

Licence Tribunal
Appeal d'appel en
Tribunal matière de permis



DATE: 2012-06-01
FILE: 6363/MVDA
CASE NAME: 6363 v. Registrar, *Motor Vehicle Dealers Act, 2002*

An Appeal from a Notice of Proposal by the Registrar, *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Sch. B - to Revoke Registrations

M & M Fine Auto Ltd. and Massoud Yousof

Applicants

-and-

Registrar, *Motor Vehicle Dealers Act 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: E. Alan Garbe, Vice-Chair

APPEARANCES:

For the Applicants: Lisa Pomerant and Justin Jakubiak, Counsel, representing the Applicants

For the Respondent: Elizabeth Maishlish, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

Heard in Toronto January 9 and 10, 2012

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 12, 2010, proposed to revoke the registration of the corporate Applicant, M & M Fine Auto Ltd., as a motor vehicle dealer and to revoke the registration of the individual Applicant, Massoud Yousof, as a motor vehicle salesperson under the Act, collectively (the "Applicants").

The Tribunal issued its Order on May 24, 2012 directing the Registrar to carry out the Proposal. The following are the reasons for that decision.

REGISTRAR'S POSITION

It is the position of the Registrar that when the corporate Applicant made its application in 2008 for registration, the individual Applicant ("Yousof"), who is the sole director of the corporate Applicant, failed to disclose assault charges in 2008 and his personal bankruptcy in 1996.

With respect to the Yousof, it is the Registrar's position that in submitting a short form application for renewal on or about July 20, 2010, he failed to fully disclose the nature of three (3) criminal charges against him for the period July 1, 2009 to November 6, 2009, which pending criminal charges are industry specific as they involve the trade in a motor vehicle.

Further, it is the Registrar's position that Yousof a) failed to notify the Registrar's office of his pending criminal charges in violation of his sales person terms and conditions; and b) failed to disclose his 2008 assault convictions on his July 2010 short form application in violation of paragraph 2 of his sales person terms and conditions.

The Registrar takes the position that both Applicants are in breach of items 5, 14 and 17 of the dealer's terms and conditions and that the Applicants have failed to comply with the Act, in particular section 6.

Further, it is the Registrar's position that the particulars submitted to the Registrar's office by Yousof in relation to his pending criminal charges are inconsistent with the information received from the Toronto Police Service.

APPLICANTS' POSITION

In the appeal of the Notice of Proposal, Yousof takes the position that he provided information explaining the pending charges, stating that the charges were not yet proven and were being handled by his lawyer.

EVIDENCE

At the commencement of the hearing, the Respondent's Book of Documents, Volume I was made Exhibit 3, Volume II, Exhibit 4 and Volume III, Exhibit 5.

Evidence of Nathan Gibson

The first witness called by the Respondent was Nathan Gibson, an officer with the Toronto Police Services, Major Crime Unit. The officer testified that he had received information from York Regional Police Service that an individual, SF, had reported that a 2008 Range Rover, VIN No. SALM13478A256879 (the "Vehicle") which SF owned had been parked and locked at approximately 8:00 pm on October 31, 2009 and when SF returned to the location where the Vehicle had been left, at approximately 9:55 pm, the Vehicle was missing. The information provided to the officer indicated that the Vehicle had been purchased from the corporate Applicant for approximately \$73,000.00.

Constable Gibson testified that the reporting officer did not check the vehicle identification number ("VIN"). The witness ran the VIN and the results indicated that the Vehicle was flagged as being possibly involved in a crime.

Counsel for the Applicants objected to the testimony of this witness. The witness was excused while argument on the objection was heard. It is the position of counsel for the Applicants that the information being provided by this witness is hearsay evidence and should not be accepted as better evidence is available by calling the York Region Police Officer. Counsel acknowledged that in administrative proceedings the rules against hearsay evidence are less stringent. The witness was permitted to continue to give testimony. The objection of counsel was taken into consideration in determining the weight to be given to the evidence being introduced.

