

August 23, 2010

MEMORANDUM

Re: Roberto Towing Auto Services Inc and I. Iraheta v. Registrar of Motor Vehicle Dealers Act

Enclosed herewith please find a copy of the Decision of the Licence Appeal Tribunal with respect to this matter.

DISTRIBUTION LIST:

Justin M. Jakubiak, Applicant's Counsel
Christopher L. Ezrin, Respondent's Counsel

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ROBERTO TOWING AUTO SERVICES INC. AND I. IRAHETA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT 2002*, R.S.O. c. M.42

TO REFUSE REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: C.EZRIN, Counsel representing the Registrar, *Motor Vehicle Dealers Act, 2002*

J. JUKUBIAK, Counsel, representing Roberto Towing Auto Services Inc. and I. Iraheta

DATE OF HEARING: July 5 and July 6, 2010 TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises out of a written Notice of Proposal, dated March 5, 2010, issued by the Registrar under the *Motor Vehicle Dealers Act, 2002* (the "Act") to refuse the applications of both Roberto Towing Auto Services Inc. (the "corporate Applicant"), owned and operated by Mr. I. Iraheta, to be a registered motor vehicle dealer under the Act, and Mr. I. Iraheta (the "Applicant") to be a registered salesperson under the Act.

Numerous particulars for the refusals were set out in the Proposal (Exhibit 1), some of which were admitted by the Applicants and some of which were withdrawn by the Registrar prior to hearing the evidence. In sum, the Registrar's concerns, as described in the opening statement of Counsel, were the following:

- (1) a history of prior convictions,
- (2) a history of non-responsiveness to queries made by the Registrar; and

(3) failure to remit sales tax.

As the hearing continued the further issue of the Applicants' continuing to sell vehicles whilst unregistered, became a significant concern.

In response, Mr. Iraheta's position was that his convictions were in some cases disclosed and in others were reasonably not disclosed; the communication history between the Parties demonstrated the Applicants were reasonably responsive to the on-going and repetitive requests for information made by the Registrar's office, and, finally, that the alleged failures to remit sales tax are in fact under appeal with the relevant tax authority.

EVIDENCE

Shannell Leggard is an employee with the Ontario Motor Vehicle Industry Council ("OMVIC"), the regulatory authority responsible for registered salespeople and dealers in the Ontario motor vehicle industry. During the relevant time period, Ms Leggard worked in the registration department where her duties included the processing of registration applications. In the course of these duties she reviewed the application for registration of the corporate Applicant dated September 10, 2008 (Exhibit 3, Tab 5), as well as the application for salesperson registration of the Applicant (Exhibit 3, Tab 6) – also received in September 10, 2008.

Financial records disclosed for the corporate Applicant suggested insufficient capital to operate. As well, further information concerning funding was required. In addition, Ms Leggard noted a negative response to the question of prior bankruptcy, despite the fact that both it and criminal record checks later undertaken by her reveal an earlier bankruptcy and additional criminal charges, beyond those disclosed on the application.

In a conversation with Mr. Iraheta on September 23, 2010, the Applicant advised he would supply the OMVIC office with additional information. This information included bank statements showing the corporate Applicant had received two different infusions of funds: one cheque in the amount of \$125,000.00 (which subsequently was returned NSF by the bank); and another deposit of over \$18,000.00. Mr. Iraheta informed Ms Leggard that the latter funds were a loan from a family member overseas. She requested additional information as to the source of the funds which she asserted was important information to the Registrar, given the potential influence a funder of that amount can wield over a registrant.

In November the Applicant wrote to advise the monies were a loan repayment from his employee/cousin. Ms Leggard passed her file on to her supervisor who again wrote the Applicant, in January, 2009, requesting further verification as to

the origins of the money (Exhibit 3, Tab 14). The Applicant responded again that it came from his employee, "O", as a loan. When, in February, the supervisor further questioned the source of the money, the Applicant advised he had no access to "O"'s bank information and thus was unable to provide source details other than the cancelled cheque (Tab 17).

