

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



VITO PERRICELLI

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

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: VITO PERRICELLI Applicant, unrepresented

SARAH AOUCHICHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act 2002*

DATE OF
HEARING: May 26th, 2011

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 issued by the Registrar, *Motor Vehicle Dealers Act 2002* (the "Registrar" and the "Act" respectively.) The Notice of Proposal, dated November 23rd, 2010, proposes to refuse to grant registration to Vito Perricelli (the "Applicant"), as a salesperson under the Act.

After the Applicant submitted his request for an appeal to the Tribunal, the Registrar issued a Notice of Further and Other Particulars dated March 24, 2011, alleging additional causes as to why the Applicant should not be registered under the Act.

FACTS

Sean Kirkey is a Field Collections Officer with the Ministry of Revenue where he has worked for over eleven (11) years. Mr. Kirkey is responsible for visiting businesses which are delinquent in their obligation to remit retail sales taxes. Such taxes are, according to the Ministry of Revenue, trust funds collected by the businesses to hold in right of the Crown. As such, the funds are not part of the vendor's general revenue or income.

The Applicant was the sole proprietor of a motor vehicle dealer business, Dream Car Sales, from 1987 through to 2010. In this capacity he is currently in tax arrears to the Ministry of an amount exceeding \$33,000.00.

Exhibit 1(a), Tab 5 consists of a letter sent by the Ministry of Revenue to the Ontario Motor Vehicle Industry Council ("OMVIC), the organization which administers the Act, on September 2, 2010 advising of the arrears and the Applicant's lack of compliance with legal obligations required under the *Retail Sales Act*. The letter requests OMVIC issue a Proposal to revoke the Applicant's dealership registration. The letter includes a Schedule describing efforts made by the Ministry of Revenue to collect the outstanding funds from the Applicant over the years. Mr. Kirkey summarized these as including nine (9) separate time periods since 1998 when the Applicant's tax arrears account was sent for collections. On three different occasions – October 2008, July, 2009 and August, 2009 the Applicant agreed to make monthly payments in accordance with a schedule entered into by the parties. In each incidence the Applicant failed to sign and return documents drafted to formalize the arrangement. He did, however, make two payments in July, 2009 and August, 2009. Since then nothing has been received from the Applicant save for a recent \$200.00 payment made on May 25th, 2011, the day preceding this hearing.

Mr. Kirkey further advised he had attended the Applicant's home in February, 2011 in an attempt to collect funds owing on the tax arrears. He was told by the Applicant that he was currently unemployed, although he had applied for a salesperson licence from OMVIC and a hearing was scheduled into the matter. Mr. Kirkey cautioned the Applicant not to engage in the sale of any vehicles whilst his application was pending as doing so would jeopardize his application request.

In response to questions posed by the Tribunal, Mr. Kirkey advised that the Ministry prepares letters such as that contained in Tab 5 as a policy initiative to alert OMVIC to registrants/applicants with a history of non-compliance over trust fund remittance/collection. It also may play a role in encouraging payments from vendors who realize further employment opportunities may be at risk if non-compliance continues.

Mr. Tim Hines is responsible for managing complaints for OMVIC and thus is involved on a daily basis with consumer/salespeople/dealer disputes.

Mr. Hines gave evidence on three such complaints which had been brought to OMVIC's attention when the Applicant, in preparing for this appeal, sought information as to any prior consumer concerns over his earlier dealership. The three files do illustrate some

concern that the Applicant may not have been always following procedures required, however, none of these were followed up by OMVIC and none form the grounds for the current Proposal before the Tribunal.

