

Licence Tribunal
Appeal d'appel en
Tribunal matière de permis



DATE: 2013-10-29
FILE: 8193/MVDA
CASE NAME: 8193 v. Registrar, *Motor Vehicle Dealers Act 2002*

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

Thi Van Nguyen

Applicant

-and-

Registrar, *Motor Vehicle Dealers Act 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Mary Ann Spencer,
Member

APPEARANCES:

For the Applicant: Self-represented

For the Respondent: Michelle Samaroo, Counsel

Heard in Toronto: October 15, 2013

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 June 19, 2013 proposes to refuse to grant the registration of Thi Van Nguyen (the "Applicant"), as a salesperson under the Act.

The Registrar is proposing to refuse the Applicant's registration on the basis 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.

At the outset of the hearing, the Tribunal member asked the Applicant if he required a translator. The Applicant advised that he was comfortable proceeding and the hearing continued.

FACTS AND EVIDENCE

The Applicant submitted two applications for registration as a salesperson, both of which were signed on November 26, 2012, to the Ontario Motor Vehicle Industry Council ("OMVIC"), the organization with delegated authority for administration of the Act. On the application received by the Registrar on December 4, 2012 (Exhibit 3, Tab 3), the Applicant indicated 'no' to question number 8 which asks if the applicant has ever been found guilty or convicted of an offence under any law. On the application received on December 13, 2012, the Applicant also indicated 'no' to question 8. A Police Criminal Records Check (Exhibit 3, Tab 9) and Court records (Exhibit 3, Tab 16) indicate that on March 4, 2011, the Applicant was convicted of theft of electricity and of production of a controlled substance.

Registrar's Evidence

The evidence of the Registrar comprised a book of documents filed as Exhibit 3 and the testimony of Detective Constable James Minns of York Regional Police and Thaya Gengatharan, OMVIC's Manager of Registration.

Detective Constable Minns testified that in December 2009, York Regional Police was informed of an electricity bypass at the home owned by the Applicant and his wife by local power company Power Stream which was in the process of installing residential smart meters. As part of his duties with York Regional Police's Drugs and Vice Unit, DC Minns began to observe the home where he saw the Applicant, his wife and children entering and exiting. After obtaining search warrants (Exhibit 3, Tab 15), over 200 marijuana plants were discovered growing in the unfinished basement of the Applicant's home. DC Minns testified that mail addressed to the Applicant and his wife was found in the home and an electricity bypass, an irrigation system, chemicals and growing agents as well as children's toys were

found in the basement. The Applicant and his wife were subsequently arrested. In a statement to police, the Applicant took full responsibility for the "grow op". He indicated that he had already produced one marijuana harvest and had hired someone he found on the Internet to bypass the home's electricity meter but stated that he and his wife did not live at the address. DC Minns described the operation as 'sophisticated' given its size, the electricity bypass and the existence of venting systems.

The Applicant and his wife were both charged with theft of electricity, production of a controlled substance and possession of a controlled substance for the purpose of trafficking. There was no trial. Rather, a plea agreement was arranged wherein all charges against the Applicant's wife and the trafficking charge against the Applicant were dropped. On March 4, 2011, the Applicant was sentenced to four months in jail and eighteen months probation on each of the two remaining charges.

Thaya Gengatharan is the Manager of Registration at OMVIC. Ms Gengatharan testified that one of the obligations of a salesperson registered under the Act is to disclose material facts about vehicles. The concern of the Registrar which resulted in the issuance of the Notice of Proposal was the Applicant's failure to initially disclose his convictions on his application for registration and his failure to provide adequate details or explanation when later requested to do so.

The Applicant's initial application for registration, signed by the Applicant on November 26, 2012, was received by OMVIC on December 4, 2012 (Exhibit 3, Tab 3). On this application, the Applicant indicated 'no' to question 8 which asks "Has the applicant ever been found guilty or convicted of an offence under any law or are there any charges pending?" The application was also incomplete. On December 12, 2012, OMVIC wrote to the Applicant requesting the missing information (Exhibit 3, Tab 4). This information was received on December 13, 2012. A further complete application was also received on December 13, 2012 (Exhibit 3, Tab 6). On this second application, also signed by the Applicant on November 26, 2012, the Applicant indicated 'no' to question 8.

