

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Citation: Premium Cars Wholesale Limited, Hussein Shahnematollah-Yazde, Daniel Amirjani v. Registrar, *Motor Vehicle Dealers Act, 2002*, 2020 ONLAT MVDA 11221

Date: 2020-02-27
File Number: 11221/MVDA

Motion pursuant to s. 9(11) of the *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c.30, Sch. B, to Stay of an Order of the Tribunal to suspend the registrations.

Between:

Premium Cars Wholesale Limited, Hussein Shahnematollah-Yazde, Daniel Amirjani

Appellants / Moving Parties

-and-

Registrar, *Motor Vehicle Dealers Act, 2002*

Respondent/Responding Party

DECISION and ORDER

ADJUDICATOR: Stephen Scharbach, Member

APPEARANCES:

**For the Appellant
Premium Cars
Wholesale Limited and
Hussein
Shahnematollah-Yazde:** Symon Zucker, Counsel

**For the Appellant
Daniel Amirjani:**

Cameron J. Wetmore, Counsel

For the Respondent:

Michael Rusek, Senior Counsel
Diana Mojica, Counsel

**Heard at Toronto,
Ontario:**

February 21, 2020

A. Overview

- [1] This is a motion by Premium Cars Wholesale Limited (“Premium”), Hussein Shahnematollah-Yazde (“Mr. Shah”), and Daniel Amirjani (collectively, “Appellants”), requesting that the Tribunal stay its Order dated January 17, 2020 (“Order”) pending their appeal of that Order to the Divisional Court.
- [2] The Order directed the Registrar to suspend the registrations of Premium and Mr. Shah for 120 days and the registration of Mr. Amirjani for 90 days.
- [3] It was made after a 9-day hearing in which the Tribunal concluded that the Appellants acted without integrity and honesty and failed to comply with regulatory disclosure requirements in connection with several consumer motor vehicle sales. In addition, in respect of some of the transactions, Premium and Mr. Shah were found to have breached a condition requiring them to comply with the *Motor Vehicle Dealers Act, 2002* (“Act”) and Regulations that had been imposed to resolve an earlier Notice of Proposal to Revoke issued by the Registrar.
- [4] In accordance with the Tribunal’s Order, the Registrar suspended the Appellants’ registrations commencing January 20, 2020.
- [5] Under s.11 of the *Licence Appeal Tribunal Act, 1999*, a party to a Tribunal proceeding held under the Act may appeal a Tribunal decision or order to the Divisional Court. Leave to appeal is not required.
- [6] On or about February 4, 2020, the Registrar filed a notice of appeal of the Order with the Divisional Court. The Registrar requests that the Order to suspend the Appellants’ registrations be set aside and instead the Registrar be directed to revoke their registrations.
- [7] On February 10 and 11, 2020, the Appellants filed notices of cross-appeal¹ and commenced the present motion asking that the Tribunal’s Order be stayed pending the disposition of their appeal. That motion was made pursuant to s.9(9) of the Act which provides that:

Even if a registrant appeals an order of the Tribunal under section 11 of the *Licence Appeal Tribunal Act, 1999*, the order takes effect immediately but the Tribunal may grant a stay until the disposition of the appeal.

- [8] If granted, the effect of the stay would be to lift the suspensions currently in place and allow the Appellants to resume trading in motor vehicles until the disposition of their appeals.

¹ Mr. Amirjani’s notice of cross-appeal is dated February 10, 2020. Premium and Mr. Shah’s notice of cross-appeal is dated February 11, 2020.

B. Decision

- [9] Pursuant to s.9(9) of the Act I grant a stay of the Tribunal's Order dated January 17, 2020 pending the disposition of the appeals commenced by the Appellants.

C. Analysis

(i) The Test on a Motion for a Stay Pending Appeal

- [10] The test to be applied on a motion for a stay pending appeal is well established and is derived from a 1994 Supreme Court of Canada case - *RJR-MacDonald v. Canada (Attorney General)*². The party seeking the stay must prove on a balance of probabilities that:

- (i) the appeal raises a serious issue;
- (ii) the stay is necessary to avoid irreparable harm; and,
- (iii) the balance of convenience favours granting the stay

- [11] The jurisprudence cautions that these considerations are not to be treated as watertight compartments. The significance of one factor in any particular circumstance may override the significance of another. The overarching question after all factors are considered is whether it is in the interests of justice to grant a stay.

(ii) Application of the Test in the Present Case

(a) Serious Issue to be Tried

- [12] I find that the Appellants have a serious issue to be tried.
- [13] Consideration of this branch of the test requires a preliminary assessment of the merits of the application to determine whether it raises an arguable case. The threshold is a low one. Most of the cases to which I was referred stated that this test is met if it is determined that the application is neither frivolous or vexatious.
- [14] In this case however, the Registrar argues that the Appellants must meet a higher threshold – they must establish that they have a strong, clear prima facie case that will likely succeed on appeal. The Registrar relies on a 2018 decision of the Supreme Court of Canada³ (“*CBC*”) which dealt with the application of the *RJR MacDonal*d test in the context of a request for a mandatory injunction. The Court held that when a mandatory injunction is sought, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR-MacDonald* test is not whether there

² *RJR-MacDonald v. Canada (Attorney General)* [1994] 1 S.C.R. 311.

