

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**  
**HIMEL, SACHS AND WARKENTIN JJ.**

**BETWEEN:** )  
)  
REGISTRAR, MOTOR VEHICLE ) *Bernard C. LeBlanc*, for the Respondent  
DEALERS ACT, 2002 ) (Appellant in Appeal)  
)  
Appellant )  
)  
- and - )  
)  
TOUFIC RADA ZABIAN ) *Symon Zucker*, for the Appellant  
) (Respondent in Appeal)  
Respondent )  
)  
)  
) **HEARD:** October 22, 2013

**HIMEL J.**

[1] The Registrar, *Motor Vehicles Dealers Act, 2002* (the "Registrar") appeals the decision of Vice-Chair D. Gregory Flude of the Licence Appeal Tribunal (the "Tribunal") dated March 21, 2011. In that decision, the Tribunal ordered the Registrar to register Toufic Rada Zabian as a salesperson subject to a number of conditions.

[2] The Registrar asks that the order be set aside and that it be permitted to carry out its proposal to refuse the registration of the respondent. In the alternative, the appellant asks that the matter be remitted for a new hearing before a different Vice-Chair. The appellant also moved to introduce fresh evidence which was opposed. The respondent argues that the Tribunal properly considered the evidence, made findings of credibility and correctly issued a sales licence rather than a dealer's licence.

[3] For reasons delivered orally at the appeal, we held that the fresh evidence adduced met the test in *R. v. Palmer*, [1980] 1 S.C.R. 759 and we admitted the evidence.

[4] For the reasons that follow, we would dismiss the appeal.

*Factual Background*

[5] The Registrar administers the *Motor Vehicles Dealers Act, 2002* (the "Act") through the Ontario Motor Vehicle Industry Council ("OMVIC"). Toufic Zabian was a registered salesperson who was the controlling mind of three formerly registered motor vehicle dealerships. In June 2009 and on a number of subsequent dates, a representative of the Registrar conducted inspections of the respondent's dealerships and identified a number of problems. The respondent applied for a transfer of registration as a motor vehicle salesperson on June 17, 2010. Following the inspections, the Registrar issued a proposal in October 2010 to refuse to register the respondent. The reasons given were:

1. He failed to ensure outstanding liens were paid out when trading for vehicles;
2. He failed to ensure warranty companies were paid for warranties purchased by customers;
3. His conduct led to consumer complaints and payouts by OMVIC's Compensation Fund;
4. He and his dealerships were the subject extensive tax-related charges; and
5. He continued to advertise motor vehicles through unregistered dealerships.

[6] The respondent appealed the proposal to the Tribunal.

*The Evidence at the Hearing*

[7] At the hearing, an inspector with the Registrar testified about numerous inspections of the dealerships and observations of the deficiencies, especially related to liens and warranty payments. The Director of the Compensation Fund testified that the fund had provided compensation to the respondent's customers. He also testified about improper advertising. The respondent testified that he had delegated general management and control of the dealerships to Hicham Lebada, the son of his accountant. He said he was not aware of the Retail Sales tax liabilities or that the dealerships were not paying liens. When he learned that he had tax liabilities of \$2,000,000 and \$120,000 and outstanding liens in 2009, he fired Mr. Lebada and hired a forensic accountant. He said that Mr. Lebada was the person responsible for paying the Retail Sales Tax returns, that he normally received the funds with his sister acting as an intermediary and the cheque would be made out to Mr. Lebada personally. He believed that outstanding tax matters were being dealt with by his employee. He said he was attempting to sell land to pay his debts but most of his deals fell through and he lost automatic registration due to his indebtedness to the Crown. He also said he was suing Hicham and Mike Lebada for \$1.7 million.