In cross examination Ms Leggard conceded that the Applicants did respond to OMVIC's requests for further information with reasonable promptness. She also advised that, given that bank records do not generally disclose the origin of funds an applicant might have, it is usual for OMVIC to request such information from the Applicant. She further acknowledged that other criminal charges of concern to the Registrar were later dropped by the Crown and that Mr. Iraheta had in fact disclosed his earlier bankruptcy in his first application for registration with OMVIC in 2004.

Jennifer Brake is an employee with the Ministry of Revenue, Collection Branch, (the "Ministry") where she has worked for twenty-eight years. The retail sales tax collected by vendors in the province is characterized as trust funds. The province relies on business people to collect and deposit such monies for the benefit of the community's revenue base. The Ministry informs and advises vendors of their obligations concerning collection by providing vendor permit applicants with a package laying out such information and encouraging those individuals to contact service representatives employed by the Ministry for explanation, assistance and/or further information.

Ms Brake testified that the Ministry advised the corporate Applicant that it is deemed to be close to \$51,000.00 in arrears. This arrears amount is based on Ministry estimated returns since December, 2008 because of the corporate Applicant's failure to file such returns. The Ministry has attempted to contact the corporate Applicant by telephone regarding the outstanding debt and has issued two written Final Notices despite its usual process of only issuing one such Final Notice. Despite all of the above, the corporate Applicant has failed to remedy the arrears outstanding, and has not requested any appeal of the Ministry findings.

In cross-examination Ms Brake conceded that the actual sum of tax revenues not remitted was \$12,593.52, given the most recent remittance of 648.99 in September, 2007 which, when added to previous payments, resulted in its total payment of \$5,293.64 on an assessed amount owing of \$18,484.55. The remaining \$39,000 deemed owing consisted of penalty and interest charges.

Ms Brake also provided copies of Ministry written communications to Mr. Iraheta's earlier registered sole proprietorship which had operated from 2003 – 2007. It too was deemed to owe Retail Sales Tax based on late and omitted filings. The amount outstanding consists of a deemed audit figure of \$19,282.00, which, when penalties and interest are added, is a debt due of \$55,000.00.

Similar to the newly incorporated entity, the sole proprietorship has also failed to either respond to Ministry notices or appeal its estimated returns. Given this, the Ministry wrote to OMVIC offices on March 9th, 2010 to advise that the corporate Applicant was not financially responsible in the conduct of business and request the Registrar propose revocation of its registration under the Act (Exhibit 3, Tab 26). A similar letter was directed to the Registrar from the Ministry on March 8, 2010 regarding the Applicant (Exhibit 3, Tab 27).

Mary Jane South is the Deputy Registrar of OMVIC. Her primary function is to oversee the registration staff and process. She testified that applicants are entitled to registration unless they fail to meet certain requirements set out in the Act. An essential element concerns an applicant's honesty and integrity which the Registrar assesses, in significant part, on the disclosure provided by an applicant to questions contained in the application form. In this case both the individual Applicant and the corporate Applicant failed to disclose Mr. Iraheta's prior bankruptcy. In addition, checks conducted by Ms. South demonstrated two prior convictions for false documents/inadequate records, which had not been disclosed, that had been registered against the earlier sole proprietorship originating from a regulatory inspection (Exhibit 3, Tab 21). Further driver history searches undertaken by the Registrar's office revealed a number of driving convictions and fines levied on Mr. Iraheta from 1984 through 2004, none of which had been disclosed in response to questions on the application requiring disclosure of convictions.

Ms South concluded that the lack of disclosure in both applications signed by Mr. Iraheta were of grave concern given the fact that the business of a motor vehicle salesperson and dealer is predicated on disclosure to consumers. Moreover, earlier bankruptcy and convictions under related legislation such as the Highway Traffic Act and related regulatory legislation were also highly relevant.

