

**Licence
Appeal
Tribunal**

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



DATE: 2016-05-19
FILE: 9948/MVDA
CASE NAME: 9948 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

Igor Ivker

Appellant

-and-

Registrar, *Motor Vehicle Dealers Act, 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Jacqueline Castel, Member

APPEARANCES:

For the Appellant: Self-represented

For the Respondent: Jane Samler, Counsel

Heard in Toronto: April 12, 2016

REASONS FOR DECISION AND ORDER

BACKGROUND

The Registrar, *Motor Vehicle Dealers Act, 2002* (the “Registrar” and the “Act”, respectively) issued a Notice of Proposal dated December 7, 2015 (the “NOP”) to refuse to grant the registration of Igor Ivker (the “Appellant” or “Mr. Ivker”) as a salesperson under the Act.

The NOP alleges that the Appellant used a customer’s credit card without authorization, made false statements, and failed to disclose information on applications for registration as a salesperson under the Act.

Mr. Ivker is appealing the NOP to the Licence Appeal Tribunal (the “Tribunal”).

FACTS

Mr. Chris Welch is the controller and treasurer of Wilson-Niblett Motors Limited (“Wilson-Niblett” or “the Dealership”). He testified that the Appellant was employed by Wilson-Niblett as a salesperson for approximately two and a half months in 2015.

Mr. Welch identified various documents in the Registrar’s Books of Documents comprising the dealer’s file, pertaining to the sale of a 2010 Chevrolet Malibu. The Appellant was the salesperson who handled the transaction. The purchaser (“WU”) paid the \$2,000 deposit by credit card. The balance (\$7,322.50) was paid by money order, dated March 5, 2015. There was an overpayment in the amount of \$12.86, probably associated with the licensing fee.

Mr. Welch testified that when Wilson-Niblett learned through the Ontario Motor Vehicle Industry Council (“OMVIC”) that Mr. Ivker used a customer’s credit card, without authorization, to renew his OMVIC registration, his employment was terminated. He stated that the Dealership considered it to be a very serious mistake by a short term employee and could not risk giving the Appellant a second chance in these circumstances. He emphasized that the Dealership was concerned about its reputation and reimbursed the customer for the money that the Appellant had charged to his credit card without authorization and for the overpayment. There was no record of the customer being reimbursed for the overpayment before this time.

Mr. Gordon Wilson is employed at Wilson-Niblett as a dealer principal. He testified that salespersons are required to have a valid driver’s licence as one of their responsibilities is to go on test drives with customers. He believed that Mr. Ivker’s driver’s licence was in good standing while he was employed with Wilson Niblett.

He testified that an OMVIC investigator briefed him about an investigation pertaining to Mr. Ivker, who was alleged to have used a client's credit card, without authorization, to renew his OMVIC registration. Mr. Wilson went to the Appellant's office on May 4, 2015 and located a Wilson Niblett handwritten post-it note with a credit card number (ending in the digits xxxx, the expiry date of the credit card, and the 3-digit security code. He also located on the Appellant's desk a printed copy of OMVIC's on-line Sales Renewal Receipt, in the name of Mr. Ivker, identifying a MasterCard ending in the numbers xxxx and showing a charge to the credit card in the amount of \$175. Mr. Wilson indicated that he gave the OMVIC investigator the two documents.

Shelley Webb is employed as a team lead in the registration department of OMVIC. She testified that she took a call from a member of the public ("WU") who informed that he noticed, on his MasterCard statement, a charge to OMVIC in the amount of \$175. He stated that he did not make or authorize this charge and has never even heard of OMVIC before. She told him what OMVIC stood for and asked if he had authorized any family members to use his credit card. In the course of the conversation, she learned that he had purchased a vehicle for his son from Wilson-Niblett about a month before and had provided his credit card information over the phone to the salesperson for the purpose of paying the deposit. Ms. Webb told WU to contact his credit card company to alert them of a potential fraud. She took down his credit card information and notified OMVIC's information technology department and management of the issue. Management assigned the matter to an investigator for follow-up.

