

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CHARLES LABERGE

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: ALLAN HIGDON, Member

APPEARANCES: HANK WITTEVEEN, Counsel, representing the Applicant

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

DATES OF
HEARING:

December 6 and 7, 2011

Ottawa

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 July 28, 2011 sets out the Registrar's reason to refuse to grant the registration of Charles P. Laberge (the "Applicant"), as a salesperson under the Act 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. Charles P. Laberge's past conduct and financial position are inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The particulars relied upon are set out in the Notice of Proposal and in the Respondent's Book of Documents Volumes i and ii, Exhibits 3 and 4, respectively. In summary, the Registrar believes the Applicant's operation as a real estate vendor without benefit of registration pursuant to section 6 of the *Ontario New Home Warranties Plan Act*, his

operation as a motor vehicle salesperson without benefit of registration pursuant to section 6 of the *Motor Vehicle Dealers Act*, and his past history of discreditable financial dealings, driving infractions and unpaid fines offers sufficient grounds for the reasonable belief that the Applicant would not operate within the law and with honesty and integrity.

Counsel for the Applicant stated the principal issue is the financial circumstances of his client whose past difficulties does provide a measure of concern. However, these issues have been resolved and his financial circumstances are currently acceptable and in order and, as such, permit him to qualify for registration under the *Act*.

ISSUE

Is the past conduct of the Applicant inconsistent with the intention and objective of the *Act* and therefore warrants disentitlement to registration under the *Act*?

EVIDENCE

The Registrar

The evidence of the Registrar consisted of documentation and the oral testimony of Leonard Dean, Senior Investigator, Tarion Corporation, and Mary Jane South, Deputy Registrar, MVDA.

The evidence of the Applicant consisted of documentation, his oral testimony, and the testimony of a certified chartered account.

There were no objections by either party to any of the documents accepted by the Tribunal for consideration.

The exhibits are as follows:

- Exhibit #1: Notice of Proposal.
- Exhibit #2: Notice of Appeal
- Exhibit #3: Respondent's Book of Documents, Volume i
- Exhibit #4: Respondent's Book of Documents, Volume ii
- Exhibit #5: Applicant's Book of Documents Appendix "A"
- Exhibit #6: Supplementary Appendix "A"
- Exhibit #7: Applicant's Disclosure Materials

The testimony of the Tarion investigator, Leonard Dean, related to the development of a subdivision in Merrickville ON. The documentation of Exhibit #4, tab #4 indicates the Applicant pleaded guilty in provincial court on November 5, 2009 to four counts of being an unregistered vendor of a new home under section 6 of the ONHWP Act.

The Applicant was fined \$7,500 for each count of being an unregistered vendor. With the inclusion of a victim surcharge the total fine amounted to \$37,500.

An Agreed Statement of Facts submitted to the Ontario Court of Justice (Exhibit #3, tab D, page 77) between Tarion Warranty Corporation and 4332261 Canada Inc and Charles P. Laberge dated November 3, 2009 acknowledges that Charles Laberge as an officer and director of 4332261 Canada Inc. accepted four (4) deposits for the purchase of new homes amounting to \$95,000. None of these homes was ever built and none of the deposits was returned to the purchasers.

A letter from Wilson Law Partners dated October 21, 2011 (Exhibit #7, tab 5) notes that comment had been requested by counsel for Mr. Laberge regarding the issue of the new home deposits he received. The letter states in part;

"The question as to the availability of these funds was the subject of discussion on a couple of occasions when finances were stretched, but other than to remind Laberge that he should not be treating these as funds for the development, we received assurances that he was aware of this."

The Applicant chose to ignore explicit legal advice and did not keep new home deposits in trust or return the money when development was no longer possible.

The Agreed Statement acknowledges that, "At no time during the period of these transactions was 4332261 Canada Inc. registered as a vendor with Tarion Warranty Corporation, as required."

The Agreed Statement of Facts concludes that Charles Laberge "knowingly concurred with the sale of these mentioned properties undertaken by the corporate defendant."

In a Statement of Claim (Exhibit #4, tab 9) filed before the Ontario Superior Court of Justice and dated February 25, 2011, Tarion Warranty Corporation sought damages and restitution in the amount of \$109,962.50 from Charles P. Laberge, the amount being the \$95,000 in new home deposits kept by the defendant plus interest and administration. Tarion had compensated the prospective purchasers the full amount of their deposits.

The Statement notes:

"Tarion has made requests of Laberge with respect to payment of the outstanding amount. To date, Laberge has refused to reimburse Tarion."

On cross examination the witness stated he was not aware of any attempt made by Tarion to secure repayment of the new home deposits before a judgement was sought.

Mary Jane South, Deputy Registrar of the *Motor Vehicle Dealers Act*, (MVDA) stated the criteria for registration under the Act were much the same as those required for registration under the ONHWP Act, that is that registrants operate within the law and with honesty and integrity.