Information provided in the applications revealed two sources of unidentified and unusual funds which Ms South noted Mr. Iraheta never adequately explained. Despite a number of months of back and forth communications and numerous written requests from the Registrar's office, the Registrar still does not know where the funds originate. Ms South concluded that the Applicants' varied responses to her office's request for information as to funding sources remained of great concern. She noted that Mr. Iraheta had first advised the funds were from a family member, then later that they were a pay back from his employee and then later proffered a third explanation that they represented a loan from that employee.

Ms South provided a copy of Terms and Conditions entered into by Mr. Iraheta when first registered as a sole proprietorship in 2004 (Exhibit 3, Tab 1). At that time, these Terms and Conditions were required to be met by new dealers to ensure certain requirements for business were clearly understood. Condition

#26 sets out the obligation concerning remittance of retail sales tax; Condition #27 articulates the Registrar's right to be provided within a reasonably short and specified time frame with information concerning new sources of funding. There is also a condition which makes clear the prohibition of trading vehicles without registration. In regards to this last requirement, Ms South relied on documentation from the Ministry of Transportation showing that, despite not receiving approval for registration since 2008, the corporate Applicant had apparently continued trading. Over 40 traded vehicles were registered as being transferred into and out of its possession since the 2008 lapse of registration.

In response to a proceeding commenced by OMVIC against the Applicant before the regulatory authority's Discipline Panel in 2008, the Registrar and Applicant agreed to a settlement which included the Applicant accepting additional conditions on its licence for registration. One was a condition setting out the requirement for any salesperson connected with the dealership to undertake additional training which Ms South alleged had not been completed by either Mr. Iraheta or his employee "O".

Mr. Iraheta's evidence was that he had successfully owned and operated a sole proprietorship registered dealership without any consumer complaints and/or issues for four years from 2004 through to 2008 when he applied for registration under his newly incorporated business name. This most recent application had, however, caused him months of uncertainty, months of frustration and finally, one and a half years later, resulted in the Proposal of the Registrar to reject his request.

The Applicant claims that not one of the grounds upon which the Registrar relies is, substantial. Mr. Iraheta noted that he had received a pardon for one of the convictions he allegedly failed to disclose; he had disclosed his bankruptcy when first registered and had no idea it was necessary for him to repeat the same disclosure each and every time he re-applied; he had admittedly not disclosed various speeding tickets and other traffic violations but queried how relevant such were for registration as a salesperson and/or dealer; he admitted his failure to commence the re-training as required under the Terms and Conditions and explained this as a lapse which, once reminded of the requirement, he had rectified by now registering for that training. Regarding the retail sales tax, Mr. Iraheta acknowledged that he had arrears, but relied on the fact that he had made numerous payments during his earlier registration and that the vast amount of what was currently deemed owing consisted of interest and penalty. He had hired a bookkeeper, three years prior who had filed an appeal of the Ministry of Revenue's assessments. As to the vehicles he had traded since 2008, Mr. Iraheta believed he was entitled to sell up to ten vehicles annually without benefit of registration and the others had all been sold outside the country and therefore were not predicated on provincial consumer protection registration requirements such as OMVIC.

Mr. Iraheta is married and supports his family. The family first came to Canada in 1980 and are now Canadian citizens. Since the age of eighteen he has been in the car business, other than the first few years of coming to this country when he was employed as a cleaner.

The original sole proprietorship grew out of a garage where he worked for eight years. Both it and the new business consist of a licensed mechanical shop, a motor vehicle inspection station (the subject of the inadequate records leading to earlier convictions) and a body shop. He has one employee, "O".

His English language skills being somewhat imperfect, he relied on his wife to assist him in completing the application forms. All further information he had provided to the Registrar's office promptly when asked, often after consultation with his lawyer. The reason he had not taken the ongoing training course as required was only because he was not aware of his commitment to do so and, once reminded by his Counsel, had registered. It was to commence in the week following the hearing.

