

**Licence
Appeal
Tribunal**

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



DATE: 2012-08-02
FILE: 6363/MVDA
CASE NAME: 6363 v. Registrar, *Motor Vehicle Dealers Act 2002*

Motion for Stay of an Order of the Tribunal pursuant to the *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Sch. B

M & M Fine Auto Ltd and Massoud Yousof

Applicants

-and-

Registrar, *Motor Vehicle Dealers Act 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Patricia McQuaid, Vice-Chair

APPEARANCES:

For the Applicants: Justin Jakubiak, Counsel

For the Respondent: Brian Osler, Counsel

Heard in Toronto: July 27, 2012

DECISION AND ORDER

On May 24, 2012, the Tribunal issued an order (followed by its reasons for decision on June 1, 2012) directing the Registrar to carry out his proposal dated November 12, 2010 to revoke the registrations of M& M Fine Auto Ltd and Massoud Yousof as a motor vehicle dealer and salesperson respectively. As of that date, the Applicants were no longer licensed to sell vehicles. The Applicants have appealed this decision to the Divisional Court. The Applicants bring this motion before the Tribunal seeking a stay of the May 24, 2012 order pending the disposition of the court proceedings pursuant to subsection 9(9) of the *Motor Vehicles Dealers Act, 2002*.

The Tribunal's jurisdiction to stay its own order pending appeal is not in dispute. The parties are also in agreement regarding the test to be applied in determining whether a stay is appropriate. It is the three part test delineated by the Supreme Court of Canada in *RJR Macdonald v. Canada (Attorney General)* [1999] 1 S. C. R. 311 which must guide the Tribunal. Specifically, the Applicant must first demonstrate that there is a serious question to be tried. Next, the Applicant must demonstrate that it will suffer irreparable harm if the stay is not granted. The final branch of the test requires a determination of the balance of convenience.

1. Serious question to be tried

The Applicants assert, as grounds for their appeal, that the Vice Chair erred by making findings of fact that were not supported by evidence, erred in considering and relying extensively upon hearsay evidence (in particular with respect to the sale of the Land Rover) and erred in considering and relying upon opinion testimony and/or expert testimony provided by the Registrar at the hearing on its own behalf (in particular, that of Carey Smith, the Director of Investigations).

Registrar's Counsel points to the passage in the decision wherein the Vice Chair states:

"These events, (being the transaction for the sale, financing and subsequent loss of the Land Rover vehicle) coupled with the failure of the Applicants to properly report criminal charges on three separate occasions or the earlier bankruptcy of Yousof combined with the numerous infractions recorded in the individual Applicant's driving record, which were also not reported, satisfies the onus placed upon the Registrar that there are reasonable grounds for the believe(sic.) that the Applicants will not carry on business in accordance with the law and with honesty and integrity."

Counsel suggests that the appeal is doomed to fail because this passage clearly states that the Vice Chair was not relying upon the "Land Rover" issue alone in reaching his decision to revoke the registrations. By inference then, the fact that there may be an issue with this aspect of the decision will not be determinative of the final outcome.

It is not for the Tribunal, on this motion, to determine the merits. However, on a preliminary assessment of the issues raised concerning the scope and extent to which an administrative tribunal can rely upon hearsay evidence raises a significant and interesting issue. As the SCC stated in the *RJR Macdonald* decision:

“Once satisfied that the application is neither vexatious or frivolous, the motions judge should proceed to consider the second and third tests even if of the opinion that the plaintiff is unlikely to succeed at trial.”

At this stage of the analysis, the threshold is not a high one, as conceded by Registrar’s Counsel. The Tribunal is satisfied that the Applicants have met this branch of the test which then requires the Tribunal to examine the second prong of the test.

2. Irreparable harm

At this stage, as per the *RJR Macdonald* decision, the issue to be decided is whether a refusal to grant relief could so adversely affect the Applicants’ own interest that the harm could not be remedied if the eventual decision does not accord with the result of the interlocutory application. Further, the SCC stated that “irreparable” refers to the nature of the harm suffered rather than its magnitude.

In support of the assertion of “irreparable harm”, Mr Yousof, at paragraph 23 of his affidavit sworn June 11, 2012, states:

“As the revenue earned by M&M is my only source of income, the revocation of M&M’s dealership licence and my licence as a salesperson pending the appeal is a serious concern to myself and my family and will cause me significant hardship.”

There is no question that in any situation where there is a revocation of registration, there is likely hardship. As Mr Yousof has indicated in his affidavit, there is a risk of loss of business, goodwill and reputation. These may adversely affect the continued viability of the business. However, he has offered little or no evidence beyond this bald statement. The Act contemplates that the Tribunal’s order takes immediate effect. There is no automatic stay pending appeal. There are hurdles to overcome.

Mr Jakubiak referred the Tribunal to the decision in *Re Fakhri* [2009] O.L.A.T.D. No. 114 wherein Vice Chair Flude granted a stay pending an appeal. On the issue of irreparable harm, the Tribunal had evidence before it that Mr Fakhri was the sole breadwinner for his family of seven, that he had significant monthly expenses for both the lease on his business premises and his home mortgage. As well, the evidence before the Tribunal was that if a stay was not granted, Mr Fakhri would in all likelihood have to file for bankruptcy and would be unable to afford to continue with his appeal.