³ *R. v. Canadian Broadcasting Corporation* [2018] 1 S.C.R. 196.

is a serious issue to be tried but whether the applicant has shown a strong prima facie case.

- [15] The Court stated that a higher threshold is required in such cases because injunctions often require the respondent to undertake a positive course of action which is often costly or burdensome and, in many cases, effectively determine the action in favour of the moving party.⁴
- [16] The Registrar essentially argues that the *CBC* case has revised the first part of the *RJR MacDonald* test to require that an applicant establish a strong prima facie case rather than a serious issue to be tried.
- [17] I disagree. From a reading of the *CBC* case I conclude that its application is limited to cases involving mandatory injunctions and it does not apply to the present case – a case involving a request for stay pending an appeal.
- [18] I note that since the *CBC* case has been decided, there have been at least two reported cases at the Divisional Court and Court of Appeal that have employed the traditional *RJR-MacDonald* test in cases dealing with stay pending appeals and have not applied the higher *CBC* threshold.⁵
- [19] The Registrar further argues that although the Appellants are requesting a stay of the Tribunal's order, any such stay will require the Registrar to take positive action – the Registrar will have to re-register the Appellants, amend its registration records, and possibly revise its public communications. Since the stay will require the Registrar to take positive steps it is akin to a mandatory injunction and should attract the higher *CBC* threshold.
- [20] I acknowledge that if the Order is stayed the Registrar will be required to take some positive steps. However, the substance of the Appellants' request is for a stay pending their appeal and not for a mandatory injunction. The positive steps that the Registrar will take if the stay is granted are minor and administrative in nature and are very much secondary to the thrust of what the Appellants are seeking. Unlike the case in many mandatory injunction applications, those steps are not burdensome or onerous and they will not effectively determine the outcome of the proceedings.
- [21] I therefore conclude that the threshold that the Appellants have to meet at the first stage of the *RJR-MacDonald* test is whether there is a serious issue to be tried.
- [22] Do the Appellants raise a serious issue to be tried? Keeping in mind that this is a low threshold to meet, I conclude that this first aspect of the test is satisfied.

⁴ *R. v. Canadian Broadcasting Corporation* at paragraph 15.

⁵ *Krizan et al v. Skurdelis* [2020] ONSC 451 (Divisional Court); *Reynolds v. Registrar (Alcohol and Gaming Commission of Ontario)*, 2019 ONCA 788.

[23] The Appellants' appeals are brought under s. 11 of the *Licence Appeal Tribunal Act* which allows for an appeal as of right and is not restricted to questions of law.

[24] In their Notices of Appeal, the Appellants allege that in reaching its conclusions, the Tribunal made errors of law and palpable and overriding errors of fact. As the Registrar legitimately points out, many of the grounds for appeal lack specificity. However, others are more pointed. For example:

- All Appellants allege that the Tribunal erred in law by failing to draw an adverse inference from the Registrar's failure to call a witness arguably relevant to a Tribunal finding that Mr. Amirjani falsified a bill of sale to give the false impression that he had disclosed required information to a consumer. That was one of the most serious findings against the Appellants because it involved a failure to comply with regulatory disclosure requirements and an intentional falsification of transaction documents to conceal that failure.
- Mr. Amirjani alleges that in another transaction the Tribunal erred in concluding that Mr. Amirjani falsified documents in circumstances where Mr. Amirjani may have believed the modified documents reflected agreed terms of the sale.
- Mr. Amirjani alleges that the Tribunal erred in interpreting the disclosure requirements in the Act and regulations to require salespersons to disclose information they are not aware of despite taking steps to acquire that information.
- All Appellants allege that the Tribunal erred in imposing a penalty that was excessive and unnecessary in all of the circumstances.

[25] Obviously, I make no comment on the likelihood of success of those and the remaining grounds for appeal. However, "on the basis of common sense and an extremely limited review of the case on the merits",⁶ I conclude that the Appellants' grounds for appeal are not frivolous or vexatious and do raise serious issues to be tried.

(b) Irreparable Harm

[26] This branch of the test requires me to consider whether the Appellants will suffer irreparable harm if the stay is not granted. "Irreparable harm" is harm that cannot be

⁶ *RJR-MacDonald* at paragraph 78.

remedied. Even financial loss may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