*The Decision of the Tribunal*

[8] The Tribunal described the evidence of Mr. Zabian as follows:

In his testimony before the Tribunal the Applicant outlined a tale of trust and betrayal that is almost epic in its scope. He started in the car sales business in 1997. He was successful. Until the events that give rise to this appeal, he had an unblemished record in the business and a good reputation. He has had an "A"

rating with the Better Business Bureau for 10 years and was recently given a plaque for that achievement.

The Tribunal went on to review the problems that took place in 2009 and 2010 concerning the liens, outstanding taxes, advertising issues and ongoing debts of the dealerships.

[9] The Tribunal referenced s. 6 of the Act and stated that its task was to determine whether there were "reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty." The Vice-Chair noted that Mr. Zabian "cannot reasonably be expected to be financially responsible in the conduct of business" as he was functionally bankrupt. The Tribunal found Mr. Zabian to be a credible witness. It found that while he blamed others, he took responsibility and showed his intention to make things right.

[10] The Tribunal concluded that the documentary evidence indicated that the wrongdoing was committed by Mr. Zabian's accountant and general manager. The Tribunal found Mr. Zabian was "guilty of lax supervision" and that he "was the victim of a well executed and long lasting fraud scheme, and has no stain on his personal honesty and integrity". There was evidence that Mr. Zabian had previous warnings of financial misdeeds by these same employees, that he misled at least one customer as to the source of the lien problem and failed to put in place sufficient controls or supervision commensurate with his obligations as a registered dealer. However, the Tribunal found that it could not find in the history of his business, grounds for belief that he would not carry on business in accordance with the law.

[11] The Tribunal noted that Mr. Zabian was only applying for a sales licence and was willing to accept terms. The Tribunal stated that any concerns relating to financial conduct could be addressed by adding terms to the licence. It noted that neither side had submitted what terms were appropriate but it ordered the following:

1. The respondent shall not apply for any registration other than a sales licence under the MCVA for two years;
2. The respondent shall not act in a managerial capacity under the MCVA for two years;
3. The respondent will take all reasonable steps to pay the webmaster in order to have impugned advertisements removed;
4. The respondent shall enter into an undertaking with the Registrar that the net proceeds after legal fees and expenses from any litigation will be applied to first discharge the liabilities of the dealerships; and
5. At six month intervals, the respondent shall update the Registrar of the status of litigation against his former accountant.

#### *Positions of the Parties on the Appeal*

[12] The appellant argues that the Tribunal erred in failing to apply the correct test set out in s. 6 of the Act. Counsel for the Registrar submits that the Tribunal failed to consider the relevant

evidence before it supporting the Registrar's proposal to refuse registration. He argues that the Tribunal did not provide its findings of fact and sufficient reasons in its analysis. Finally, it imposed terms which, counsel for the Registrar submits are not enforceable. The respondent argues that the Tribunal made findings of fact, weighed the evidence, found the respondent to be credible and that since he was seeking a salesperson licence and not a dealership licence, the issue of supervision was not relevant. Counsel for the respondent also argued that Mr. Zabian has been registered as a salesperson since the decision was rendered, that the Registrar did not apply for a stay and that there is no evidence of any complaints or wrongdoing during this period since the decision of March 21, 2011.

*The nature of the fresh evidence*

[13] The evidence admitted under s. 134(4)(b) of the *Courts of Justice Act* consists of an affidavit of a paralegal with the Ontario Motor Vehicle Industry Council which attaches newspaper articles, court records, transcripts, exhibits, documentation provided by the respondent relating to the tax proceedings and a letter and cheques regarding payment of the fines to the Canada Revenue Agency. The affidavit stated that Mr. Zabian had been providing updates on the status of proceedings as he was required by the order of the Tribunal but that while he reported on the charges of wilful evasion of PST and charges concerning GST, he did not disclose that, on behalf of the dealership, he had pleaded guilty to charges for unpaid GST and he had pleaded guilty to charges of failing to file corporate tax returns for which the company was fined a total of \$96,000. The OMVIC had learned about this from an article in the London Free Press and followed up by ordering court transcripts which were filed at the appeal before us. The transcripts set out the Agreed Statement of Facts which clarified that pleas of guilty were entered by Mr. Zabian as officer and director of the company and, according to the press release from the Canada Revenue Agency, the fine of \$95,913 had been paid and outstanding returns were filed.

