) (i) and (1) (c) (i) do not apply.

A travel agent may claim on the Fund in certain circumstances where the agent reimburses a customer or pays money to provide alternate travel service under section 58. As well, a travel wholesaler is entitled to a claim on the Fund for reimbursement of money paid to a customer in certain circumstances as set out in section 59 of the Regulation.

The Tribunal also considered the following statutory provisions:

Real Estate and Business Brokers Act, 2002 – O. Reg. 567/05, section 1(1)(a):

> "customer" means,
>
> (a) with respect to a brokerage and a trade in real estate, a person who, in the trade,
>
> (i) has an agreement with the brokerage under which the brokerage provides services to the person, and
>
> (ii) is not represented under a representation agreement by the brokerage or any other brokerage,

Travel Agents Act, Regulation respecting travel agents, R.R.Q. 1981, c. A-10:

> (d) "customer": every person benefiting from the tourist services provided by a travel agent, excluding any direct or indirect supplier of a travel agent.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A:

> **Interpretation**
>
> 1. In this Act,
>
> "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; ("consommateur")

The *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, provides:

> **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.
>
> **Same**
>
> (2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.

The "modern principle" of statutory interpretation preferred by the courts[5] is this:

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[5] *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] S.C.J. No. 2; [1998] 1 S.C.R. 27 (S.C.C.)

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 74]

Cases considered:

Ontario (Travel Industry Council) v. Gray (c.o.b. All Sport Accommodations), 2010 ONCA 518

Sunquest Vacations Ltd. (Re) [1998] O.C.R.A.T.D. No. 136

ANALYSIS

O. Reg. 26/05 provides that a customer is entitled to be reimbursed for travel services paid for but not provided, if the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent.

Customer is not defined in the Act or the Regulation. The Respondent has provided two definitions for "customer" found in other legislation. Specifically, under the *Real Estate and Business Brokers Act, 2002* – O. Reg. 567/05, a customer is defined, with respect to a brokerage and a trade in real estate, as "a person who has an agreement with the brokerage under which the brokerage provides services to the person". The Tribunal notes that a "trade" in real estate encompasses a whole range of transactions.

The other definition of customer put forth is found in the *Travel Agents Act,* Regulation respecting travel agents, R.R.Q. 1981, c. A-10. This definition appears to be even broader as it includes "every person benefiting from the tourist services provided by a travel agent, excluding any direct or indirect supplier of a travel agent".

"Customer" is defined in the Shorter Oxford English Dictionary as "a person who makes a purchase or gives business, especially habitually to any particular seller or establishment".[6]

CIBC has an agreement with Merit, a registrant under the Act, under which Merit provides services to CIBC: specifically Merit makes travel arrangements for CIBC clients and orchestrates the payment by CIBC for all or a portion of those travel services. Based on any of the three definitions set out above, CIBC would be a "customer" given these facts.

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[6] Shorter Oxford English Dictionary, On Historical Principles, 5th ed., Volume 1, Oxford University Press

In coming to its decision however, the Board has chosen to add criteria to the definition of "customer" in its interpretation of s. 57(1)(a). It has included the criteria that the customer is the person who has made the bookings and received an invoice with the travel details. Based on these additional criteria, the Board concluded that since the consumer has satisfied the criteria of having made the booking, and had been given an invoice with the travel details, they are therefore the "customer". This conclusion apparently then precludes CIBC from being considered "the customer".

The wording of the Regulation is simply that a customer may be entitled to reimbursement if the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent. In this particular situation, there are two parties acting, the consumer making the travel arrangements (and in some instances potentially making some payment) and CIBC paying for the services selected (partially or entirely). The fact that the consumer may qualify as a customer, does not in the Tribunal's opinion, disqualify CIBC from being considered a customer for the purposes of section 57(1)(a); nor does the fact that in some instances a consumer may have paid something towards the travel services obtained.

It has been suggested that the purpose of the Act and Regulation is to protect the "travelling public". Clearly this is one purpose. The Fund, however, responds to claims by customers, travel agents and travel wholesalers. This suggests that the intent and object of the Act is to offer protection to a broader group of persons who are affected by the failure of a travel registrant. It is not simply protecting the travelling consumer. Travel agents and travel wholesalers are business entities and the Act offers them protection when they suffer a loss as a result of a registrant's failure, provided they have followed the rules and acted prudently. It does not seem reasonable to conclude that a business such as CIBC, which has an agreement with a travel registrant, to pay for travel services through it, albeit for the benefit of another party, should be barred from compensation when a registrant fails because it did not select the specific travel services and was not provided with the details of those services. CIBC paid for travel services, selected by its clients, through a registered travel agent, Merit, and it has provided documentation to prove this.

Mr. Pepper testified he did not appreciate that CIBC would not be making the travel service arrangements for its clients directly with Merit, when he provided his opinion that CIBC would be able to access the Fund. The Tribunal finds it surprising that this would have been his assumption given that the Act would appear to prohibit a non-registrant from playing such a role.

It is very clear from the Act and Regulation that the purpose of the Fund is to reimburse for actual losses. Section 57(3) 6. explicitly excludes claims for travel services obtained with a voucher, certificate, coupon or similar document that the customer did not pay for. Clearly, this would be a basis to deny a claim by CIBC's clients for reimbursement for the travel services they anticipated receiving through their rewards program but did not actually pay for. The travel services being claimed for by CIBC, however, were paid for by CIBC with a wire transfer of money to Merit. This fact is not in dispute.

Why CIBC was paying, and how much it was paying, was determined by an agreement with its client and involved the redemption of points. This does not change the fact that CIBC was a customer of a registered travel agent, which paid for the travel services through that agent, and the travel services they paid for were not provided. These are the requirements for reimbursement under the Act and the Tribunal finds that CIBC has satisfied those requirements.

The total amount being claimed by CIBC is $15,117.85. The evidence before the Tribunal indicates that $2,164.35 of this was retained by Merit as commission, pursuant to their agreement with the defunct Conquest. Had Merit reimbursed CIBC and made a claim for compensation pursuant to section 58, this fact would have reduced the eligible claim amount. However, that is not the claim before the Tribunal.

ORDER

On the basis of the evidence, the Tribunal orders that the Fund should pay to the Applicant its claim of $15,117.85.

LICENCE APPEAL TRIBUNAL

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Elizabeth Sproule, Vice-Chair

RELEASED: March 31, 2011

This decision may also be available on Quicklaw.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

RAINBOW TOUR & RECEPTION INC.-Order

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, c. 30, Sch. D

TO REVOKE A REGISTRATION

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: JANE TRUE, Agent, representing Rainbow Tour & Reception Inc. (the "Applicant")

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act*, *2002* (the "Registrar")

DATE OF HEARING: March 21, 2011 Toronto

ORDER

Following an undertaking given by the Applicant at the outset of the hearing to voluntarily surrender its registration, the Registrar withdrew the Notice of Proposal in this matter.

The matter now having been concluded, the Tribunal has closed its file.

LICENCE APPEAL TRIBUNAL

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David Gregory Flude, Vice-Chair

RELEASED: March 24, 2011

This decision may also be available on Quicklaw.