Ms. Jean Cameron is a senior Inspector with OMVIC where she has worked for fourteen years. As an Inspector, she is required to visit dealerships and inspect books and records. Over the years she has met with the Applicant on a number of occasions in this capacity while he operated Dream Car Sales. On July 12th, 2010 she made a routine unscheduled stop at Imperial Motors to perform such an inspection. On her arrival, no one was present save for the Applicant. Ms. Cameron discussed the Applicant's current application and reminded him that, under the new legislation effective January, 2010, he was not legally able to act as a salesperson until the application was approved. It was her evidence the Applicant advised he was not aware of this prohibition and had thought he could perform such sales. However, he assured her he would not perform any future sales work with the public until his registration application had been approved by the Registrar.

She wrote up her findings and left a copy with the Applicant to pass on to the dealer principal of Imperial Motors (the "Dealer") on his return to the office – Exhibit 1(a), Tab 9.

As she never heard back from Imperial Motors, she scheduled a follow-up inspection which occurred on August 10, 2010. On that date the Dealer advised that, although his sales were limited to approximately two vehicles monthly, he had three registered salespeople working for him as well as the Applicant, whose registration remained in process. He acknowledged his understanding that the Applicant could not act as a salesperson until the application was granted, advising Ms. Cameron that the Applicant's duties consisted of paperwork and some safety/repair activities. He advised he was aware of the Applicant's financial difficulties.

Based on documentation for a number of sales which appeared to omit disclosure to consumer purchasers of material information required by law (i.e. correct odometer reading in the sale of vehicle – see Tab 12; and no mention of significant prior damage as required - see Tab 13), Ms., Cameron decided to send out questionnaires to a random selection of past consumers. Of the four such questionnaires sent, three responses were provided. The first involved a sale in August 2010 where the Consumer wrote that the salesperson's name was "Vito" in contradiction to the Bill of Sale for the transaction which listed the salesperson as Enzo Juliano, who also signed as Dealer. In the second response, Enzo was referenced as the salesperson on the sales documentation although the consumer had no recollection of that name, and, in the third: Vito, the salesperson was named by the Consumer as "Vito".

Finally, Ms. Cameron noted Imperial Motors had issued numerous cheques to the Applicant's company, Dream Car Sales, which was no longer registered under the Act. The Dealer, Enzo, informed her that these funds were for services provided to Imperial Motors by the Applicant which included vehicle safeties, repairs and general paperwork. It also reflected the arrangement between the two that Imperial Motors would split profits on its vehicle sales with Dream Cars. This latter arrangement was a direct contravention of

the Act as such funds represented commissions on sales and only registered salespersons were entitled under the Act to such commission funds.

Ms. Andrea Korth is the Business Standards Co-ordinator for OMVIC. In November of 2011, just prior to the issuance of the Proposal and some two to three months after Ms. Cameron's findings, she responded to a Kijiji advertisement for a vehicle sale posing as a consumer with an alias name and email account (Tab 14). The response came from "Vito" at dreamcarsales advising the vehicle remained available for sale and providing the telephone number listed on OMVIC records as that belonging to Dream Car Sales.

Mr. Blake Smiley has been an Investigator with OMVIC since September 2010. Prior to working at OMVIC he had been a police officer for over thirty (30) years with Halton Police Services – largely responsible for criminal investigations. In December, 2010 he reviewed the Imperial Motors' registrant identity number (RIN), which provides tracking for all sales made by the Dealer, and randomly selected three consumer transactions for follow up. The statements provided by these three Consumers appear in the Exhibit 1(b), Tab 22. All three refer to "Vito" – either by name or by description - as the salesperson with whom they negotiated their vehicle purchases in August, 2010 and October, 2010. In each case the Bill of Sale for the transaction includes the numbered company designation for Imperial Motors and the telephone for Dream Cars. Each Bill of Sale further notes the salesperson is the same as the Dealer principal – Enzo Juliano. However, each Consumer advised the salesperson with whom they dealt was not "Enzo" and in two of the three cases was clear the sales person's name was "Vito".

As a consequence of these findings, Mr. Smiley has laid *Provincial Offences Act* charges against both Imperial Motors and the Applicant. These charges remain pending. When the Applicant was served by Mr. Smiley this spring, the Applicant stated he had believed he was entitled to sell vehicles while his application was being processed.

