

Licence  
Appeal  
Tribunal

Tribunal  
d'appel en  
matière de permis



DATE: 2015-03-09  
FILE: 9224/MVDA  
CASE NAME: 9224 v. Registrar, *Motor Vehicle Dealers Act 2002*

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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

Daryl Joseph Diemer

Appellant

-and-

Registrar, *Motor Vehicle Dealers Act 2002*

Respondent

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**REASONS FOR DECISION AND ORDER**

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**ADJUDICATOR:** Kenneth W. Koprowski, Vice-Chair

**APPEARANCES:**

**For the Appellant:** Justin M. Jakubiak, Counsel

**For the Respondent:** Sarah Aouchiche, Counsel

Heard in Windsor: February 11, 2015

## REASONS FOR DECISION AND ORDER

### BACKGROUND

This is a hearing before the Licence Appeal Tribunal (the “Tribunal”) arising out of a Notice of Proposal issued by the Registrar, *Motor Vehicle Dealers Act 2002* (the “Registrar” and the “Act” respectively). The Notice of Proposal dated November 3, 2014, proposed to refuse to grant the registration of Daryl J. Diemer (the “Appellant”), as a salesperson under the Act.

### PRELIMINARY MATTER

At the commencement of this hearing, Counsel for the Registrar informed the Tribunal, as a preliminary matter, that the Registrar was withdrawing from the consideration of this Tribunal the second sentence of the allegation in paragraph 7 of the Notice of Proposal.

Paragraph 7, in its entirety, reads as follows:

7. The Applicant has failed to comply with the terms of his Restitution Order. As of September 11, 2014, the restitution in the amount of \$7,946 remains outstanding.

Counsel for the Registrar acknowledged that the Appellant has paid the sum required by the Restitution Order. The Registrar, therefore, withdrew the second sentence of paragraph 7 but intended to retain the allegation in the first sentence; namely, the allegation that “The Applicant has failed to comply with the terms of the Restitution Order.”

Counsel for the Appellant objected to the Registrar’s proposal to retain the allegation in the first sentence as an issue in this hearing. The reason for the objection was that, one of the orders made by the presiding Member at the pre-hearing in this matter, released December 24, 2014, was as follows:

2. The issues to be addressed at the hearing are as set out in the Registrar’s Notice of Proposal (the “NOP”) dated November 3, 2014, to refuse to grant registration, and relate to the Appellant’s criminal history. *The allegation enumerated at point 7 under “Criminal History” on the NOP alleging the Appellant has failed to comply with the terms of his restitution order has been withdrawn by the Registrar.*

(Emphasis is added)

Counsel for the Appellant acknowledged that the Registrar’s representative at the pre-hearing was not the same representative that appeared at this hearing. Nevertheless, relying on the italicized portion of the above Order, Counsel argued that the entire allegation in paragraph 7 of the Notice of Proposal, and not just the second sentence of it, was withdrawn at the pre-hearing. For the Registrar to now resurrect the first sentence was both contrary to the pre-hearing Order and also was made without any

notice to the Appellant before this hearing. As a result, the Appellant did not come prepared to lead evidence on the allegation in the first sentence and did not arrange for any witnesses to give evidence relating to that issue. The Appellant, therefore, would be prejudiced by having to deal with that issue at this hearing since it had been withdrawn at the pre-hearing and especially since the Appellant had not received prior notice of the Registrar's intentions at this hearing.

The Tribunal heard submissions from both parties and took time to consider its decision on the matter and to prepare reasons. By way of lengthy oral reasons, the Tribunal concluded that the Registrar's proposal to retain the first sentence in paragraph 7 of the Notice of Proposal would, indeed, in the circumstances of this case, be unfair and prejudicial to the Appellant, and would be contrary to the pre-hearing Order which was made in clear and unambiguous wording.

Therefore, the allegations in paragraph 7 of the Notice of Proposal were held to be not in issue before the Tribunal at this hearing.

The hearing then proceeded.

## **BACKGROUND AND EVIDENCE**

The facts are not significantly in dispute. The dispute centred on the question as to what effect those facts should have on to the Appellant's application to be registered as a salesperson under the Act.

The Appellant is 26-years old. He lives in the City of Windsor with his fiancée and his four-year old son. His fiancée does not work. He received a high school diploma. He also obtained a business management degree from a local College in Windsor. He obtained the degree after he had been released from custody following convictions under the Criminal Code of Canada, the details of which are summarized later in these reasons.

His father owns a motor vehicle dealership in Windsor. It is at this dealership that the Appellant intended to work if he was to be successful in being registered as a salesperson. He has been working at the dealership for about ten or eleven years. He had been fired from his employment there on only two occasions, while he was in his mid-teen years.

The dealership covers nine acres of land and employs about 70 to 80 people. The dealership sells both new and used vehicles, has a service area, a body shop and a reconditioning centre. The Appellant currently works at the dealership as support for those departments.

The Appellant stated that he wishes to be a motor vehicle salesperson because he feels it would be a good career for him, he would be working in his family's business, it would

provide a good income and because he has “been around cars all my life,” to quote his testimony.

On June 16, 2011, the Appellant applied to be registered as a salesperson under the Act. The Registrar issued a Notice of Proposal to Refuse Registration (not the Notice that is being appealed at this hearing) dated February 22, 2012, (Exhibit #5, Tab 1A). There were several grounds for the refusal.

