

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



DATE: 2014-10-31
FILE: 8421/MVDA
CASE NAME: 8421 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 Revoke Registration

David Lorne Foster

Appellant

-and-

Registrar, *Motor Vehicle Dealers Act, 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Simon Dann, Member

APPEARANCES:

For the Appellant: Lauren M. Angle, Counsel

For the Respondent: Michael Rusek, Counsel

Heard in St. Catharines: September 16, 2014

REASONS FOR DECISION AND ORDER

BACKGROUND

The Appellant appeals to this Tribunal from the Notice of Proposal of the Registrar under the *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Sch. B (the "Registrar" and the "Act" respectively) dated October 24, 2013, to revoke the registration of David Lorne Foster ("Foster" or "Appellant") as a motor vehicle salesperson under the Act.

The reasons provided in support of the proposal to revoke the Appellant's registration are that the Appellant provided incomplete or misleading statements in his 2008 application for registration, and in his 2010 and 2012 renewal applications. Specifically, the Appellant:

- failed to disclose and/or provided misleading information in his 2008 application regarding his employment history with CIBC;
- submitted a renewal application on May 10, 2010, in which he replied "No" to Question 5, Section B, of the application, which asked whether he had "...ever been found guilty or convicted of an offence under any law, or are there any charges pending...";
- subsequently pled guilty, on June 30, 2010, to the offence of "Theft over \$5000";
- submitted, on May 14, 2012, a renewal application in which he answered "Yes" to the questions of (a) whether he had ever been found guilty or convicted of any offence under any law, and (b) whether he had disclosed all pending charges or convictions on previous applications (he had answered "No" to any pending charges in May 2010).

As a preliminary matter, the Appellant's Counsel, Ms. Angle, requested an adjournment for the reason that she had not received a witness list, and any indications of their testimony, in advance of the hearing.

The Registrar's Counsel, Mr. Rusek, replied there would only be one witness for the Registrar, in addition to his client and noted that all the material to be presented was contained in the already disclosed Respondent's Books of Documents (Exhibits 3, 4, 5).

The Tribunal denied the adjournment request given that the evidence to be presented by the Registrar was contained in the disclosure materials.

In his opening statement, Mr. Rusek stated that the Registrar has based the proposal to revoke on the grounds that the Appellant misrepresented his criminal conduct for some years and failed to properly account for his employment history.

Mr. Rusek stated that the criminal conduct at the heart of the matter is Foster's theft of cash from the CIBC and he would present a witness from Niagara Regional Police Service ("NRPS") to provide evidence.

In her opening statement, Ms. Angle suggested the issue is whether the Appellant's registration should be revoked for misrepresentation and a failure to provide employment history. She acknowledged that the Appellant had an addiction and made a mistake. He also took steps to make amends and accepted full responsibility. He attended addiction counselling and made full restitution.

Ms. Angle questioned whether the Appellant should have his career taken away as he is an honest and trustworthy individual who made a mistake and never had a prior problem with law. He does not want to downplay his offence and submits that the criminal justice system has made him pay an adequate price. She stated that while it may be appropriate to attach terms, it is not a situation which calls for complete revocation.

EVIDENCE

The Registrar's Evidence

Tracy McCabe is a retired police officer who, prior to her retirement from the NRPS in 2013, was a fraud detective between 2004 and 2010.

She testified that as a result of her investigation of the case, she arrested the Appellant in October 2009. She reviewed her prosecution summary (Exhibit 5, Tab 2) and confirmed there was only one account from which the Appellant was found to have made withdrawals. The Appellant re-deposited the funds he withdrew to various accounts, including his own, over a 3-year period.

In cross-examination, the witness confirmed the Appellant was cooperative at all times of the investigation and at the time of his arrest. There was only one victim in the case.

Mary Jane South is the Deputy Registrar at the Ontario Motor Vehicle Industry Council ("OMVIC") and has held that position since 1997. Her responsibilities include overseeing licensing and consumer complaints. She stated that truthful disclosure is an important test for anticipating the behaviour of an applicant with consumers. Failing to provide details is a significant issue for OMVIC.

Ms. South said she had not previously met the Appellant but was familiar with the case. She pointed to the June 12, 2008 application form completed by the Appellant (Exhibit 3, Tab 2) in which he replied "no" to question 9, which asked whether he had ever been found guilty or been convicted of an offence under any law or had any charges pending. He also failed to disclose his prior employment with the CIBC.