Blake Smiley is employed as an investigator with OMVIC. He was assigned to investigate WU's complaint into an unauthorized credit card use by the Appellant.

Mr. Smiley testified that he attended the dealership of Wilson-Niblett on April 28, 2015 and obtained the dealer's file which contained documents supporting the purchase of the 2010 Chevrolet Malibu by WU, as well as WU's MasterCard information on a handwritten post-it note.

Mr. Smiley also interviewed Mr. Ivker on April 28, 2015. Ms. Samler played the audio recording of the interview. Mr. Smiley told Mr. Ivker what the investigation was about. Mr. Ivker expressed surprise and stated that he had made a mistake and that he had intended to use his mother's credit card for the renewal of his OMVIC registration. He told Mr. Smiley that he often used his mother's credit card, with her permission. Mr. Smiley asked him to provide his mother's credit card information. He looked through various documents to try and locate his mother's credit card number but was unable to find it.

As a result, he called his mother during the interview and wrote down her credit card information for Mr. Smiley. The name provided by Mr. Ivker, on the OMVIC renewal form, for the owner of the MasterCard, was his mother's name, "RI". However, the credit card number he obtained from his mother on the phone was not the number he used for his on-line OMVIC renewal. In addition, his mother's credit card was a Visa credit card, whereas the credit card he used for the OMVIC on-line renewal was a MasterCard, and the year of expiry for the two cards was also different. Mr. Ivker admitted during the interview that he obtained WU's credit card information twice over the phone, once for the deposit and subsequently to reimburse an overpayment of about \$11.00.

Mr. Smiley testified that he interviewed WU at his residence on May 1, 2015. Mr. Smiley stated that WU told him that he provided his MasterCard information to Mr. Ivker on two separate occasions, first for the initial \$2,000 deposit and second because Mr. Ivker told him he needed it to reimburse him for an overpayment. WU showed Mr. Smiley his MasterCard and told him that he never received any type of reimbursement for an overpayment. He also confirmed that he did not authorize any use of his credit card except for the \$2,000 deposit and for the reimbursement.

Mr. Smiley testified that he also met with Chris Welch, the controller of Wilson-Niblett, on May 5, 2015 to ascertain whether there was in fact an overpayment by WU. Mr. Welch checked the database and confirmed an overpayment in the amount of \$12.86. The \$12.86 had been entered into the database as a fee for gas. Mr. Welch provided a copy of the computer printout showing the overpayment. When asked to explain the company's policy respecting the return of overpayments, Mr. Welch stated that because the amount was under \$20 it would not normally be returned to the customer, as it would have been deemed an "insignificant amount". He indicated that he did not ask Mr. Ivker to contact WU to obtain his credit card information for the purpose of reimbursing him the \$12.86. If the client asked to be reimbursed, the Dealership would normally issue a cheque or a service coupon.

Mr. Smiley stated that Mr. Welch gave him the on-line renewal application confirmation page for Mr. Ivker (dated April 20, 2015) and a Wilson-Niblett handwritten post-it note with a MasterCard number ending in xxxx, expiry date and three-digit security code on it. There was no indication of the card holder's name on the post-it note. Mr. Welch told him that Mr. Wilson had located these documents in Mr. Ivker's office on May 4, 2015. Mr. Welch also informed him that Mr. Ivker's employment at Wilson-Niblett had been terminated, and that the Dealership contacted WU, apologized on behalf of Wilson-Niblett, and reimbursed him the \$175 and the overpayment of \$12.86.