One ground was that, at the time he applied on June 16, 2011, the Appellant disclosed that he had outstanding criminal charges. On November 26, 2008, he had been charged with break and enter with intent to commit assault with a weapon, forcible confinement, disguise with intent and mischief under \$5,000.00. On December 12, 2011, after a trial, he was found guilty of mischief and break and enter with intent to commit an assault with a weapon. At the time of his application in June 2011, he had not yet been sentenced on those offences. The sentencing took place later, on May 28, 2012.

In addition, a further ground for the Registrar’s refusal in February, 2012, of the Appellant’s application in June 2011 was that, in July 2011, he had been charged under the Act with acting as an unregistered salesperson on behalf of his father’s business, Windsor Chrysler. The Appellant pled guilty to that offence on September 16, 2011, and received a suspended sentence.

Although the Appellant filed a Notice of Appeal of the Registrar’s Notice of Proposal to Refuse Registration dated February 22, 2011, he did not pursue the appeal any further. Consequently, the Registrar issued a Final Notice, dated March 14, 2012 (found in Exhibit #5, Tab 3) to confirm that the Registrar was carrying out the proposal to refuse registration. By Order of this Tribunal, released April 30, 2012, (Exhibit #5, Tab 4), the Appellant’s request for a hearing was dismissed.

Then, on May 28, 2012, the Appellant was sentenced on his Criminal Code convictions for break and enter with intent to commit assault with a weapon and mischief.

On the former conviction, he was sentenced to 20 months incarceration, less time served, followed by two years probation. The terms of his probation included the requirement to perform 100 hours of community service and to make restitution in the amount of \$7,946.00.

On the latter conviction, the Appellant was sentenced to ten months in custody, to run concurrently with the other sentence.

There was also a firearms prohibition for a period of ten years.

In the period of time between the date on which he was charged in November 2008, until the date on which he was sentenced on May 28, 2012, he was not held in custody, but was released by way of Recognizance of Bail that had restrictive terms attached to it. The terms included a residence requirement and a curfew to remain in that residence

from 9:30 p.m. until 6:00 a.m. unless accompanied by one or more of his sureties (see Exhibit #5, Tab 7, page 61).

He was actually released from custody on December 18, 2012, after only his first parole hearing.

At the time of this hearing, his period of probation was still outstanding, to expire January 14, 2016. In the meantime, he is required to meet with his Probation Officer once a month. To date, he has not breached any terms of his probation. He still has to complete his hours of community service, the remaining length of which he estimated to be about 13 more hours. The Court-ordered weapons prohibition would still run for slightly more than six years by the time his period of probation ends.

By his application dated April 30, 2014, and received by the Ontario Motor Vehicle Industry Council (OMVIC) on June 23, 2014, the Appellant again applied to be registered as a salesperson under the Act (Exhibit #5, Tab 6). OMVIC licenses and regulates motor vehicle dealers and salespersons in Ontario and administers the *Motor Vehicle Dealers Act, 2002*, on behalf of the Minister of Consumer Services. In the Notice of Proposal, the Registrar made no allegation of incorrect or non-disclosure of the required information in the application.

The application was also accompanied by the Appellant's own summary of the events leading up to his Criminal Code charges (Exhibit #5, Tab 6). Both the Appellant and the dealership's general sales manager, Mike Hogue, signed the summary. The Appellant testified that his version of events had never changed over the years, according to his memory of events, although he acknowledged that there were some inconsistencies between his summary and the findings of the trial Judge. The Appellant stated that, in his summary, he took full responsibility for his actions, was remorseful and admitted that he was wrong.

One of the inconsistencies was brought up by Counsel for the Registrar on cross-examination. In the Reasons for Judgment at page 119 of Exhibit #5, the trial Judge stated that, in the Appellant's videotaped statement to the police, he stated that one of his co-accused was carrying a bulletproof vest, bats, gloves, ski mask and a bandana when he entered the Appellant's car (which was actually being driven by another of the persons involved in this crime). When the co-accused exited the car, the Appellant stated in the videotaped statement that "he had all that crap on", referring to the vest, mask, gloves, together with a knife in a sheath worn at the side of the co-accused. In contrast, in the Appellant's summary (Exhibit #5, Tab 6), he states that the same co-accused walked to the Appellant's vehicle with what looked like a sweater or clothes. When asked to explain the inconsistency, the Appellant stated that he did not remember his videotaped statement.

At page 130 of Tab 11, Exhibit #5, the trial Judge found that the extent of what ultimately transpired against the victim was not known or anticipated by the Appellant.

The Appellant further testified that, after he pled guilty to the charge of acting as an unregistered salesperson in September, 2011, he has not sold any vehicles since.

The evidence of Mike Hogue, the general sales manager at Windsor Chrysler, further confirmed that the dealership itself was, as well, charged under the Act at the same time that the Appellant was charged and also pled guilty. Mr. Hogue was general sales manager at the time. He stated that the charge was an “eye-opener,” to quote his testimony, for the dealership which subsequently changed its process for renewals of registrations, although the Tribunal notes that the Appellant was never registered as a salesperson. On cross-examination, he confirmed that the Appellant was still working at the dealership, but not as a salesperson. Mr. Hogue also had no concerns if conditions were attached to the Appellant’s registration as a salesperson.

Mr. Hogue also testified that, since he first met the Appellant in November, 2009, he, the Appellant, is a changed person. Mr. Hogue had no concerns if the Appellant were registered under the Act, since Mr. Hogue would normally oversee his work. He stated that the Appellant wants to work to maintain his family and that he, Mr. Hogue, was willing to “stick my neck out willingly for him.”