Ms. South referred to Section D of the form which reminds applicants about the requirements for full disclosure. The application form was endorsed by the dealer. Ms. South said she is not aware if the Appellant asked OMVIC for any help with completing the form.

The Appellant's completed short form application, received by OMVIC on May 10, 2010, contained the Appellant's answer of "no" to the question about any convictions and/or charges pending (Exhibit 3, Tab 3). This form was also endorsed by the Appellant's dealer-employer.

Ms. South stated this was an issue of non-disclosure as criminal charges were pending against the Appellant at that time (Exhibit 3, Tabs 12 and 13). Court records showed there were 11 charges against the Appellant in December 2009 and a guilty finding on June 30, 2010. On November 17, 2010, the Appellant was convicted on one count (10 counts were withdrawn) and he was given a conditional sentence of 9 months on the one count.

In May 2012, OMVIC received the Appellant's short form renewal application (Exhibit 3, Tab 4) in which he correctly replied to the question about ever having been convicted of an offence but incorrectly to the question about whether he had disclosed all pending charges or convictions on a previous (2010) OMVIC application.

The May 2012 renewal application contained an attached note from the Appellant stating that he had pled guilty to a charge of theft over \$5000 on September 17, 2010 and that he had made full restitution. The statement noted that a probation period ended on August 16, 2011 and his dealer-employer was fully aware of the conviction.

When the Appellant was asked for additional information (Exhibit 3, Tab 5) on May 18, 2012, he wrote back immediately to explain that his September 17, 2010 guilty plea to theft over \$5000 was the result of:

a claim from a customer of mine when I worked with the CIBC and funds were missing from his account. The customer whom I knew for over 20 years had insisted on giving me some funds in repayment for all I had done for him but when he passed away his estate claimed they knew nothing about it and a charge was laid. My lawyer recommended I not fight the charge. The dealership was made aware of this at the time and supported me. All funds were paid back in full and the probation ended on August 16st (sic) of 2011.

Ms. South stated the Registrar would not consider any terms or conditions as the Appellant "took money from a customer over a longer period of time". OMVIC is concerned about compromising consumer money or consumers not being provided with full disclosure about vehicles presented for sale.

In cross-examination, it was confirmed that the Appellant was not charged while working at the CIBC but sometime after leaving the bank.

Ms. South stated that OMVIC's view is that the Appellant failed to disclose on purpose and that the Appellant did not provide sufficient explanation of the circumstances around the charge.

When asked who initiated the charge laid against the Appellant, as the account owner was dead, Ms. South said it was the individual with Power of Attorney over the estate.

The Appellant's Evidence

David Lorne Foster is currently employed by Grimsby Chrysler Jeep Dodge Ltd. ("Grimsby") as a salesperson and has been at the dealership for about 6½ years.

Regarding the conviction arising from his work at the CIBC, he had a client ("S") who followed him from branch to branch for his personal service. The Appellant said that S also wanted to make him a beneficiary in his will, but S's sisters would not allow him to do that.

The Appellant claimed it was S who always signed the deposit slips he used, but he acknowledged he made a mistake and it was wrong. When he was charged in the Fall of 2009, his lawyer advised him not to fight the charge as S was the only one who could corroborate the Appellant's version of the events, and since S had died there was no evidence to support his explanation for what had occurred.

The Appellant acknowledged he did have a gambling problem which developed in about 2005 when he used to drive his wife to her work and gym. He would always wait for her and with three to four hours to kill, he started going to the casino. After a while, his casino trips became an addiction.

Around 2008, he put himself into a counselling program with Cindy Jennings for about a year and that was also the last time he was in a casino.

The Appellant identified his OMVIC application of June 2008 (Exhibit 3, Tab 2) and said he worked at the winery noted longer than at the CIBC. He still works at the winery part-time.

The Appellant claimed that when he filled out question 5 of his May 2010 OMVIC renewal application (Exhibit 3, Tab 3), he probably only read it as asking if he had ever been found guilty or convicted of any charge. Since he had not been convicted to that time, he mistakenly answered "no" to question 5. He then pointed out that while he correctly filled out question 5 of the May 2012 OMVIC renewal application, he almost made the same mistake and the correction can be seen on the form (Exhibit 3, Tab 4).