As part of the application process, applicants for registration are required to provide a police background report. "myBackCheck.com" is an on-line service used by OMVIC to provide an alternative way for applicants to provide the report. Applicants can sign in on the OMVIC website and a report becomes available to OMVIC, usually with a 24 hour turnaround time. The Applicant's report dated November 28, 2011 indicates the Applicant entered information that he had been convicted of the offence of 'marijuana growth' in December, 2009 and had received a 3 month penalty (Exhibit 3, Tab 7). As a result of the "BackCheck" report, on December 18, 2012, OMVIC sent a letter (Exhibit 3, Tab 8) to the Applicant requesting that he submit fingerprints to permit the search of the RCMP National Repository of Criminal Records and that he provide a statement signed by both himself and an authorized representative of the dealer indicating why he answered 'no' to question 8 and listing the detail of his convictions as well as the circumstances surrounding them.

On December 19, 2012, OMVIC received a December 14, 2012 "Police Criminal Records Check" produced by York Regional Police (Exhibit 3, Tab 9) indicating that the Applicant

was convicted on March 4, 2011 of the offences of stealing electricity and producing a Schedule II substance for which he was sentenced to 4 months in custody and 18 months probation on each charge to be served concurrently. Further, the RCMP criminal records report (Exhibit 3, Tab 10) listing the same convictions, indicates that the Applicant applied for a pardon in October, 2012. Ms Gengatharan testified that the receipt of these documents was the first OMVIC learned of the Applicant's conviction for the theft of electricity. On December 28, 2012, OMVIC received a letter from the Applicant (Exhibit 3, Tab 11) in which he wrote:

I put check mark (NO) on the back check, when it come back not clear. Four ago I let some one rent the basement. They do growing under there I don't know. The police come charge me.

On January 11, 2013, OMVIC sent a further letter to the Applicant (Exhibit 3, Tab 12) in which it again requested the Applicant provide a detailed statement signed by both himself and the sponsoring dealership's representative outlining why the Applicant answered 'no' to question 8 on his applications and providing the detail surrounding his convictions. The Applicant's response, received on January 16, 2013, signed by both the Applicant and the General Manager of the sponsoring dealership, states:

My reason for crossing the option (no) on the section D was because the question was not clear to me at the moment. I had sent the RCMP record and the police clearance documents. According to the OMVIC letter I had received. It had stated that the conviction were not disclosed. These conviction occurred 4 years ago. I had believed that everything was clear which led me to be confused with the option.

Ms Gengatharan testified that the Registrar's concerns were that the Applicant was given multiple opportunities to provide disclosure but failed to do so. She indicated that OMVIC regards the completion of the application for registration as the first test of an Applicant's honesty and integrity.

Applicant's Evidence

The Applicant apologized for his past actions and stated he has already paid for the mistake he made. He promised that he would not repeat his mistake and stated that he is the sole support of his family and wants the opportunity to work in a stable job.

The Applicant testified that when he first completed the application for registration, he completed the 'BackCheck', declaring his criminal record. He stated that when he answered question 8 on the application for registration, he had already completed both his time in jail, having been released May 28, 2011, and his probation. Therefore he checked 'no'. He then stated that when OMVIC asked for further information, he asked for their assistance in obtaining the required documents from York Regional Police.

On cross-examination, the Applicant stated 'yes' when asked if he had made full disclosure in "BackCheck". Asked if he mentioned the theft of electricity, the Applicant also stated 'yes' but then agreed this conviction had not been explicitly set out. Counsel then asked him to confirm that he had understood he needed to apply for a pardon for the charges and

the Applicant agreed he did and added he applied in October, 2012. In her questions, Counsel for the Registrar referred to the Applicant's applications for registration by the date they were received at OMVIC. Given there was some confusion on the Applicant's part, the Tribunal asked for clarification of the date the Applicant signed the application. The Applicant then testified that after he completed the application, it was provided to the representative of the dealership who then mailed it to OMVIC.

