

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



**DATE:**            2012-05-30  
**FILE:**            7033/MVDA  
**CASE NAME:**    7033 v. Registrar, *Motor Vehicle Dealers Act 2002*

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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

Asad A. Malik

Applicant

-and-

Registrar, *Motor Vehicle Dealers Act 2002*

Respondent

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**REASONS FOR DECISION AND ORDER**

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**ADJUDICATOR:**    Patricia McQuaid, Vice-Chair

**APPEARANCES:**

**For the Applicants:**    Ben Peterson, Paralegal

**For the Respondent:**    Elizabeth Maishlish, Counsel

**Heard in Toronto :**    March 29 and 30 and April 30,  
2012

## 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 October 18, 2011 proposes to refuse to grant the registration of Asad A. Malik (the "Applicant"), as a salesperson under the Act.

This is not the first such application by Mr. Malik. He was first registered as a motor vehicle salesperson from February 4, 1997 to February 4, 1999. He subsequently submitted an application for registration as a salesperson in January 2006, with his proposed employer being Erin Mills Mazda (1994), hereafter, "Erin Mills." The 2006 application was refused and Mr. Malik appealed to this Tribunal. In the LAT decision dated April 3, 2007, the presiding member found that the 'past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty since he has only been back in the workforce for one year since his release from probation in February 2003.' She directed the Registrar to carry out his proposal to refuse registration. Mr. Malik appeared before the Tribunal on that occasion without legal representation.

Mr. Malik re-applied for registration in April 2009. Again, a Notice of Proposal to refuse registration was issued. Mr. Malik did not appeal that proposal therefore, pursuant to the Act, the Registrar carried out the proposal to refuse registration on August 26, 2009. In that instance, the sponsoring dealership was again Erin Mills.

This leads then to the current matter – the application dated March 3, 2011 with, once more, Erin Mills as the sponsoring dealership. The fact that Mr. Malik plead guilty and was convicted in February 2002, of numerous offences is not in dispute. These offences included several counts of fraud, trafficking in credit cards, possession of credit card data relating to 65 persons for the purposes of committing an indictable offence, possession of stolen and/or falsified credit cards, and possession of stolen identification and of counterfeit currency. It is also not in dispute that Mr. Malik received a pardon in November 2008 with respect to these offences (Exhibit 1, Tab 8). What impact this pardon should have is, however, one of the matters in issue.

### REGISTRAR'S EVIDENCE

Carey Smith is the Director of Investigations for the Ontario Motor Vehicle Industry Council (OMVIC). He reports directly to the Registrar under the Act. Mr. Smith has extensive experience in car industry and automotive related crime, first through his years of police work at the Halton Regional Police Service which led to his appointment as director with OMVIC in 2003. He explained that the Act is designed to protect the public. The overarching principle governing a salesperson is that of full

disclosure – to the public when they are purchasing a vehicle and to the Registrar in filling out the application form to become a registered salesperson. The public, and OMVIC, needs to have faith that a person will do all the Act requires in terms of full disclosure, whether or not that would be to the salesperson's advantage. From his involvement in this file, Mr. Smith has concluded that the Applicant has never been forthcoming about all of the circumstances surrounding his conduct and criminal convictions and he continues to minimize his role in what transpired. On basic elements of his application, Mr. Malik has not provided correct information. For example, he responded that he was not registered as a salesperson prior to January 1, 2010 when in fact he was registered in February 1997, though his position was terminated on March 21, 1997.

Mr. Smith acknowledged that Mr. Malik received a pardon for his criminal convictions in November 2008. However, Mr. Smith explained that for OMVIC, the issue is not the convictions per se, but the conduct that gave rise to those convictions. By virtue of the pardon, Mr. Malik can say that he has no criminal record, but he cannot assert that the circumstances on which the convictions were based did not occur.

Throughout his testimony, Mr. Smith conveyed the Registrar's concern that Mr. Malik, despite the fact that he plead guilty to a list of criminal offences (Exhibit 1, Tab 4G), continues to offer misstatements as to what occurred. This is exemplified, in the Registrar's view, in the letter of support written by Ms. Taibi (Exhibit 1, Tab 8). In that letter, she states that Mr. Malik gave details and an explanation of events and charges. She relied on that information in providing the letter to the Registrar. The Registrar contends that through the letter, it is clear that Mr. Malik continues to minimize his involvement despite the guilty plea and convictions. For example, he told Ms. Taibi that he was unaware that the computers were stolen and was unaware that information on the laptop included the names and credit card information for an unknown number of people. He distanced himself from the conduct. Several of his convictions related to conspiracy and in Mr. Smith's experience, the organized criminal element is active in the car industry, relying on a criminal network. Mr. Smith remains suspicious of Mr. Malik's continued efforts to get back into the car business when he appears to be successful in other areas of sales. This remains a "live" concern for the Registrar.

