

**Licence  
Appeal  
Tribunal**

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December 20, 2007

**MEMORANDUM**

**Re: *Mario Jorge Mendonca and Fly-Hom Fine Cars and Registrar, Motor Vehicle Dealers Act***

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

**DISTRIBUTION LIST:**

Howard A. Goldkind, Counsel for the Applicant  
Yovanka McBean, Agent for the Respondent

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FLY-HOM ENTERPRISES INC. O/A FLY-HOM FINE CARS AND MARIO JORGE MENDONCA

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE *MOTOR VEHICLE DEALERS ACT* TO  
*REVOKE REGISTRATIONS*

TRIBUNAL: HARINDER S. GAHIR, Vice-Chair

APPEARANCES: HOWARD A. GOLDKIND, Counsel, representing the Applicants

YOVANKA MCBEAN, Agent, Representing the Respondent

DATE OF  
HEARING: November 8, 2007

Toronto

**REASONS FOR DECISION AND ORDER**

**BACKGROUND**

This hearing arises out of a written Notice of Proposal (the "Proposal") dated April 18, 2007, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively) to revoke the registrations of Fly-Hom Enterprises Inc. o/a Fly-Hom Fine Cars and Mario Jorge Mendonca (the "Dealer" and the "Salesperson", respectively and collectively as the "Applicants").

The Registrar bases his Proposal under section 7 of the Act as read with section 5. (1)(b) and section 6. (1) of the Act.

In support of the Proposal the Registrar furnished the following particulars:

1. Fly-Hom Enterprises Inc. o/a Fly-Hom Fine Cars ("the Dealer") is currently registered as a motor vehicle dealer and was originally registered on or about September 17, 2002.

2. Mario Jorge Mendonca ("Mendonca") is currently registered as a motor vehicle salesperson and was originally registered on or about September 17, 2002.
3. Mendonca is the sole officer and director of the Dealer.
4. The Dealer has failed to comply with the requirements of the *Retail Sales Tax Act* as to the filing of returns, remitting of tax due and paying assessments when due.
5. As a result of failure to comply with the *Retail Sales Tax Act*, the Dealer is indebted to the Ministry of Finance in the amount of \$100,600.28 as at February 8, 2007.

## THE EVIDENCE

The Registrar presented documentary evidence consisting of a Respondent's Book of documents, marked as Exhibit 3, and a memo from the Ministry of Finance, marked as an Exhibit 4. Jennifer Brake and Mary Jane South testified in support of the Proposal. Jorge Mendonca testified on behalf of himself and the Dealer. The summary of the evidence is as follows:

### Testimony of Jennifer Brake

Ms. Jennifer Brake ("Brake") is employed by the Ministry of Finance (the "Ministry") as a Field Collections Officer, handling matters pertaining to dealers' non-compliance with their requirements under the *Retail Sales Tax Act*. She testified that, under the *Retail Sales Tax Act*, the Dealer is obliged to complete monthly returns and remit taxes to the Ministry in respect to retail sales tax the Dealer collected during the course of its business. The tax collected is considered trust monies, and is to be remitted by the vendor by no later than the 23<sup>rd</sup> day of the month following the month in which the vendor had collected from its purchasers.

Brake went on to refer to a letter forwarded to OMVIC requesting revocation of Applicant's licence and providing a history of the Dealer (Exhibit 3, Tab 4). She noted that the Dealer commenced business in 2002, and is still in operation. In addition to defaulting in remittance of taxes, the Dealer has been in default with respect to filing of returns with the Ministry, since March 2007, and has ignored all attempts to obtain compliance since then. Since the start of business, the Dealer has only remitted \$700.00 to the Ministry, and as of March 2007, had outstanding remittance of \$109,975.16.

The Ministry referred the Dealer's account for collection in January 2004 after the Ministry's phone calls and demand letters failed to persuade the Dealer to make the outstanding remittances. The Ministry registered a PPSA lien and writ of Seizure and Sale in January 2007, against the Dealer. In February 2007, the Ministry issued a Bank

Demand, which also failed to make recovery. Brake testified that, during the period of non-compliance, the Ministry issued a total 13 letters and made 11 phone calls to the Dealer to urge compliance.

Upon being unsuccessful in bringing the Dealer into compliance, the Ministry, on February 15, 2007, requested OMVIC to issue a proposal to revoke the Dealer's and the Salesperson's registration.

#### Testimony of Mary Jane South

Ms. Mary Jane South has been the Deputy Registrar of OMVIC since its creation in 1997. She outlined that OMVIC is a not-for-profit corporation with the mandate to administer the Act and its Regulations. She reviewed the Proposal and confirmed that the Dealer and the Salesperson are currently registered under the Act. She referred the Tribunal to the corporate search of the Dealer (Exhibit 3, Tab 3), which confirms that the Dealer is a corporation and the Salesperson is its sole director.

South testified that the Ministry's problems with the Dealer began soon after its registration, and have been continuing since that date, as the Dealer has always been in default in remitting the taxes to the Ministry. South stressed that the public is paying P.S.T. to the Dealer with the expectation that it will be remitted to the government. Due to the Dealer's default, OMVIC has concerns about its financial responsibility. She testified that the conduct of the Dealer is also an issue of non-compliance with the law. In addition to the Ministry's efforts, OMVIC also provided a final opportunity for the Dealer to comply by sending a letter on March 2, 2007.

