

**Licence
Appeal
Tribunal**

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



DATE: 2014-09-18
FILE: 8825/MVDA
CASE NAME: 8825 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

Paul J. Wolfe

Appellant

-and-

Registrar, *Motor Vehicle Dealers Act, 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Simon Dann, Member

APPEARANCES:

For the Appellant: Self-Represented

For the Respondent: Michael Rusek, Counsel

Heard in Thunder Bay: August 19, 2014

REASONS FOR DECISION AND ORDER

Background

The Appellant appeals to this Tribunal from the Notice of Proposal of the Registrar under the *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Sch. B (the "Act") dated April 29, 2014, to refuse the registration of Paul J. Wolfe ("Wolfe") as a motor vehicle salesperson under the Act.

The reasons provided in support of the proposal to refuse the Appellant registration are as follows:

- In the Appellant's February 12, 2013 application for registration as a motor vehicle salesperson, he provided a criminal records check which indicated that a search could only be completed if fingerprints had been submitted to the national Criminal records repository." Positive identification that a criminal record may or may not exist" could only be confirmed by fingerprint comparison
- The Appellant answered "Yes" to Question 8, in section D of the application form, which asked whether he had "... been found guilty or convicted of an offence under any law or are there any charges pending", but he failed to provide written details.
- In late February, 2013, the Appellant submitted a written statement that he had been charged with "an assault" in June 2012 but had been not convicted and was still "going through the process of the court"; the Registrar stated the Appellant "failed to provide fulsome details about the circumstances ...".
- When asked for documentation and details about the circumstances surrounding his charge, the Appellant, in late March 2013 replied with documentation which included a letter and court document, stating he had been charged with sexual assault in July 2012 but was not convicted as the matter was still before the courts.
- In October 2013, the Appellant submitted an RCMP criminal record check which disclosed there were no pending charges or findings or record of convictions;
- A representative of the Registrar contacted the Appellant and he "denied having plead guilty to any criminal charges".
- Documentation obtained by the Registrar's office revealed the charge of sexual assault was withdrawn on April 26, 2013, and the Appellant did plead guilty to the charge of criminal harassment; the Appellant was sentenced to eight (8) months probation, which ended in December 2013.

At the outset of the hearing, the Registrar's Counsel, Mr. Rusek, requested an exclusion of witnesses and there being no objection, the request was granted.

In his opening statement, Mr. Rusek stated the Registrar has refused the application on two grounds: the first is the Appellant's criminal conduct based on him being charged with criminal assault though convicted on another offence; the second ground is that the Appellant did not disclose his criminal conduct and did not provide full disclosure when asked for it.

Mr. Rusek stated the first ground is sufficient in itself to refuse registration and the lack of honesty also ought to disqualify the application. It is the Registrar's position that the Appellant fails the test for honesty, integrity and the requirement to conduct himself in accordance with the law.

The Appellant, Mr. Wolfe, had no opening statement.

Registrar's Evidence

Thaya Gengatharan is the Ontario Motor Vehicle Industry Council's ("OMVIC") registration manager and has been in that position since 2005. Her work includes review of disclosure, supporting documents and police reports, if there are issues involved. In the event there are issues arising from disclosure and/or police reports, she will request information about the circumstances which may lead to review of an application to determine whether there should be terms and conditions, approval or refusal.

Ms. Gengatharan said she was familiar with the Appellant from his initial application (Exhibit 3, Tab 4) which OMVIC received February 13, 2013. The only concern she had with the application was the fact the Appellant had answered 'yes' to question 8 which asks:

Has the applicant ever been found guilty or convicted of an offence under any law, or are there any charges pending? Make sure to include to include those cases with a conditional, absolute discharge or stayed charges. Please note: This question refers to charges under any law. Accordingly, you may need to answer "yes" even if a criminal record (or other) check has come back clean.

According to the witness, the Appellant did answer correctly, but failed to provide satisfactory details regarding the charge and/or circumstances. The fingerprint report provided by the Appellant stated that "Based solely on the name(s) and date of birth provided, a search of the National Criminal Records repository maintained by the RCMP could not be completed" (Exhibit 3, Tab 5).

