

Licence  
Appeal  
Tribunal

Tribunal  
d'appel en  
matière de permis



ELAK MARKETING LTD. o/a BANNERMAN AUTO  
AND CHRISTOPHER BANNERMAN

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

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: No-one appearing on behalf of the Applicants, ELAK  
MARKETING LTD. o/a BANNERMAN AUTO and  
CHRISTOPHER BANNERMAN

YOVANKA McBEAN, Agent, appearing on behalf of the  
Registrar, *Motor Vehicle Dealers Act*

DATE OF HEARING: February 4, 2008 London

### REASONS FOR DECISION AND ORDER

This is an appeal by Elak Marketing Ltd. o/a Bannerman Auto and Christopher Bannerman (the "Applicants") to the Licence Appeal Tribunal pursuant to section 7(2) of the *Motor Vehicles Dealers Act*, R. S. O. 1990 Chapter M. 42 (the "Act") appealing the Notice of Proposal to Revoke the Registration of the Applicants issued by the Registrar, *Motor Vehicles Dealers Act* and dated August 10, 2007.

The Notice of Proposal to Refuse Registration was entered as Exhibit 1. It states:

#### REASONS

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 and financial position are inconsistent with the intention and objective of the Act, and therefore warrants disqualification to registration under the Act.

## PARTICULARS

The Reasons for this proposal are:

1. Elak Marketing Ltd. o/a Bannerman Auto (the "Dealer") is currently registered as a motor vehicle dealer and was originally registered on or about September 27, 1999.
2. Christopher A. Bannerman ("Bannerman") is currently registered as a motor vehicle salesperson and was registered at all material times.
3. Bannerman 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 the failure to comply with the Retail Sales Tax Act, the Dealer is indebted to the Ministry of Finance in the amount of \$68,567.44 as at April 2, 2007.

## GROUND FOR APPEAL

The Notice of Appeal, Exhibit 2, is vague but appears to take issue with the results of a tax audit. It appears to dispute the tax liability assessment for the months of August 2005 to February 2006 with respect to both vehicle sales and parts sales.

## ISSUE

1. Does the past conduct of the Applicants afford reasonable grounds for the belief that the Applicants will not be financially responsible in the conduct of business and that they will not carry on business in accordance with the law and with integrity and honesty?
2. Should the Tribunal confirm, modify or set aside the Registrar's order?

## STATUTORY AUTHORITY

The statutory authority for the actions of the Registrar and the jurisdiction of the Tribunal are set out in sections 5, 6 and 7 of the *Motor Vehicle Dealers Act*. For ease of reference they are set out below.

### Registration

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; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations. Tribunal or prescribed by the regulations.

#### **Refusal to register**

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

#### **Suspension or revocation**

- (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.

#### **Notice of proposal to refuse or revoke**

7. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

#### **Notice requiring hearing**

- (2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

#### **Powers of Registrar where no hearing**

- (3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1).

#### **Powers of Tribunal where hearing**

- (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

## EXHIBITS

The following exhibits were entered at the hearing:

- Exhibit 1 Notice of Proposal to Revoke the Registration of the Applicants dated the 10<sup>th</sup> day of August, 2007;
- Exhibit 2 Notice of Appeal of the Applicants dated September 27, 2007 and received by the Tribunal on October 1, 2007;
- Exhibit 3 Respondent's Book of Documents;
- Exhibit 4 Notice of Hearing dated November 5, 2007;
- Exhibit 5 Fax cover sheet dated November 5, 2007 confirming that the Notice of Hearing was sent to the Applicants at 519-657-5199, the number given by the Applicants as their fax number; and
- Exhibit 6 Updated Schedule A & B from Ministry of Revenue indicating current arrears at January 31, 2008 is \$71,085.86.

## EVIDENCE

The Tribunal heard from two witnesses on behalf of the Registrar. No-one appeared on behalf of the Applicants.

The first witness was Diane Gautier. Ms Gautier is a Field Collection Officer for the Ministry of Revenue. The Ministry has recently changed its name to Ministry of Revenue from Ministry of Finance. She has been with the Ministry for twenty-one years. In her current position she becomes involved with the Ministry's clients when all in-office attempts to collect retail sales tax have failed. The files are then referred to Ms Gautier to visit the client and to take steps to collect outstanding taxes.