A letter of support was filed at this hearing from Mr. Hogue and from Mr. Gil Valley (another employee at the dealership), both of whom testified on behalf of the Appellant. Their letters of support can be found at Tabs 1 and 3, respectively, in Exhibit #4. Furthermore, the Appellant attached to his application a favourable and very supportive letter from his Probation Officer (Exhibit #5, Tab 6), prepared at the Appellant’s request. The Appellant has not associated with his three co-accused since the charges were laid.

The Appellant’s father also provided a letter of support (Exhibit #5, Tab 13) dated September 10, 2014. His father was out of the country at the time of this hearing, so unavailable to testify.

The Appellant also included with his application a copy of the entire transcript of the Reasons for Judgment of the trial Judge convicting the Appellant on two charges (Exhibit #5, Tab 11) on December 12, 2011, and a copy of the entire transcript of the trial Judge’s Reasons for Sentencing on May 28, 2012 (Exhibit #5, Tab 12).

The Appellant had no previous criminal record before the two convictions in December, 2012.

In response to the Appellant’s new application for registration under the Act, the Registrar issued the Notice of Proposal with which this appeal is now concerned (Exhibit #5, Tab 1). The refusal was based on section 6(1)(a)(ii) of the Act, which states:

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...

The grounds for the refusal to register were similar to those that appeared in the previous Notice of Proposal dated February 22, 2012, except that, by the time of the second Notice of Proposal, the sentencing had already occurred. The grounds, therefore, as stated in the current Notice of Proposal, were that the Appellant had been convicted on December 12, 2011, of assault with a weapon and mischief and, on May 28, 2012, received a custodial sentence, followed by probation for two years. The period of supervised probation had not yet been completed either as at the time of the Appellant's application or at the time of this hearing.

Notwithstanding what is stated in the Notice of Proposal and based on the material found at Tab 6 of Exhibit #5, the Tribunal notes that the two convictions were, more accurately, for the offences of break and enter with intent to commit assault with a weapon and mischief.

The Registrar also attached, as Schedule "A" to the current Notice of Proposal, the previous Notice of Proposal dated February 22, 2012, and repeated the particulars in that proposal as applicable to the current application of the Appellant's. By doing that, the Registrar also relied on the Appellant's guilty plea on September 16, 2011, to the charge of acting as an unregistered salesperson on behalf of his father's business, Windsor Chrysler

Mary Jane South was the sole witness to testify on behalf of the Registrar. She is the Deputy Registrar. As such, she reports to the Registrar and deals with the licensing of applicants and with consumer complaints under the Act, which she described as consumer protection legislation.

She stated that it was a concern to the Registrar that the Appellant had been charged with acting as a salesperson when not registered under the Act. It was especially concerning because the violation occurred while the Appellant was working at his father's dealership, which, as the evidence of Mr. Hogue confirmed, also had been charged. It was the father's dealership for which the Appellant intended to work if registered, giving rise to the Registrar's further concerns about proper supervision of the Appellant. The Registrar had little confidence in the dealership's compliance with the Act, notwithstanding the fact that neither the Appellant nor the dealership had been charged with any violation of the Act since 2011.

Although the Appellant disclosed his Criminal Code convictions in his application (Exhibit #5, Tab 6), he had not yet completed his period of probation. That was a concern to the Registrar because, in effect, the Appellant had not yet completed his sentence.

Ms. South emphasized that it was not only the outstanding period of probation that was a concern to the Registrar. The Registrar was additionally concerned with the

seriousness of the offences of which the Appellant had been convicted, in what was, in effect, a “home invasion” as characterized by the Court in the Reasons for Sentence. The Registrar also had concerns about the Appellant’s lengthy custodial sentence on a first conviction, injury to the victim, his knowing participation in the events leading to the charges, the fact that he supplied the vehicle involved in the matter and the fact that he was a willing passenger in the vehicle, knowing that one of his co-accused had bats and a Kevlar vest.

Ms. South acknowledged that she appreciated that the Appellant did not actually conduct the acts of violence, although he failed to intervene or leave the scene.

Ms. South further added that, although the Criminal Code convictions were not industry related (unlike the conviction of selling a vehicle without being registered under the Act), the seriousness of the offences was cause for concern. The combination of those convictions, their serious nature, the conviction under the Act and the outstanding term of probation led the Registrar to issue the Notice of Proposal to Refuse Registration. Notwithstanding the favourable letter from the Probation Officer (Exhibit #5), the Appellant had not demonstrated a sufficiently long period of positive conduct without supervision. There was an element of public interest and consumer protection in the Registrar’s position, as well.

In the end, Ms. South stated that the Registrar’s refusal was not “a forever ban,” to use her terminology. Once the Appellant demonstrated a sufficient period of positive conduct without supervision, the Registrar would consider receiving a further application from the Appellant. In response to questioning from the Tribunal as to what she considered to be a sufficient period of positive conduct, she stated that though it was difficult to put an exact number on it, a period of two years free of offences and absent supervision would be expected.

On cross-examination, Ms. South emphasized that the Registrar was not concerned only with the fact that there was an insufficient period of positive, unsupervised conduct on the part of the Appellant. The Registrar was also concerned with the seriousness of the Criminal Code convictions. They were serious enough to attract a lengthy custodial sentence, notwithstanding that the Appellant had no criminal record beforehand. The Registrar was also concerned about the Appellant’s guilty plea to the charge of selling a vehicle without being registered under the Act, an offence that was industry related. She acknowledged that he had not re-committed that offence in subsequent years, but pointed out that, during that same period of time, the Appellant was either in custody or under the supervision of the judicial system.