The Appellant's employer has supported him throughout this time (Exhibit 6, Tab 5) and he has had no other police issues since that conviction. He has never declared bankruptcy, is not aware of any complaints against him and regrets the mistakes he made, because of his gambling, with his customer, and then with the OMVIC forms.

In cross-examination, the Appellant said he started working at CIBC in 1974 as a trainee and eventually left as an account manager in 1989. He returned to CIBC in 2001 as an account manager and was there until February-March of 2008. He handled all customer requirements for their accounts, mortgages and loans. The issue with his customer S was the only issue he ever had. The Appellant said that after leaving the bank, he later learned that S was ill for the last 6 months of his life.

When asked why he had deposited monies he claimed were gifts into numerous accounts, not only his own, the Appellant said that as a bank employee it was wrong for him to accept cash from a bank customer, but he paid back the money when he became aware of the bank claim.

Regarding his work at the winery, the Appellant said he started there in the mid-1990s. He worked at night during the week and then on weekends in hospitality. He acknowledged he should have included the CIBC on the 2008 OMVIC application but repeated that he had not read the question carefully enough.

Dave Hanson is the sales manager at Grimsby and has been there about 22 years. He has known the Appellant for about 6½ years and views him as a good employee and team player. He confirmed that he still stood by the letter of support he wrote for the Appellant in December 2013 (Exhibit 6, Tab 7).

The witness said he did not know a lot about the charges, but the Appellant kept the dealership informed and as far as he (Hanson) was concerned, "it's over". The witness said he discussed the Appellant's situation with the dealership's owner and they decided that the Appellant had never done anything to give them a problem or concern and so they had no concerns going forward.

The witness referred to the Appellant as being good with his customers, that he had a good work ethic, took a soft-sell approach and had good product knowledge. The dealership has never had any complaints about him.

In cross-examination, the witness stated the dealership has 20 employees and the Appellant ranks in the middle for sales performance. He confirmed he has no social relationship with the Appellant.

Cindy Jennings is an addictions counsellor with the Niagara Community Addictions Service. She has been there for about 18 years. Her educational background includes a Bachelor of Psychology and additional training through work related programs.

The witness confirmed that the Appellant came to the program voluntarily in July 2008 and then attended intermittently until 2010 and met with her about six times during that period. She explained that an individual who comes to the program first does a self-assessment and then a treatment program is developed.

The Appellant was placed in the Action Maintenance program which means a person already has a plan in place and they are prepared to abstain from their addiction activity for a minimum of six months. There are three stages before the action stage and because he brought his spouse with him to the first meeting, it showed he had a commitment to the program. This represented accountability and confirmed the Appellant was willing, cooperative and open to change.

The witness said she knew about the criminal charges but they were not relevant to the program. When the Appellant left the program, it was mutually agreed upon because he had achieved a change in his behaviour for a period of six months or more. People typically only come back when there is a relapse in behaviour and this did not happen. The witness confirmed that she still stood by the letter she wrote for the Appellant in August 2014 (Exhibit 6, Tab 8).

Genevieve Brady is the current dealer principal of Grimsby. She has only known the Appellant since she acquired the dealership in December 2013. She described the Appellant as pleasant, kind and gentle - not an "in-your-face" personality.

The witness stated the previous owner informed her of the Appellant's background before she came into the dealership. She confirmed that she stood behind the letter of support she wrote for the Appellant in December 2013 (Exhibit 6, Tab 6). She has had no customer complaints about the Appellant and has no concerns about his dealings with customers.

The witness confirmed the Appellant has no role in any financing related activities and is limited to providing quotes based on a computer program and financing terms which are set by whichever institution the dealership may be using.

In cross-examination, the witness confirmed she has no social relationship with the Appellant and considers the past situation as dealt with and there is no concern for the present business. She repeated her support for the Appellant.

The Registrar's Submissions

Mr. Rusek began his submissions with reference to section 6.(1)(a)(ii) of the Act stating that an applicant is entitled to registration or renewal of registration by the Registrar unless, 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.

He submitted that there are reasonable grounds for belief that the Appellant will not act with honesty and integrity because he failed to list his employment history with the winery and the CIBC and, then he failed to list 11 pending charges in his 2010 renewal application.