She outlined the various payment schedules for businesses that collect retail sales tax. In the case of the Applicant, Elak, she stated that it has a requirement to file monthly returns. She stated that the information in the return is provided on a voluntary basis. By this the Tribunal understands that there is no independent check each month to confirm if the information in the return is correct so the Ministry relies on the filing business to be honest and truthful. Elak is required to file and remit outstanding tax on the 23<sup>rd</sup> of each month for tax collected in the previous month.

Ms Gautier reviewed the history of dealings with Elak set out in the Ministry's letter to the Registrar found at Tab 4 of Exhibit 3. She stated that attempts were made to collect the outstanding tax and that promises were made by Bannerman. A number of steps were taken including a PPSA registration and a bank demand. Arrangements were made with the Applicants to pay the arrears and the Ministry withdrew its bank demand. The payment arrangement was not honoured by the Applicants.

In summary, Ms Gautier testified that the Applicants were under an obligation to file and remit on forty-six occasions. They actually filed on time on five occasions. Only three returns included payment. Other payments were short when finally received with respect to interest and penalties and several were short on the tax due. Ms Gautier reviewed the calculations in Exhibit 6 and testified that as of January 31, 2008, the amount of \$71,085.86. is still outstanding.

Ms Gautier stated that the Retail Sales Tax Act deems all tax collected by Vendors to be trust funds held for the benefit of the Ontario public at large. With respect to the Applicant, Bannerman, Ms Gautier pointed out that the Retail Sales Tax Act makes directors personally liable for unpaid trust funds. She testified that Bannerman had been advised of his personal obligations in detail.

When asked why the Ministry had sent the letter to the Registrar asking for the revocation of the Applicants' registrations, Ms Gautier stated that the Ministry wants to stop the bleeding. The situation where the Applicants continue to collect retail sales tax from customers and use it for their own use could not be allowed to continue. She further advised the Tribunal that a second corporation owned by Bannerman was in arrears in its corporate taxes in the amount of some \$11,000.00

The second witness was Mary Jane South. Ms South is the Deputy-Registrar of the Ontario Motor Vehicle Industry Council, the regulator under the Act. Her duties include oversight of the registration process. She advised the Tribunal that it is the Registrar's position that the Act is consumer protection legislation. She reviewed the requirements of section 5 of the Act set out above. She then reviewed and confirmed the facts as set out in the Notice of Proposal. She reviewed the corporate filings of the corporate Applicant, which show clearly that Christopher Bannerman is the sole administrator of the corporation.<sup>1</sup>

Ms South then outlined the Registrar's position that by failing to remit retail sales tax and by failing to comply with the Retail Sales Tax Act trust provisions, the Applicants have shown that they have not conducted business in accordance with the law and with honesty and integrity and in all likelihood they will not do so in the future.

The Registrar then closed its case and Ms McBean made closing arguments. In her closing arguments, Ms McBean reviewed the financial irresponsibility of the Applicants as disclosed by the evidence; failure to remit and submitting payments that were less than the amount due. She stated that the requirements of section 5 of the Act are clear and it is clear that it applies to both the officers and directors of a corporate registrant as well as the corporate registrant. She drew the Tribunal's attention to the decisions of the Ontario Divisional Court in *Brenner*<sup>2</sup> and *Shine*<sup>3</sup>, which set out the standard of review by the Tribunal of the Registrar's decisions. She pointed out the provisions of S. 22 of the *Retail Sales Act* which deem collected tax to be trust funds and section 43, which makes directors liable for unremitted taxes. Ms McBean stated that the Applicants had no excuse for depriving the Province of Ontario of trust funds that were to be used

<sup>1</sup> Exhibit 3 Tab 3

<sup>2</sup> *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. No. 1017

<sup>3</sup> *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O. J. No. 603

for the betterment of all Ontarians and for social programs. She stated that to divert trust monies for personal use, whether paying bills or for any other reason, is a failure to comply with the law and grounds for revocation.

## FACTS FOUND PROVEN

The Tribunal finds the following facts proven:

1. Elak Marketing Ltd. o/a Bannerman Auto (the Dealer) is currently registered as a motor vehicle dealer and was originally registered on or about September 27, 1999.
2. Bannerman ("Bannerman") is currently, and was at all material times, registered as a motor vehicle salesperson.
3. Bannerman 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 the failure to comply with the Retail Sales Tax Act, the Dealer is indebted to the Ministry of Finance in the amount of \$71,085.86 as at January 31, 2008.
6. The Dealer has submitted numerous payments that were less than the amounts due.
7. As the sole officer and director of the Dealer, Bannerman is liable for the payment of retail sales tax.