Ms. Mary Jane South is the Deputy Registrar with OMVIC. It is her duty to oversee the actions of registrants and consumer complaints. She advised that OMVIC is a public protection statute and aims to ensure certain requirements are met of transactions and sellers involved in motor vehicle sales to consumers in the province.

Ms South determined that a Proposal to Refuse the Applicant's registration as a salesperson was appropriate in the circumstances as the Applicant had demonstrated a serious lack of integrity and honesty in the history of his dealings with the Ministry of Revenue involving the large amount of outstanding tax arrears. She was particularly concerned with the fact that the Applicant failed to comply with arrangements he had made for repayment on three different occasions. The fact that these funds were trust funds and therefore, once collected, should never have been used as working monies, made the Applicants' failure to meet his obligations even more concerning for a prospective regulator of a consumer protection industry.

Evidence not disputed by the Applicant also demonstrated a number of outstanding personal judgements. In his appeal to the Tribunal, he took the position that, given that a

number of these were over two years old, he was no longer obligated to repay the debts. While the two year limitation defence is available for a civil suit, the fact remains that the Applicant does not demonstrate the business integrity and financial reliability expected of a registrant.

Ms. South was further concerned with the evidence of the Applicants' activities since last July when Ms Cameron had cautioned him that he was not legally able to sell vehicles until his application for a salespersons license was approved and provided. Notwithstanding this, Ms. Cameron, Ms. Korth and Mr. Smiley all found evidence of the Applicant continuing to engage in the negotiation of consumer sales between August and November of last year. These have led to the laying of charges against both him and his employer, Imperial Motors. They raise serious issues as to the governability of the Applicant in a registered industry.

In cross examination Ms. South explained the lengthy time period between the Applicant's initial submission of his application (May, 2010) and the Proposal (November, 2010) as not unusual given the on-going evidence which various OMVIC employees continued to discover over the late summer and fall of 2010.

Ms South also responded to questions put to her in cross-examination by the Applicant that he was made aware of the requirement to re-pay the retail tax monies he owed as it is listed as a pre-condition to registration in the application form for registration which he submitted (see Exhibit 1(a), Tab 6). It had also been on his renewal application for Dream Car Sales which he had opted not to complete in 2010.

The Applicant gave evidence. He questioned why OMVIC requested numerous additional documents from him over the summer of 2010 while processing his application and yet at no time was he ever told that he needed to complete a course mandatory for new registrants with the coming of the new Act in January, 2010, nor that OMVIC required he pay back the retail sales tax he owed. He stated that he had run into financial difficulties during the recession period and had been required to go into arrears as a consequence. Until he is able to work again, he is not in a financial position to make further payments to the Ministry of Revenue.

With regard to the Registrar's allegations of his continuing to sell vehicles while unregistered, the Applicant denied this was the case and concluded that the provincial charges will determine the matter and he will face whatever repercussions follow. He and Imperial Motors had long been in business whereby Dream Car Sales performed various repair work and safeties on vehicle sales which the Dealer was responsible for concluding. Although he acknowledged he often made initial contacts with consumers, it was always Enzo, the Dealer, who closed the deals.

In cross examination the Applicant acknowledge his many years in the car sales industry and his consequent familiarity with the legal requirements of the trade. He noted that prior to the new Act, those with pending registration applications could sell vehicles. He admitted

he knew that had changed however; he agreed ignorance of the law is no excuse; and, he acknowledged that he had read the section of the application which stipulates:

I acknowledge I will not work in any capacity that requires registration until I have received confirmation from OMVIC that I am registered.¹

He further acknowledged having been told by Ms Cameron in August, 2010 that he was not to engage in sale activity. He characterized his Kijiji advertisement and response to Ms Korth as something other than a sale negotiation, which he referenced as a "lead-intake". He characterized his actions with other consumers interviewed by Mr. Smiley as also that of "lead intake". He claimed the Consumers were mistaken if they believed he had performed the sale as that activity had been undertaken by his Dealer.