In summary, the evidence of Constable Gibson is that the Vehicle entered Canada pursuant to a Vehicle Import Form dated March 27, 2009 (Exhibit 5, Tab 6, Pages 75 and 76) wherein Custom Auto Collision Inc. imported the Vehicle from Gotcha Auto Sales of New York, New York. A certificate of title issued by New York State for the Vehicle appears at Exhibit 5, Tab 6, Page 77.

An application for registration of the Vehicle dated the 22nd day of June, 2009, appears at Exhibit 5, Tab 5, Page 69.

According to the transfer documents (Exhibit 5, Tab 5, Pages 70 to 75) this Vehicle was transferred from Custom Auto Collision Inc. to the corporate Applicant. Certified documents

from the Ministry of Transportation (Exhibit 5, Tab 4) state that the Vehicle was transferred by Custom Auto Collision Inc. to the corporate Applicant on or about July 21, 2009. The corporate Applicant transferred the Vehicle to SF on or about July 24, 2009, with a Safety Standard Certificate of the same date.

According to the information package (Exhibit 5, Tab 4, Pages 63 to 65) the Vehicle was sold to the corporate Applicant for \$61,000.00.

Constable Gibson testified he entered the VIN into the Canadian Police Information Central Data Base ("CPIC") and there was an alert on file for the Vehicle as a crime vehicle. The witness testified that the Vehicle was the only vehicle transferred by Custom Auto Collision Inc., located at 44 Dover Court Road, in Toronto, in 10 years and that the business was currently boarded up. He received information from Officer Keizerwarrrd, a detective with York Regional Police service.

The witness testified that the Vehicle was insured by Kingsway General Insurance Company ("Kingsway") and an insurance investigator from that company had investigated the matter. A copy of the affidavit of Jenn Gill, a claims adjuster at Kingsway, had been provided to Constable Gibson (Exhibit 5, Tab 2). This affidavit contains a statement signed by SF with respect to the alleged theft.

The witness testified that, in the course of his investigations, he determined there was a report made on October 1, 2009, of the theft of a 2008 Audi Q7, black, VIN No. 1BY64L4AD049807, which was insured with The Personal Insurance Group. The owner of the vehicle, who appeared to be a family member, resided at the same address as Yousof.

The witness testified that there was also record of a 2008 BMW X5, VIN No. 5UXFE835881244364, with a value of \$55,000.00, that had been reported stolen. The owner of the vehicle, who also appeared to be a family member, resided at the same address as the individual Applicant.

Constable Gibson testified that the insurance documentation showed that there were two loss payees under the vehicle insurance policy, being SF and the Applicants. The bill of sale (Exhibit 5, Tab 2, Page 51) indicates a purchase price of \$73,644.50 of which \$60,644.51 is to be financed in payments of \$883.55 per month for 72 months commencing July 21, 2009.

Constable Gibson interviewed SF who, with the assistance of a translator, stated that she had experienced financial difficulties and had been introduced to Yousof through another person who was told that Yousof would help her with her financial difficulties. The witness testified that SF said she was introduced to Yousof sometime in June or July of 2009 and told that arrangements could be made for her to purchase a car, then claim that the car had been stolen and that he would help her in filling out the necessary documentation. Constable Gibson stated that SF said she was to wait to be contacted by the Yousof and that she did not know if the Vehicle actually existed.

The witness testified that he formed the opinion that there were reasonable and probable grounds to charge SF with attempted fraud, mischief and conspiracy to commit an indictable offence. Constable Gibson attended at the residence of the Yousof and , when Yousof answered the door he arrested and charged him with mischief and fraud over \$5,000.00. Yousof was cautioned and taken to 43 division of the Toronto Police Service where he was interviewed. Yousof denied any involvement or knowledge of the offence.

Constable Gibson testified that he had reviewed the phone records of the cell phone carried by SF and determined that she had called Yousof prior to attending at the police station that day and that he had called SF on the same day. The witness stated that SF had with her, at the police station, a folder which contained various documents with respect to the purchase and insuring of the Vehicle.

