

**Licence
Appeal
Tribunal**

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December 20, 2007

MEMORANDUM

Re: Steven A. Smith v. 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:

William Kelly, Counsel for the Applicant
Aviva Harari, Counsel for the Respondent

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STEVEN A SMITH

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

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: WILLIAM F. KELLY, Counsel, representing the Applicant

AVIVA HARARI, Counsel, represented the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: November 22, 2007

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal"), dated July 12, 2007, pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The proposal sets out the Registrar's reasons to revoke the registration of Steven A. Smith as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act. Therefore, the Registrar is unwilling to register Steven A. Smith under the *Motor Vehicle Dealers Act*.

PARTICULARS

The reasons for this proposal are:

1. The Registrant was first registered as a motor vehicle salesperson on or about February 17, 1999.
2. On or about January 8, 2007 the Registrant disclosed pending criminal charges on his renewal application.

3. On or about June 18, 2007, the Registrant was found guilty of counselling to commit the indictable offence of arson contrary to section 464(a) of the Criminal Code of Canada. The offence is Industry specific as it relates to the sale of a motor vehicle for which the Registrant was the salesperson.

PRELIMINARY MATTERS

There were no preliminary matters and the hearing proceeded.

EXHIBITS

Exhibit 1 - Notice of Proposal to Revoke dated July 12,2007.

Exhibit 2 - Notice of Appeal received at the Tribunal July 26,2007.

Exhibit 3 - Respondent's Book of Documents.

EVIDENCE

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence, as well as the oral testimony of Detective Constable Kevin Neath and Carey Smith.

The evidence presented by the Applicant consisted of the oral testimony of the Applicant, his employer and his wife.

The following is a summary of the relevant testimony.

Detective Constable Kevin Neath

Detective Constable Kevin Neath was sworn in and testified that he has been with the Toronto Police Services for the last six years, working in the Auto-Squad and the Major Crime Units. He stated that he was familiar with the Applicant. On September 24, 2006, while he was working in 43 Division, he was assigned to an occurrence report for a criminal investigation involving a complainant who had a tape recording of a conversation between the Applicant and a customer, wherein the customer was counselled by the Applicant to have his vehicle burned in order to solve his financial difficulties. The witness testified that the next day, he spoke to the complainant about the content of the tape that included discussion about the burning of the vehicle and receiving an insurance settlement as well as the dealership not wishing to take the recently purchased vehicle back and granting him a full refund.

The witness testified that the complainant wanted to purchase a new home which required a mortgage, but the vehicle leasing payments on the vehicle he had recently leased from

the dealership, where the Applicant works, placed him in the non-approval category with the mortgage vendor. The witness stated that the Applicant offered an alternative to the customer such as contacting another mortgage company but would not take the vehicle back without a significant loss to the customer as this is now a used vehicle.

The witness stated that the tape contained a conversation during which the Applicant advised a customer that if the vehicle was stolen or wrecked, it would take about thirty to forty days before the insurance company would pay it out; however, if it was burned, the insurance would pay the claim in about ten days. He continued stating that the taped conversation indicated that the Applicant knew a towing company that would burn the vehicle and charge for the services.

The witness testified that he spoke to the owner of the dealership regarding the taped conversation and his investigation. He further stated that he advised the owner of the dealership that the Applicant would be charged with counselling to commit the offence of arson. He stated that he spoke to the Applicant, that same day, and advised him to get a lawyer, and turn himself into the police station; on September 27, 2006, the Applicant did that and was released the same day.

The witness stated that he then changed offices, but he was aware that the case went to court on June 18, 2007, and that the Applicant pleaded guilty, and was given a conditional discharge with 18 months probation and 125 hours of community services work.

On cross-examination, the witness stated that this was not the first lease for the complainant, but he wanted out of the signed deal. The witness testified that he had no knowledge of the finances of the complainant.

When asked during cross-examination of the extortion possibilities, he stated that was not part of the police investigation.