Mr. Malik's convictions were not a "one off," but rather, by their nature were perpetrated over a period of time. For the Registrar, the breach of trust issue arising, for example, from his possession of Future Shop credit applications where he was an employee (s. 354(1)(a) of the Criminal Code) is an aggravating factor. That conduct demonstrates a level of premeditation and organization, a sophisticated fraud carried out with deliberation. In car sales, Mr. Malik would have access to much credit card and other confidential financial information through his interface with customers.

Mr. Smith acknowledged that significant time has elapsed since these events, but in his view, the pattern of conduct of denial is a constant. Mr. Malik continues, as evidenced by his explanations to Ms. Taibi, to not fully disclose, using her to pass on misstatements.

Mr. Malik may be friendly, affable and hardworking as referenced in the appreciation offered by his employer, the Brick (Exhibit 1, Tab 10), but that, in the Registrar's view, has little to do with the "honesty and integrity" requirement.

Mr. Smith was asked about terms and conditions that could be placed on Mr. Malik's registration to alleviate concern about the risk posed by his access to financial information in his role as salesperson. He responded that he did not believe that would be effective in these circumstances. Specifically, car sales are usually structured around financing and access to credit card information. In the normal course, the salesperson would be the one filling out this information, with little ability to monitor the use of that information. In order for the Registrar to utilize terms and conditions, he has to have confidence that they will be followed, which is not the case here. The Registrar will consider terms when his concerns about a person are low and when it is determined that the person might need to be subject to extra vigilance for a temporary period.

When asked by the Tribunal when the passage of time will mitigate concerns, Mr. Smith responded that circumstances have to be looked at in their entirety, on a case by case basis. Factors for consideration are the seriousness of the prior conduct, whether it was related or applicable to the auto industry, whether the conduct was an isolated incident, perhaps motivated by personal hardship or whether the conduct suggested a sophisticated and organized predisposition to such behaviour. He reiterated that nothing has changed for the Registrar since the last hearing.

Mr. Peterson chose not to cross examine Mr. Smith.

### **APPLICANT'S EVIDENCE**

Three witnesses testified on behalf of Mr. Malik. The first, Mr. Ajay Chadha, is the new car sales manger at Erin Mills where Mr Malik is currently working as a service advisor. He has known Mr. Malik for four years.

Mr Chadha explained that the first contact with the public is the salesperson. As a salesperson, Mr. Malik would take customers out for test drives and in so doing he would make copies of the driver's licence. He would discuss features of the vehicle and its cost, but it is the sales manager and/or finance manager who would review financing documents with the customer and obtain signatures on those documents. The salesperson takes the offer to the finance manager having 'swiped' the credit card, but he does not review credit arrangements with the customer.

In his current role at Erin Mills, Mr. Malik has invoiced customers and frequently handled credit cards and cash, with no issues arising. His work is closely monitored. They have found no reason to distrust him. When questioned about Mr. Malik's past convictions, Mr Chadha stated that he believed what he had been told by Mr. Malik about the circumstances surrounding those. He was, however, not aware that one of

the convictions related to credit card applications which Mr. Malik had accessed as an employee of Future Shop, nor did he indicate much concern about how much or little he knew of the particular circumstances. That behaviour was in the past. He accepts the pardon as a decision made by a knowledgeable authority. Mr. Malik's recent behaviour suggests to him that he is honest and trustworthy. He described Mr. Malik as the "darling of the dealership."

Mr. Chadha stated that Mr. Malik's conduct as a service advisor has given him comfort. H

e believes that he would be an asset in sales. Mr. Chadha, during the course of his testimony, stated that he believed that Mr. Malik had previously sold cars, before he, Mr. Chadha, joined Erin Mills. He personally had not seen Mr. Malik selling cars. This testimony caused a certain amount of confusion and raised the possibility that Mr. Malik may have been selling cars without a licence, and was permitted to do so by Erin Mills. However, there was no reliable evidence in this regard offered to the Tribunal.

Of the two other witnesses called on behalf of Mr. Malik, one, NH, has been his friend for 16 years. Through her evidence, it was clear that she knew few details about his legal problems in the past, but came to the hearing to testify as a supportive friend. While such a gesture is commendable, NH's evidence was given little weight in the circumstances.

