

Licence Tribunal
Appeal d'appel en
Tribunal matière de permis



DATE: 2013-07-16
FILE: 7992/MVDA
CASE NAME: 7992 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

Allistair Grier

Applicant

-and-

Registrar, *Motor Vehicle Dealers Act 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Mary Ann Spencer,
Member

APPEARANCES:

For the Applicant: John Puddicombe, Agent

For the Respondent: Brian Osler, Counsel

Heard in Toronto: July 8, 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 March 12, 2013 proposed to refuse to grant the registration of Allistair Grier (the “Applicant”), as a salesperson under the Act.

The Registrar is proposing to refuse the Applicant’s registration on two grounds: 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 and that the Applicant made a false statement in the application for registration.

FACTS AND EVIDENCE

The Applicant’s application for registration as a salesperson (Exhibit 3, Tab 3) was received by the Ontario Motor Vehicle Industry Council (“OMVIC”) on December 20, 2012. In response to question number 8 on the application which asks if the applicant has ever been found guilty or convicted of an offence under any law, the Applicant indicated ‘yes’ and attached a “Criminal Convictions Conditional and Absolute Discharges” report prepared by the Royal Canadian Mounted Police (“RCMP”) and an explanatory letter. A further explanatory letter was submitted by the Applicant on February 4, 2013. On March 12, 2013, the Registrar issued the Notice of Proposal to Refuse Registration.

Registrar’s Evidence

The evidence of the Registrar comprised documents filed as Exhibits 3 and 5 and the testimony of Michael Rothe, the Director of Legal Services at OMVIC, which has delegated authority for administration of the Act.

Referring to Justice R.C. Boswell’s June 20, 2011 sentencing decision (Exhibit 3, Tab 1), Mr. Rothe noted that the decision indicates that on June 16, 2011 the Applicant was acquitted of attempted murder and of pointing a firearm at his brother but was convicted of the following five charges:

- (i) Assaulting his brother, causing bodily harm;
- (ii) Assaulting his sister-in-law;
- (iii) Pointing a firearm at his sister-in-law;
- (iv) Threatening his sister-in-law with death; and,
- (v) Using a weapon in the commission of an indictable offence.

Mr. Rothe highlighted the sections of the decision which describe the events of September 9, 2009 which resulted in the charges against the Applicant. In summary, the Applicant, had been living in his parents’ home but was asked to leave by his brother. In return, he

was to receive payment, not all of which was made. Three months after leaving the parents' home, the Applicant went to his brother and sister-in-law's house to demand his money. The sentencing decision indicates that the Applicant pulled out a pistol and fired a warning shot at his brother. An altercation then ensued during which the gun fired, striking the brother. The Applicant also pulled his sister-in-law out of the kitchen at gunpoint and pushed her down the stairs. The Applicant then punched his brother in the mouth. All of these events were witnessed by the brother and sister-in-law's eleven year old son.

The Applicant was sentenced to four years in custody, with three years credit for time served, and three years' probation. The Applicant's probation does not end until February 20, 2015 (Exhibit 3, Tab 6). There are seven conditions to the Applicant's probation including that he have no contact with his brother, sister-in-law or nephew.

Referring to contemporaneous notes (Exhibit 5), Mr. Rothe outlined the content of a telephone conversation he had with the Applicant on February 20, 2013. The Applicant had called OMVIC after staff had requested more information with respect to his application for registration. Mr. Rothe testified that the Applicant was upset because he had been asked to provide a copy of a Pre-Sentence Report and a status letter from his probation officer. He also expressed concern about the time it was taking to process the application and asked why a personal family matter was holding it up. During the conversation, Mr. Rothe explained that the "odds were against" the Applicant because the recommendation to the Registrar would be that the Applicant's registration be refused given the Applicant was still on probation. The Applicant stated he was not guilty and that his brother only suffered a bloody nose when his head hit the Applicant's. The Applicant also stated that the judge had found the weapon used was "only a toy gun" and then stated that his lawyer had proven there was no gun. When Mr. Rothe asked the Applicant to clarify whether there was a gun, a toy gun or no gun, the Applicant said he did not want to argue "semantics". Mr. Rothe advised the Applicant to put his case to the Registrar in writing and the Applicant said he was suspicious of the request because it might be used against him.