Carey Smith

Carey Smith was sworn in and testified that he has been the Director of Investigations with the Ontario Motor Vehicle Industry Council ("OMVIC") since 2003, and that he was previously employed by the Halton Police Services for nearly thirty years, spending several of them investigating automotive fraud. He stated that OMVIC was a not for profit corporation designated to administer the Act, which is a public protection statute.

The witness testified that he is familiar with the Proposal and the application of the Applicant. In his testimony, he stated that this legislation is intended to provide the public with a level of confidence in the automotive industry, and while he is reviewing the applications, he keeps that in mind. In this case, he stated that the Applicant did indicate accurately that he had charges pending before the court, but in his letter attached, he only gave a very brief explanation. He testified that although the Applicant wrote it was a long story, he did not give sufficient details. When the Applicant was requested by the Registrar

to provide further written details, he did not respond at all. The witness testified that the Registrar expected to receive the full story.

The witness testified that on June 18, 2007, the Applicant attended court and pleaded guilty to the offence and received a sentence including a period of probation for eighteen months. The Applicant will be on probation until January 2009.

The witness explained the Chrysler leasing program that was offered at the time and the financial incentive for the Applicant if the subject vehicle were burned. He continued his testimony by stating that this is of concern to the Registrar since it involves criminal conduct that would have been difficult for the dealership to detect and speaks directly to honesty, integrity and acting within the law. The witness stated that the Applicant, with his years of experience, knew that if a vehicle is stolen the insurance does not pay quickly. He stated that the Applicant knew a towing company that would dispose of the vehicle in a manner that would have the insurance money arrive quickly; however, such a claim would have been a fraudulent insurance claim.

The witness concluded his testimony by stating that it is the Registrar's opinion that the Applicant's registration should be revoked.

The Applicant

The Applicant was sworn in and testified that he has been married to his wife for more than fourteen years and they have two children. He stated that his father was in the automobile industry for twenty-five years and his brother has been in the industry for numerous years and is now the used car sales manager at the dealership where the Applicant works. The Applicant stated that he had previously been employed by several dealerships before being hired by his current employer, and later promoted to new car sales manager in 2004.

The Applicant stated that, as new car sales manager, he was responsible for advertising, rebates, training new staff, approving deals and some property maintenance. He stated that although he was honoured to have the sales manager position, he is not a manager. He continued by stating that he was working 60 to 70 hours a week, not eating properly, not seeing family members as he would have wanted, but he did not want to tell his employer, as he thought this would disappoint him.

The Applicant stated that the customer/complainant had an older leased vehicle that he wished to exchange for a newer leased vehicle, provided there were lower monthly lease payments. The Applicant testified that the customer/complainant was dealing with an inexperienced salesperson so he sat in with him as a training exercise giving support and guidance when requested. He stated that the monthly lease payments were reduced, and the deal belonged to his salesperson, therefore there was no financial benefit to him as a sales manager.

The Applicant testified that one week after the deal was completed, he received a telephone call from the customer/complainant stating that he could not get a mortgage now

because of the new vehicle lease arrangement, and he wanted out of the deal. He stated that he advised the customer/complainant to come to see him and they discussed options such as trying to get mortgage approval from another financial institution or making financing arrangements with a family member or obtain an appraisal of the vehicle in order to get out of the lease arrangement. The Applicant went on to state that the customer/complainant was crying, shaking and upset while explaining the impact this deal was having on his family. He stated that he felt bad and he wanted to help, but he had no experience in dealing with this kind of situation. The Applicant testified that he advised the customer/complainant that if the vehicle disappeared or was in an accident, the pay out from the insurance company, if it is written off, would take at least thirty days, however, the customer/complainant did not have this kind of time. The Applicant testified that the option of having the vehicle completely destroyed by fire was then discussed including the shorter pay out time. The Applicant knew someone who would do it for a fee and he gave the telephone number to the customer/complainant. The Applicant testified that he had a friend who operated a towing company who had offered to help him out with a family matter and the Applicant was sure he would assist in this case.