Mr. Smiley stated that as part of the investigation, he checked Mr. Ivker's driving record on the Ministry of Transportation database. From the database, he learned that Mr. Ivker has not had any vehicles registered in his name since 2009, and that his driver's licence has been suspended 11 times for unpaid court ordered fines or driving while under suspension. His driver's licence was suspended on these dates:

May 8, 2015 to July 14, 2015
January 28, 2015 to February 17, 2015
January 16, 2014 to February 4, 2014
April 22, 2013 to April 30, 2013
August 20, 2012 to March 28, 2013
May 12, 2011 to September 8, 2011
April 13, 2010 to November 10, 2010
March 28, 2010 to April 8, 2010
June 16, 2009 to December 16, 2009
July 4, 2008 to April 15, 2009
March 29, 2007 to July 17, 2007

Mr. Smiley stated that Mr. Ivker submitted applications for registration to OMVIC on or about May 16, 2011 and June 22, 2015 (Exhibit 3, Tabs 4 and 11). Question 1 of the Eligibility Section asks:

Does the applicant currently hold a valid Ontario driver's licence?

Mr. Ivker answered "Yes" on both applications, even though his licence was under suspension when the applications were submitted, namely from May 12, 2011 to September 8, 2011 and May 8, 2015 to July 14, 2015.

On the two applications, Question 5 of the Eligibility Section asks:

[Has the registrant] **ever** been found guilty or convicted of an offence **under any law** or are there any charges pending? (emphasis added on application forms)

Mr. Ivker answered "Yes" on both applications.

On the two applications, Question 6 of the Eligibility Section asks:

[Has the registrant] disclosed all pending charges or convictions on a previous OMVIC application?

Mr. Ivker answered "Yes" on both applications. Mr. Ivker also disclosed that he had been convicted of "Theft Under 1,000" in 1984.

Mr. Smiley stated that he contacted the OPP to conduct a criminal record check on Mr. Ivker as part of the investigation. The criminal record check, which was performed on the Canadian Police Information Center ("CPIC"), revealed that Mr. Ivker was convicted of using a stolen credit card on June 22, 1983 and sentenced to two years' probation (paid restitution), and with "fraud over \$200" on August 13, 1985 and sentenced to 45 days in jail and two years' probation (paid restitution). There was no conviction for theft under \$1,000 on Mr. Ivker's criminal record. Further, the criminal record check revealed that Mr. Ivker was charged with uttering threats by York Regional Police on or about January 31, 2015.

This charge was dismissed on November 9, 2015. However, when he filed the June 22, 2015 application with OMVIC, it was still before the courts.

Ms. Mary Jane South is the Registrar of OMVIC. She has held this position since February 2015 and held the position of Deputy Registrar between 1997 and February 2015.

Ms. South stated that she has trouble believing Mr. Ivker's explanation that he made an honest mistake and intended to use his mother's credit card to pay for his OMVIC registration, given his prior criminal record and the amount of time which elapsed from the sale of the vehicle and the unauthorized use of the customer's credit card. Ms. South stated that the worst case scenario is that he knowingly used the customer's credit card. However, the "best" case scenario is that he was "fast", "loose" and "careless" with a customer's credit card information, and this too is entirely unacceptable and denotes a lack of integrity.

Ms. South indicated that she also has concerns about Mr. Ivker's suitability for registration because he failed to provide full disclosure and provided false information on numerous applications for registration to OMVIC.

Ms. South testified that on August 11, 2000, the Registrar issued a Notice of Proposal to refuse Mr. Ivker's application for registration as a salesperson because he failed to disclose four findings of guilt from the 1980s (use of a stolen credit card, false pretences over \$200, possession of stolen property under \$200 and fraud over \$200) and that his driver's licence was under suspension. Ms. South explained that on September 7, 2000 the proposal was settled by way of a Consent Order issued by the Tribunal. The terms and conditions of the Consent Order included:

Paragraph 1: The Applicant agrees, if he is criminally charged in the future, to immediately notify the Registrar, in writing, of the charges laid against him.

Paragraph 9: The Applicant agrees to provide full and complete disclosure on all future applicants [*sic*] and discussions with the Registrar, regardless of whether the disclosure has been previously provided to the Registrar.

