

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



ALFA MOTORS INC. AND AMRISH GATHANI

APPEAL FROM A NOTICE OF PROPOSAL BY THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT, 2002*, S.O. 2002,
c. 30, Sch. B

TO REVOKE REGISTRATIONS

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: JUSTIN M. JAKUBIAK, Counsel, representing Alfa Motors Inc. and
Amrish Gathani

BERNARD C. LeBLANC, Counsel, representing the Registrar,
Motor Vehicle Dealers Act, 2002

DATES OF HEARING: October 31 and November 1, 2011 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") pursuant to section 9 of the *Motor Vehicle Dealers Act, 2002* (the "Act"). Dated April 30, 2010, the Proposal sets out the reasons relied upon by the Registrar under the Act (the "Registrar") for revoking the registration of Alfa Motors Inc. as a dealer under the Act and the registration of Amrish Gathani ("Mr. Gathani") as a salesperson under the Act.

The reasons include the existence of 16 provincial offence charges then outstanding against both entities. On October 4, 2011, a Notice of Further and Other Particulars was issued by the Registrar withdrawing the allegations against earlier named individuals who no longer are pursuing an appeal to this Tribunal; updating information to allege that Mr. Gathani had pled guilty to two of the provincial offence charges and the unregistered company of which he was the directing mind, Nufresh, had pled guilty to one other; and, finally, that Alfa Motors Inc. was now operating under the registered business name of Gateway Inc. ("Gateway").

FACTS

The facts are largely undisputed. Testimony provided by twelve consumer witnesses, one investigator with the Ontario Motor Vehicle Industry Council ("OMVIC"), the Director of Compliance for OMVIC and Mr. Gathani consisted of the following:

1. D.S. purchased a 2007 Nissan Versa from an industrial area in Toronto following an internet ad and follow-up phone call made by his brother concerning a used vehicle being offered for sale. D.S. acknowledged that he knew at the time of his purchase that the vehicle was used, was American and had been in an accident – all such information was gathered by his brother who had done the initial negotiations prior to his own attendance at the location where he paid for the purchase. He did not recognize Mr. Gathani, but acknowledged receiving a bill of sale from the vendor, Nufresh, at the time of the purchase in October 2008 (Exhibit 3, Tab 10 **CHECK).
2. R.G. and his wife saw an ad in the Toronto Star in early February 2009 for a used vehicle and went to an industrial location where they met Mr. Gathani who showed them the vehicle and negotiated with them for the purchase. The car appeared to be in good shape. Mr. Gathani informed them that it had been owned by one of his employees who had recently transferred from the USA to Ontario for work and now needed a larger car. When asked whether there had been any prior problems with the vehicle, Mr. Gathani had responded "No".

Upon returning home they were surprised to see an Ontario Used Vehicle Information Package ("UVIP") listing their purchase as a rebuilt salvage vehicle in the documentation Mr. Gathani had provided them when leaving his location. Also in the documentation was a CARFAX search history disclosing no damage dated March 12, 2008 – close to one complete year before their purchase. Neither document had been drawn to their attention prior to them having completed the sale.

Although disappointed, neither R.G. nor his wife attempted to contact Gathani to complain. Only when approached by OMVIC who requested they testify for these proceedings did they take responsive action.

3. At the end of February 2009, P.T. went with his son, R.T., to purchase a 2008 Sentra at a location north of Toronto in response to a newspaper advertisement. He left most of the dealings to his son who had a better grasp of the English language. R.T. testified that the vendor, Zahir Khan, had informed him the vehicle was for sale as it was no longer required by an American employee of the company. In response to questions posed by the consumers, no information was provided as to any past accident history. A few months after purchase, however, P.T. took the vehicle in for an oil change where the mechanic told him it had been in a significant accident. Although

no effort was undertaken to contact the vendor to complain, the consumers were willing to appear at this Tribunal when contacted later by OMVIC.

Like other consumers who testified before the Tribunal, P.T. identified the Bill of Sale document for the transaction as printed on Nufresh Marketing Inc. heading, signed by themselves as purchasers and, in this case, Zahir Khan for Nufresh. While neither R.T. nor P.T. could recollect whether a CARFAX report had been provided to them at the time of sale, such report tendered in evidence by Mr. Gathani (Exhibit 3, Tab 5) is dated March 2008 – and is thus, like the earlier transaction, one year out of date by the time of the sale in issue.