The witness referred to the letter appearing at Exhibit 5, Tab 3, which is a letter addressed to him signed by Scott Tucker, Manager, Dealer, Technical Support and Essential Tools and Equipments for Jaguar, Land Rover, North America, LLC. The letter states that, based on their records, the VIN of the Vehicle is fraudulent and has never been assigned to a 2008 Land Rover. The letter also states that the writer of the letter can attest that no such VIN has been assigned to any vehicle in the North American market.

Under cross examination, Constable Gibson stated that there were concerns with regards to the report of the theft of the Vehicle as it was an expensive vehicle owned for a short period of time and that there was no glass or any other indications of the Vehicle being broken into at the scene of the alleged theft. The witness indicated that a finger print system ("FPS") number was assigned when the matter became an active criminal investigation. Constable Gibson testified that when SF was at the police station, she repeated that she was under financial stress and that her credit cards were maxed out and she was not able to pay her bills or her mortgage.

The witness confirmed that SF did not provide the location of the Tim Horton's restaurant where she met Yousof nor was she able to recall the exact amount paid for the Vehicle. He acknowledged that no credit check was conducted of S.F. nor did anyone attend at SF's residence. Constable Gibson confirmed that S.F. had been released on her own undertaking.

Constable Gibson was referred to the synopsis attached to the record appearing at Exhibit 3, Tab 13, Page 49 which states that Yousof met with SF at a coffee shop in the Victoria Park and Highway 401 area and he confirmed that this statement was prepared by the police.

He acknowledged that the terms of bail for the individual Applicant had been varied to permit the individual Applicant to purchase and import motor vehicles provided that the witness was notified of the VIN for such vehicles.

When asked about a three day hold on the arrest of Yousof for a show cause hearing, the witness replied that he could not recall asking for a three day hold.

Constable Gibson did not agree with the suggestion that Yousof had been charged based on information received from an "unsavoury person."

When asked about his knowledge of a civil action commenced against Yousof and if he was aware that action was dismissed, Constable Gibson testified that he was only aware that there was a civil action but not what had happened to it.

Evidence of Carey Smith

The next witness identified himself as the director of investigations with the Ontario Motor Vehicle Industry Council ("OMVIC") and reported to the Registrar. He was in charge in the administration of investigations and assigned investigators to certain files. The witness stated that he has twenty (20) years investigating automotive fraud since he started as a detective in Halton region in 1977. He has an extensive career in forensic investigations, criminal fraud and automotive fraud. The witness was involved in a joint forces exercise called "Phantom" involving the RCMP, Ontario Provincial Police, Canada Revenue Agency and OMVIC. He took early retirement and joined OMVIC and also acted as an advisor to police forces with respect to automotive investigations. The witness stated that the term "Phantom" refers to vehicles which do not exist.

Mr. Smith referred to Schedule "A" in the Notice of Proposal (Exhibit 3, Pages 5 to 9) which contain the conditions attaching to the registrations of the corporate Applicant and Yousof. These conditions were admitted as the terms and conditions forming part of the registrations of the Applicants. He made reference to condition number 5 of the corporate Applicant's terms and conditions which states that the registrant will not use his registration to buy, sell or lease motor vehicles where the registrant knows or ought to have known that the purchase, sale or lease of those vehicles would facilitate an illegal or unethical practice. Reference was also made to Paragraph 14 of these conditions wherein it states that the registrant will not be involved in the creation of books and records which are misleading as to the nature of a transaction involving the purchase, sale or lease of a motor vehicle. The witness referred to Paragraph 16, which states that the registrant will operate from the premises approved by the Registrar and Paragraph 17, which states that the registrant agrees not to invite the public to deal at a place other than the approved location.