OMVIC then contacted the Appellant and advised him that a fingerprint report and a disclosure letter regarding his answer to question 8 were required. The disclosure letter would also need to be signed by his supporting dealer. The Appellant agreed to do this.

On February 28, 2013, OMVIC received a receipt for a fingerprint report (Exhibit 3, Tab 7) and a 'To Whom It May Concern' statement signed by the Appellant, and a witness.

The statement read that the Appellant "had been charged with an assault in June 2012 but had not yet been convicted of the charge as he was still going through "the process of the court" (Exhibit 3, Tab 8).

On March 25th, the Appellant was advised that OMVIC would not make any decision without his full disclosure about the assault charges. The following day, OMVIC received a handwritten letter describing the circumstances which led to the assault charge (Exhibit 3, Tab 10). The letter was signed by the Appellant and his employer. There was no evidence to dispute the Appellant's description.

In cross-examination, the witness was asked why, if there was an absolute discharge, OMVIC would need to know the details of the charge, if an absolute discharge was equivalent to it being "wiped out".

Ms Gengatharan explained that OMVIC needs to know if it relates to the Act and the requirements for conduct with honesty and integrity. The witness acknowledged that registrations are allowed in instances where there are on-going investigations or charges against an applicant if disclosure of all facts and circumstances are provided at the beginning of the application process.

When asked if OMVIC would have approved the Appellant's application if the fingerprint report came back clear,, the witness replied it would depend on the circumstances..

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

The Appellant's file first came to her attention in 2013. When she did speak with him about his application, by telephone on October 11th, she was not inspired by his honesty and integrity, about which she had serious concerns.

In cross-examination, the witness was asked where she believed the Appellant had lied. Ms. South replied that he had said "no" to her question of whether he had pled guilty to anything. She further stated she could not see how he would be uncertain about what to disclose because of the outcome of his court case (Exhibit 3, Tab 17) which shows that on April 26, 2013, he had pled guilty to a harassment charge and was given 8 months probation.

Appellant's Evidence

John David Murphy is general manager of iCar Canada, a sub-branch of Lakehead Motors. He has been in that position for 4 years and the Appellant has been employed by the dealership for 2 years.

The Appellant's role with the dealership is to look after vehicle inventory from time of purchase to sale and to ensure they are properly booked, registered, and prepared for sale. He started as a lot porter and has evolved to his current responsibilities, but has not sold cars.

Mr. Murphy confirmed the Appellant asked him for advice about completing the OMVIC application form and also kept him informed about the application process.

He believes that the Appellant is an honest person. He has complete trust and confidence in him. The Appellant has been to visit him socially and completed some home repair jobs when he was not at home - even though his wife and children were. He does not believe the Appellant is a danger to the public and he wants him as salesperson.

In cross-examination, Mr. Murphy confirmed he knew about the conviction when the OMVIC application was prepared. He admitted he did not know about the charges when he hired the Appellant as a lot porter but believes he would have learned about it if the application had been for a salesperson's position.

The witness said he understood why the Appellant would not have said anything before he had to and allowed for the fact that everyone can make a mistake. He relies on his own ability to judge character and he retains his trust in the Appellant.

Mr. Murphy did acknowledge that when he saw the Appellant's first disclosure reference to the charges against him, he suggested to the Appellant that there was not enough detail. The witness said he signed the application because the Appellant answered "yes" to question 8 of the application form.

The witness also acknowledged he knew the Appellant pled guilty to the harassment charge as a result of a deal on the initial criminal charge but remained committed to his belief in the Appellant's character.

In his testimony, **Paul Wolfe** said he was unable to understand what detail he was actually being asked for when OMVIC requested additional detail after they received his letter of February 14, 2013 (Exhibit 3, Tab 8). At that time, he relied on the fact that he had not been convicted.

Mr. Wolfe stated that he was offered a "plea deal" of a lesser charge three times and eventually accepted in the belief that he would finally be able to get on with his life. He said he had never had any problem with the law prior to this event.