The Applicant provided two letters of reference to the Tribunal which were entered as Exhibit 4. On cross-examination, the Applicant agreed that one of these letters had in fact been prepared for his application for another type of licence and that he had brought it to the Tribunal in error although he indicated he had a similar letter specific to his application for registration as a motor vehicle salesperson. The second letter, from the Applicant's sponsoring dealership, is signed by one of two managers at the dealership, in this case by a manager who did not sign the Applicant's application for registration. This letter, dated October 3, 2013 confirms the dealership's "commitment to hire and provide ongoing training" to the Applicant.

THE LAW

The Act states in part as follows:

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;

(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).

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.

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.

ISSUES

The issue to be addressed is whether or not the Applicant is entitled to registration as a salesperson under the Act. Does the past conduct of the Applicant afford reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty? Did the Applicant provide a false statement in his application for registration?

APPLICATION OF LAW TO FACTS

It is the responsibility of the Registrar to prove to the Tribunal, on a balance of probabilities, that the Applicant's application for registration should be refused. The Applicant is entitled to registration unless one of the grounds in section 6 of the Act applies. The Tribunal must make an independent assessment as to whether or not those grounds have been proven. In reaching its conclusions, the Tribunal has considered the evidence of the parties and the decisions submitted for the Tribunal's consideration by Counsel for the Registrar.

Counsel for the Registrar argued that the Applicant is not entitled to registration because he will not act with honesty and integrity. She submitted that this is a case of "willful deceit", the Applicant having lied about his convictions on his application for registration, about tenants being responsible for the 'grow op' in the basement of his residence in his first explanatory letter, and, by omission, about his conviction for theft of electricity in his "BackCheck" application. Further, the Applicant had numerous opportunities to provide the required disclosure but failed to do so. She also argued that the Applicant's application for registration was premature, having been submitted to OMVIC while the Applicant was on probation for a serious offence for which he has yet to take responsibility.

On March 4, 2011, the Applicant was convicted of two offences relating to what DC Minns described as a 'sophisticated' marijuana 'grow op' in the basement of the Applicant's home. The evidence indicates that the Applicant answered 'no' to the question asking if there are pending charges or convictions on the applications received by OMVIC on both December 4, 2013 and December 13, 2013. The Tribunal notes, however, that the December 13, 2013 application is clearly a photocopy of the one previously submitted with the only change being the signature of the authorized individual from the sponsoring dealership. The original signature and title is scratched out, but the date has not been changed. The Applicant indicated that the applications were mailed by the dealership. The Tribunal therefore is of the view that the Applicant only completed one application. However, the fact remains that the Applicant did indicate 'no' to question 8 on that application.

The explanation provided by the Applicant for his incorrect completion of question 8 is unclear in the letter he provided to OMVIC on December 28, 2012. The letter he provided on January 16, 2013 is somewhat clearer and is consistent with his testimony at this hearing in which he indicated that he was not trying to conceal his convictions and did reveal them when he completed the "BackCheck" component of his application. He also testified that having completed his jail sentence and probation, he wrote 'no', notwithstanding the fact he also testified that he only applied for a pardon in October, 2012. The "BackCheck" report is dated November 28, 2012. Ms Gengatharan indicated that these reports usually have a turnaround time of 24 hours. Given the application for registration was signed on November 26, 2012, the "BackCheck" report was clearly requested within a short time of the completion of the application. The evidence indicates the Applicant did enter "Marijuana Growth" as a convicted offence when completing the "BackCheck" request. While this does not specifically address the Applicant's two convictions, it is not clear to the Tribunal from the Applicant's testimony that he was being deceitful in this omission, as suggested by Counsel for the Registrar, or whether he viewed both convictions as being covered by this somewhat unspecific descriptor.