Here, aside from taking note of the “usual consequences of revocation,” one of which may be the loss of reputation and goodwill, there was no compelling evidence put before the Tribunal of irreparable harm and therefore this second prong of the test has not been satisfied.

3. Balance of convenience

However, even if the Tribunal were to find that the second prong of the test had been met, that indeed it would be difficult to resurrect the business should the Applicants be successful on appeal, the Tribunal finds that the third prong of the test, the balance of convenience, has not been satisfied. It is at this point that the “public interest” must be considered in assessing where the balance of convenience lies. The interest of the public must be taken into account in circumstances such as this where the nature and purpose of the relevant legislation is to protect the public.

The affidavit evidence (June 11, 2012) of Mr Yousof was that he had an unblemished record between October 13, 2003 and May 24, 2012, the time during which he was registered as a motor vehicle salesperson. He asserts that there were no consumer issues or concerns regarding his conduct as a salesperson. Such a record, over a time span of almost nine years is given considerable weight by a tribunal. In *Fakhri*, the Tribunal stated:

“...in eighteen years as a motor vehicle dealer, there were no complaints or regulatory infractions against the Applicant. His record in terms of motor vehicle sales appears to be without blemish.”

Here, in response to the affidavit evidence, the Registrar cites the actions by Mr Yousof subsequent to the decision of May 24th: the attempts to sell two vehicles, the first on May 25, 2012 and the second on June 4, 2012. Mr Yousof states that he only became aware of the Tribunal’s decision on May 26, 2012 and upon becoming aware of that decision, sought an “override” from OMVIC for these sales. An override, if granted, would allow the sale despite the revocation. While it can be appreciated that the timing of the revocation order may present logistical challenges with respect to sales that occur somewhat contemporaneously to it, it is of concern that the “override” was not sought until June 8, 2012, almost two weeks after Mr Yousof became aware of the decision and after transfers were attempted, subsequent to May 26th.

The Registrar also responded with two affidavits, those of Justin Brown and Sara Griffin, with information regarding two relatively recent consumer complaints, arising from sales in October and November 2011. Both complaints were ultimately resolved by the Applicants, but not before each consumer had contacted OMVIC.

Registrar’s Counsel submits that these more recent events are indicative of a non-compliant attitude which has existed (as exemplified by the breach of dealer’s terms and conditions) and continues, posing a risk of consumer harm. There is, therefore, a need to protect the public which shifts the balance in favour of denial of a stay.

Applicant's Counsel quite candidly conceded that the two more recent consumer complaints are concerning, but urges the Tribunal to consider that in nine years of registration, there are only two consumer complaints. As well, he submits that some of the conduct in issue is non-industry related.

In *1490464 Ontario Ltd v. Motor vehicle Industry Council (Ontario)* [2006]O.J. No.2092, the Court, in considering whether to grant a stay of a Tribunal order revoking registration pending appeal, stated at paragraph 4 as follows:

"The more important matter here is the issue of public interest and the balance of convenience. The purpose of the statute and its regulations clearly embraces the public interest, and the registrar is obliged to be vigilant ..."

Issues of public interest and safety are of paramount concern. Chapnik, J commented in the above noted decision that since the inception of the charges in issue, no incidents had arisen. She went on to state that:

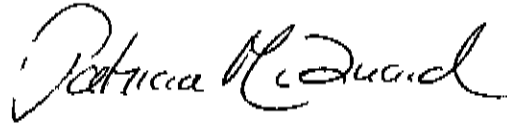
"...I am satisfied that the grant of a stay would pose no significant imminent rush or jeopardy to the public, provided the appeal is expedited and the terms and conditions already imposed on the applicants and the dealership are strictly complied with and enforced."

In this matter, there are consumer complaints subsequent to the events that gave rise to the Notice of Proposal. The issues around the sale of the two vehicles in May and June may be explained in such a way to the point of being excusable, but the two consumer complaints in the fall of 2011 cannot. The appeal to Divisional Court focuses on the evidentiary issues around the 2009 dealings with the Land Rover. However, Vice Chair Garbe's decision was based, as well, on the effect of the failure of the Applicants to properly report criminal charges on three separate occasions and the non-reporting of an earlier bankruptcy and numerous infractions in Mr Yousof's driving record, all factors which, like the consumer complaints, imbue the elements of honesty and integrity. This is not a situation of an isolated event in an otherwise unblemished record, these issues arose over a period of time.

In the context of the weight to be accorded the public interest component and in light of the fact that the Tribunal has no power to expedite an appeal which, according to counsel, may be six to eight months away, the Tribunal concludes that the balance of convenience rests in favour of the maintenance of the Tribunal's order.

Pursuant to subsection 9 (9) of the Act, the Tribunal dismisses the motion for stay brought by the Applicants.

LICENCE APPEAL TRIBUNAL



Patricia McQuaid, Vice-Chair

Released: August 2, 2012

PAGE 7/7 * RCVD AT 8/2/2012 10:52:39 AM [Eastern Daylight Time] * SVR:OMVICFAX-B/2 * DNIS:3758 * CSID:416 325 5217 * DURATION (mm-ss):02-38