The Applicant testified that he knew it was wrong and illegal, but he wanted to help out.

During his testimony, the Applicant stated that he has never talked to the customer/complainant since that day. He stated that the next time he heard of this issue was when he was called into the dealership owner's office where the owner was clearly upset with him and told him he was demoted to salesperson. He testified that the demotion was a shock to him, and has taken a big toll on his family and his work. He stated that his actions hurt a lot of people by letting them down. Moreover, he pleaded guilty to the criminal charge and received a conditional sentence including 18 months probation and a one hundred and 125 hour community service order which he is presently working off.

The Applicant testified that he would never consider this conduct again, and that he is ashamed of this. He stated that OMVIC staff had contacted him requesting further particulars regarding the circumstances and details concerning the criminal charges, but he did not respond because his lawyer told him it could hurt his court case as the information is public.

On cross-examination, the Applicant testified that during his 15 years in the motor vehicle industry he has seen 15 to 20 deals that have been cancelled, but not after the paperwork has been submitted to the lease holding company. He continued by stating that he had no authority to cancel the deal and that he had never spoken to the dealership owner about this situation.

The Applicant testified during the cross-examination that he had spoken to the used car sales manager regarding selling this vehicle on the dealership used car lot, but the customer would have suffered a significant financial loss.

During cross-examination, the Applicant admitted that he would have suffered some financial loss if this deal was cancelled. When asked if he knew how much insurance the customer had or how much of a deduction the customer had on the subject vehicle, he replied "no". Also when asked if he knew the amount of the financial shortfall that the disposing of the vehicle would cost to the customer the Applicant replied "I don't know".

During cross-examination, the Applicant was asked to explain how he became aware that having a vehicle burned rather than stolen the insurance company paid out the funds with less waiting time? The Applicant responded that he had a previous police officer customer who's vehicle caught fire and the pay out was very prompt and that he had another customer who had his vehicle stolen and he had to wait at least thirty days before the insurance benefit was received.

The Applicant's employer

The next witness for the Applicant was his employer who was sworn in and testified that he was a graduate of Trent University, and had purchased his father's dealership in 1978. He stated that he employed seventy-three employees, and has known the Applicant since 1977. He testified that he knew the Applicant's father, and the Applicant's brother is his used car sales department manager. He assessed the Applicant as straight forward, above board, knows the product well and is appreciated by customers. The Applicant's employer said that he promoted the Applicant to new car sales manager in 2004 where he was overseeing new car sale deals, advertising and supervising sales staff. The Applicant did not have much training for the position, and even though he performed well, he struggled with the duties of the position. The witness stated that the Applicant tried to do too much himself when he ought to have delegated some tasks to others.

The witness testified he was not aware of the conduct that brought about the charges until the complainant telephoned him and requested a meeting in the dealership parking lot and not in the owner's office. He stated that he did suspect something, but when he met the complainant in the parking lot, the latter played the tape where his sales manager had advised the complainant of the option to have the vehicle burned. He stated that the complainant gave him a copy of the taped conversation to take with him. The Applicant's employer went on to state that the complainant advised him that the lease of the new vehicle was causing personal family concerns as he now was having difficulty getting mortgage approval for the new home they intended to purchase. The witness stated that he advised the customer/complainant that he would have his son contact him as he has extensive knowledge and numerous contacts in the mortgage business. He testified that he advised the customer /complainant that he would deal with the new car sales manager as he saw appropriate. When he spoke to the sales manager and after much consideration, he decided to demote the Applicant to a salesperson and hire a new sales manager for his new car sales department. He stated that the decision to demote rather than fire was based on the fact that the Applicant admitted that he had made a gigantic mistake, had no previous incidents of this nature in his past conduct and firing would have been too severe a punishment for the crime. He continued by stating that he could control

the Applicant if he was a salesperson as all deals would be monitored and approved by the sales manager.