- [27] In my view, if the stay is not granted the Appellants will suffer irreparable harm in two ways.
- [28] Firstly, the Appellants have appealed an Order which resulted in the suspension of their registrations as of January 20, 2020. Transcripts of the Tribunal's proceedings have already been prepared and counsel for Premium and Mr. Shah estimates that the appeal will likely be heard within the current year. Whatever the estimate, it appears very likely that by the time the appeal is heard, and a decision rendered, the Appellants' suspensions will have been completed, thereby rendering their appeals moot and their statutory right of appeal essentially meaningless.
- [29] Secondly, the Appellants are presently unable to conduct business as motor vehicle salespersons and dealers. Both Mr. Shah and Mr. Amirjani derive most, if not all, of their income from Premium's motor vehicle sales operation. The current suspensions have caused that income to dry up. According to Mr. Shah, while the current suspension has essentially prevented Premium from generating an income, he and Premium are still faced with large and on-going expenses including payments for existing inventory, the salaries of approximately 10 people, and lease/mortgage payments on Premium's business premises and Mr. Shah's personal obligations including the support of several dependants. The evidence is clear that the Appellants are all experiencing significant financial losses due to their present inability to conduct business.
- [30] The Appellants argue that unless a stay is granted if their appeals are successful and the suspensions are ultimately overturned, they will not be able to recover their financial losses. I agree. There is no mechanism in the present proceedings that would allow the Appellants to recover financial losses due to a suspension ordered by the Tribunal that is later set aside by an appellate Court.
- [31] As the Supreme Court stated in *RJR-MacDonald*:

[E]ven quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits⁷.

- [32] In the present circumstances I conclude that if a stay is not granted the Appellants will suffer irreparable harm in that their right to a meaningful appeal will be denied and, if their appeal is successful, they will incur significant financial losses that cannot be recovered.

⁷ *RJR-MacDonald*, at paragraph 79

(c) Balance of Convenience

- [33] The balance of convenience favours the Appellants. The harm to the Appellants if the stay is not granted outweighs the potential harm to the public if the stay is refused.
- [34] This branch of the test has been described as requiring a balancing of which party will suffer the greater harm from the stay being granted or refused.⁸ This requires an assessment of the appropriate balance between the private interest of the Appellants and the public interest of the Registrar in effectively administering his regulatory function.
- [35] In the Registrar's view, granting a stay would create a risk to the public that outweighs the harm to the Appellants. The Act is consumer protection legislation that attempts to protect the public by ensuring that salespersons and dealers carry on business with honesty, integrity and in accordance with the law. The Registrar points out that the Appellants have already been found to have breached disclosure obligations to consumers and conducted themselves in a way that affords reasonable grounds for belief that they will not carry on business with honesty, integrity and in accordance with the law.
- [36] The Registrar provided affidavit evidence that suggested that since the issuance of the Notice of Proposal that led to the hearing, the Registrar has received several new complaints about the Appellants from the public. In the Registrar's view, that suggests that the Appellants continue to pose a significant threat to the public. In addition, public confidence in the regulation of motor dealers/salesperson would be eroded if registrants who were suspended as a result of their questionable conduct could continue to conduct business pending appeal.
- [37] Despite the Registrar's assertions, I find the balance of convenience favours the Appellants for the following reasons.
- [38] The transactions and conduct that formed the basis of the Tribunal's Order took place approximately 4-5 years ago (in 2015 or 2016). At the hearing there was no evidence that the Appellants had continued to operate in questionable ways up to the present. That was a factor that the Tribunal considered in deciding to impose a suspension instead of a revocation.
- [39] With respect to the current consumer complaints, evidence before me indicated that OMVIC receives thousands of communications from consumers regarding dealers and a fraction of those result in formal complaints.⁹ It appears that OMVIC typically responds to consumer communications by providing information and, in appropriate

⁸ *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395 at paragraph 12.

⁹ According to OMVIC's 2019 Annual Business Report OMVIC received over 30,000 such communications in 2018 and 1192 resulted in formal complaints.

cases, suggesting that concerns be raised with the dealer in the hope that the issue can be aired and resolved informally. If resolution is not possible OMVIC may elevate the communication to a formal complaint in which case, OMVIC contacts the dealer.

- [40] A review of the 9 complaints raised by the Registrar indicates that in all cases except one OMVIC was contacted by a consumer with a question or concern involving the Appellants. Later, the consumer either reported the issue resolved or did not communicate further with OMVIC and the issue was not elevated to a formal complaint.
- [41] In the one case that was elevated to a formal complaint, a consumer complained that he purchased a used vehicle from Premium that later proved to have mechanical problems. Mr. Shah stated in writing that he was prepared to inspect and repair the vehicle, but all repairs must be done at Premium.
- [42] According to Mr. Shah's evidence, Premium worked with the consumer to resolve the complaint although no information was provided by any party as to whether or how the issue was ultimately resolved. According to OMVIC's records, the consumer stopped responding to OMVIC and the complaint file was closed.
- [43] In summary, I conclude that the information before me does not establish that the Appellants presently pose a risk to the public of such urgency or magnitude that it outweighs the Appellants' right to a meaningful appeal.
- [44] In that connection I note that there are statutory mechanisms available to the Registrar to address significant risks posed by any future questionable conduct by the Appellants, including imposing an immediate temporary suspension pending a notice of proposal to revoke or suspend.¹⁰

D. Order

- [45] Pursuant to s.9(9) of the *Act*, I grant a stay of the Tribunal's Order dated January 17, 2020 pending the disposition of the appeals filed by the Appellants.

LICENCE APPEAL TRIBUNAL



Stephen Scharbach, Member

Released: February 27, 2020

¹⁰ Act, s. 10