Ms. South also acknowledged that, if the Appellant were registered under the Act, OMVIC had powers to supervise him as a registrant and could discipline him or lay charges or suspend or revoke his licence. However, she emphasized that OMVIC did not have the same ability to scrutinize a registrant’s conduct as is available under the Appellant’s Probation Order or his previous court-imposed restrictions. She stated that, in Ontario, there are over 8,000 dealers but that OMVIC could conduct only about 2,500



to 3,000 inspections each year. The task of OMVIC was to scrutinize any applicant before registration because OMVIC wished to be preventive rather than reactive, especially when registrants will have dealings with the public. An applicant must meet the standard of honesty, integrity and compliance with the law.

Ms. South was referred, on re-examination, to that part of the transcript of the Reasons for Judgment where the trial Judge found that the Appellant was aware that he was to provide “the scare factor” just before the other co-accused conducted the home invasion. In contrast, the Appellant minimized his involvement in his summary that was attached to his application (page 50, Exhibit #5) where he stated that he stood there confused. Ms. South was, therefore, further concerned that the Appellant had not yet accepted full responsibility for his conduct on the day on which the crime was committed in that his involvement, as found by the trial Judge, was greater than what the Appellant stated in his summary. The trial Judge’s decision confirmed that the sentence had to be sufficient to convey the principles of general deterrence and denunciation.

## THE LAW

The Act states in part as follows:

### Prohibition

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; or

(b) act as a salesperson unless he or she is registered as a salesperson.

...

### Salespersons

(5) A salesperson shall not trade a motor vehicle on behalf of a motor vehicle dealer unless the salesperson is registered to that dealer.

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.

**Conditions**

(2) Subject to section 9, the registrar may,

(a) approve the registration or renewal of a registration on such conditions as he or she considers appropriate; and

(b) at any time apply to a registration such conditions as he or she considers appropriate.

**Notice re: refusal, suspension, etc.**

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.

**Content of notice**

(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.

**Hearing**

(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.

**Parties**

(6) The registrar, the applicant or registrant and such other persons as the Tribunal may specify are parties to the proceedings under this section.

**SUBMISSIONS**

**THE REGISTRAR'S POSITION**

The Registrar refused to grant the application of the Appellant, relying on section 6(1)(a)(ii) of the Act which is worth repeating here:

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 ...

Among other arguments, the Registrar submitted that the Appellant's application was premature in that he has not completed his period of probation, set to expire January 14, 2016. There has been no recent period of sufficient length of positive conduct without supervision.

Counsel for the Registrar submitted that the issue for the Tribunal to consider is whether the past conduct of an applicant for registration under the Act affords reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty (*Registrar, Motor Vehicle Dealers Act v. Khan* [2007] O.J. No. 1459, at paragraph 4 ("*Khan*"); *Brenner v. Ontario Registrar of Motor Vehicle Dealers and Salesmen* [1983] O.J. No. 1017 ("*Brenner*").

The Registrar was concerned about the seriousness of the Appellant's convictions. The task of the Tribunal is not to re-litigate the Criminal Code charges, citing, as authority, *Registrar, Motor Vehicle Dealers Act v. John Robert Jacobs* [2004] O.J. No. 189 ("*Jacobs*") where, at paragraph 69, Campbell J. states:

**69** It was fully open to the Tribunal to consider any factors which, in its view, mitigated the fraud. It was not open to the Tribunal to re-litigate the matter and to let Mr. Jacobs pass off his criminal fraud as an innocent mistake. The effect of its error was to undermine entirely the criminal conviction which was one of the evidentiary cornerstones of the Registrar's proposal to refuse registration. The Tribunal thus undermined not only the case for the Registrar but also the integrity of the criminal process and the integrity of the system by which pardons may be granted to those convicted of criminal offences.

In the instant case, the judgment of the trial Judge must prevail over the inconsistencies contained in the Appellant's summary of events that was attached to his application and that tended to minimize his involvement in the crime. The trial Judge found that the Appellant was engaged in the crime and shared responsibility for the offence. The trial Judge also found the Appellant to be an "aider and abettor" of the crime. Thus, a conditional sentence was not appropriate to demonstrate the seriousness of the offence and to show general deterrence and denunciation. The fact that a lengthy custodial sentence was imposed on a first offence illustrates the gravity of the offence.

Further, the Appellant has not completed his period of probation. In the decision of this Tribunal in the case *Michael Kin-Lon Koo v. Registrar, Motor Vehicle Dealers Act, 2002* [2012] O.L.A.T.D. No. 235 ("*Koo*"), the facts were very similar to those in the case now before the Tribunal.

In that case, the appellant was convicted of break and enter into his employer's premises and theft over \$5,000.00. He received a conditional sentence of two years less a day. Mr. Koo complied with the conditions of the conditional sentence. His Probation Officer described him as "low risk." Mr. Koo was in a relationship with a woman who was a registered nurse and had one child. Mr. Koo was active in the care of his son. Mr. Koo applied for registration as a salesperson under the Act in November, 2011. The conditional sentence ended in June 2012. His case was heard in September, 2012, three months after the completion of his conditional sentence. The Registrar issued a Notice of Proposal to Refuse Registration because of the concern about his previous criminal activities, not unlike the present case involving Mr. Diemer. In addition, the Registrar in *Koo* was concerned because not enough time had passed after Mr. Koo's sentence was completed to establish a record of unsupervised positive conduct, a concern that is akin to the Registrar's concern in the present case.