The witness testified that in his view, the customer/complainant had manipulated the Applicant, but he was not sure why the Applicant did not discuss the matter with him.

The witness testified that three weeks later, the customer/complainant's mortgage was approved, and he still retained the vehicle. He stated that the customer/complainant called him again and requested another meeting with him at a local donut shop. He agreed to meet him, and at this meeting, the customer/complainant thanked him for arranging the mortgage and he advised the customer/complainant that the Applicant was no longer the new car sales manager. The customer/complainant then asked him for further compensation, but the witness refused. The witness testified that the customer/complainant then said "if there is no further compensation then we will take this matter further". The witness testified that several months later two police officers arrived at the dealership to meet with him and requested to see the Applicant.

The witness concluded his testimony by stating that in the ten years, this is the only incident he is aware of where the Applicant's conduct was criminal and he believes this is out of character. He stated that he had no reason to question the Applicant's honesty and integrity and, if granted registration, he will continue to employ the Applicant because he does not see him as a risk to the public.

On cross-examination, the witness stated that he supports the automotive industry having a positive image, and if his salespersons were found stealing from his dealership or lying to a finance company he would be "hard line" with them, and if the situation was serious enough he would fire them. He stated that his sales managers have more free rein and not the same controls as do the salespeople.

Again during cross-examination, he said that he believed the Applicant was manipulated, but he continues to support him and that was the reason him attending the hearing.

The witness explained how the Applicant was compensated. He stated there is a flat line compensation per car. Then, there is a salary/bonus based on volume, and then the sales manager, the Applicant, would receive a percentage of the net profit of the department he supervises. He stated that there would be minor financial impact on the Applicant if he had taken the vehicle back.

The witness explained that once the customer takes delivery of his new licensed vehicle, it is registered with Chrysler and impossible to undo the deal other than calling the vehicle "used". Thus, the customer loses a significant amount of money.

The witness advised the Tribunal that the Applicant is one of his top salespersons every month, and he sells about ten percent of the dealership vehicles.

During cross-examination, the witness confirmed that the Applicant did not tell him or discuss this matter with him, and he found out about this incident from the customer/complainant. He stated that he was "shocked" that the Applicant did this, and he does not believe he would do this again.

The witness concluded his testimony by stating that if he thought the Applicant would do this again he would not be working with him now.

The Applicant's wife

The Applicant's wife was sworn in and testified that she was a registered nurse and had known the Applicant for more than 15 years, as they are married and have two children.

The witness said that her husband does not see his work as a job, but rather as a career. She stated that her husband has pride in what he does, and in his accomplishments, and he always goes the extra mile to assist others.

The witness testified that while the Applicant was the sales manager, he was stressed, spent a lot of time away from home, and he was hard to get to go on vacation. She stated that she learned about her husband's criminal charges the day the police came to the dealership and advised the Applicant and the dealership's owner of the pending charges. She stated that her husband was embarrassed to tell her and he knew he was wrong. She continued stating that he was disappointed in himself, and that he had let everyone down. She, also, was ashamed for what he had done.

The witness testified that she was shocked when advised of the conduct that led to the criminal charges as this was out of character for her husband, and this had never happened before.

The witness concluded her testimony by stating that her husband had never done anything dishonest or lacking in integrity before and that he was always forthright. She stated that he made a mistake he will never forget, and she is sure it will never happen again.

FACTS FOUND PROVEN

The facts found proven by the Tribunal are as follows:

1. The Registrant was first registered as a motor vehicle salesperson on or about February 17, 1999.
2. On or about January 8, 2007 the Registrant disclosed pending criminal charges on his renewal application.
3. The Applicant when requested to provide further details and particulars of the outstanding charge chose not to respond to the Registrar's request.