The telephone number used by Imperial Motors was that once used by his earlier company Dream Car Sales. The transfer had been made with Bell telephone in 2010 when he ceased his own dealer registration and joined up with Imperial Motors.

The Applicant acknowledged that he had only advised OMVIC that his Dealer, Enzo Juliano, was no longer available to appear as his witness twenty-four hours prior to this hearing.

THE LAW

The Act states in part as follows:

Prohibition

4.(1) No person shall,

(a) act as a motor vehicle dealer unless the person is registered as a motor vehicle dealer under this Act; or

(b) act as a salesperson unless he or she is registered as a salesperson.

Unregistered salesperson

(3) A motor vehicle dealer shall not retain the services of a salesperson unless the salesperson is registered in that capacity.

Salespersons

(5) A salesperson shall not trade a motor vehicle on behalf of a motor vehicle dealer unless the salesperson is registered to that dealer.

Regarding the right to registration, the Act states:

Registration

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

(a) the applicant is not a corporation and,

¹ See s.G of Applicant's application to OMVIC – Exhibit 1(a), Tab 6

- (i) having regard to the applicant's financial position or the financial position of an interested person in respect of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business,
- (ii) the past conduct of the applicant or of an interested person in respect of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty, or
- (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;

Refusal to register, etc.

8. (1) Subject to section 9, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 6.

Conditions

- (2) Subject to section 9, the registrar may,
 - (a) approve the registration or renewal of a registration on such conditions as he or she considers appropriate; and
 - (b) at any time apply to a registration such conditions as he or she considers appropriate.

ISSUES

The issues raised by this case are:

1. Does the Applicant's financial position demonstrate he cannot reasonably be expected to be financially responsible in the conduct of his business and thus disentitle him to registration under sub paragraph 6(1)(a)(i) of the Act?
2. Does the Applicant's past conduct afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty and thereby disentitle him to registration pursuant to sub paragraph 6(1)(a)(ii)?

ANALYSIS

The burden of proof in this matter rests on the Registrar who has proposed the Applicant be denied the registration he seeks under the Act. The task of this Tribunal is to determine if the grounds set out in the Act for the refusal have been established, on a balance of probabilities, sufficient to conclude (1) the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business and/or, (2) the Applicant's past conduct affords reasonable grounds to believe he will not carry on business in accordance with law, and with integrity and honesty.²

The evidence led by the Registrar was not contested by the Applicant. The essence of his evidence was rather directed at explaining the context of his action (1) not to re-pay

² *Brenner v. Registrar Ontario Motor Vehicle Dealers and Salesmen*, [1983] O.J. No. 1017 (Ont. Div. Ct); *Registrar, Motor Vehicle Dealers Act v. Bilal Ahmad Khan* [2007] No. 385/05 (Ont. Div. Ct)

the sales tax obligations, and (2) the limitation of his role in completing the sales transactions.

With regard to the first issue – the Applicant's financial position as an indicator of business financial responsibility - the evidence reveals the Applicant's serious failure to meet business financial obligations, including the basic requirement of remitting trust funds to the Ministry of Revenue collected whilst operating as a registered motor vehicle dealer under the predecessor to the Act. The Applicant's statutory duty was to collect and remit the collected retail sales taxes to the Ministry of Revenue. These collected taxes are entrusted funds to be remitted for the benefit of the government. In not doing so, he has demonstrated financial irresponsibility in business conduct.

As concerns the second issue, the Tribunal finds that his failure to comply with the reporting and remittance provisions of the *Retail Sales Tax Act* also demonstrates he has not carried on business in accordance with that law. The taxes collected from consumers are entrusted funds, which the Applicant does not have the discretion to allocate at pleasure, depending on the economy.