## ANALYSIS

As stated above the test to be applied is set out in *Brenner*. *Shine* stands for the proposition that in making its deliberations the Tribunal owes the Registrar no deference. It remains to determine whether the Applicants' actions represent past conduct that affords reasonable grounds for a belief that they will not carry on business with honesty and integrity and in accordance with law.

In the circumstances of this case, the Tribunal is satisfied that there are reasonable grounds for believing that both of the Applicants will not carry on business with honesty and integrity and in accordance with the law in the future. The Applicant Dealer has consistently diverted trust funds to its own ends. It has a history of not dealing in accordance with law or with honesty and integrity. It has failed to abide by repayment promises made to the Ministry of Revenue. As Vice-Chair Israel pointed out in *Joseph Fine Car Sales Ltd and Riadh Jirjis v. Registrar, Motor Vehicles Dealers Act*, a November 28, 2002 decision of this Tribunal, where the facts are on all fours with the current case, the sole director and controlling mind of the corporation must bear equal

responsibility for the actions of the corporation. This principal is clearly recognized in the Act where registration of a corporation is dependent on its controlling mind having demonstrated good past behaviour. Accordingly, the Tribunal is of the opinion there is clear and cogent evidence that the Applicants are not entitled to registration as a motor vehicle dealer with respect to the Applicant Dealer or as a motor vehicle salesman with respect to the Applicant, Bannerman.

## **COSTS**

At the conclusion of the hearing, the Registrar asked for an award of costs under Rule 14 of the Tribunal's Rules of Practice. Rule 14 (1) states:

Where a party believes that another party in a proceeding before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings

By virtue of Rule 14 (2) the Tribunal shall consider all of the circumstances in making an award of costs. In particular, the subsection specifically states that failure to attend without notice was one of the grounds to consider.

It is clear from a reading of subsection 14 (1) that it contemplates that the request for costs must follow the belief of unreasonable activity requiring the sanction of costs. In doing so it encapsulates the general policy of the Tribunal that in asserting statutory rights, applicants should not be penalized by an award of costs. The purpose of the Tribunal is to provide swift and inexpensive access to a hearing for those who feel aggrieved by a regulator's actions. The request for costs must be on notice. The difficulty for the Registrar is that, using the standard precedent, the notice is set out in the Notice of Proposal where it is unknown how the Applicant may behave during the proceeding. At the time the notice was given, the Applicants in this case had not yet had an opportunity to appeal and the Registrar can have had no cases for any beliefs regarding the manner in which the other party may act in the proceeding. The Tribunal has serious concerns that the current practice of including a demand for costs in the Notice of Proposal meets or either the letter or the intent of Rule 14 (1).

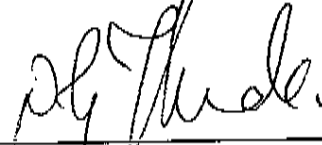
The matter does not end there, however. By virtue of Rule 14 (3), the Tribunal may, of its own motion, make a costs award against a party that has acted in an unreasonable manner. It is expected that this discretion will be exercised with some restraint in accordance with the overall policy to provide inexpensive access to the Tribunal. The current facts make this a case where the Tribunal should exercise its discretion. The Notice of Proposal is not a complicated document. It alleges that the Applicants have failed to remit retail sales tax to the provincial government. There are only three possible answers to such an allegation. The allegation may be correct and tax was not remitted; it may be wrong and tax was remitted; or it may be wrong because the tax calculation is incorrect and the tax is not due. In the Notice of Appeal the Applicants have suggested that their defence to the allegation is the third of the possible defences. This is done in two ways. The first suggestion is in the wording of the grounds of

appeal. The second is in the fact that the Applicants state that they intend to call three expert witnesses. As a result of the Applicants' representations, the Tribunal scheduled two days of hearings. The Registrar's representatives have had to travel from Toronto and set aside two days. By failing to appear without notice, effectively abandoning the appeal, the Applicants have shown a total disregard for the Tribunal, the other party and, indeed for the taxpayers of Ontario who have had to foot the bill for this hearing. Costs are an appropriate sanction to bring home to the Applicants the totally disrespectful nature of their behaviour.

#### DECISION:

By virtue of the authority in it pursuant to the provisions of section 7 (4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out the proposal dated August 10, 2007 to revoke the Applicants registrations. The Tribunal awards the Registrar costs for one day of hearing in the amount of \$800.00.

LICENCE APPEAL TRIBUNAL



D. Gregory Flude  
Vice-Chair

**RELEASED: February 15, 2008**  
File Name: 4438.mvda.Elak Enterprises.order.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.