The third witness was Rosanne Taibi, a social worker with the Canadian Mental Health Association – Peel Branch. Ms. Taibi is a housing support worker with approximately twenty clients. She has been working with Mr. Malik for approximately 4 ½ years. As she got to know him, he talked about his past more. He was troubled by it and realized that he had made some mistakes. Ms. Taibi described the process behind the letter of support that she wrote (Exhibit 1, tab 8). She met with Mr. Malik at his request and that of his legal representative. Mr Malik had a list of the charges in front of him. He described the circumstances to her from his memory. She did not see the actual court documents. Mr. Malik told her that at the time he could not afford legal representation. He took the advice of duty counsel and pled guilty, having been told that he would likely get a "slap on the wrist." However, he went to jail which was a terrible time for him.

Ms. Taibi described Mr. Malik as a very spiritual person. She has never found him to question or oppose the law, but rather, he is respectful of it. As she knows him to be now, she does not sense that he struggles with compliance with the law.

He has expressed to her that the salesperson licence is an opportunity to prove himself. He is personable and warm. She could not fathom that he would exploit his job situation for his own personal benefit given what she sees in him now. She did state that Mr. Malik is easily influenced by others, though she did not perceive that as an issue in this line of work. Ms. Taibi stated that she did not really know the roles and responsibilities of a salesperson, but did know that in his employment at the Brick he has handled credit cards and there have been no issues. She has observed him in his

work environment, with customers, managers and doing credit checks. He is a trustworthy individual in her view.

Mr. Malik was called as the last witness. He currently works full-time, seven days a week – five days as a service advisor at Erin Mills and two days at the Brick. He described the period of 2005-2009 as a very difficult one: his family situation was not good, he broke up with his girlfriend and he had his criminal convictions. He was diagnosed with manic depression and was in and out of hospital many times. He was on significant amount of medication, which has since diminished so that he now only takes medication on an as needed basis. Through this period, he embarked on a spiritual journey which has brought him to a good place.

He had no criminal history before 2001 and has had no issues since, but he acknowledged the concerns of the Registrar while questioning the assumption that the incidents in his past are predictors of his future actions. In his view, there is no danger now that he would exploit a position for personal financial gain.

In describing his convictions, Mr. Malik stated that his lawyer told him that he would only receive a “slap on the wrist” as these were first offences. To fight the charges would have required significant time and involve a lot of stress. He described himself as remorseful, to a degree; not for the things that he did not do.

With respect to his answers on the application form that were incorrect, for example, that he had in fact been a registered salesperson previously (in February, 1997), he never perceived it to be of any note given that he had terminated the position within one month. He described the OMVIC form as difficult to fill out. He tried to be truthful and knew that OMVIC had all the information about his convictions so he would not in any way benefit by attempting to mislead. If he explained the details of the convictions incorrectly, it was because he was doing so from memory. He anticipated that he would have the opportunity to provide a further explanation to OMVIC, but was aware that OMVIC does rely on what is disclosed to them by an applicant.

Throughout his evidence, Mr. Malik did attempt to explain the charges and convictions. For example, that certain financial information, the credit card applications with Future Shop, found in his bag were actually rejected applications which he had no intention of using in any way. He explained that this was a time in his life when he was going to nightclubs, socializing with a crowd which “talked big” and was eager for displays of wealth. This is for him, now, an embarrassing time. These were foolish mistakes made for which he has suffered, but to his mind, eleven years is a very long time for him to continue to suffer. When asked what the “mistakes” were, Mr. Malik responded that the first mistake was to “hang” with the people he did.

Mr. Malik reiterated that he respects the position of OMVIC. He knows their concerns, but they do not know him: he is a man of honesty and integrity. In his words: “If you look at my story, it changes everything.” His past is, he agrees, unfortunate and it is nerve wracking for him to confront it again through the hearing process.

His recent work experience at both Erin Mills and the Brick suggest that he can be trusted with credit cards, financial information and customer's pieces of identification. Regarding terms and conditions, he believes that he should be licensed, eleven years later, with none. While he would not be happy with conditions, "something is better than nothing."

In cross examination, he stated that some of what he wrote previously, his explanation offered in 2006 for his convictions, read now, is embarrassing to him (Exhibit 1 Tab 4A). However, this was a reality he believed to be true at that time, a time when he was suffering with his mental health issues. He did concede that he has not offered any medical evidence in support of his assertions about those mental health issues.

## **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.

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

(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.

#### **Further Application**

**12.** A person whose registration is refused, revoked or refused renewal may reapply for registration only if,

- (a) the time prescribed to reapply has passed since the refusal, revocation or refusal to renew; and
- (b) new or other evidence is available or it is clear that material circumstances have changed. 2002, c. 30, Sched. B, s. 12.

