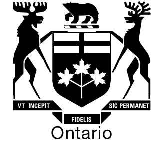
**Licence Appeal Tribunal** | **Tribunal d'appel en matière de permis**




DATE: 2013-08-29
FILE: 8098/MVDA
CASE NAME: 8098 v. Registrar, Motor Vehicle Dealers Act, 2002

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Appeal from a Notice of Proposal of the Registrar under The *Motor Vehicle Dealers Act, 2002* S.O. 2002, C. 30, Sch. B to Refuse a Registration

Andrew Edward Olejko

Applicant

-and-

Registrar, Motor Vehicle Dealers Act, 2002

Respondent

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**ORDER**

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**ADJUDICATOR:** D. Gregory Flude, Vice-Chair

**APPEARANCES:**

**For the Applicant:** Self-Represented

**For the Respondent:** Jane Samler, Counsel

Heard in Guelph: August 22, 2013

**Reasons for Decision and Order**

[1] The Applicant appeals to this Tribunal from a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act, 2002* S.O. 2002 C. 30 Sched B (the "Act") to refuse him registration as a motor vehicle salesperson. The Registrar's proposal to refuse registration is based on a sequence of events that occurred in 2007.

[2] The Tribunal heard from three witnesses: Mary Jane South, the Deputy-Registrar, Amadeo Cuschieri, a TTC manager who had first reported the theft suspicions to TTC security and the Applicant. The underlying facts are not in dispute. On February 22, 2007, the Applicant was relieved of his duties as a repairperson in the Revenue and Security Equipment Maintenance Department, Subway Equipment of the Toronto Transit Commission ("TTC"). After a report that the Applicant and his supervisor were stealing tokens, TTC internal security set up covert camera surveillance at the Bedford Park entrance to the Lawrence Subway Station. The Applicant and his supervisor were filmed manipulating the "high gate" turnstiles to collect tokens in a rag inserted into the machine to prevent tokens from dropping into the secure vault. To increase the yield of tokens, the Applicant and his supervisor disabled the other turnstile by taping the token slot closed. They were then seen to remove the harvested tokens. On the first occasion, the Applicant filled in a work card stating that he had cleared a jam from the turnstile. No jam had been reported and the video surveillance showed the turnstile operating normally before the Applicant worked on it. On two other occasions, the Applicant filled in no work cards.

[3] The Applicant was charged with, *inter alia*, theft and fired from his job shortly after he was relieved of his duties. On September 21, 2007, he applied for registration under the predecessor of the Act and disclosed his pending criminal charges. The Registrar issued a Notice of Proposal to refuse him registration and the Applicant did not appeal. His explanation for not appealing was that the dealership he was planning to work for got into financial trouble and closed and, since he was aware that his charges were still pending, he thought that by doing nothing he was withdrawing his application. The Registrar issued a Final Notice in December 2007.

[4] Of the five counts the Applicant was charged with, two were dropped prior to trial and the other three came on for trial in January 2008. On the second day of trial, the TTC disclosed a new document to the Crown prosecutors who then disclosed it to the defence. The defence counsel sought an adjournment and, because an adjournment would lead to a dismissal for delay, the charges were dismissed. There never has been a determination of the merits of the case in a criminal court.

[5] The Applicant's union, the Amalgamated Transit Union, Local 113, filed a grievance against the Applicant's dismissal. At issue was a provision of the collective agreement that mandated termination if the arbitrator found the Applicant to have committed theft (see *Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Olejko Grievance)* [2010] O.L.A.A No. 147, 193 L.A.C. (4$^{th}$) 273). In a lengthy decision, Arbitrator Harris reviewed all of the evidence, including the Applicant's

assertion that he was simply acting under the orders of his supervisor at the time of the alleged theft, and found that the Applicant's explanation was not credible and that, on a balance of probabilities, the Applicant had committed theft as that term is used in the *Criminal Code*. The Arbitrator upheld the Applicant's dismissal.

[6] Mr. Olejko applied again to be registered as a motor vehicle salesperson on March 19, 2013. He answered the two questions regarding previous refusals of registration both under the Act and pursuant to any other legislation in the negative. He was asked for an explanation and stated:

> Section B, Question 1:
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> It was my understanding back in 2008 that my application was not processed, due to the alleged charges against me. These charges were totally unfounded due to false accusations, thereby the case was dismissed.
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> Section D, Question 2:
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> At the time I had applied for my licence in 2008, while working at Summit Dodge, my application was not processed (put on hold) pending the outcome of the alleged charges whereby I was cleared of any charges.

Given that the criminal charges were not decided on their merits, the Registrar takes the position that the first answer is deliberately misleading and an attempt to minimize the Applicant's culpability in the theft scheme.

[7] Notwithstanding that the Applicant provided no contemporaneous explanation of his actions at the time of his arrest, starting with the arbitration in 2010, he has continually asserted that he and his supervisor were harvesting tokens to test turnstiles because of complaints about jams with the new bimetal tokens that had just come into use. He testified at the arbitration and before this Tribunal that he was simply following the instructions of his supervisor to harvest tokens in such a manner. He made these assertions despite the fact that he had approximately 25 years' service with the TTC, was well aware of policies regarding the handling of tokens and testing of machines and had worked in a management capacity from time to time. As stated above, the arbitrator did not accept this explanation. Mr. Cuschieri testified that when he viewed the video surveillance footage it was clear what was going on. He saw both the Applicant and his supervisor "rig" the turnstile in a manner that was not normal repair procedure.