In the course of this hearing, it became evident to the Tribunal that the Applicant is not completely fluent in the English language as he needed questions rephrased in order to understand them. The Tribunal is therefore prepared to give the Applicant the benefit of the doubt with respect to his motivation in the completion of both the application form and the "BackCheck" request.

However, the Tribunal does note that in his December 18, 2012 letter to OMVIC the Applicant wrote that he rented the basement of his home and he was unaware of what the tenants were doing. This statement is not credible given DC Minns' testimony that the Applicant, his wife and his children were living in the home and that in his statement to police, the Applicant admitted to one previous marijuana harvest and to hiring someone to bypass the home's electricity meter. Moreover, the Applicant accepted conviction for two of the three charges against him in his plea arrangement. The Tribunal therefore concludes that the Applicant was being untruthful in his letter to OMVIC. And, notwithstanding the fact that OMVIC gave the Applicant an opportunity to address this when it asked for further detail a second time on January 11, 2013, the Applicant failed to provide any further information in his January 16, 2013 response.

In *Monzon v Registrar of Motor Vehicles* [unreported], Vice Chair Hunt wrote:

Whether or not the Applicant provided correct information in the Application document 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 public or with the Registrar.

Both the failure to provide full disclosure and the provision of false information reflect an Applicant's honesty and integrity. The regulatory regime set out in the Act is largely based on disclosure. A consumer's right to full information in order to make an informed decision is set out in requirements regulating, for example, vehicle history and advertising disclosure.

The Tribunal finds that the Applicant provided false and misleading information to the Registrar in his application for registration in accordance with section 6(1)(a)(iii) of the Act. Further, in accordance with section 6(1)(a)(ii) of the Act, the Tribunal finds that this conduct of the Applicant provides reason to believe that the Applicant will not carry on business in accordance with law and with integrity and honesty.

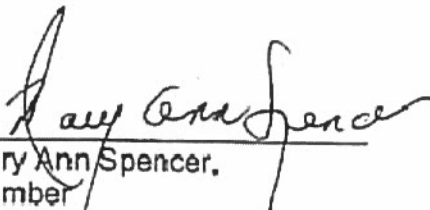
Counsel for the Registrar argued that the Applicant was premature in applying for registration while he was on probation, stating that his probation was due to end on January 4, 2013, 18 months after his conviction date. However, the Tribunal notes that the Applicant was released on May 28, 2011, and that his probation would end 18 months after that date, approximately coinciding with the date the Applicant signed his application. While a period of unsupervised good conduct would certainly be of benefit to the Applicant's case, what is more relevant to the Tribunal is whether or not the Applicant has accepted responsibility for his past actions and is unlikely to repeat them. As DC Minns' noted, the Applicant was running a 'sophisticated' illegal operation. While the Applicant apologized in his testimony at the Tribunal, he offered no explanation for why he had informed OMVIC that tenants were responsible for the 'grow op'. In fact, he offered no explanation for what he had done and provided no indication of a commitment to positive conduct other than to state he was sorry, he had made a mistake and he now needed a stable job.

The Tribunal notes that in both letters OMVIC sent to the Applicant requesting further detailed explanations, it was requested that the Applicant's response be signed by a representative of the sponsoring dealership. While the Applicant provided a general supporting letter dated October 3, 2013 from the Sales Manager of that dealership, neither that letter nor the January 16, 2013 letter signed by the General Manager contains any detail with respect to the Applicant's convictions. Evidence that the Applicant's prospective employer was willing to hire him with full awareness of the nature of his criminal record might have helped to address the Tribunal's concerns about the Applicant's honesty and integrity and allowed the Tribunal to give some consideration to the possibility of registration with conditions. However, there is no such evidence. The Tribunal therefore directs the Registrar to carry out the Proposal to refuse the application for registration.

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 application for registration as a salesperson.

LICENCE APPEAL TRIBUNAL


Mary Ann Spencer,
Member

Released: October 29, 2013