The witness reviewed the Application for Registration under the Motor Vehicle Dealers Act completed by the Applicant and received November 5, 2009 (Exhibit #3, tab 3). The application notes a conviction for driving under the influence in the 1990's and pending charges related to Tarion.

A second OMVIC application was received October 7, 2010 (Exhibit #3, tab 24). The Applicant in answer to the question "Were you registered as a salesperson in Ontario at any time prior to January 1, 2010" replied "Yes". He also acknowledges completion of an OMVIC certification course since January 1, 2009.

The OMVIC application concludes with a consent and undertaking section in which the signator confirms the following: "I understand I may not trade on behalf of a motor vehicle dealer unless I am registered under the Act as a salesperson to that dealer." It is signed below by the Applicant, Charles Laberge and dated September 29, 2010.

In the same document the Applicant wrote in Section D: Employment or Other Activities that he was employed in land development for Veranda Developments on an "on going" basis.

The Applicant also listed Kanata Ford as a business in which he has been employed as a "sales representative" since September 19, 2009. The Applicant also listed his occupation as "sales person" in his Proposal to creditors dated April 20, 2011 (Exhibit #5, tab 15).

The Applicant is not registered to work as required by law in either of these industries. The evidence clearly indicates he was cognisant of his obligation to register but chose to wilfully ignore the law. He would be particularly aware of the registration requirement for selling automobiles having worked as a registered car salesperson from 1988 to 2009 and having recently passed an OMVIC certification course.

The Applicant

Paul Salewski is a certified chartered accountant who is a personal bankruptcy specialist. He was contacted by the Applicant in February 2011 who stated his development company was not going well and he had no assets available for creditors.

The witness told the Applicant he had three choices: he could do nothing, he could declare bankruptcy or he could make a proposal to his creditors. The Applicant chose the last option, which the witness thought a better option than bankruptcy.

Under the Proposal creditors were informed they might recover 1.71 to 3.10 cents on the dollar, a slightly higher amount than would possibly be available through bankruptcy proceedings.

The Proposal was accepted by the Applicant's creditors and approved by the courts. The Applicant agreed to pay a total of \$30,000 in instalments to clear \$1,085,963.41 of debt.

The only asset of the Applicant is his employment.

Charles Laberge is 43 years of age, married with one child. He testified he has been an automobile sales representative since 1988. He left the industry in January 2007 and returned in 2008. He was most recently employed in that capacity by Kanata Ford but is now confined to administrative duties pending the outcome of his OMVIC appeal.

The Applicant stated his financial affairs are now in order. His debts were consolidated under his Proposal to creditors and he has been current in the payment schedule of \$500 a month reached in the agreement.

On November 30, 2011 the Applicant was granted an extension of time to complete payment of \$37,500 in fines, interest and administrative fees levied against him due to his conviction in provincial court on November 5, 2009 for being an unregistered vendor of new homes under section 6 of the ONHWP Act. The extension provides a deadline of April 15, 2012 for completion of payment and requires the Applicant to pay a minimum \$300.00 monthly.

The Applicant noted he is able to meet all his current financial liabilities. He has no loan or credit card debts. His outstanding obligations consist solely of paying off his Tarion fines and his Proposal to creditor agreement payments.

The Applicant stated he was candid and forthcoming in his OMVIC application. He noted on his application a conviction for driving with more than .80 MGS of alcohol in 1991 and pending charges from Tarion. He has no other criminal convictions. There have been no claims or complaints about his work as a car salesperson.

The Applicant confirmed that he pleaded guilty on November 5, 2009 to the charges of being an unregistered vendor of new homes. He also acknowledged the Agreed Statement of Facts (Exhibit #3, tab D, page 77) regarding the circumstances of the four (4) convictions. He was unaware he needed a vendor permit to sell new homes.

The Applicant stated all his debts had been the result of a failed development project. Given his experience in land development he intends to confine himself to the car sales business and has no plans for any future land proposals.

On cross examination the Applicant acknowledged he was strongly cautioned by legal counsel in the Wilson letter of October 21, 2011 (Exhibit #7, tab 5) that the new home deposits he received should not be treated "as funds for the development, we received assurances that he was aware of this." Despite this cautionary advice the Applicant received \$95,000 in deposits, none of which was returned and no homes were built.

The Applicant was referred to An Agreement of Purchase and Sale (Exhibit #5, tab 4) between the Applicant's numbered company and a purchaser. Under the heading "Adjustments" item 3 notes:

"The purchase price shall be increased or adjusted as of closing by the following: (b) the enrolment fee required pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, as amended, imposed by the Tarion Warranty Corporation, formerly the Ontario New Home Warranty Program."