With respect to the individual Applicant, Mr. Smith referred to Schedule "B", Paragraph 1, which requires the registrant to immediately notify the Registrar in writing of any charges that are laid against him and provide a copy of such notifications signed by the dealer to the Registrar. Reference was also made to Paragraph 2, which requires that the registrant make full and complete disclosure on all future applications regardless of whether or not disclosure has been made previously to the Registrar. The witness stated that these conditions are an ongoing test to insure that the registrant is acting honestly and with integrity. The witness testified that Yousof was the sole officer, director and controlling mind of the corporate Applicant.

The witness referred to the Sales Short Form (Exhibit 3, Tab 4) of Yousof and specifically question 5 thereof, which asks if the registrant had ever been found guilty or convicted of an offence under any law or are there any charges pending, to which Yousof marked "yes." This question is asked as the Registrar is concerned, not about the conviction, but about the conduct giving rise to the conviction. The purpose of question number 6 of the application, requiring disclosure of all pending charges or convictions, is to inform the Registrar about a registrant's background and is part of the test of honesty and integrity.

Mr. Smith referred to the criminal information, occurrence number 06-207628, wherein five charges were laid against Yousof; three charges were for committing an assault on one member of his family, NY, and two charges for committing assault on another member of the family, TY (Exhibit 3, Tab 10). He testified that three counts were dismissed and Yousof was given a conditional discharge with twelve months probation for one charge of assault on TY and the same with respect to one charge of assault against NY. The events leading up to the charges occurred in September and October of 2006.

The witness referred to the criminal information (Exhibit 4, Tab 1) in which Yousof was charged in September 1998, with committing an offence on NY; uttering a threat to NY; another charge of assault on NY; a third charge of assault on NY and an assault on another individual, RH. It was noted that Yousof was found not guilty on all counts. The witness referred to the letter from Yousof (Exhibit 3, Tab 8) responding to the inquiry from OMVIC in regards to his criminal record in which he stated that he had never had any criminal records or any type of problems with the police.

Mr. Smith referred to the driving record of the individual Applicant, which was obtained from the Ontario Ministry of Transport (Exhibit 4, Tab 4), the introduction of which was objected to by Counsel for the Applicants, which objection was overruled. The witness stated that the charges reflected in the driver's record are of concern to the Registrar because of the nature of the charges and the fact that they were not disclosed in Yousof's application.

The charges laid against the individual Applicant, appearing both at Exhibit 3, Tab 12 and Exhibit 4, Tab 2, which are charges for offences occurring between July and December 2009 for fraud over \$5,000.00; for public mischief in October of 2009 and attempt to defraud Kingsway on or about the 6th day of November, 2009, which are the charges referred to by the previous witness. The Registrar's concerns with respect to these charges are that they were industry related and were for fraud and attempt to defraud. The witness noted that the charges had been stayed under Section 11(B) of the Charter of Rights and Freedoms, but nevertheless the Registrar was concerned with respect to the conduct which gave rise to the charges.

Mr. Smith noted that the failure of the Applicants to disclose Yousof's bankruptcy also raised concerns about the honesty of the Applicants.

Mr. Smith referred to the Car Proof Report (Exhibit 3, Tab 17) and the Car Fax Report (Exhibit 3, Tab 18) which reports are generated as a result of searches of databases. Both reports indicate that no records were found of the registration of the Vehicle in the

United States and indicated that there had only been two (2) owners. The witness referred to the certified documents appearing at Exhibit 3, Tab 15, and the Ministry of Transportation records appearing at Exhibit 3, Tab 16, all of which tracked the movement of the Vehicle from Custom Auto Collision Inc. to the corporate Applicant then to SF.

The witness described the process for bringing a vehicle into Canada from the United States and referred to the documentation appearing at Exhibit 5, Tabs 6 and 7, which shows the vehicle import form (form 1) and the certificate of title from New York State with respect to the Vehicle. He noted that according to the Car Proof and the Car Fax reports, there is no record of the Vehicle being registered in the United States. The witness stated that upon presentation of form 1 and the certificate of title, a vehicle permit is issued in Ontario. This process is all based on documentation and that no one necessarily sees the actual vehicle.