[8] The Applicant testified that he thought his 2007 application for registration had not been processed but had been withdrawn. He acknowledges receiving the Notice of Proposal from the Registrar as well as the Final Notice, but states that he just threw them away unopened because he was abandoning his application.

**ANALYSIS**

[9] The Registrar relies on several sections of the Act. The section dealing with

registration generally is s. 6, the relevant parts of which state:

> **6.** (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
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> (a) the applicant is not a corporation and,
>
> (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
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> (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;

[10] While it is clear from a reading of s. 6 that the onus is on the Registrar to establish that an Applicant is not entitled to registration, the Registrar also relies on s. 12 which establishes an onus on the Applicant to justify registration.

> **12.** A person whose registration is refused, revoked or refused renewal may reapply for registration only if,
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> (a) the time prescribed to reapply has passed since the refusal, revocation or refusal to renew; and
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> (b) new or other evidence is available or it is clear that material circumstances have changed.

The prescribed time is 2 years so that factor is not in issue. The threshold question to be decided pursuant to s. 12 is whether there is new or other evidence or a material change of circumstances. Until that question is decided, the Tribunal cannot embark on an analysis of s. 6.

[11] While the wording of s. 12 is not evaluative of the nature of the new or other evidence or material change in circumstances, the Tribunal is of the view that it addresses evidence that, if available at the time of the first refusal, would have modified the outcome. Any other interpretation leads to ridiculous results. For instance, evidence that an Applicant had been charged with much more serious moral turpitude offences since his refusal constitutes new or other evidence and a material change in circumstances, but to permit an application to proceed on that basis would be a waste of administrative resources and is clearly not contemplated in the statutory scheme.

[11] The Tribunal accepts that there have been a number of developments since 2007. The Applicant has had the criminal charges against him dismissed. The presumption of innocence is the major underpinning of our criminal justice system. The dismissal of the criminal charges, whether on procedural grounds, entitles the Applicant to state that he is not guilty of the crimes with which he has been charged. The Crown failed to satisfy its evidentiary and procedural onus of proving the Applicant’s guilt beyond a reasonable doubt. Notwithstanding the Crown’s failure, the Applicant has been found to have committed theft on a balance of probabilities.

[12] The Registrar submits that the decision of Arbitrator Harris precludes the Applicant from denying that he was involved in a scheme to steal tokens from the TTC. The Registrar relies on the decision of the Divisional Court in *Registrar, Motor Vehicles Act v. Jacobs*, 2004 CanLII 9450 (ON SCDC). In *Jacobs* this Tribunal accepted the applicant's evidence that his criminal convictions for fraud had resulted from sloppy bookkeeping and not from any real criminal intent. On appeal to the Divisional Court, the Court held that it was not open to the Tribunal to question any of the essential elements of his conviction including the intent to commit fraud. The Court cited the decision of the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR 77. That decision reviews the whole area of abuse of process, issue estoppel, *res judicata* and collateral attack. With respect to collateral attack, Justice Arbour states:

> 33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack
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> > has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed.
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> It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
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> Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

[13] There was no evidence before the Tribunal that an appeal or judicial review application was taken against Arbitrator Harris's decision. It is thus final and it is not this Tribunal to make any finding inconsistent with it. To do so would be to permit a collateral attack on that decision. Thus, if there is new or other evidence, pursuant to s. 12 it is not evidence that assists the Applicant.

[14] There is also the fact that the events leading to the Applicant's dismissal and

charges occurred over six years ago. While the lapse of time itself is not a change of circumstances, as Vice-Chair Sanford said in the *Koo* decision (*7340 v. Registrar, Motor Vehicle Dealers Act 2002*, 2012 CanLII 52462 (On LAT)):

> If there is sufficient evidence that a criminal has paid his debt to society, taken responsibility for his actions, taken material and concrete steps to reform and achieved success in sustaining a life of honesty and integrity, then the Tribunal is entitled to take these factors into consideration.

As in the *Koo* case, there is a dearth of evidence in support of the factors set out above. The Tribunal notes that the term “criminal” does not apply to the Applicant but it is incontrovertible that he was terminated from the TTC for theft. He has not taken responsibility for those actions. In all of his correspondence with the Registrar he has attempted to minimize his actions, not own them, put them behind him and move ahead with his life. No *viva* voce character evidence was advanced on behalf of the Applicant. The sole character reference (Ex 4.) was a letter from his proposed employer stating that the employer is aware of the Applicant’s past but is prepared to hire him because he is a good worker. In light of the Applicant’s denials, the Tribunal agrees with the Registrar’s submission that there can be no confidence in the extent of the Applicant’s disclosure to his employer.

[15] The Tribunal finds that there is no new or other evidence or material change of circumstances. Thus the provisions of s. 12 have not been satisfied and the Applicant is precluded from reapplying for registration as a motor vehicle salesperson.

**DECISION**

[16] Pursuant to the provisions of s. 9 (5) of the Act, the Tribunal orders the Registrar to carry out his proposal dated May 9, 2013 to refuse the Applicant registration under the Act.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice Chair

*Released on: August 29, 2013*