Commenting on the criminal convictions, the Vice Chair stated, at paragraph 15:

**15** This leaves the issue of Mr. Koo's criminal activities and here the Tribunal has grave concerns. This was not a petty crime or a spur of the moment misjudgement (*sic*). The amount of the theft is significant as was Mr. Koo's expected payment. The testimony was that the crime took hours to perpetrate and Mr. Koo was actively involved, although he was not the directing mind. Approximately six months elapsed from the date of the crime until Mr. Koo's arrest and confession.

The Tribunal notes that, in the *Koo* decision, the Tribunal found that Mr. Koo was not the directing mind of the crime, similar to the situation involving the Appellant in the instant case.

Concerning the issue that the offence was not industry related (as Counsel for the Appellant argued on behalf of Mr. Diemer), the Vice-Chair states, at paragraph 16:

**16** Mr. McCormack, on behalf of Mr. Koo, argued that the crime did not involve consumers. He noted that it was a crime against an employer. Mr. McCormack is the principal of the dealership that employs Mr. Koo and that is sponsoring his application. He argued that if he, as the employer, was prepared to take the risk of employing Mr. Koo, then that should address the Registrar's concerns. There are several problems with this argument. First, the crime has effects beyond the harm to the company that was robbed. It affects society as a whole both quantitatively and qualitatively. Quantitatively, prices of merchandise go up when merchants have to cover losses due to theft. The costs of policing rise when the police, as here, have to conduct extensive investigations to apprehend criminals. Qualitatively, the fabric of society is undermined when people commit crimes like this one. Secondly, the argument breaks down as a matter of logic. There is no reason why a man who is willing to steal from his employer should be trusted not to steal from his customers.

In the *Koo* case, the Tribunal found that, although Mr. Koo completed his conditional sentence, there had not been a sustained period of unsupervised positive conduct, even though his sentence ended in June 2012, three months before the hearing on September 5, 2012. That is to be contrasted with the Appellant in the instant case who has not yet completed his sentence.

As for an applicant's right to apply for registration at a later date, the Tribunal stated in the *Koo* decision, at paragraph 20:

**20** Under the Act, Mr. Koo has the opportunity to renew his application in two years if new or other evidence is available or if material circumstances have changed. If Mr. Koo is in a position to bring forward evidence of a change in his ability to comply with the law and conduct his business with honesty and integrity, he will be free to re-apply then, on the basis of that evidence.

Counsel for the Registrar also submitted that it is also relevant for the Tribunal to consider whether the Appellant has accepted responsibility for his past actions (*Nguyen v. Registrar, Motor Vehicle Dealers Act, 2002* [2013] O.L.A.T.D. No. 253 at paragraph 29). In the instant case, the Appellant's attempts to minimize his involvement in the crime (contained in his summary attached to his application) are inconsistent with the findings of the trial Judge, as Ms. South pointed out in her testimony.

Counsel also urged the Tribunal to consider that the Act has a consumer protection focus, relying on *Prestige Toys Ltd. v. Registrar, Motor Vehicle Dealers Act* [2009] O.J. No. 3437, Divisional Court, ("*Prestige Toys*"), where, at paragraph 24, Karakatsanis J. states:

**24** In my view, the Tribunal was entitled to consider the past conduct of the corporate car dealership under s. 5(1)(b), as well as the past conduct of its sole officer and director under s. 5(1)(c)(ii). An interpretation that permits the Registrar and the Tribunal to examine the past conduct of both the corporation and its officers and directors is consistent with the purpose of the Act as traced through its legislative history and with its increased focus on consumer protection. While the MVDA affects livelihood, as noted in *Coates*, amendments to broaden the ambit of the past conduct that may be considered in determining whether to grant, renew or revoke a registration have expanded its consumer protection focus. It is also consistent with the language of the MVDA.

Counsel argued that the financial situation of the Appellant should not be a consideration for this Tribunal, relying on the decision in *Registrar of Alcohol and Gaming v. Hosseini-Rad* [2004] O.J. No. 1273, Divisional Court, ("*Hosseini-Rad*"). At paragraph 19, Ferrier J., referring to section 6(2)(d) and (e) of the *Liquor Licence Act* R.S.O 1990 c. L.19, (the "LLA") states as follows:

**19** In addition, the Board, in considering ss. 6(2)(d) and (e), took into account further irrelevant considerations, concerning whether or not the refusal of a licence is, in effect, revoking the respondent's existing letter of authorization, and whether or not that would be a punitive result unintended by the regulations. Furthermore, the Board considered whether or not the respondent would lose his investment in time and capital or borrowed capital if the licence were disallowed, and also considered the fact that such a disallowance "could cause upheaval in his life as well as the lives of his family and loved ones. It could trigger the payment of loans. Life savings could be lost. Child support could go unpaid. A person's health could be impacted. Employees could lose their jobs and face a similar impact on their own lives, none of which is in the public interest." We find, on the basis of a correct interpretation of these provisions of the statute, that these considerations play no part in a determination as to whether or not an applicant should be granted a licence.

The Tribunal notes that the wording of the two sections, in the LLA and this Act, is virtually identical. Therefore, the reasoning in the *Hosseini-Rad* decision, inasmuch as it dealt with an applicant's financial circumstances, is applicable to the case now before the Tribunal.

Finally, on the question of the imposition of terms or conditions, the Registrar expressed concern about whether proper supervision will be provided for the Appellant's conduct, if he were to be registered. It was while he was working for his father's dealership, and presumably under someone's supervision there, when both he and the dealership were charged with and pleaded guilty to offences under the Act.

