

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court (<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> in approximately three weeks.