4. The Applicant was promoted to new car sales manager with a large dealership in 2004.
5. The Applicant advised the customer/complainant of the option to burn the subject vehicle and collect the insurance pay out promptly.
6. On or about June 18, 2007, the Applicant was found guilty of counselling to commit the indictable offence of arson contrary to section 464(a) of the Criminal code of Canada.
7. The offence is industry specific as it relates to the sale of a motor vehicle for which the Applicant was involved as a salesperson.
8. The Applicant received from the Court a sentence of a conditional discharge with a condition of 18 months probation and a one 125 hour community service order. The probation period will end in January 2009. The Applicant is presently working on satisfaction of his community service hours.
9. On or about July 12, 2007, the Registrar sent a Notice of Proposal to Revoke Registration as a salesperson to the Applicant.

THE LAW

The *Motor Vehicle Dealers Act* (the 'Act'), states as follows;

5(1) An applicant is entitled to 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

THE ISSUE

Does the past conduct of the Applicant afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty?

APPLICATION OF LAW TO FACTS

The governing legislation has as its primary purpose consumer protection. The legislature to that end has decided that in the area of the retail sales of motor vehicles, a regulatory scheme is required. The scheme mandates that persons involved in that industry become

registrants under the Act. While the Act allows for a prima facie right to registration it also allows the Registrar to intervene in the registration process if he feels that there are grounds for such intervention. Those grounds are set forth in section 5 of the Act and the registrant or applicant are informed of that intervention 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*.

In the present case, the Applicant's application for registration was denied on the basis of past conduct not reflecting honesty and integrity, and not acting within the law.

The Applicant, in his testimony, did not dispute his charge or conviction as rendered by the Court nor did he dispute the charge was industry related. The Applicant did not admit that there was any financial benefit to him as a result of the advice he gave to the customer, but one of his witnesses explained the compensation package and clearly there was some financial gain for the Applicant.

The Applicant attempted to explain to the Tribunal that his actions were intended to assist a customer out of a financial bind. A person with the Applicant's education and experience ought to have known at the time, that the counsel he was giving the customer was not in accordance with the law and that he was not acting with honesty and integrity. The Applicant had ample time to consider other alternatives such as doing nothing to assist the customer, discussing the situation with the owner of the dealership, or if he did not wish to do that, he could have spoken to the dealership owner's son who, the owner testified, had experience and contacts to assist others in need of financial help. Instead, the Applicant chose to remember some previous incidents where customers received the insurance pay out very quickly, as well as his friend who, he was sure, could provide the services needed to the customer. When his customer returned for advice, the Applicant counselled him to commit a criminal act as well. Choosing the latter alternatives are not considered by the Tribunal as acting with honesty, integrity and within the law. Even though the Applicant stated that this was a huge mistake and other witnesses testified this was out of character for the Applicant, the Tribunal heard no convincing testimony that this would not happen again as all were shocked it happened this time. This legislation is intended to protect the unsuspecting public. For the Tribunal to support the registration of an applicant who has a recent conviction for a very serious industry related offence and is still serving the eighteen month sentence imposed by the court would be sending an incorrect message to the industry and to the public.

The Applicant did attempt to explain why he did not provide a response to the Registrar's request for additional particulars and details by stating that his lawyer advised him it may affect his court case. Even though he had received that advice, he could have chosen to respond to the Registrar indicating the direction he had received from his lawyer or provide a full explanation. The Tribunal views the lack of response to the Registrar's authority as self-serving in this case, as well as not within the law. This causes concern to the Tribunal as to whether or not the Applicant would respond honestly, with integrity and in a timely manner in the future.

Having carefully considered all the evidence, the Tribunal concludes that the Applicant's past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

DECISION

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal dated July 12, 2007, to revoke the registration of Steven A Smith as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL


Donald Benninger, Member

Released: December 20, 2007

Filename: 4318.mvda.smith.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 <http://www.lat.gov.on.ca/> in approximately two weeks time. The decision will also be available on Quicklaw at a later date.