By applying to become a salesperson, he was trying to improve his life as he is only earning minimum wage. He has also taken and passed the Georgian College Automotive Certification course but has been advised he cannot have the certificate until he is registered as a salesperson.

The witness said he completed his probation period without incident and that the presiding judge, at his court hearing, had said this should not affect him in his life going forward. He referred to his previous work history as a personal care attendant for 14 years, handling money, medications, narcotics and doing bookkeeping. The last 4 people he looked after were in wheelchairs.

In cross-examination, when the Appellant was asked why he did not take Mr. Murphy's advice that the disclosure provided with the application form (regarding question 8) was insufficient, the Appellant said he replied to the question as he thought he was required.

The Appellant said that his personal reputation is most important to him as he believed his reputation in the community would follow him.

The Registrar's Submissions

The Registrar's position is that there are reasonable grounds for belief that the Appellant will not act with honesty, integrity and in accordance with the law. Mr. Rusek also submitted that the Appellant provided a false statement about his past conduct in his motor vehicle salesperson's application.

Mr. Rusek, submitted there is no debate about the charge of sexual assault, which was changed to a plea deal of harassment and was accepted by the Appellant. The fact the Appellant served a period of probation does not mean his slate is wiped clean. It just means it cannot be used for certain purposes.

In reply to the Appellant's suggestion that OMVIC unfairly keeps bringing this up, Mr. Rusek referred to OMVIC's mandate to protect people who sell/buy vehicles and in particular, to protect people from any improper actions.

Mr. Rusek submitted that it is of concern to the Registrar that as a salesperson, the Appellant would have access to private personal information of customers.

He said there has not been enough time to see how the Appellant may conduct himself since the event which led to him being charged. There is concern about the Appellant's incentive to conduct himself in accordance with the law without the probation condition.

Mr. Rusek suggested the Tribunal should give little weight to Mr. Murphy's testimony as there are no indications to show the Appellant would not repeat the behaviour for which he was charged.

Regarding the lack of disclosure on the application form, Mr. Rusek submitted that despite the assistance provided by Mr. Murphy, the Appellant did not provide satisfactory detail. If he had not understood what was required, he could have contacted OMVIC for more information as omission and non-disclosure are equivalent to lying. While the Appellant did call OMVIC, he did not ask for help and then lied to Ms. South when asked if he had ever been convicted of a criminal charge (Exhibit 3, Tab 13).

In closing, Mr. Rusek asked the Tribunal to not grant the registration and that there should not be any consideration of registration with terms and conditions.

The Appellant's Submissions

The Appellant submitted that the sexual assault was alleged, but not proven. He agreed that he pled guilty to the harassment charge and understands what happened. He is now trying to straighten out his life.

The Appellant admitted that he did not initially share what he was charged with because it was a difficult time for him.

In his view, he feels he was convicted from the start and the result was a period of probation and counselling sessions. He said he completed the probation period eight months ago and nothing else has happened since then.

The Law

The applicable provisions of the Act regarding registration state in part as follows:

Registration

6.(1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,

(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 past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or

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. 2004, c. 19, s. 16 (10).

ANALYSIS AND REASONS

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

The Registrar's decision to deny registration to the Appellant is based on the reasons that he was (1) charged with sexual assault, but convicted on another offence and (2) that he did not disclose the criminal conduct and then failed to provide full disclosure when asked for it. In addition, the Appellant's lie to Ms. South is an issue.

As the Registrar's evidence shows, the Appellant answered 'yes' to question 8 of the application form, but he did not provide any written details. While the Tribunal cannot find the Appellant failed to disclose that he had been charged it is acknowledged that he did not, in the first instance, provide the background details of the charge..

The Tribunal does note that when the Appellant was asked for details about the circumstances surrounding his charge, he responded within one day. He immediately wrote back stating he had been charged, but had not been convicted and was still going through the courts.

The brevity of that reply can be faulted but that is tempered by the fact that when asked for additional detail, he immediately provided a handwritten statement with more detail.