Question 8 on the OMVIC application form for registration asks whether or not an applicant has prior criminal convictions. If the answer is yes, a detailed statement signed by the applicant and an authorized individual at the dealership is to be provided. Mr. Rothe testified that OMVIC regards this question as the first test of an Applicant's honesty and integrity. In the Applicant's case, the Applicant answered "yes" and provided a letter dated December 20, 2012 which states:

I had a domestic with my brother for robbing my parents and myself. I thought if I gave him the opportunity to do the right thing and not bring the police in he wouldn't go to jail for fraud. Unfortunately he took advantage of the situation and things became fisical (sic). The end result was that I beat the charges by jury but not by the judge. He added a gun charge with no evidence of one.

Mr. Rothe stated that the Registrar regards this statement as false, noting that the sentencing decision clearly sets out that the jury convicted the Applicant of firearm offences.

In a further letter to OMVIC dated February 4, 2013, and signed by a representative of the dealership, the Applicant wrote:

The 2011 charges of uttering death threats, assault and using an imitation fire arm occurred from a domestic with my brother who mistreated my sick parents, I should have let my lawyer take care of it, this will never happen again.

Mr. Rothe noted that the letter is inconsistent with the findings of fact contained in Justice Boswell's sentencing decision and pointed out that it contains a number of references to 'pistol', 'gun' and 'loaded handgun' but no reference to "imitation" firearm or to mistreatment of the Applicants' parents. He also noted that Justice Boswell states that the Applicant's act was not impulsive, that "he had months to think about it".

Mr. Rothe testified that the Act is consumer protection legislation. Individuals purchasing vehicles provide both personal and financial information and must have confidence that the information will not be abused. He also noted that there are situations when consumers are alone with salespersons or dealers and indicated that OMVIC is aware of numerous situations where confrontations have taken place. OMVIC therefore looks carefully at the past conduct of individuals applying for registration.

Mr. Rothe explained that the legal department reviews each application on its own merit but when false information is provided, the recommendation is to refuse registration. All recommendations are reviewed at a meeting attended by the OMVIC directors and the Registrar and it is the Registrar who makes the final decision.

In the Applicant's case, Mr. Rothe stated that the Registrar has refused the application for registration because the Applicant did not complete the application honestly; he did not provide information which was consistent with the factual findings of the Court and, in the two letters he submitted and his telephone conversation with Mr. Rothe, he minimized the events which led to his convictions. Further, the Applicant has been convicted of serious offences. Mr. Rothe then stated that the Registrar believes an application submitted while an applicant is still on probation to be premature. The Registrar would look for a period of good conduct after probation has been completed when good conduct is not mandated and scrutinized. Mr. Rothe did note there have been cases where the Registrar has granted registration subject to conditions.

On cross-examination, Mr. Rothe agreed that the Applicant has no convictions for theft or fraud. He also agreed that the sentencing report indicated that the gun was never found and therefore the report contained no ballistic information

Applicant's Evidence

The Applicant testified that he has no history of or convictions for theft, fraud or incidents involving violence. A portion of a supporting reference letter from a former neighbour (Exhibit 4) was read into the record:

Given the nature of the care and compassion Allistair demonstrated during some very stressful years, Allistair should be given a chance to put that all behind him, and move forward, to forge a new and meaningful life for himself. He can only do this now, when he receives rightful acknowledgement of his true character, that of a caring, compassionate and big-hearted person. He should have the right to be a contributing member of society, that he wishes to be. He should not be prevented from earning a living yet once again.

With respect to the information he sent to OMVIC, the Applicant testified that he sent the CPIC forms provided by the RCMP. His lawyer had advised him that he should not talk too much about the events and therefore he kept his explanatory information “to the bare bones”.