4. C.B. and P.B. attended an industrial mall in May 2009 to look at a used vehicle advertised for sale on the internet. P.B. identified Mr. Gathani as one of the men that they dealt with. He told the couple that the vehicle was for sale due to company downsizing and a need to sell-off US stock. The price of \$14,200.00 was much better than similar model years they had seen so that the fact that the vendor disclosed it had been in a very minor accident – “The air bags were never deployed” was stated by Mr. Gathani a couple of times – did not dissuade them from the sale. They denied that they had been supplied with either a UVIP for the vehicle or the CARFAX history dated March 2008 (Exhibit 5, Tab 9).

A few months post purchase, they attended at a dealership for a service repair and were then advised that the vehicle had been in a “serious” accident. Although angry and upset, they made no attempt to contact Nufresh as they believed it was a dishonest transaction and their money would be long gone. Recently P.B. was offered \$2,000.00 for the vehicle on a trade-in.

5. P.Tg. was looking for a car for his son in the fall of 2008 when he saw an advertisement for a 2007 Nissan Versa. He contacted the salesperson “Andy”, identified by the Consumer as Mr. Gathani, who agreed to meet north of the city in a parking lot for a food supply company. Andy told him the vehicle was for sale because he needed a minivan. In response to questions about the vehicle history, Andy advised the car was in great shape with low mileage and remained under manufacturer warranty coverage.

Although P.Tg. claimed that he had not realized that the vehicle was rebuilt at the time of his purchase, (had he been so informed, he would not have bought it), he did acknowledge receipt of the UVIP at the time of sale and that he circled the word “Rebuilt” describing the condition of the vehicle at the time.

6. N.K. purchased a 2007 Versa from Nufresh in October 2008 in response to a newspaper advertisement. He did not arrive at the industrial area for the

agreed meeting with the vendor until after dark and testified it was difficult to see the vehicle clearly. Mr. Gathani, representing the vendor Nufresh, told him there was nothing wrong with the vehicle and the reason for the sale was simply that the company required vans instead. He advised there was no warranty as the vehicle was from the USA. The UVIP, disclosing that the car was in fact rebuilt, was not provided to him but was rather given to his wife the next day when she attended to pick up the vehicle. He had never reviewed this documentation and therefore had not known that the vehicle had been damaged in an accident prior to the sale until informed of that by Ralph Bailey from OMVIC.

7. R.C. also attended a parking lot in an industrial area north of the city in response to a newspaper car sale advertisement in February 2009. He met with Mr. Gathani and an older gentleman he assumed was Mr. Gathani's father. When he asked whether the car had ever been in an accident, he was told that it was in great shape and only being sold as the son no longer needed it. He was surprised to hear it was an American vehicle, but liked its performance on the test drive and left his deposit funds. He returned a few days later to pick up the car, Mr. Gathani having arranged to complete all the Ministry transfer sales paperwork. He was not aware of any prior accident damage until informed that the vehicle had been purchased at an auction in the USA as an accident repaired car by Ralph Bailey of OMVIC in the summer of 2009
8. R.S. testified he had purchased a used 2008 Sentra from Nufresh in March 2009 having seen an advertisement for the product in Autotrader. On attending at the industrial location he met with Zahir Khan who advised he had three vehicles for sale as his company was shutting down its US operations and needed to sell off its American stock vehicles. The consumer liked the vehicle on the test drive. He asked for a CARFAX report of its history. Although provided with the Report, it was not until much later that he realized the Report was dated a year earlier – in March 2008.

When he was later told by a service mechanic that the car was a re-built, he called Mr. Khan to complain. Mr. Khan refused to assist.

9. J.M. purchased a used Nissan Sentra from Nufresh also in March 2009 having seen it advertised on the internet. He met with both Zahir Khan and Mr. Gathani, also known as "Andy", at a warehouse where Zahir Khan took him for a tour of the food supplier business operated by the company. The price offered for the vehicle was very good which was why he had driven all the way from Guelph. Although he was concerned with the manual windows, he decided to purchase the vehicle since he trusted the seller who assured them he was not a dealer, but simply trying to download vehicles no longer needed for his business.

In response to questions on accident history posed by the consumer to Mr. Gathani, he was told that the vehicle was almost brand new, in great condition and very low on mileage. Given that the consumer was from Guelph, it was not practical to have his mechanic review the condition of the car prior to purchase. He was not provided with either a CARFAX Report, again dated March 12, 2008, or a UVIP, dated March 6, 2009 the same day as the Bill of Sale (Exhibit 5, Tab 6) - stating that the first time he had seen both documents allegedly tendered by Mr. Gathani was at the hearing.