It was submitted that what the Appellant described as a monetary gift, the police described differently. His behaviour in accepting money in his role with the bank and depositing it into different accounts was wrong.

OMVIC is seeking a revocation because this is a regulated industry and honesty is a critical element in protecting consumers from any improper actions against them. He submitted that OMVIC's application forms are the first test for assessing honesty and integrity of an applicant or registrant.

Mr. Rusek argued that the Appellant failed on the first application by omitting an employer; he failed the second time by omitting the charges; and failed again on the third application when he disclosed the conviction but gave the wrong answer about having previously provided that information. Mr. Rusek submitted that these omissions presented a pattern of deliberate lies and misconduct.

Case law regarding the provision of false information on the OMVIC application form was referenced. In *Thi Van Nguyen v. Registrar, Motor Vehicle Dealers Act, 2002*, the Tribunal found the appellant in that case provided false and misleading information.

Mr. Rusek submitted that the witnesses from the dealership acknowledged they do not know the Appellant outside of work and the Tribunal should consider that lack of knowledge. Mr. Rusek also expressed his concern that the Appellant's addictions counsellor did not have any personal knowledge of the Appellant.

In closing, Mr. Rusek asked the Tribunal to confirm the revocation and submitted that there should not be any consideration of terms and conditions on the registration.

The Appellant's Submissions

Ms. Angle submitted that the Appellant is a trustworthy individual and while he made mistakes due to a gambling addiction, he has no other charges or involvement with the police. He has made every effort to take responsibility for his actions and is not a danger to the public.

Ms. Angle referred to the case of *Re: Koo* [2012] O.L.A.T.D. No. 235, in which the appellant failed to testify, had no character witnesses and did not show he had done anything to remedy his situation.

The Appellant in this case has taken concrete and material steps to address his mistake. These include counselling, serving his sentence without any problems and providing complete restitution. She argued that the Registrar's case law reference contained no evidence of employer support, however, in this matter, the Appellant's employer is fully aware of the past conviction and is supportive of his continued employment.

Ms. Angle submitted that the Appellant did not attempt to mislead and noted Ms. South's acknowledgement that people do make mistakes. Regarding the ground of financial responsibility the Tribunal heard evidence that he is not involved with any financial aspects at the dealership.

THE LAW

The applicable provisions of the Act regarding registration state 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) ...
 - (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, ...

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.

ANALYSIS AND REASONS

The issue in this matter is whether, on a balance of probabilities, there are reasonable grounds for belief that the Appellant will not act with honesty, integrity and in accordance with the law.

The Registrar's proposal to revoke the registration of the Appellant is based on the reasons that he did not disclose all past employment information, and then failed to correctly answer disclosure questions about those charges.

There is no dispute of the Registrar's evidence that the Appellant:

- (1) did not disclose his CIBC employment in the 2008 application;
- (2) in his May 2010 renewal application he improperly answered "no" to the part of question 5 which asked if there were any charges pending against him (when he was actually first arrested and charged on December 18, 2009); and

(3) in his May 2012 renewal application, he incorrectly answered the question of whether he had disclosed all pending charges on previous applications (referring to the May 2010 renewal application form).

Therefore, the Tribunal finds this evidence as fact.

However, the Tribunal considers that the Appellant, on his behalf, explained that he probably did not read the questions carefully enough in 2008 and 2010 and almost made the same mistake in 2012. The 2012 form shows he corrected himself.

The Appellant had no particular explanation for not disclosing pending charges in 2010 on the 2012 renewal application. He acknowledged and regretted his mistakes.

Overall, the Tribunal finds these explanations weak, but at the same time must consider the evidence which was presented about the Appellant's character and conduct. This being:

- there is no evidence of any other improper conduct, before or after the CIBC incident of 2008;
- Tracy McCabe testified to the Appellant's cooperation through the investigation and arrest;
- there was only one "victim" and around the time the charges were laid, the Appellant made full restitution; there is no evidence of any kind of avoidance or effort to pay back a lesser amount;
- the Appellant, on his own initiative, placed himself in a counselling program to successfully address his gambling and behaviour problem;
- the Appellant has been employed as a salesperson for 6½ years without any consumer complaint and has the full support of his previous/current employer and management;
- the evidence from the Appellant's current employer is that the Appellant has no direct financial involvement in his sales role as he is limited to working with computerized financing programs and all vehicle sales are processed through the dealership's business office.