Mr. Smith referred to the bill of sale for the Vehicle, which appears at Exhibit 5, Tab 2 Page 19, which is Exhibit "B" to the affidavit of Ms. Gill and notes that this bill of sale is troubling as it does not properly document the loan. Further, the use of the used vehicle information package appearing at Exhibit 5, Tab 4, Page 63, is irregular. Such a package is normally used between a private seller and a private buyer and not required where a buyer is purchasing from a registered dealer.

The witness referred to the letter from the corporate Applicant, signed by the individual Applicant, dated July 20, 2010 (Exhibit 3, Tab 5) in which the Applicants acknowledges that SF alleged that she never received the Vehicle and that the police alleged the Vehicle never existed. The letter goes on to state that the Applicants' lawyer is handling this matter and the next court date is in June 2011. Mr. Smith testified that according to the application of Yousof, dated April 7, 2008, Yousof purportedly completed the certification course and he should therefore have known the proper procedures with respect to the sale of motor vehicles.

Counsel for the Applicants objected to certain of the evidence given by this witness as being "expert evidence" from a witness who was not qualified as an expert and did not have an expert's objectivity. This objection was overruled as the evidence being given by this witness was not expert evidence but testimony within his knowledge as part of his job responsibility and past work related experience.

On cross examination Mr. Smith acknowledged that there was no evidence that Yousof had breached the terms of his bail. The witness acknowledged that reference to Schedule "A," being the conditions to the corporate Applicant's registration, Items 5, 6, 14 and 17, related to issues surrounding the purchase and theft of the Vehicle. He acknowledged that there were no consumer issues with respect to the Applicants.

The witness acknowledged that the terms and conditions in Schedules "A" and "B" (Exhibit 3, Tab 1, Page 5 to 10) are standard terms and conditions and not individual registrant specific.

Mr. Smith did not agree with the suggestion that the Vehicle may have been "reVINed" as VIN plates are fixed in a particular fashion to a vehicle and if removed and replaced it would be apparent.

The witness acknowledged that the information for the data base upon which Car Fax relies could be incorrectly entered into the data base.

Mr. Smith acknowledged that he was not involved in the investigation by Constable Gibson and acknowledged that he accepted what SF said to Officer Gibson as being true. The witness did not agree that he was accepting information for which there was no direct evidence.

The Applicants called no evidence

Following the oral evidence, the Tribunal received written submissions from the parties

FACTS

The following are the facts as found by the Tribunal:

1. The corporate Applicant was registered as a motor vehicle dealer on or about September 29, 2008.
2. The individual Applicant was registered as a motor vehicle sales person on or about October 17, 2003.
3. On or about November 28, 1996, Yousof declared personal bankruptcy.
4. On or about October 1, 1998, Yousof was charged with four counts of assault and one count of uttering a threat, which counts were dismissed.
5. On or about October 24, 2006, Yousof was charged with four counts of assault and one count of uttering a threat. Three of the four counts of assault were dismissed and Yousof was given a conditional discharge with twelve months probation on one count of assault and on the charge of uttering a threat.
6. Yousof has an extensive record of highway traffic violations, certain of which relate to permits, licencing, licenses and licence plates.
7. On or about July 21, 2009, the corporate Applicant issued a bill of sale for the sale of a 2008 Land Rover black vehicle, VIN SALM13478A256879 for \$73,644.50.
8. In December 2009, Yousof was charged with fraud over \$5,000.00, public mischief and attempt to defraud, which charges were stayed under the Charter of Rights and Freedoms.

- 9. According to the records of Jaguar, Land Rover, North America, LLC, no such VIN had ever been assigned to one of their vehicles.

THE LAW

The authority granted to the Registrar is provided in subsection 6(2) of the Act which states:

- 6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

The Registrar has proposed to revoke the registration of the Applicants as the Applicants' conduct was not in compliance with subsection 5(1)(b) of the Act, which states:

- 5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

- (b) the past conduct 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;

.....