The Applicant testified that he looked after his parents for twenty years. When his father started to be manipulated and blackmailed, he stepped in.

The Applicant is a licenced mechanic but health issues now prevent him from doing that work. He believes he is well suited to work as a motor vehicle salesperson with his background.

On cross-examination, the Applicant agreed that he had not appealed either his conviction or his sentence, stating he had been advised not to and noting that when he was sentenced, he was given credit for three years time served. Asked to explain the statement in his letter that he ‘beat the trial by jury but not by the judge’, he stated that there was no forensic evidence presented at the trial. There was no evidence of any bullet or gun other than his brother’s testimony that a pellet gun had been used. He agreed that the gun had not been recovered and stated “there wasn’t a firearm and there weren’t bullets unless you consider a pellet a bullet”. Referred to the sentencing report referencing a warning shot, the Applicant stated that the findings are inaccurate: for example, a bullet did not penetrate the wall; rather, a pellet penetrated drywall. He then stated “I’m not arguing the judge’s position. But you’re asking me to testify when I didn’t testify at my trial”. Referred to a number of specific references to a gun contained in the report, the Applicant then said that his sister-in-law believed it was a gun and that was why he was charged with an indictable offence. He stated that he was convicted because of her testimony and repeated that there was no evidence of a gun. Rather, what occurred was the accidental discharge of a pellet gun which he later took apart and destroyed. He then said “But this is a gray area, I’m not comfortable, getting back into a trial again”.

The Applicant then re-iterated that he had been told by his probation officer that he is not allowed to have a copy of a Pre-Sentence Report and that probation officers do not produce status reports. He provided Counsel for the Registrar with his probation officer’s contact information in order to verify what she had told 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 this 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 by Counsel for the Registrar for consideration.

Counsel for the Registrar submitted that the Applicant is not entitled to registration because his past conduct reveals convictions for recent, violent offences and he is still on probation. Counsel argued that the Applicant should not be eligible for registration while still on probation because time is required to establish proof of his rehabilitation. He further argued that the Applicant failed to fully disclose the circumstances surrounding his convictions and in fact minimized them, indicating that he has yet to come to terms with his actions.

The Applicant's Agent submitted that the Applicant has not tried to hide anything and that the Applicant's brother and sister-in-law had reason to lie during the Applicant's trial. He stated that the Applicant made a "huge mistake" but it was a family issue and the Applicant will not re-offend. He suggested that the fact the Applicant is still on probation is a benefit because it means he is being supervised. Finally, he noted that the Applicant did not intend to give partial information to OMVIC but was directed by his lawyer not to talk about the charges and he was desperate to get a job.

The questions before this Tribunal are whether the Applicant's past conduct provides reasonable grounds for belief that the Applicant will not carry on business in accordance with law, with integrity and with honesty and whether or not the Applicant made a false statement in an application for registration.

On June 16, 2011, the Applicant was convicted of five offences relating to violent behaviour. While the documentary evidence before the Tribunal indicates that the Applicant has two older convictions for driving under the influence of alcohol, there is no record of other violent behaviour.

There are undoubtedly situations which could arise in transactions between consumers and a motor vehicle salesperson which could lead to frustration and/or anger. Mr. Rothe testified that OMVIC has been informed of numerous such confrontations, some instigated by consumers, others by salespersons. The question before the Tribunal is whether or not the Applicant's past conduct provides the Registrar with reasonable grounds for what Mr. Rothe described as 'concern' that the Applicant might have a 'predilection' to resolve disputes similarly in the future. Counsel for the Registrar also argued that the Applicant is not entitled to registration while he is on probation and submitted four past decisions of this Tribunal for consideration.

In *O'Connor v Registrar of Motor Vehicles*, [unreported] Vice Chair Israel wrote:

Although the convictions are not industry related they are nevertheless serious as they both involve violence. The two convictions relating to violent conduct are relevant as a probable predictor of the Applicant's future behaviour in a regulated industry... The statute is directed to the protection and safeguarding of the public in their dealings with motor vehicle dealers and salespersons... Members of the public should not be at risk of having a violent act committed against them when, in dealings with a salesperson, the latter becomes violent due to some act or omission, perceived or otherwise, of the customer that offends the salesperson and produces a violent reaction from such salesperson who is unable to manage his anger.