Ashok Kumar operates a tax/accounting/book-keeping service. He testified he had been hired by Mr. Iraheta "over one year ago" to assess his finances. As a result he filed a "Notice of Objection" with the Ministry of Revenue concerning its assessment of the Applicants' outstanding tax debts. The filing was by regular mail dated January 14, 2010.¹ Although he has received no response from the Ministry to date, such is not unusual as often objections/re-assessments take a number of years to resolve.

In cross examination Mr. Kumar advised he has only known Mr. Iraheta for one year and maybe two months. He conceded that the Notice of Objection he prepared was filed late, but understood a simple request for re-assessment was sufficient to initiate the review process nonetheless.

Jennifer Brake was called for reply evidence. She stated that the Ministry has still not received any Notice of Objection or appeal concerning the Applicants' two assessments. Further, an appeal filed over two years late, as was alleged to have occurred by Mr. Kumar, was so completely out of time that it would most certainly be disallowed.

The Law

The following provisions of the Act are particularly relevant:

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

¹ See copies of letters faxed to Tribunal by the Applicants' Counsel on July 9, 2010 signed by Kumar and directed to the Ministry of Revenue formally objecting to Ministry audits for the period ending December, 2007.

(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;

(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). 2002, c. 30, Sched. B, s. 6 (1); 2004, c. 19, s. 16 (4-6).

(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. 2004, c. 19, s. 16 (7).

(2) A registration is subject to such conditions as are consented to by the applicant or registrant, as are applied by the registrar under section 9, as are ordered by the Tribunal or as are prescribed. 2002, c. 30, Sched. B, s. 6 (2).

(3) A registration is not transferable. 2002, c. 30, Sched. B, s. 6 (3).

(4) For the purposes of this section, a person shall be deemed to be an interested person in respect of another person if the person is associated with the other person or if, in the opinion of the registrar,

(a) the person has or may have a beneficial interest in the other person's business;

(b) the person exercises or may exercise control either directly or indirectly over the other person; or

(c) the person has provided or may have provided financing either directly or indirectly to the other person's business. 2002, c. 30, Sched. B, s. 6 (4); 2004, c. 19, s. 16 (8).

s.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. 2004, c. 19, s. 16 (10).

s.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. 2002, c. 30, Sched. B, s. 9 (1); 2004, c. 19, s. 16 (11).

(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. 2002, c. 30, Sched. B, s. 9 (2).

(5) If a hearing is requested, the Tribunal shall hold the hearing and may by order direct the registrar to carry out the registrar's proposal or substitute its opinion for that of the registrar and the Tribunal may attach conditions to its order or to a registration. 2002, c. 30, Sched. B, s. 9 (5).

The following section of the Regulation 333/08 is also relevant:

S. 11 (1) The following are prescribed, for the purposes of subsections 5.1 (1) and 6 (1) of the Act, as requirements for registration or renewal of registration as a motor vehicle dealer:

1. The fee required under clause 9 (b) is paid.
2. If the applicant is an individual, the applicant is at least 18 years of age.
3. The applicant does not owe money to the Crown under the Retail Sales Tax Act or, if the applicant does owe such money, the applicant has made arrangements, acceptable to the Ministry of Finance, to pay the money.
4. Every person who is associated with the applicant as described in subsection 1 (2) of the Act also satisfies the requirements set out in paragraph 3.

Decision and Order

The Registrar relied on the Tribunal decision of *Khambiz Barghi and Canada Car Import Inc. o/a Canada Car Import v. Registrar, Motor vehicle Dealers Act* (LAT, released October, 2009) for its position that the public needs to be protected from the Applicants given their disregard of their fiduciary obligations concerning retail sales tax. In that decision Vice-Chair D'Amours noted:

"The Applicants' failure to comply with the reporting and remittance provisions of the *Retail Sales Act* establishes that they have not carried on business in accordance with the law. The taxes collected from consumers are entrusted funds which the Applicants do not have the discretion to allocate at pleasure. The deviant use of the tax funds is fraudulent and dishonest. Consumers must be protected from motor vehicle dealers and salesperson (sic) who disregard statutory fiduciary obligations."