ISSUE:

The issue before this Tribunal is whether the past conduct of the Applicants affords reasonable grounds for the belief that the Applicants will not carry on business in accordance with the law and with integrity and honesty.

The Tribunal recognizes that in making its decision it owes no deference to the Registrar's opinion.

REASONS FOR DECISION

It was argued that the primary reason why the Registrar was proposing to revoke the registrations of the Applicants was due to their involvement in the transactions involving the Land Rover vehicle. It may well be that when the events surrounding the alleged theft of this vehicle came to the attention of the Registrar it raised sufficient concerns that an investigation of the Applicants was undertaken, which investigation disclosed other issues which were also of concern of the Registrar regarding the conduct of the Applicants.

As noted above, the Applicants did not introduce any evidence in response to the evidence introduced by the Respondent in support of the allegations in the Notice of Proposal.

Without determining whether the Land Rover vehicle ever existed, it is clear that the transaction for the sale, financing and the subsequent loss of the Vehicle raises sufficient concerns as to the honesty and integrity of the Applicants to have warranted an investigation by OMVIC. That the bill of sale did not properly document the loan arrangement and the use of the consumer resale package in a dealer transaction raises further concern about the conduct of the Applicants.

These events, coupled with the failure of the Applicants to properly report criminal charges on three separate occasions or the earlier bankruptcy of Yousof combined with the numerous infractions recorded in the individual Applicant's driving record, which were also not reported, satisfies the onus placed upon the Registrar that there are reasonable grounds for the believe that the Applicants will not carry on business in accordance with the law and with honesty and integrity. After considering all of the evidence and the submissions of counsel, the Tribunal concluded that the registrations of the Applicants should be revoked.

Counsel for the Applicants repeatedly raised objections to certain of the evidence as being hearsay. The Tribunal reviewed the authorities presented by both the Applicants and the Respondent's Counsel and in particular the *Statutory Powers and Procedures Act R.S.O. 1990, S.22; Dayday v MacEwan* [1987] 62 O.A. (2d) 588 and *Re: Girvin et al and Consumers Gas Co.* 1973 Carswell Ont. 281.

The Tribunal, in making its finding in this matter, is not relying exclusively on hearsay evidence as did the board of arbitration in *Re: Girvin*.

The Tribunal refers to the statement of Judge Matlow (as he then was) in *Dayday v MacEwan* that:

"It is also important to bear in mind that the statute does not deprive any person of the right to cross-examine witnesses at a hearing before a review board including these witnesses who give hearsay evidence. As well, there is nothing to prevent the original sources of the hearsay from being required to attend a hearing at the instance of the person affected to give their evidence in the form of direct evidence.

Nor, in my view, is such use of hearsay evidence necessarily contrary to the rules of natural justice.

It is of some significance that the Applicant chose not to testify or to call evidence to refute either the hearsay or the direct evidence of misconduct on her part."

The Tribunal finds that the evidence given in this matter does not violate the hearsay principles as they apply to administrative tribunals.

The Tribunal does not accept that the evidence of Carey Smith is expert evidence and notes that in the decision of *Graat v R* [1982] 2 S.C.R. 819 referred to by Counsel for the Applicants, Mr. Justice Dickson, writing on behalf of the Court, at page 837, stated

"I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by so doing, he is able more accurately to express the facts he perceived."

As a last point, the Tribunal does not accept the submission that the Registrar or OMVIC is to be held to a higher standard than anyone else who appears before this Tribunal.

ORDER

Pursuant to the provisions of section 9 (5) of the Act, the Tribunal orders the Registrar to carry out his proposal dated November 12, 2010, to revoke the registrations of M & M Fine Auto Ltd. as a motor vehicle dealer and Massoud Yousof as a motor vehicle salesperson under the Act

LICENCE APPEAL TRIBUNAL


E. Alan Garbe
Vice-Chair

Released: June 1, 2012