In cross-examination, South agreed that the Dealer had only one complaint against it in 2003 with respect to selling an unsafe vehicle. There is no criminal record of the Dealer or the Salesperson.

#### Testimony of Mario Jorge Mendonca

Mendonca is the sole director, officer and salesperson of the Dealer. He blamed his inexperience in maintaining paperwork to be a contributory factor in his defaults. Mr. Mendonca did not dispute the Ministry's calculations of his default amounts, and he agreed that he also has been behind in filing of his P.S.T. returns for about seven months. He testified that he was in financial difficulties as he had put all his savings in the business. He blamed the slow business for his losses. Also, he admitted using PST collections to run his business, and assured that he wanted to pay off his debts to the Ministry by borrowing money from relatives and friends but did not provide any timelines.

His only excuse for not filing 2007 returns, was that he could not find a suitable professional to do the job.

## THE LAW

The Act states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
  - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
  - (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; or
  - (c) the applicant is a corporation and,
    - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
    - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty

- 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 *Retail Sales Tax Act* states:

10. Every vendor is an agent of the Minister and as such shall levy and collect the taxes imposed by this Act upon the purchaser or consumer.
- 22.(1) Any amount collected or collectable as or on account of tax under this Act by a vendor shall be deemed, despite any security interest in the amount so collected or collectable, to be held in trust for Her Majesty in right of Ontario and separate and apart from the vendor's property and from property held by any secured creditor that but for the security interest would be the vendor's property and shall be paid over by the vendor in the manner and at the time provided under this Act and the regulations.
43. (1) Where a corporation has failed to collect tax or has collected tax and failed to remit the tax or has failed to pay any interest or penalty relating thereto, the directors of the corporation at the time the corporation was required to collect or

remit the taxes or to pay the interest or penalty relating thereto, are jointly and severally liable, together with the corporation to pay such amounts.

## REASONS FOR DECISION

The *Motor Vehicle Dealers Act* is consumer protection legislation, which lays out the regulation of retail sales of motor vehicles. The legislation requires that persons involved in that industry be registered under the Act. While the Act gives an entitlement to registration, it also allows the Registrar to refuse or revoke registration on the specified grounds. Those grounds are set forth in section 5 of the Act, and the registrants are informed of the refusal by the issuance of a Notice of Proposal. An appeal from the Registrar's Proposal lies to the Tribunal by way of hearing *de novo*.

The only issue for determination in this matter is whether or not the Dealer's past conduct affords reasonable grounds for belief that it will not carry on business in accordance with the law and with integrity and honesty. If reasonable grounds for such belief exist, the Dealer is not entitled to continue to be registered

Section 43. (1) of the *Retail Sales Tax Act* is clear on the obligation of the director of the corporation with respect to collection and remittance of PST, it reads:

Where a corporation has failed to collect tax or has collected tax and failed to remit the tax or has failed to pay any interest or penalty relating thereto, the directors of the corporation at the time the corporation was required to collect or remit the taxes or to pay the interest or penalty relating thereto, are jointly and severally liable, together with the corporation to pay such amounts.

The Salesperson agreed that he is the sole director of the Dealer, and that he has been the controlling mind at all material times since Dealer's commencement of business. Furthermore, he did not dispute that Dealer was, and remains, a vendor as meant under the *Retail Sales Tax Act*. Accordingly, the Tribunal, finds that the Dealer was a vendor under the *Retail Sales Tax Act*, and further finds that, as a vendor, it did levy and collect taxes in the sum of about \$109,975.16 up to March 2007, and continues thereafter. All of which it failed to remit to the Ministry. The Tribunal further finds that as an agent of the Ministry in terms of section 10 of the *Retail Sales Tax Act*, the Dealer was deemed to hold such funds in trust for the Ministry, and was obliged to pay the same to the Ministry as required in terms of section 22.(1) of that Act, all of which it failed to do. Furthermore, the Salesperson admitted that he used these trust funds to finance the operations of the Dealer.

There is no doubt in the Tribunal's mind that the acts of misusing the trust funds is fraudulent and as such involves deceit and dishonesty. The facts in this matter stand in stark contradiction to the honesty and integrity required of the Applicants to carry on

business in accordance with law. The Tribunal regards the offences as serious. The important principle in matters of this nature is compliance with law, in addition to promoting and safeguarding the integrity and honesty of dealers within the motor vehicle industry. To permit the Applicants to stay members of that industry would, in view of their conduct, send the incorrect message to the industry and to the public at large. The Tribunal finds that the lack of honesty and integrity on the part of the Applicants did relate to period of over five years, and reflects poorly for the future business conduct of the Applicants, should they be permitted to remain registered under the Act.

## DECISION

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs that the Registrar to carry out his Proposal dated April 18, 2007, to revoke the registration of Fly-Horn Enterprises Inc. o/a Fly-Horn Fine Cars as a Dealer, and Mario Jorge Mendonca as a Salesperson, under the *Motor Vehicle Dealers Act*, as amended.

LICENCE APPEAL TRIBUNAL

  
Harinder Gahir,  
Vice-Chair

*Released: December 20, 2007*

File name: 4209.mvda.mendonca\_fly-horn.doc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court 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, will also be posted on the Licence Appeal Tribunal's website [www.lat.gov.on.ca](http://www.lat.gov.on.ca) in two weeks time. The decision will also be available on Quicklaw at a later date.