This Tribunal had occasion to hear a similar reason advanced for a similar failure to remit *Retail Sales Tax Act* monies by an applicant for salesperson licence in *Kelatos (Re)*[2001] O.L.A.T.D. 439. At paragraph 14 the Tribunal held:

The funds collected and not remitted by the Applicant were trust funds held by the Applicant and were not his funds to use for any purpose except to remit to the Government. The Applicant's use of trust funds for his own business purposes is a completely unsatisfactory and irresponsible approach to the conduct of business. A business downturn is no excuse for a person to misappropriate another person's funds. To do so is not acting with honesty and integrity or in accordance with law.

The deviant use of these trust funds is fraudulent and dishonest. Consumers must be protected from motor vehicle dealers and salesperson who disregard such basic statutory fiduciary obligations.

The Applicant claims he is unable to pay this now-not-insignificant debt until he finds work. However, the uncontradicted evidence demonstrates that he has been working and receiving pay from Imperial Motors, at least since last July when Ms. Cameron met with the Dealer, with no effort to resolve the issues since the only payments received on the account prior to this week took place the year prior in the summer of 2009.

Moreover, his repeated failures to abide by agreements he negotiated with Ministry of Revenue staff indicates conduct which affords reasonable grounds for the belief he will not carry on business in accordance with the law and with honesty and integrity.

As held in *Ferguson (Re)* [2006] O.L.A.T.D. No. 581, curb siding is a term used in the motor industry to refer to an individual who buys or sells vehicles when that person is

not registered as a salesperson under the Act. Curb siding is in contravention of the Act because only a person who is registered as a salesperson is entitled to sell a motor vehicle³.

The Applicant queried in closing submissions why such a prohibition is necessary and asked what harm a car salesperson could do. He noted his son sells furniture and is not required to be registered by the province. The fact is, however, that *Motor Vehicle Dealers Act* has established the motor vehicle sales industry to be one regulated by a consumer protection statute. One of its purposes is to assure the public that one can do business with motor vehicle salespersons and dealers, confident in the knowledge that these people will conduct their business in accordance with the law and with honesty and integrity. In dealing with a registered salesperson, the Act provides consumers with certain protections and rights, not least of which is access to the Compensation Fund set up under the legislation.

The public and the Registrar are entitled to rely on the accuracy of books and records completed by registered salespeople and in this case, the bills of sale do not accurately reflect the consumer transactions in that the salesperson listed is not the individual who negotiated the transaction on behalf of the dealer.

The Tribunal finds that the Applicant continued to negotiate the sale of vehicles knowing full-well he was not legally entitled to do so. Whether he knew it from the outset, he certainly knew it by the time of completing his application in May of 2010 and by July of 2010 when Ms. Cameron directly advised him this was the case. At the hearing, he continued to claim his actions were "lead intake" only, suggesting this was something less than trading in vehicle sales. The Tribunal finds this self-serving, dishonest and irresponsible. The application form he signed and acknowledged reading states clearly above his signature that he is not to trade until registered as a salesperson and that:

"trade" refers to any form of discussion, representation or negotiation concerning the purchase, sale or lease of a vehicle and is not limited to the signing of contracts.

By continuing to act as a salesperson when not registered to do so, the Applicant was in contravention of the Act.

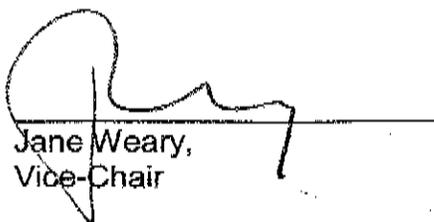
Based on the above the Tribunal finds the Applicant is not entitled to registration under section 6 of the Act.

³ See s. 4

ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out the Proposal.

LICENCE APPEAL TRIBUNAL



Jane Weary,
Vice-Chair

Released: 06/03/2011

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Ontario 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/> within three weeks time. The decision may also be available on Quicklaw at a later date.