*Decision*

[14] An appeal may be brought to the Divisional Court from the decision of the Tribunal under the *Licence Appeal Tribunal Act, 1999*, c. 12 Sched. G, s. 11(1). In this case, the issues before the Tribunal were matters of licensing and the interpretation of the Tribunal's home statute, matters which fall within its core function. The standard of review is that of reasonableness.

[15] The Tribunal's task was to consider the application of section 6(1) of the Act which provides:

- 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.

[16] The appellant argues that the Tribunal failed to apply the proper test under s. 6 in holding that the extensive fraudulent acts of the appellant's employees did not reflect on him as he claimed to know nothing about it but that he failed to adequately supervise them. The respondent submits that the proper test was considered as this was not a case of the applicant seeking a dealer's licence where ability to supervise appropriately comes into play.

[17] The Tribunal held that the appellant was the victim of a fraud and that he was unaware of the harm caused to consumers by his own employees despite previous warnings that these employees had engaged in highly questionable conduct. The appellant argues that the Tribunal erred by finding that the test requires knowledge or intent on the part of the applicant and did not apply the statutory test which sets out an objective test that applies to both acts and omissions. The appellant argues that the failure to supervise is a compelling reason to take the licensing action and that finding that the fraud "has no stain on his personal honesty and integrity" encourages registrants to look the other way rather than meeting the purpose of the statute which is consumer protection legislation: see *Allright Automotive Repair Inc. v. Ontario (Motor Vehicle Dealers Act, Registrar)*, [2008] O.J. No. 1557 (Div. Ct.) at paras 6-11.

[18] In determining whether a decision is reasonable, this court is to consider, the "existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. In applying this test, we find that the Tribunal provided a reasonable interpretation of s. 6 of the Act for an applicant who is not a corporation.

[19] First, the Tribunal said that, based on Mr. Zabian's own evidence with respect to his financial position, he cannot reasonably be expected to be financially responsible in the conduct of business. The Tribunal wrote: "He is functionally, if not actually, bankrupt. All of his property is currently subject to power of sale proceedings and it is far from clear if these sales will leave sufficient excess funds to discharge the corporate tax, warranty and lien liabilities...". The Tribunal then imposed conditions to meet this concern by ordering that "he not be in a managerial capacity with a motor vehicle dealer nor shall he handle or be responsible for the handling of cash or consumer deposits without supervision."

[20] Next, the Tribunal considered whether there are reasonable ground for belief that Mr. Zabian will not carry on business in accordance with law and with integrity and honesty. The Vice-Chair said that the analysis depends on the credibility of the applicant. The Tribunal found him to be a credible witness who accepted responsibility for his actions and wrote:

As the directing mind of three corporate entities, the Applicant was guilty of lax supervision. In a perfect world, rogues would bear traits that would make them and their schemes obvious, but this is not a perfect world. Rogues exist and succeed because of their plausibility. They know how to work people and deflect inspection. In the end the Tribunal is satisfied that the Applicant was the victim of a well executed and long lasting fraud scheme and has no stain on his personal honesty and integrity.

[21] The Tribunal had reviewed in detail earlier in the decision the background of Mr. Zabian and concluded that it could not "find in the history of the Applicant's business grounds for belief that he will not carry on business in accordance with the law".

[22] The Tribunal was in the best position to weigh the evidence and consider the past conduct. With the terms imposed, it was of the view that this was a case of registration as a salesperson with terms. We see no error in the interpretation of s. 6 and find the decision to be reasonable.