Counsel referred to the Applicant's signed OMVIC application form received October 7, 2010 (Exhibit #3, tab24). The Applicant checked "Yes" to the question as to whether he completed the OMVIC certification course since January 1, 2009. The Applicant acknowledged he was aware that he should have registered as a sales person as required by the Act.

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.

Name and place of business

(2) A motor vehicle dealer shall not,

(a) carry on business in a name other than the name in which the motor vehicle dealer is registered; or

(b) invite the public to deal in a place other than the place that is authorized in the registration of the motor vehicle dealer.

Unregistered salesperson

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

Supply to unregistered person

(4) A motor vehicle dealer shall not supply motor vehicles to another motor vehicle dealer for the purpose of trading in motor vehicles unless the other motor vehicle dealer 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,

(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;

(b),(c) REPEALED: 2004, c. 19, s. 16 (5).

(d) the applicant is a corporation and,

(i) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,

(ii) having regard to the financial position of its officers or directors or an interested person in respect of its officers or directors, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,

(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

(iv) an officer or director of the corporation 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

Does the past conduct of the Applicant Charles P. Laberge afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty and therefore warrants disentitlement to registration under the Act?

APPLICATION OF LAW TO FACTS

The Applicant has a qualified right to a licence unless there are reasonable grounds for the belief that he will not carry on business in accordance with the law and with integrity and honesty.

The Tribunal received a great deal of documentation in this case but it will confine itself to discussing the key elements considered sufficient to make a finding.

The Tribunal considers the evidence presented to be compelling.

The Applicant admitted to an Agreed Statement of Facts dated November 3, 2009 in which he acknowledged receiving four deposits from prospective home purchasers totaling \$95,000 for home that were never built. The deposits were never returned. In the absence of the Applicant fulfilling his obligation to return the money the Tarion program reimbursed the purchasers.

A letter dated October 21, 2011 was presented in which legal counsel affirmed it had reminded the Applicant that deposit funds should not be used for development. This explicit cautionary advice was ignored by the Applicant.

The Applicant stated he was unaware he had to register as a vendor in order to sell new homes. The evidence presented shows that all four agreements of Purchase and Sale presented by the Applicant's numbered company explicitly state on the front page that

adjustments will require a Tarion enrollment fee. The Applicant never enrolled as a vendor and none of the prospective purchases were ever registered with Tarion.

On November 5, 2009 the Applicant pleaded guilty to four charges of being an unregistered vendor of new homes and was fined \$7,500 for each conviction.

In his OMVIC application form received October 7, 2010 the Applicant notes he had completed the OMVIC certification course since January 1, 2009. In the same document the Applicant puts his start date as an automobile "sales representative" as September 19, 2009. Given his past employment in the car sales industry from October 1988 until April 2009 and his completion of the OMVIC course the Applicant should clearly have known that he was required by law to register as a car sales person. The Applicant ignored the requirement to register and did not even apply until he had been employed in a sales capacity for a considerable time.

It is very disturbing to the Tribunal that the Applicant should fail to register as required by law in two industries involving the biggest consumer purchase of most households – the purchase of a home and the purchase of a car.

The Applicant has a very inconsistent financial record.

As late as February 25, 2011 a Statement of Claim filed by Tarion notes the Applicant refused to reimburse Tarion for four outstanding deposits never returned totaling \$95,000.

That claim and thirty three others were settled by a Proposal to creditors dated April 20, 2011. Outstanding claims totaling \$1,085,963.41 were settled for an agreement to repay \$30,000 in installments. Creditors were notified a return of 1.71 to 3.10 cents on the dollar may be available. The Tribunal notes the Proposal was accepted by all creditors but it is mindful that the settlement would have resulted in significant hardship to many small businesses.

The Applicant claimed that all his debts were a result of a failed land development proposal. However, an Equifax credit report dated August 18, 2010 (Exhibit #3, tab34) shows that a number of consumer businesses were forced to write off debt. The Applicant's credit rating was the worst level possible for many accounts.

The Tribunal acknowledges the Applicant has made progress in dealing with his debts. However, that progress is very recent and may well be fragile. The settlement proposal of debt was accepted only in the spring of 2011. The Applicant should demonstrate clear financial responsibility for a minimum of two to three years before there would be sufficient evidence to be confident that he has put past conduct behind him.

The past conduct of the Applicant in willfully ignoring his obligation to register in both the housing industry and car sales industry, his refusal to return \$95,000 in new home deposits to consumers, combined with a disturbing history of very significant debt has provided compelling and sufficient evidence to the Tribunal that there are reasonable grounds for

belief that he will not carry on business in accordance with law and with integrity and honesty.

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 registration to the Applicant under the Motor Vehicle Dealer's Act.

LICENCE APPEAL TRIBUNAL

A handwritten signature in black ink, reading "Allan Higdon", written over a horizontal line.

Allan Higdon, Presiding Member

Released: January 3, 2012

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.