On driving home, the vehicle clearly pulled to one side. His mechanic later told him it had been in an accident. He called Mr. Gathani who, after a number of exchanges, said he would not take the vehicle back. Finally, at the end of April, Mr. Gathani agreed to do certain repairs, but required the consumer first sign a waiver terminating any future repair responsibility.

10. Ralph Bailey ("Bailey") has been an Investigator with OMVIC since 2007. His duties include enforcing provisions of the Act as well as other consumer protection statutes in relation to motor vehicle sales.

Monitored by the Ministry of Transportation, private insurance companies brand vehicles with the moniker "salvage" when accidents have rendered such vehicles a "total loss" meaning where the insurer deems the cost of repair is more than the cost of the subsequent value – generally when the accident has compromised the vehicle's structural integrity.

Mr. Bailey became involved in this matter when he was assigned investigative responsibilities following a consumer complaint called in to the OMVIC "curbsider hotline". This hotline had been set up by OMVIC in the early summer of 2009 to allow consumers to anonymously call-in and inform the Ministry administrator of motor vehicle sales being negotiated by non-registrants.

On arrival at the Woodbridge location provided in the hotline call, Mr. Bailey found himself at an industrial area housing a two story building and three or four loading doors, some of which were open, disclosing bags and boxes of dried grocery goods and spices. A number of vehicles were parked alongside a fence which ran down the southern perimeter of the lot. All were plated and none appeared to be for sale. He noticed that a couple of the vehicle validation stickers were out of date. Exiting his vehicle and looking closer, he noticed a "For Sale" sign on the front seat of one of the cars. He ran an identification check and discovered that the licence plates on the vehicles were not in fact registered to the vehicles, despite none of these being reported as lost or stolen. All vehicle identification checks came back with the information that all were registered to Nufresh. A further review made by the investigator revealed no such name was licensed as a dealer or salesperson under the Act.

On contacting the registered dealer in whose name the vehicles had been earlier licensed, Mr. Bailey learned that all had been insurance write-offs due to previous accident histories. All had been sold to Nufresh at auction and Nufresh was owned and operated by Mr. Gathani.

From information gleaned during his investigation, Mr. Bailey laid the provincial offence charges of operating while unregistered to which Mr. Gathani pleaded guilty on one count and Nufresh pleaded guilty on two counts.

11. Mr. Gathani acknowledged that, to date, he has failed to pay the fine imposed by the Court but has sought and been provided additional time to do so.
12. Laura Halbert has been the Director of Compliance for OMVIC since 1997. In this capacity it is her duty to oversee the regulatory authority's duties of investigation and decisions under the consumer compensation fund provided for under the Act.

Ms Halbert tendered documents disclosing that Mr. Gathani had taken the required OMVIC Law/Ethics course required of registrants in October 2008. He passed with a mark of 91%. One of the more basic elements covered in both the course and set out clearly in the legislation is the prohibition against buying, selling, or in any other manner, trading in motor vehicles without being registered. Another requirement concerns the need for vehicle history information disclosure which, fundamentally, includes whether a vehicle has been branded.

Ms Halbert noted that both of these requirements were also highlighted in particularized terms and conditions which Mr. Gathani signed in applying for registration for both himself as a salesperson and his company as a dealer in March of that year (Exhibit 1, Tab 2). Nonetheless, after having completed the course, and while waiting for registration approval, Mr. Gathani and his dealer company, then Alfa, now Gateway, sold two such vehicles to two consumers who testified at the hearing, in breach of both requirements. Then, after receiving registration, another two vehicles were sold without the required disclosure to consumers P., C.B. and M.D. In all four of these transactions Mr. Gathani and Alfa must have been aware they were acting in specific breach of two of the basic protections which the Act provides to consumers.

13. Ms Halbert conceded that there have been no further complaints of the Applicants acting in breach of their requirements. Her conclusion was however, that, despite the passage of just over two years, no evidence is available which suggests that the Applicants' sales in that time period are of sufficient numbers to reassure the Regulator there has been a sea change in the Applicants' manner of doing business.

14. Amrish Gathani is thirty-five years of age, married with a three month old daughter. He immigrated to Canada at a young age and is now a Canadian citizen. For a number of years he owned and operated a dry goods import food company called Nufresh Marketing Inc. ("Nufresh").

Early in 2008, due to the market conditions and competition in ethnic food production by big chain retailers, Nufresh stopped selling foods. Instead, Mr. Gathani decided to try selling repaired salvaged vehicles to new immigrants who could not afford transportation costs required for their employment. His father had recently purchased such a vehicle. Mr. Gathani, through Nufresh, also employed an individual by the name of Mr. Khan, who had prior experience with motor vehicles.