Regarding the case law referenced by Counsel for the Registrar, *Thi Van Nguyen*, in which the appellant was found to have provided false and misleading information to the Registrar, the Tribunal notes it was relevant to the Tribunal's final decision that the appellant provided no indication of a willingness to accept responsibility for his past conduct and there was no commitment to positive conduct. Further, the appellant did not provide the Tribunal with any evidence to show that a prospective employer was willing to hire him with full awareness of his criminal record.

Regarding the question of whether Mr. Foster deliberately did not provide accurate information in his 2010 and 2012 renewal application forms, the Tribunal was presented with no evidence to show that the Appellant clearly intended to deceive or misrepresent. Therefore, the Tribunal finds that, on a balance of probabilities, there is insufficient evidence of intention to deceive the Registrar.

The Tribunal further distinguishes the current Appellant from *Thi Van Nguyen* in that this Appellant accepted responsibility for his original conduct at the CIBC by making full restitution, obtaining counselling to change his behaviour (the gambling addiction), and successfully completing his probation period in 2011.

This Appellant also has supporting letters from his employer and the management of the dealership, as well as his addiction counsellor, each of whom appeared at the hearing to provide their personal testimony in addition to their letters of support.

There is no evidence to indicate that the Appellant has engaged in any other improper conduct, in any other employment, or during the 6½ years he has been employed as a motor vehicle salesperson.

Counsel for the Appellant referred the Tribunal to *Re: Koo* [2012] O.L.A.T.D. No. 235. In that case, one of the reasons for the Registrar's refusal to register was that not enough time had passed since the appellant's sentence was completed to establish a record of unsupervised positive conduct. In its decision, the Tribunal stated, at paragraph 18 of the decision, that:

Mr. Koo did not testify nor were any character witnesses called on his behalf ... While he has completed his conditional sentence, there has not been a sustained period of unsupervised positive conduct. The Tribunal has no option but to conclude that Mr. Koo's past conduct does give rise to reasonable grounds to believe that he will not conduct his business in accordance with the law and with integrity and honesty as required under the Act.

This is to be contrasted with the case now before this Tribunal where the Appellant successfully completed his period of probation in 2011. The Tribunal also recognizes that contrary to *Koo*, this Appellant gave testimony and also had character witnesses appear on his behalf.

Particular attention is paid to the Tribunal's decision comment in *Koo* that:

The Act does permit consideration of all the past conduct of a potential registrant. Thus, if there is sufficient evidence that a criminal has paid his debt, taken responsibility for his actions, taken material and concrete steps to reform and achieved success in sustaining a life of honesty and integrity, then the Tribunal is entitled to take these factors into consideration in determining whether someone has taken themselves out of the operation of subparagraph 6(1)(a)(ii) of the Act.

The Tribunal in this case, finds that there is sufficient evidence to show that the Appellant has "paid his debt, taken responsibility for his actions, taken material and concrete steps to reform and achieved success in sustaining a life of honesty and integrity" since first being arrested in December 2009 through to completing the probation period in 2011.

In conclusion, the Tribunal notes that each case must be adjudicated based on the facts presented. In this case, given the foregoing, and on a balance of probabilities, the Tribunal concludes that the past conduct of the Appellant does not afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

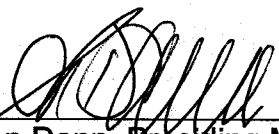
However, given the applications filed and mindful of the Registrar's concern for consumer protection, the Tribunal is of the view that conditions on his registration are appropriate.

ORDER

Therefore, 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 to Revoke, and orders that the following conditions attach to the registration:

1. The Appellant is to ensure that all information, verbally or in writing, which he provides to the Registrar, or a representative of the Registrar, is accurate in all details. Further, the Appellant is to ensure he provides full and complete disclosure on all future applications for registration or renewal as a motor vehicle salesperson and in all of his discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
2. The Appellant is to advise the Registrar and his sponsoring dealer in writing, within five business days, of any future findings of guilt, convictions or pending charges under any federal or provincial legislation.
3. The Appellant shall not transfer his registration as a salesperson under the *Motor Vehicle Dealers Act, 2002*, to another dealer without prior consent from the Registrar.

LICENCE APPEAL TRIBUNAL



Simon Dann, Presiding Member

Released: October 31, 2014