The testimony of the Registrar's witnesses points to the fact the Appellant had to provide a criminal record check and that he initially did not do it properly. The evidence is that the Appellant made his first request on the basis of name and birth date, which was not sufficient for the first RCMP criminal record check (Exhibit 3, Tab 5). The Appellant then submitted his fingerprints for a second criminal record check. This revealed there were no pending charges and no findings of any convictions (Exhibit 3, Tab 12). Based on the evidence, the Tribunal finds the Appellant was cooperative in providing a criminal record check, despite going through two steps instead of one.

The evidence of Ms. South was that the Appellant lied to her when during a telephone conversation he replied "no" to her question of whether he had pled guilty to anything. This telephone conversation occurred on October 11, 2013 and the Appellant had pled guilty to a harassment charge on April 26, 2013.

On this point, the Tribunal acknowledges the Appellant's reply is disconcerting because in October the Appellant would have been clear in his knowledge that he had pled guilty to a charge in April, that same year.

But, if this is the only lie to be found, the question can fairly be asked how large a role this plays in leading the Registrar to conclude the Appellant cannot be relied upon to act with honesty, integrity and in accordance with the law.

On this point, the Tribunal weighs the disclosure evidence and information provided by the Appellant in the application form and follow up communications. In the absence of any other evidence of deceit, the Tribunal finds Ms. South's evidence on this one point insufficient in itself as a basis to deny the Appellant registration.

The Tribunal found the evidence of the Appellant's employer, Mr. Murphy, particularly compelling. Mr. Murphy said that after two years of having the Appellant as an employee, and being fully aware of the charges and the background to the conviction, he remains convinced the Appellant is an honest person in whom he has complete trust and confidence. He has had the Appellant in his home, left him alone with his wife and children, and firmly believes the Appellant is not a danger to the public.

Mr. Murphy said he signed the Appellant's application form, even though he had suggested there was not enough detail in the reply to question 8, because he saw the Appellant had answered "yes" to that question.

As there is no reason to question the credibility of Mr. Murphy, the Tribunal accepts Mr. Murphy's description of the Appellant's character.

Mr. Rusek's submission that the Appellant would have access to personal and private information of consumers and there could be possible problems overlooks the fact that, based on the evidence from Mr. Murphy, in all likelihood the Appellant has already had that kind of file access through the course of plating and preparing the documents for the delivery of 'sold' vehicles. There is no evidence to suggest there has been any misuse of consumer information by the Appellant during his time of employment with the dealership.

The Tribunal also gave serious consideration to the Appellant's letter (Exhibit 3, Tab 10) and description of the event which led to him being charged. In the absence of any other evidence or testimony disputing that description, the Tribunal finds the disclosure sufficient. The Tribunal has all given due consideration to the fact the Appellant responded within one day to the request for this information.

In reaching its decision, the Tribunal does not discount the seriousness of the Appellant's conviction. However, it has also considered the Appellant's undisputed testimony that he previously worked as a personal care attendant with elderly clients for 14 years where he handled money, medications, narcotics, bookkeeping without incident, that he has never previously, or since, had any other encounters with the law and that he is seeking to better his life with the support of his employer. Further, the Tribunal notes that he has successfully passed the Georgian College Automotive Certification course.

Regarding the ground that the Appellant did not provide "fulsome disclosure", the Tribunal finds the Appellant did provide sufficient disclosure, despite the fact it occurred in three stages, specifically, by first indicating 'yes' on the application form, second, by

providing the 'To Whom It May Concern' statement, and then] the handwritten letter). Further, the Appellant's response to each request was timely.

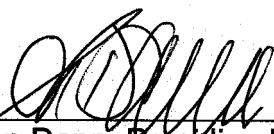
Each case must be adjudicated based on the facts presented. In this case, given the forgoing, the Tribunal is of the view that the past conduct of the Appellant does not afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. However, given the sequence of events through the application process and mindful of the registrar's concern regarding consumer protection, the Tribunal is of the view that certain conditions are appropriate.

ORDER

Therefore, pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs that the Registrar not carry out the Notice of Proposal and further orders that the Registrar approve the registration of the Appellant as a salesperson, subject to the following conditions:

1. The Appellant 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 or provincial legislation.
2. The Appellant 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



Simon Dann, Presiding Member

Released: September 18, 2014