### **REASONS/ANALYSIS**

The Registrar asserts that Mr. Malik has not met the requirements for registration and he has failed pursuant to s. 12 of the Act, to establish a material change in circumstances. Ms. Maishlish drew the Tribunal's attention to the earlier decision of this Tribunal (2007) wherein Ms. Montano summarized Mr. Malik's evidence as follows:

*In his opening remarks, the Applicant indicated that he was not in a position to say that he was innocent, but he did say: "not guilty of all this." "This was a one time incident in my life. I have changed completely and have become very spiritual. I was wrong, I made a mistake. It's been seven years. I have suffered a lot. It has affected me emotionally, psychologically. I paid the price and I have been in good conduct. I have not done anything bad or wrong in seven years. It has completely changed my life."*

The Applicant advised the Tribunal that he was remorseful and apologetic for his past conduct, but then he refused to accept responsibility for his past convictions and contradicted and denied the level of his participation in the crimes which he committed.

And further:

His conduct in inaccurately completing the application to the Registrar and then making contradictory and inconsistent statements indicates he is unlikely to abide by the restrictions of a regulated industry designed to protect the public.

The conduct of the Applicant at today's hearing does not convince the Tribunal that it would be in the public's best interest to grant the application for registration to the Applicant. Although he was apologetic with regard to his past conduct, he was not in agreement with his past convictions which he pleaded guilty to. This Tribunal is of the opinion that the Applicant is not fully aware of the impact and seriousness of his past criminal convictions. He was not expecting the Registrar nor OMVIC to fully investigate his background.

With regard to the issue of a material change in circumstances, reading this excerpt, five years later, there is a common thread through Mr. Malik's evidence: a certain inability to take full responsibility for the conduct that led to his convictions. And, it is

the conduct underlying those convictions that remains the Registrar's concern.

As was reiterated throughout the hearing, the Tribunal cannot permit an Applicant to re-litigate his guilt. The guilty plea and resulting convictions are an admission of every element of the offence, including knowledge and intent (*Ontario (Motor Vehicles Act, Registrar v. Jacobs [2004] O.J. 189*). In November 2008, Mr. Malik was granted a full pardon in respect of those offences. The pardon does not erase the fact that those offences were found to have occurred. Rather, the convictions are taken out of the Canadian Police Information Centre (CPIC) and may not be disclosed without Ministerial permission<sup>1</sup>. Mr. Smith, in his testimony, stated that the pardon may be a mitigating factor as the Registrar assesses the application, but it is not a material change.

The question then, is what might be considered a material change in this case. Mr. Malik has been working for approximately 4 ½ years at Erin Mills and the Brick, in service advisor and sales positions. There has been no evidence of any issues in terms of his misuse of credit cards or personal information of the public. There is evidence that he has had access to such information. While Mr. Chadha may not have had the full picture of the facts surrounding Mr. Malik's convictions (which the Registrar finds problematic in term of Mr. Malik's less than fulsome disclosure), when information was provided to him at the hearing, he did not waver in his desire to employ Mr. Malik in car sales.

To this extent, Mr. Chadha's evidence carries more weight than that of Ms. Taibi. His employ of an individual who may run afoul of the law carries a risk to the business and reputation of Erin Mills. Ms. Taibi is a professional, a social worker working in the mental health area. She, too, has known Mr. Malik for over four years. She has watched him face his demons. She cannot fathom that he could at this stage, commit the crimes he was convicted of over ten years ago. Ms. Taibi did concede that she perhaps did not have the complete facts when she provided the letter of support and is not fully aware of the job responsibilities of a car salesperson (and hence the potential for risk to the public).

However, the indisputable fact is that eleven years have transpired since the incidents giving rise to the criminal conduct. Mr. Malik has had no brushes with the law since then. In *Popal (Re) [2009] OLATD* the Tribunal stated:

The fact that there have been no new convictions does not qualify, as it would be tantamount to saying that it is new evidence or a material change to have not engaged in criminal behavior.

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<sup>1</sup> The Tribunal notes that Mr. Malik's representative did raise in his submissions, on the issue of the pardon and its effect, the possibility that the Registrar might be engaging in discriminatory practice pursuant to the Canadian Human Rights Act. After hearing from both representatives regarding the impact on the hearing of this issue being raised at that stage, the Tribunal took a brief recess at which time Mr. Peterson conferred with his client. Upon resumption after the recess, Mr. Peterson advised that his instructions were to withdraw that aspect of his submissions.

In *Popal* the passage of time being considered was one year and eight months, not 11 years. On these facts, the Tribunal does give weight to what can only be considered as a very considerable passage of time. When considered together with the 4½ years employment outlined above, the Tribunal is satisfied that there has been a change of circumstances since both the 2007 decision and the 2009 refusal to register sufficient to meet the test in the Act.