### **THE APPELLANT'S POSITION**

Counsel for the Appellant argued that this matter was primarily a "time" case; that is, that consideration should be given to the question of how much time has passed since the Appellant was charged with his offences. Counsel acknowledged the Appellant's past but submitted that what must be considered is what has happened since then.

He argued that being on probation is not, in and of itself, a bar to the registration of the Appellant under that Act. It is only one factor in a list of many. He also referred to the *Nguyen* decision where, at paragraph 29, the Vice Chair states:

29 ... While a period of unsupervised good conduct would certainly be of benefit to the Applicant's case, what is more relevant to the Tribunal is whether or not the Applicant has accepted responsibility for his past actions and is unlikely to repeat them...

Counsel also argued that there is no likelihood of a repeat offence by the Appellant. The Appellant has not engaged in any conduct since 2008 that would demonstrate any difficulties during his time in custody or during his current period of probation.

Counsel also referred the Tribunal to several other decisions of this Tribunal. Such decisions are not binding on the Tribunal but can be persuasive. A consideration of the facts underlying those decisions is a useful exercise to determine the applicability of those decisions to the instant case. Each case is to be determined according to its own merits.

Citing the decision in *Alison Grier v. Registrar, Motor Vehicle Dealers Act, 2002* [2012] O.L.A.T.D. No. 169 ("*Grier*"), Counsel argued that a person can be registered notwithstanding that he is still on probation.

In the *Grier* case, the applicant applied to be registered as a salesperson under the Act. He had been convicted of five Criminal Code offences on June 16, 2011. Those charges were: (1) assaulting his brother, causing bodily harm; (2) assaulting his sister-in-law; (3) pointing a firearm at his sister-in-law; (4) threatening his sister-in-law with death; and (5) using a weapon in the commission of an indictable offence.

He was sentenced to four years in custody and three years' probation, which ended on February 20, 2015. He applied for registration in December, 2012. The Registrar refused to grant registration on the ground under section 6(1)(a)(ii) (as in the case now before the Tribunal) and because Mr. Grier made a false statement in the application for registration. The hearing before the Tribunal was heard on July 8, 2013. At paragraph 36 of the decision, the Vice Chair states:

**36** The Tribunal must consider each case before it on its own merit. In this case, the Tribunal is not convinced that the acts of the Applicant on September 9, 2009 were the result of a predisposition towards violence. In fact, the aggravating factor noted by Justice Boswell persuades the Tribunal that the Applicant's actions were not reactionary or impulsive. Nor is the Tribunal convinced that the fact the Applicant is on probation is sufficient reason in itself to deny registration. The conditions on the Applicant's probation do not include any requirement for anger management courses; rather, they include provisions that the Applicant have no contact with his brother and his family, suggesting that very specific circumstances led to the Applicant's behaviour. In this regard, the Registrar has not proven that registration of Mr. Grier as a salesperson would present a risk to the physical safety of the public.

Notwithstanding the above comments, the Vice-Chair still concluded that the applicant in that case made a false statement in the application and that the past conduct of the applicant provided reason to believe that he will not carry on business in accordance with the law and with integrity and honesty. The Tribunal directed the Registrar to carry out the proposal to refuse the application for registration as a salesperson.

Counsel also referred the Tribunal to the decision in *Koo* to illustrate that the evidence available at this hearing involving Mr. Diemer was stronger than that in *Koo*. In *Koo*, there were no character witnesses, whereas Mr. Diemer had two. Also, Mr. Diemer obtained a Business Management Degree after his release from custody. This is in contrast to the circumstances of Mr. Koo, described in paragraph 18 of the decision as follows:

**18** In this case, the Tribunal does not have this evidence. Mr. Koo did not testify nor were any character witnesses called on his behalf. It is not possible for the Tribunal to determine whether Mr. Koo has taken any actions to understand what caused him to commit the crime or to learn any lessons from it. Apart from evidence of a longer term relationship and the birth of his son, the Tribunal has scant evidence that Mr. Koo has taken any steps to turn his life around. While he has completed his conditional sentence, there has not been a sustained period of unsupervised positive conduct. The Tribunal has no option but to conclude that Mr. Koo's past conduct does give rise to reasonable grounds to believe that he will not conduct his business in accordance with the law and with integrity and honesty as required under the Act.

Counsel also referred the Tribunal to the decision of this Tribunal in *Astra Motors Inc. and Paul Zbigniew Jadwidzic v. Registrar, Motor Vehicle Dealers Act, 2002* [2011] O.L.A.T.D. No. 55 ("*Astra Motors*").

In that case, the Registrar issued a Notice of Proposal on May 6, 2010, and a Notice of Further and Other Particulars on August 6, 2010 to revoke the registrations of the

registrants as a dealer and as a salesperson, respectively. The salesperson had been registered under the predecessor of the Act on October 3, 1997. The dealership was registered on December 20, 2000, on Terms and Conditions. The dealer was also registered as a Motor Vehicle Inspection Station with the Ministry of Transportation. The dealership was convicted of two counts of fraud over \$5,000.00 on October 26, 2009. The charges had been laid on or about October 22, 2008. The offence involved the re-winning of motor vehicles sold by the dealership. The charges and convictions are set out more fully at paragraphs 50 and 51 of the decision:

On a short-form application for registration submitted on November 10, 2008, the dealer stated that there were no charges pending (thereby ignoring the charges laid in October 2008) and that it had not been found guilty under any law.