Nufresh bought and sold three separate vehicles in this fashion. Mr. Gathani testified that he then believed himself to be competent to enter the used motor vehicle sales business given his knowledge of where to source vehicles, where to obtain replacement parts, reliable mechanics and body shops. He registered for the required course at OMVIC, passing in October of that year with 91%.

According to Mr. Gathani, there was no prohibition in any information made available to him by OMVIC that Nufresh could not engage in the selling and purchasing of vehicles it had required for transport in its food business. This was what he believed he was doing prior to having taken the OMVIC course and for the nine consumer sales negotiated by Nufresh following the successful completion of the course. It is these transactions which formed the basis of the provincial offences for which both he and Nufresh were later charged and on which he and the company later pled guilty to three counts.

Mr. Gathani sold all the vehicles believing them to be safe. He acknowledged he did not advise the consumers that they had been insurance write-offs due to prior accidents and that he did "bend the truth" when telling potential purchasers they had been owned by previous employees.

LAW

The Act states in part as follows:

1(1) In this Act

"motor vehicle dealer" means a person who trades in motor vehicles, whether for the person's own account, or for the account of any other person or who holds himself, herself or itself out as trading in motor vehicles.

"trade" includes buying, selling, leasing, advertising or exchanging an interest in a motor vehicle or inducing or attempting to induce the buying, selling, leasing or

exchanging of an interest in a motor vehicle, and "trade" when used as a noun has a corresponding meaning.

4. (1) No person shall

- (a) act as a motor vehicle dealer unless the person is registered as a motor vehicle dealer under this Act
- (b) act as a salesperson unless he or she is registered as a salesperson.

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,
 - (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....
- (d) the applicant is a corporation and
 - (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 law and with honesty and integrity, or
- (f) the applicant is in breach of a condition of registration.

REASONS

The issue before the Tribunal is whether the past conduct of the Applicants provides reasonable grounds to believe that they will not carry on business in accordance with the law and with honesty and integrity.

The Act is consumer protection legislation. It exists to protect often unsophisticated consumers involved in reasonably complex transactions involving a significant sum of money. It does so by setting up a regulatory system whereby additional protection is made available to consumers of motor vehicles by requiring the salesperson/dealer be obligated to meet more onerous conditions of disclosure, record-keeping and business practice than is required in common market transactions. If those regulated individuals demonstrate an inability or unwillingness to meet the requirements of regulation, then the very protection the Act seeks to provide is compromised.

The Act provides for a compensation fund available to consumers who suffer damage from acts by registered dealers. However, the fund is not available to consumers purchasing from non-registrants, with the result that none of the consumers purchasing from Nufresh would have been eligible to seek compensation under its provisions.

Attaining the high mark he did on the OMVIC course in October 2008 Mr. Gathani, as the officer and director of Gateway, had proven himself well informed of both the Act's provisions, including the limitations on the compensation fund, as well as registration and the disclosure requirements of a motor vehicle dealer and salesperson. The Tribunal does not accept his evidence otherwise. To claim he believed he could trade in motor vehicles whilst acting under the Nufresh name, in contrast to the clear wording of the Act, is simply not reasonable. If such were the case, any corporate interest could circumvent the Act by trading in vehicles as well as engaging in other business interests.

Neither does the Tribunal accept Mr. Gathani's evidence that the two transactions negotiated by Nufresh in April and May 2009 (after the registration of Alfa as a dealer) were innocently undertaken by him since he was not informed by the Ministry of Alfa's registration until June 2009. The evidence established that in March he had signed the Terms and Conditions which underlined the reference to the registration and disclosure requirements in the Act.

In contrast to the consumers who testified, Mr. Gathani claimed car histories were in fact provided to consumers. Even were the Tribunal to prefer the evidence of Mr. Gathani, which it does not given the consistency with which the separate and independent consumers testified, the documents provided by the Applicants demonstrated that in some instances these reports were outdated and deceiving (C.B. and P.B. purchase May 2009, Exhibit 5, Tab 7; R.S. purchase March 2009 Exhibit 8). In themselves, they thus demonstrate dishonesty on the part of the vendor.

It is clear that Mr. Gathani was not honest in his dealings with consumers when acting under the Nufresh name. He admitted as much. It is also clear that he did not act in accordance with the law of which the evidence establishes he was made fully aware before any of the sales transactions heard by this Tribunal occurred in his successful completion of the OMVIC registration course requirements. In so doing, he deprived his consumer purchasers the protection provided to them under the Act.