The Tribunal in *Popal* also made note of the less than full and frank disclosure (again). There, the Applicant sought to explain this away as a reasonable misunderstanding, a position that resonates on these facts. Was Mr. Malik totally accurate in details and descriptions of all of his offences? No. But he did not conceal them. Whether he described an offence as a fraud over \$5000 or under, is not material in the Tribunal's view. He did describe a list in substantial detail.

While it is not incumbent upon the Registrar to search its records to ascertain information about an Applicant, on these facts, with a relatively recent (2007) Tribunal decision and an application, and subsequent review by the Registrar in 2009, that can hardly have been required. Mr. Malik stated that misleading the Registrar about his convictions was in no way to his benefit; he was fully aware that they were apprised of the details of his past. That statement rings true. If the lack of disclosure as reflected in Ms. Taibi's letter is what the Registrar is relying upon, as was suggested by counsel in her submissions, this is not compelling as material in the context of all that was disclosed and of what the Registrar was patently aware.

What Mr. Malik did not disclose was his previous registration, in 1997, for what he views as a period of a month. While he was indeed registered, this was not a period of time, based on Mr. Malik's evidence, that he perceived himself as working as a registered salesperson some 15 years ago. This is not, given what has been put in issue at the hearing, material, nor was it established as being in any way intentional, nor even inadvertent. Rather, Mr. Malik simply did not recall this, given his resignation from the position after a training period, as a registration.

The crux of the Registrar's concern about this Applicant is twofold – first, the fraud and conspiracy convictions in 2001 show a pattern of conduct which poses a risk; it is not isolated "one-off" behavior, and second, the continued lack of acknowledgement of responsibility. The Tribunal agrees with Mr. Peterson that the convictions, in the context of Mr. Malik's entire personal history, occurred in a short and specific period of time. The conduct has not been repeated. Both representatives cited extensive case law, some of which included situations where there was a history of past criminal conduct, though none where the time interval approached eleven years, yet registration, on terms, was granted: see *Biancofiore(Re)[2009]O.L.A.T.D.*, 6948 v. *Registrar, Motor Vehicle Dealers Act, 2012CanLII 19530 (ON LAT)* and *Meeder (Re) [2010] O.L.A.T.D.*

One of the cases cited was *Re: Astra Motors Inc and Paul Zbignew Jadwidzic [2011]*

*O.L.A.T.D.* There, registration was granted without conditions. There is a crucial difference between Mr. Malik and Mr. Jadwidzic. The latter appeared to have unequivocally expressed remorse and accepted full responsibility. This is not so with Mr. Malik. From a review of the Tribunal's decision in 2007, the affidavit filed in support of this application (in Exhibit 1, Tab 2, page 20, paragraphs 12 and 13) and his oral testimony, one might conclude that it is simply not in Mr. Malik's character to do so. And this may be a very real personality flaw, but to deny him registration because he cannot seem to show the degree of contrition acceptable to the Registrar is not an appropriate ground, nor does it necessarily equate to a risk to the public interest. There are likely many registrants who display levels of arrogance and hubris, which are off-putting and at times unattractive personality traits, but they are nevertheless permitted registration.

In the circumstances of this case, the Tribunal is prepared to give the Applicant a chance. The one concern which did resonate was that articulated in Ms. Taibi's evidence, that Mr. Malik is easily influenced by others which may speak to the Registrar's concern about the infiltration of the auto sales industry by organized criminal elements. The Tribunal is of the view that conditions may be tailored to mitigate against any such possibility.

## 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 and further orders that the Registrar approve the registration of the Applicant as a salesperson, subject to the following conditions:

1. The Applicant is to advise the Registrar and his sponsoring dealer in writing, within five business days, of any 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.
2. The Applicant shall not, for a period of two years, be a final signatory on the bill of sale for vehicles he will be selling, nor will he be a final signatory on the purchase of vehicles for resale.
3. The Applicant shall not, for a period of two years, have any involvement in any credit and finance arrangements for vehicles he will be selling.
4. The Applicant shall not transfer his registration as a salesperson under the *Motor Vehicles Dealers Act, 2002*, to another dealer without prior consent from the Registrar.

LICENCE APPEAL TRIBUNAL



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Patricia McQuaid, Vice-Chair

*Released: May 30, 2012*

PAGE 13/13 \* RCVD AT 5/30/2012 9:11:49 AM [Eastern Daylight Time] \* SVR:OMVCFAX-B/3 \* DNIS:3758 \* CSID:416 325 5217 \* DURATION (mm-ss):05-02