The Tribunal notes that in the above case, the Applicant was ordered to attend a course of assessment and counselling, including anger management, as a condition of probation. Vice Chair Israel goes on to quote the Commercial Registration Appeal Tribunal's decision in *Ripani*:

What all these cases indicate is that where past conduct includes criminal convictions, generally, *unless* exceptional circumstances exist, no registration will be permitted until sometime after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then, certain terms and conditions will be imposed.

Counsel for the Registrar also submitted this Tribunal's decision in *Iuliano v. Registrar, Real Estate and Business Brokers Act, 2002*, [unreported] in which Vice Chair Sanford wrote:

The fact that Mr. Iuliano remains on parole is also a relevant consideration. It is important to note that the aim of the Act is not to punish miscreants but to protect the public... Punishment is left to the criminal justice system. However, when the sentence is not yet complete, this fact can underscore concerns about the extent of a person's rehabilitation. In this case, the fact that Mr. Iuliano has not yet completed his sentence may help explain why he appears not to have gained the insights into his crime that he will need to avoid any recurrence of violence. He may need more time to fully come to terms with his action.

In *Ullah* (Re), [2008] O.L.A.T.D. No. 429, the applicant was refused registration while still on probation. The facts, however, distinguish that case from the current situation in that Mr. Ullah had charges pending related to his failure to attend court and to comply with his probation. One of the breaches of the conditions of his probation was his failure to attend an anger management course.

Other than the events of September 9, 2009, there is no evidence before this Tribunal that the Applicant has a history of violence or of an inability to manage anger. The Court did not order the Applicant to attend anger management courses. The Tribunal notes that Justice Boswell's sentencing decision indicates there had been a "long simmering quarrel" between the Applicant and his brother. While Justice Boswell noted a number of aggravating factors in his decision, including the fact that the Applicant's actions were the result of a considered decision, he also noted the following as a mitigating factor:

...Allistair does not have a history of acting violently. The acts in question appear to be out of character for him and do fit the profile of someone who "lost it".

The Tribunal must consider each case before it on its own merit. In this case, the Tribunal is not convinced that the acts of the Applicant on September 9, 2009 were the result of a predisposition towards violence. In fact, the aggravating factor noted by Justice Boswell persuades the Tribunal that the Applicant's actions were not reactionary or impulsive. Nor is the Tribunal convinced that the fact the Applicant is on probation is sufficient reason in itself to deny registration. The conditions on the Applicant's probation do not include any requirement for anger management courses; rather, they include provisions that the Applicant have no contact with his brother and his family, suggesting that very specific circumstances led to the Applicant's behaviour. In this regard, the Registrar has not proven that registration of Mr. Grier as a salesperson would present a risk to the physical safety of the public.

With respect to the provision of false information on an application for registration, the evidence indicates that the Applicant did indicate 'yes' in his answer to the application's question asking if he had ever been charged or convicted of a criminal offence. Mr. Rothe suggested that the Applicant misrepresented the events of September 9, 2009 in his letters of December 6, 2012 and February 2, 2013. With respect to the latter letter, Mr. Rothe highlighted the Applicant's reference to 'imitation' firearm. The Tribunal notes that the Criminal Convictions Conditional and Absolute Discharges" report prepared by the RCMP and submitted by the Applicant with his application indicates that one of the Applicant's five convictions was for the charge "Use of Imitation Firearm During Commission of an Indictable Offence". It is therefore understandable that the Applicant would use the same wording in his accompanying letters.

What the Applicant has failed to satisfactorily explain is why he did not fully disclose the details surrounding the events leading to the convictions. The Applicant's December 6, 2012 letter to OMVIC provides almost no information:

Unfortunately (my brother) took advantage of the situation and things became fysical (sic). The end result was that I beat the charges by jury but not by the judge. He added a gun charge with no evidence of one.