By virtue of Mr. Gathani having engaged in repeated instances of "curbsiding" the Tribunal is satisfied there exists reasonable grounds for belief that he will not carry on business in accordance with the law and with honesty and integrity. Given that Mr. Gathani is the sole officer and director of Gateway, the Tribunal is further persuaded there are reasonable grounds to come to a similar conclusion regarding it.

The question for the Tribunal raised by the Applicants is whether the more recent past conduct of the Applicants in the last two years, should be given significantly extensive consideration so as to conclude that the cumulative history of their conduct leads to a reasonable conclusion such dishonest and illegal behavior does not truly reflect the Applicants' propensity for similar future business operational behavior.

Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda [1994] O.J. No. 954, a decision of the Divisional Court was cited by Counsel for the Applicants. The

decision of the Court concerned the Tribunal's assessment of the applicant's past conduct in similar legislation to the Act. The Court held that:

It is the totality of the past conduct, considered in light of more current circumstances, which form the basis for the relief.

The Court concluded that simply passage of time, without evidence of further legal violations by the applicant, was not a sufficient basis upon which the Tribunal could conclude whether the applicant's past conduct met the required standard:

...we have the concern that the Tribunal appears not to have made the requisite qualitative assessment of the respondent's conduct in light of all the evidence placed before it and the standards of "integrity" and "honesty", as well as "law" imposed by (the) section...We are also troubled that the Tribunal appears to have found that a period of time during which no violation of the law is established automatically meets the required standard, presumably as a matter of law or on the basis of a principle of rehabilitation, notwithstanding the nature of established past misconduct and the possible absence of positive and material exemplary conduct. Clearly (the) section requires a more qualitative assessment of the entire conduct of an applicant to determine whether past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with the law and with honesty and integrity.

Based on the repeated nature of Mr. Gathani's earlier violations as well as on the Tribunal's finding that his on-going apparent justification for the contraventions was not believable, first in light of his training and course work, second in light of his having signed terms and conditions expressly containing the prohibitions he continued to breach, the Tribunal is not able to conclude the lack of consumer complaints in the intervening two years is sufficient to overturn the effect of the prior conduct.

Had there been evidence of proper sales, including consumer disclosure required, in a relative number of transactions occurring since registration, such would have been of assistance. As it was, there was not. Further, no one corroborated the testimony of Mr. Gathani that his sales in this time period were significant and clean. Indeed, no witness was presented to speak to his current conduct and that of Gateway in car sales transacted in the last two years of operation.

Counsel for the Applicants submitted that the legislation prohibits an applicant from re-applying for registration for two years following a refusal or revocation. Given that this two year term has expired without incident, he claims the Applicants have demonstrated a good recent track record and should therefore be registered.

The Tribunal disagrees that any time period is automatically to be relied upon. It relies on the *Faccenda* case to conclude that the assessment of the conduct in question must be more nuanced than a simple reliance on the passage of time. In this proceeding there has been no evidence of conduct, positive or negative, during these two years. As noted above, such a neutral situation is insufficient to overturn the reasonable conclusion arising out of older past conduct which clearly falls below the standard. Counsel urged the Tribunal to consider allowing registration but imposing certain terms and conditions on that registration, one of which would be a ban on importing salvage or

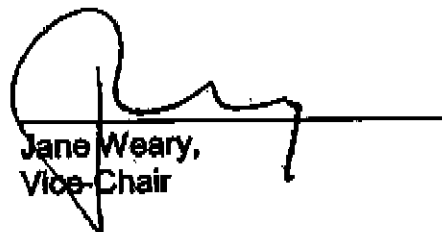
auction vehicles for subsequent sale to the public. The Registrar opposed the imposition of registration with conditions arguing there was no condition available for over-seeing compliance given the role of Mr. Gathani as the principal of Gateway. Further, Mr. Gathani had already been registered subject to terms and conditions which he had breached. The condition posed by the Applicants that Mr. Gathani re-take the OMVIC course was unlikely to result in any reassurance given his high marks already achieved.

The Tribunal agrees with the Registrar that any of the conditions submitted are insufficient to provide adequate protection and dismisses the submission.

DECISION

By virtue of the authority vested in it pursuant to the provisions of section 7 of the Act, the Tribunal directs the Registrar to carry out the Proposal dated April 30, 2010 to revoke the registrations of the Dealer, Gateway, and the salesperson, Amrish Gathani, under the Act.

LICENCE APPEAL TRIBUNAL



Jane Weary,
Vice-Chair

Released: December 06, 2011

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Ontario Superior Court of Justice or Divisional Court (<http://www.ontariocourts.on.ca/>) is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

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.