The Vice-Chair did not direct the Registrar to carry out the proposal to revoke the dealer's licence even though the offences were industry related. The reasons given by the Vice-Chair, and those on which Counsel for the Appellant in the instant case relies, are found at paragraphs 64-66 of the decision:

**64** In view of the above convictions, normally the Tribunal would have no sympathy with someone who engaged in improper business practices and the licence would be revoked

**65** But after analyzing the evidence, the Tribunal finds that there are number of mitigating factors in favor of the Applicant that tilt the balance in the Applicants' favor, which include:

(a) The Applicant not only cooperated with the police at the time of execution of a search warrant in September 2008, but he accepted responsibility for his conduct.

(b) It has been over two years since he and his family members were charged and since this date there has been no further violations of the Act. Although this is not a significant period of time from the date of the charges, it is still a positive factor,

(c) Astra pled guilty and paid the fine in the criminal courts and Applicants had expressed remorse at the hearing.

(d) The Sentencing Judge made a positive finding about the business conduct of the Applicant and his family<sup>17</sup>."

(e) the Applicants have otherwise unblemished business record.

(f) Most importantly, and this is what turned this case completely:

i) upon becoming aware of the issues, the Applicant and his family took steps to improve business practices. The Applicant and his brother took educational courses, retained services of an expert and learned from the Ministry of Transportation and Insurance Bureau of Canada about their obligations in conduct of their business,

ii) the Applicant forthwith spent about \$66,000.00 to purchase back and settle issues with customers of both vehicles in question, causing no financial loss to its customer.



**66** Due to the foregoing, on balance, the Tribunal is not persuaded that the Applicant's past conduct afford reasonable grounds for belief that it will not carry on business in accordance with the law and with integrity and honesty.

Applied to the case of Mr. Diemer, Counsel argued that Mr. Diemer obtained a Business Management Degree after his release from custody, he co-operated with the police and showed remorse for his offences.

Counsel also referred the Tribunal to its decision in *Robert Vernon v. Registrar, Motor Vehicle Dealers Act, 2002* released on October 30, 2014, and found at [2014] O.L.A.T.D. No. 234 ("*Robert Vernon*") which is currently under appeal.

In that case, Mr. Vernon was convicted in the United States in 2006 on a charge of "Maliciously Attempting to Damage and Destroy by Means of Fire, a Building Used in an Activity Affecting Interstate or Foreign Commerce." Mr. Vernon had hired someone to firebomb the offices of an inspector who was giving Mr. Vernon a difficult time after he refused to pay bribes to that inspector. Before 2006, Mr. Vernon had successfully operated two car dealerships in Buffalo, New York. On conviction, he was sentenced to 60 months in prison with three years of supervised release and ordered to pay restitution of \$250,000. If Mr. Vernon did not reside in the United States, his release was to be unsupervised. Mr. Vernon then moved to Canada where, in May, 2014, he applied to be registered as a salesperson under the Act.

In the application, he disclosed his criminal record in the United States. However, the Registrar considered that Mr. Vernon's letter that explained the circumstances of his conviction was an attempt to mislead the Registrar. The decision recounts that, in the letter, Mr. Vernon attempted to not only minimize the conviction but also to exculpate himself. The Registrar, therefore, refused to grant the registration.

The Tribunal in that case did not conclude that Mr. Vernon's minimization of his behaviour was a deliberate attempt to mislead the Registrar or to hide his past. Consequently, the Tribunal directed the Registrar not to carry out the proposal to refuse registration.

In concluding his submissions, Counsel for the Appellant urged the Tribunal to consider that enough time has passed. Furthermore, if the Tribunal had concerns, it could impose terms and conditions on the Appellant's licence, including oversight by the two managers (who testified at this hearing) of the dealership at which the Appellant intended to work as a salesperson.

## **ANALYSIS**

It is well established that the issue that the Tribunal must decide in a matter such as this is whether the past conduct of the Appellant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty.

If the Tribunal concludes that the past conduct does afford such reasonable grounds for belief, then the Tribunal should direct the Registrar to carry out his proposal.

The Tribunal does not agree with Counsel for the Appellant that this case is primarily a “time” case; that is, that the Tribunal should consider primarily how much time has passed since the Appellant was charged with his offences.

This case involves a consideration of many more factors. It is a question of the character of the Appellant’s Criminal Code convictions, described as serious by the trial Judge. It is a question of the lengthy period of custody imposed upon the Appellant for a first offence. He had no previous criminal record. It is a question of the violence perpetrated on the victim who, more than three years after the offence and as at the time of sentencing on May 28, 2012, was still suffering from the effects of the home invasion. The Appellant was an “aider and abettor” in that crime. The Tribunal accepts those findings of the trial Judge and cannot re-litigate the matter (*Jacobs*), despite the summary that Mr. Diemer prepared that conflicted with the findings of the trial Judge. It is also a question of the Appellant pleading guilty to an offence contrary to the very Act under which he now wishes to be registered. Further, there is the fact that the Appellant has not yet completed his sentence, inasmuch as his period of probation has not yet expired. It expires on January 14, 2016. There is also consideration of the fact that, since November of 2008, when terms of bail were imposed, the Appellant has been under some kind of supervision and has been and continues to be under some form of judicially-restricted terms of conduct. There has not been any recent period (let alone any significant period) of positive, unsupervised conduct.