Ms. South explained that although these terms and conditions were removed on November 18, 2014, Mr. Ivker should have been aware of the importance of providing full disclosure on the application forms, given that he came very close to having his registration refused in 2000 for failure to provide full disclosure.

Ms. South testified that the Appellant submitted two applications for renewal of his registration, one on February 17, 2015 and another on April 20, 2015. On the two applications, Question 5 of the Eligibility Section asks:

[Has the registrant] **ever** been found guilty or convicted of an offence **under any law** or are there any charges pending?

Mr. Ivker answered “Yes” on both applications.

On the two applications, Question 6 of the Eligibility Section asks:

[Has the registrant] disclosed all pending charges or convictions on a previous OMVIC application?

Mr. Ivker answered “Yes” on both applications.

Ms. South testified that the Appellant provided false information in response to Question 6 on both applications, as he had not previously disclosed the 2015 pending criminal charge for uttering a threat, and this charge had not been dismissed at the time these applications were submitted.

Ms. South also testified that on February 19, 2015, a representative of the Registrar asked the Appellant for a detailed statement regarding his answer of “Yes” on the February 17, 2015 application. On March 7, 2015, the Appellant explained he was convicted of credit card fraud in 1983, but failed to disclose the 2015 pending criminal charge for uttering a threat.

Ms. South stated that Question 8 of the Eligibility Section of the current application form asks:

Has the registrant **ever** been found guilty or convicted of an offence **under any law** or are there any charges pending? (emphasis added on application forms)

Mr. Ivker answered “Yes”.

Ms. South stated that as part of the application, a detailed statement is required for any answers of “Yes”. The Appellant disclosed he was convicted of theft under \$1,000, however, he failed to disclose the 2015 pending criminal charge for uttering a threat.

Ms. South testified that Ministry of Transportation records indicate that the Appellant was convicted of over 50 driving related offences (between 1984 and 2013) including, driving while his licence is suspended, no driver’s licence or improper class, failure to produce driver’s licence, failure to have valid permit, failure to surrender permit, failure to display plates, failure to have insurances, disobeying traffic signs, speeding and careless driving. She testified that the Appellant failed to disclose any findings of guilt for driving related offences on nine of the applications he submitted to OMVIC between September 12, 2005 and June 22, 2015.

Ms. South stated that she asked one of her staff to obtain a credit check on Mr. Ivker on June 26, 2015, which revealed he had 12 collections (10 outstanding, two closed) with a total balance of \$12,569. The collections were reported in or around February 2013 (Exhibit 3, Tab 6).

Ms. South stated that Mr. Ivker submitted renewal applications on eight occasions (April 10, 2013, June 17, 2013, February 11, 2014, August 27, 2014, November 17, 2014, February 17, 2015, April 20, 2015 and June 22, 2015). She stated that on the eight applications, Question 3 of the Eligibility Section asks:

Are there any unsatisfied judgments, court orders, collections currently pending against the registrant/applicant?

The Appellant answered “No” on all applications.

Ms. South stated that Mr. Ivker therefore provided false information in response to Question 3 on all eight applications. Ms. South testified that one of her staff requested information from Mr. Ivker as to why he answered “No” to Question 3 on his current June 22, 2015 application. He explained that he was not aware of the collections, but indicated that now that he knows about them he will make arrangements to settle them as soon as possible. Ms. South stated that another credit check was performed on September 1, 2015, and it revealed that Mr. Ivker still has 12 collections (10 outstanding, two closed) with an increased total balance of \$12,625.

Mr. Ivker testified on his own behalf. He repeated that he never intended to use a customer’s credit card and made an honest mistake, believing he was using his mother’s credit card. He indicated he had his mother’s permission to use her credit card and often used it. He filed a letter from his parents, RI and SI, dated April 2, 2016, stating that he had his mother’s authorization to use her credit card whenever he needed and that he paid her \$175 the day before he used her card.