Further, as Mr. Rothe noted in his testimony, the statement that the Applicant "beat the charges by jury but not by the judge" is untrue. The Applicant was found guilty of five offences by a jury.

The February 4, 2013 letter provides no further disclosure:

The 2011 charges of uttering death threats, assault and using an imitation fire arm occurred from a domestic with my brother who mistreated my sick parents, I should have let my lawyer take care of it, this will never happen again.

Rather than providing details, the emphasis in the letters to OMVIC is on why the Applicant reacted as he did. While the Applicant did not specifically deny the events set out in the sentencing report, his testimony at this hearing indicates that he believes the testimony of his brother and sister-in-law at his trial resulted in his convictions for gun-related offences. It is somewhat unclear to the Tribunal whether the Applicant is denying that there was a gun involved or whether he is denying that a pellet gun is in fact a gun. However, it is not the role of this Tribunal to determine what happened on September 9, 2009. That determination was made at the Applicant's trial. The events as set out in Justice Boswell's sentencing decision must be taken as findings of fact. The Tribunal is concerned, however, that the Applicant has presented varying versions of those events.

The Applicant's representative suggested that the Applicant did not intend to provide "partial" information to OMVIC. The Applicant testified the information he provided was "bare bones". Both the representative and the Applicant stated this was because the Applicant had been advised by his counsel not to discuss the charges. However, the Tribunal notes that the information provided was not only incomplete but was also incorrect.

Mr. Rothe testified that in his February 20, 2013 conversation with the Applicant, the Applicant stated he was not guilty and that his brother only suffered a bloody nose when his head hit the Applicant's. Justice Boswell's decision, however, states that the Applicant punched his brother in the mouth. The Applicant told Mr. Rothe that the judge had found the weapon used was "only a toy gun" and then stated that his lawyer had proven there was no gun. The Tribunal notes that there is no reference to 'toy' or 'imitation' gun in the sentencing decision. When Mr. Rothe asked the Applicant to clarify whether there was a gun, a toy gun or no gun, the Applicant said he did not want to argue "semantics". The Applicant did not refute Mr. Rothe's testimony. Further, at this hearing, the Applicant testified that there was no gun and then testified that he had taken apart and disposed of a pellet gun he used in the September 9, 2009 assault.

The Applicant's representative stated that the Applicant was desperate for a job and the Applicant himself testified that he is no longer physically able to perform work as a mechanic. While the Applicant may well have attempted to downplay aspects of his convictions as an attempt to improve the chances of OMVIC approving his application for registration, both the failure to provide full disclosure and the provision of false information reflect on the Applicant's honesty and integrity. Disclosure is a key component of the regulatory regime set out in the Act. 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. These cannot be compromised by a salesperson desperate to close a deal.

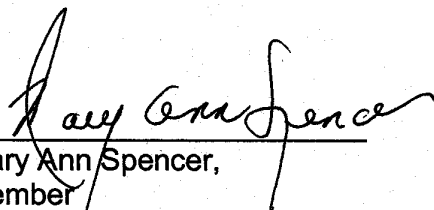
The Tribunal finds that the Applicant provided false and misleading information to the Registrar in his application for registration in accordance with section 6(1)(a)(iii) of the Act. Further, in accordance with section 6(1)(a)(ii) of the Act, the Tribunal finds that this conduct of the Applicant provides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

The Applicant provided the Tribunal with an unsigned letter dated June 18, 2013 from a neighbour as a character reference which largely speaks to the way in which the Applicant helped his parents. While not wishing to diminish what the Applicant may have done to assist his parents, such a reference is of limited value to the Tribunal. References from former employers or an undertaking from his prospective employer might have helped to address the Tribunal's concerns about the Applicant's honesty and integrity and therefore allowed the Tribunal to give some consideration to the possibility of registration with conditions. In this case, however, there is no such information. 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: July 16, 2013