The Tribunal agrees, as was stated in the *Grier* decision, that the fact that the Appellant is on probation is not sufficient reason “in itself” to deny registration. Relying on *Nguyen*, the Tribunal is justified, therefore, in considering the other factors, enumerated above. They are serious enough that the Tribunal cannot simply ignore them. The Tribunal also notes that, in *Grier*, the application for registration was ultimately refused and that, at the time of the hearing in *Grier*, the Applicant in that case was still on probation and would continue to be on probation for another 19 months.

The Tribunal acknowledges the argument of Counsel for the Appellant that the Appellant’s convictions were not industry related. But, it has been established that past conduct does not have to relate to only the regulatory scheme under which the Appellant wishes to be registered. The words, “past conduct” in section 6(1)(a)(ii) of the Act, are not so limited in the context of what is consumer protection legislation (*Prestige Toys*). There are no such limiting or restrictive words in the section. By its ordinary and grammatical meaning, past conduct cannot “be confined to the individual’s operation” under the governing statute. Compliance with the law generally and acting with integrity and honesty are not limited to violations of only the governing Act (see *Registrar, Alcohol and Gaming Commission v. 751809 Ontario Inc. (c.o.b. Famous Flesh Gordon’s)* [2013] O.J. No. 1139 (Ontario Court of Appeal), at paragraphs 29 and 32 (“*Flesh Gordon’s*”).

The Tribunal acknowledges that Mr. Diemer had two character witnesses, and had

obtained a Business Management Degree after his release from custody, in contrast to the circumstances of the Appellant in the *Koo* decision. The Tribunal also notes that, in *Koo* (the facts of which most closely resemble the facts in the case now before the Tribunal), the appellant had completed his conditional sentence by the time of his Tribunal hearing, unlike Mr. Diemer, who was still on probation. Notwithstanding that Mr. Koo had completed his sentence three months previously, the Tribunal still directed the Registrar to carry out the Proposal to refuse to register the Appellant as a salesperson.

In the *Astra Motors* decision, the Tribunal was considering a Notice of Proposal to Revoke an existing registration, and not a proposal to refuse to grant a first-time application, as in the case now before the Tribunal.

In the *Astra Motors* decision, the Tribunal denied the Registrar's proposal to revoke the Applicants' existing licence, despite the Criminal Code convictions. However, that decision can be distinguished from the case now before the Tribunal. *Astra Motors* involved the Registrar's Proposal to Revoke an existing licence, unlike the proposal to refuse a first registration for Mr. Diemer. In addition, the individual Applicant in that case had been a registrant for well over a decade and the dealership had been a registrant since 2000. They had demonstrated a significant period of time of positive past conduct, unlike Mr. Diemer who has never been registered and who has not, since 2008, demonstrated a period of positive, unsupervised or non-Court restricted conduct.

The *Robert Vernon* decision, relied on by the Appellant, is under appeal. Notwithstanding that, the case can be distinguished from the instant case. Although his time of release in the United States was to be supervised, Mr. Vernon did not have to be supervised in Canada. Further, Mr. Vernon had previously demonstrated that he could operate a successful business dealing with consumers in the United States for several years. Those factors are not at all present in the instant case.

Finally, Counsel for the Appellant urged the Tribunal to impose Terms and Conditions on the licence that Counsel advocated should be granted to the Appellant. Counsel for the Registrar objected.

The Tribunal notes that, even while under some form of supervision while employed at the dealership, the Appellant committed the offence under the Act in 2011. In addition, the dealership (where the Appellant is still employed) also pled guilty at the same time to a violation of the Act. Mr. Hogue was the Appellant's supervisor at the dealership at the time. He proposed that the Appellant could continue to report to him if registered. Mr. Valley was not employed at the dealership at the time of the offences under the Act. However, he stated in his testimony that, in any event, he would not be the one to whom the Appellant would report. Mr. Hogue stated that changes had been made at the dealership after its guilty plea in 2011. However, he presented very few details as to what those changes involved. He did say that the dealership was more involved in the renewal of the salespersons' registrations, although he gave no particulars.

Considering those circumstances, Counsel for the Registrar stated that the Registrar

had little faith in the dealership or the general sales manager to properly supervise the work of the Appellant. The Tribunal considers this to be a reasonable concern, in the circumstances of this case. Accordingly, granting registration on terms and conditions would not address those concerns given the facts before the Tribunal

## CONCLUSION

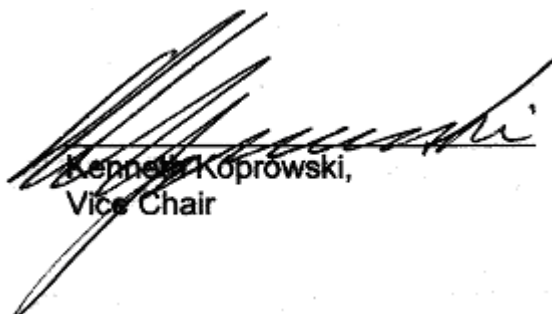
The Tribunal concludes that, in the circumstances of this case, the Appellant has not shown a sufficient length of time of positive, unsupervised conduct. In addition, considering the cumulative effect of his involvement in a very serious Criminal Code offence, the fact that he is still on probation for that offence, his tendency to downplay his involvement through his summary, his previous violation of the Act and the factors enumerated earlier in this Analysis, the Tribunal is satisfied that the past conduct of the Appellant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty.

The Tribunal further concludes, for the reasons given, that Terms and Conditions should not be imposed.

## ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar to carry out the Proposal.

LICENCE APPEAL TRIBUNAL



Kenneth Koprowski,  
Vice Chair

*Released: March 9, 2015*