[23] The appellant also submits that the Tribunal failed to consider the evidence suggesting that the respondent was not simply guilty of lax oversight but that he knew or ought to have known about the Lebadas' activities. That evidence included: the large investment loss in 2003 for which he knew the Lebadas' were responsible, a tax audit revealing debts of \$400,000 in 2004 and 2005 for which he knew the Lebadas were responsible and ignoring the 2009 OMVIC bulletin which warned dealers to pay outstanding liens and warranties and cautioned them to maintain adequate financial controls. The appellant also lists a number of items in the evidence which the appellant says were not referenced by the Tribunal and no reasons were given for giving no weight to that evidence. Failing to consider this evidence, it submits, constitutes an error in law: see *Prestige Toys Ltd. v. Ontario (Motor Vehicle Dealers Act, Registrar)*, [2009] O.J. No. 3437 (Div. Ct.) at para. 44. In *Prestige Toys*, the Divisional Court held that while the Tribunal is not obligated to comment on every piece of evidence, a complete lack of analysis regarding evidence of the dealer's personal involvement in improper conduct occurring at her dealership was unreasonable: at paras. 43-4.

[24] While the Tribunal outlined the evidence concerning the financial history and commented on the credibility of the respondent, it did not reference every piece of evidence before it nor make explicit findings on each constituent element. In *Newfoundland & Labrador Nurses Union v. Newfoundland & Labrador (Treasury Board)*, [2011] S.C.J. No. 62, the Supreme Court held as follows at para. 16:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusions (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to

determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

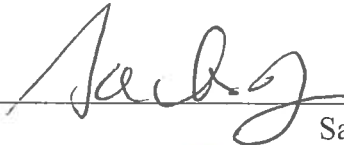
[25] In applying *Newfoundland & Labrador Nurses Union*, we find that the reasons were adequate in allowing us, as the reviewing court, to understand why the Tribunal made its decision and to consider whether the conclusion reached is within the range of acceptable outcomes: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. We do not see this decision as demonstrating "a complete lack of analysis" as was the case in *Prestige Toys*.


[26] The decision of the Tribunal is entitled to deference. We find that the decision of the Tribunal was reasonable in that it considered and weighed the evidence before it, made findings of credibility and applied the relevant statutory provisions to the facts as it found them. In our view, the fresh evidence submitted on appeal would not have affected the Tribunal's findings. The most significant aspect of this evidence is that Mr. Zabian pleaded guilty to failing to file corporate tax returns. However, it is important to recognize that he only did so in his capacity as a director of the corporation. These guilty pleas cannot be construed as an admission that Mr. Zabian had done anything more than fail to fulfill his responsibilities as a director in supervising the people who were actually running the companies. As already noted above, the Tribunal was fully aware that Mr. Zabian was guilty of lax supervision.

[27] The order that the Registrar not carry out the proposal to deny the registration of Mr. Zabian and to direct the Registrar to register him on terms was a reasonable disposition. The parties did not provide the Tribunal with input on the conditions which left the Tribunal to determine the terms itself. Those terms have been in place for two years. We understand that no stay was sought and that there have been no issues with respect to the conditions imposed.

[28] For these reasons, the appeal is dismissed. Costs are fixed at the agreed upon amount of \$14,000 for fees plus reasonable disbursements and HST, an amount which we deem fair and reasonable in the circumstances, payable by the Registrar to Mr. Zabian within 30 days.

  
Himel J.

  
Sachs J.

  
Warkentin J.

**CITATION:** Registrar, Motor Vehicle Dealers Act, 2002 v. Zabian, 2013 ONSC 6647  
**DIVISIONAL COURT FILE NO.:** 26/13  
**DATE:** 20131025

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**HIMEL, SACHS AND WARKENTIN JJ.**

**BETWEEN:**

REGISTRAR, MOTOR VEHICLE DEALERS ACT,  
2002

Appellant

**– and –**

TOUFIC RADA ZABIAN

Respondent

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**REASONS FOR JUDGMENT**

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**Himel J.**

**Released:** October 25, 2013