Mr. Ivker apologized for what happened and promised he would be more careful in the future if he was given another chance. He stated that he has been unemployed for a year and that he needs to be able to work in his field. He is 55 years of age and has worked in the car business all of his adult life. This is the only business he knows and it will be next to impossible for him to change professions at this stage of his life. Without a job, he has no way of paying his debts.

Mr. Ivker also testified that he has applied for a pardon for his criminal convictions from the 1980s. A copy of a letter dated December 16, 2015 (from Pardon Applications of Canada), confirming that Mr. Ivker has applied for a pardon and that the application is being processed before it is submitted and reviewed by the Parole Board of Canada for their independent decision, was filed with the Tribunal.

Mr. Ivker stated that he did not disclose the charge for uttering threats because it was a personal, domestic matter and he knew it would be dismissed or withdrawn. He did not disclose his driving convictions because he thought the question on the application only applied to criminal charges and convictions. When he applied for registration on June 22, 2015, he thought that his driver’s licence was no longer under suspension. He stated that he did not know there were judgments against him, which is why he didn’t disclose them.

THE LAW

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;

...

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.

ISSUES

Does the Appellant's past conduct afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty?

Did the Appellant make false statements or provide a false statement in an application for registration or renewal of registration?

APPLICATION OF LAW TO FACTS

Compliance with the Law, Integrity & Honesty (Section 6(1)(a)(ii))

The Tribunal has difficulty accepting the Appellant's explanation for the unauthorized use of a customer's credit card, that is, that he thought he was using his mother's credit card, given his history of non-compliance with various laws and of false statements and failure to provide full disclosure on multiple renewal applications with OMVIC.

The fact that the Appellant's mother's name was listed as the owner of the credit card on the OMVIC form does not mean he believed he was using his mother's credit card.

As Ms. Samler argued in submissions, it could have been an effort to “cover his tracks”. He testified that he frequently used his mother’s credit card with her permission. However, his mother’s credit card was a Visa credit card, and the customer’s credit card was a MasterCard. The year of expiry was also different on the two credit cards. Moreover, it does not add up that he requested the customer’s credit card information (the second time) for the purpose of reimbursing a small overpayment since he never reimbursed the overpayment. It was the Dealership’s policy not to reimburse overpayments under \$20 and no one at the Dealership directed him to obtain the customer’s credit card number for the purpose of processing the reimbursement.

The letter from his parents, stating that he paid his mother \$175 the day before he thought he used her credit card, was not tested under cross-examination and, therefore, the Tribunal gave very little weight to it. The Appellant also did not say anything about reimbursing his mother the \$175 the day before he used her credit card during his interview with the OMVIC investigator. Further, at the hearing, under cross-examination, he ultimately acknowledged that he did not know whether he reimbursed his mother the \$175 before or after he purportedly used her credit card.

The Tribunal might be more inclined to believe that this was an unintentional mistake if the Appellant had an otherwise clean record. However, this Appellant does not have an unblemished record.

The Appellant was found guilty of using a stolen credit card under false pretenses over \$200, possession of stolen property under \$200 and fraud over \$200 in the 1980s. He has a lengthy history of *Highway Traffic Act* violations, including 11 suspensions of his driver’s licence between 2007 and 2015, for unpaid fines and driving while his licence was suspended. In addition, he has been convicted of over 50 driving related offences (between 1984 and 2013). The Appellant also has a history of failing to provide full disclosure on multiple renewal applications for registration with OMVIC.

The Tribunal agrees with Ms. South that even if it accepts that the Appellant believed he was using his mother’s credit card, it was an extraordinarily careless and reckless mistake which denotes a lack of respect for the client’s personal, confidential financial information. It was also lacking in honesty and integrity to request and obtain the client’s credit card information (the second time) for the stated purpose of reimbursing him a small overpayment and then never providing that reimbursement.