Counsel for the Registrar submitted that this decision, released prior to the enactment of the current Act, (which, by virtue of Regulation, now makes it mandatory for registrants to be compliant with the *Retail Sales Tax Act*) acts as a bar to the Applicants' gaining registration under the Act.

Counsel for the Applicants stressed that, unlike the facts of that case, in this matter his clients had in fact made regular payments of these taxes up until 2008 and have initiated an appeal of the Ministry findings that it is delinquent in remittances.

While the facts do establish that the Applicants did make some payments as obligated under the *Retail Sales Tax Act*, they also establish that neither has continued with this obligation in recent years. The facts also demonstrate that the appeal, if filed, was filed after numerous notices had been sent by the Ministry over a period of many months, advising of the arrears. There is also the question raised by the witnesses as to whether the appeal was filed correctly or was ever received by the correct authority. There is also some disturbing contradiction in

the evidence of Mr. Iraheta and Mr. Kumar as to how promptly the consultant was hired by the Applicants. The Applicant testified it was three years ago but the consultant was clear it was less than one and a half years ago.

Based on this evidence, the Tribunal is not convinced that the Applicants have acted responsibly and responsively to the Ministry's clear requirements for further filings.

Given this finding, even were the amount of the alleged arrears be found on appeal (if the appeal is accepted), to be less than that currently claimed by the Ministry, the fact remains that as of this date the Applicants are not compliant with section 11 of the Regulation. They have not arranged for satisfactory monetary payments to the Ministry. Moreover, the evidence demonstrates that when contacted for an explanation, the Applicants chose to ignore rather than co-operate with the Ministry. As a consequence, regardless of conclusions this Tribunal may reach as to the effect such actions has on implications for honesty and integrity, there is no doubt the applications failed to comply with the requirements now mandatory upon them as registrants under the Act. As such, they have failed to meet the legislative requirements for registration and thus their applications must properly be denied on this basis.

The Tribunal is not convinced that Mr. Iraheta failed to co-operate with the Registrar's demands for on-going information as to the source of the financing as alleged. It also does not conclude that the three responses received from the Ministry over the source of those funds reasonably led to a conclusion that the Applicants lack the integrity and/or honesty required of a registrant.

However, the Tribunal is concerned that convictions stemming from inadequate record keeping as required by the regulatory legislation concerning the Applicants' inspection station were not disclosed as required.

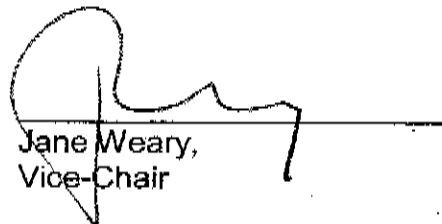
It is also concerned that, despite signing terms and conditions clearly agreeing not to trade/sell vehicles without registration, the facts establish a number of such trades having taken place by Mr. Iraheta since his registration lapsed in 2008.

Consequently, the Tribunal finds that there are sufficient grounds to conclude that the past conduct of Mr. Iraheta affords reasonable grounds for belief that the Applicants will not carry on business in accordance with the law and with integrity and honesty.

Order

By virtue of the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out his Proposal to Refuse the registration of the Applicants.

LICENCE APPEAL TRIBUNAL



Jane Weary,
Vice-Chair

RELEASED: August 23, 2010

This decision, which is being released to the parties in this proceeding, may also be posted on the Licence Appeal Tribunal's website www.lat.gov.on.ca in approximately three weeks time. The decision may also be available on Quicklaw at a later date. However, the Applicant's name will not appear in the decision nor will the name of any witnesses or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

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.