The number of times his driver’s licence has been suspended for unpaid fines and driving while his licence was under suspension between 2007 and 2015, and the 50 driving related convictions (between 1984 and 2013), is a concern in and of itself, but particularly given that the Appellant is seeking to be registered in a field where he is required to drive, as part of the employment responsibilities of a car salesperson. Eleven driver’s licence suspensions in eight years and 50 *Highway Traffic Act* convictions point to a disturbing pattern of non-compliance with the law, including a law related directly to his employment.

The Appellant argued in closing submissions that his “history” (including his criminal record which dates back to the 1980s, his driver’s licence suspensions and *Highway Traffic Act* convictions, and his credit history) is “irrelevant” to this matter because it never interfered with his business practices. The test for registration under section 6 of the Act is “past conduct”. Section 6 does not limit the inquiry into past conduct which is proven to interfere with the applicant or registrant’s business practices. Moreover, given that it is a job requirement for salespersons to hold a valid driver’s licence, since they must be able to take customers on test drives, his driver’s licence suspensions would have directly interfered with his ability to carry out this employment responsibility in compliance with the law.

The Tribunal appreciates that the refusal of his registration will impact his livelihood and acknowledges that he has apologized and promised to be more careful and behave better in the future. As noted above, the test under the legislation is “past conduct” not “future intentions”. A review of the Appellant’s past conduct gives no indication that he has learned from his mistakes and remedied his behaviour.

The unauthorized use of a customer’s credit card, the failure to reimburse the customer for the overpayment (the stated purpose for requesting his credit card information the second time), the failure to provide full disclosure and to respond honestly to questions on multiple applications for registration, 11 driver’s licence suspensions, and 50 *Highway Traffic Act* convictions, all afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

False Statements (Section 6(1)(a)(iii))

The Appellant was, in effect, given a second chance in 2000, when a NOP to refuse his registration for failing to disclose four findings of guilt from the 1980s and that his driver’s licence was suspended, was settled by way of a Consent Order with terms and conditions of registration.

Given that he almost lost his registration in 2000, there was no excuse for him not understanding the importance of providing full and accurate disclosure on the OMVIC application forms.

The Appellant clearly did not learn a lesson from this experience:

- On his February 17, 2015 and April 20, 2015 applications for registration, he answered that he had disclosed all pending charges on a previous application when he had not disclosed the 2015 pending criminal charge for uttering a death threat. This charge had not been dismissed when he made these two applications.
- On his May 16, 2011, April 20, 2015 and June 22, 2015 applications for registration, he answered that he holds a valid Ontario driver’s licence when his licence was in fact suspended.

- On at least nine applications submitted to OMVIC between September 2005 and June 2015, he failed to disclose his *Highway Traffic Act* convictions.
- On eight applications submitted to OMVIC between 2013 and 2015, he answered that he had no judgments, court orders or collections currently pending against him, when there were collections pending against him during this time period in the approximate aggregate amount of \$12,000.

The Appellant's explanation that he did not know about the driver's licence suspensions and about the collections was not credible. The Tribunal found him to be evasive and dismissive when cross-examined on his explanation.

His explanation that he thought he only had to disclose criminal convictions defies a plain language reading of the question on the application form. None of the applications use the word "criminal" offences. Rather, the question on the form clearly asks whether the applicant or registrant has "ever been found guilty or convicted of an offence under any law" (emphasis added on application forms).

Further, the Appellant acknowledged that he knew about the charge of uttering threats, but chose not to disclose it because it was a private domestic matter which he knew would be dismissed or withdrawn. As such, he acknowledged making a conscious and deliberate decision to conceal the charge on the application forms.

Based on the evidence, the Tribunal finds that the Appellant did not provide full disclosure and provided false information in relation to multiple questions on multiple applications for registration between 2005 and 2015.

ORDER

Therefore, 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 the registration of the Appellant as a salesperson under the Act.

LICENCE APPEAL TRIBUNAL


Jacqueline Castel, Member

Released: May 19, 2016