

**Licence  
Appeal  
Tribunal**

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March 27, 2008

**MEMORANDUM**

**Re: DWAYNE MCCUTCHEON O/A D&S CLASSIC CARS 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:**

Colleen E. Butler, Counsel for the Applicants  
Aviva Harari, Counsel for the Respondent

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4491 – MVDA – REGISTRATION

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE *MOTOR VEHICLE DEALERS ACT* R. S. O.  
1990 C.M. 42

TO REFUSE REGISTRATION

TRIBUNAL: HARINDER S. GAHIR, Vice-Chair

APPEARANCES: COLLEEN E. BUTLER, Counsel, representing the Applicant

AVIVA HARARI, Counsel, representing the Registrar, *Motor  
Vehicle Dealers Act*

DATE

OF HEARING: February 6, 2008

Toronto

### REASONS FOR DECISION AND ORDER

#### BACKGROUND

This hearing arises out of a Notice of Proposal to Refuse Registration (the "Proposal") dated October 17, 2007, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively), to refuse the registration of Dwayne Richard McCutcheon o/a D&S Classic Cars (the "Applicant") as a Motor Vehicle Dealer and Salesperson under the Act.

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

The reason given by the Registrar in his Proposal is 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 Applicant's past conduct and financial position are inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Dwayne Richard McCutcheon o/a D&S Classic Cars under the Motor Vehicle Dealers Act.

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

1. Dwayne Richard McCutcheon o/a D&S Classic Cars applied for registration as a motor vehicle dealer on or about June 25, 2007.
2. McCutcheon has been found guilty of the following:

Theft	June 27, 1988
Impair driving	April 27, 1993
Mischief	November 2, 2002
Assault	February 2, 2005
Breach of Probation	August 8, 2005

3. McCutcheon is currently on probation for possession.
4. McCutcheon's driver's licence is suspended for unpaid fines.
5. McCutcheon has numerous driving related convictions.

The Applicant filed an appeal against the Proposal on October 29, 2007.

### THE EVIDENCE

The Registrar's evidence included the Respondent's Book of Documents, which the Tribunal marked as Exhibit #3, Court Information marked as Exhibits #4 and #5, as well as the testimony of Carey Smith. The evidence of the Applicant included the Applicant's Book of Documents, which is marked as Exhibit #4, and the testimony of the Applicant.

#### Testimony of Carey Smith

Mr. Smith has been employed by OMVIC for the last five years as a Director of Industry Conduct Investigations. He has 30 years experience gained as a member of a regional police service prior to joining OMVIC, and he has spent his career investigating criminal activities since 1980 onwards. From 1997 to 2003, he led a task force funded by the Federal and Provincial Governments, to investigate organized crime in the auto industry. He is familiar with the motor vehicle industry in Ontario, and the statutory requirements and procedures followed by the Registrar in carrying out his obligations under the Act. He explained the significance of OMVIC's regulation of the automobile industry. OMVIC, a public protection body, was created in 1997 to administer the Act. Mr. Smith runs the investigation section of the OMVIC. He identified documents contained in Exhibit #3, #5 and #6.

Mr. Smith testified that the Applicant has been found guilty of various criminal offences including theft, impaired driving, breach of probation and numerous driving related offences. He is currently on probation for possession of drugs. Moreover, the Applicant did not provide truthful information on his application for a dealer's licence. Mr. Smith referred the Tribunal to Exhibit #3, page 16, which is the Applicant's application for registration where the Applicant answered question number 4 indicating that he has a current and valid Ontario driver's license. However, the Applicant's Driver's license was suspended at the time of answering this question. Similarly, the Applicant was required to list all his charges and convictions of any offence under any law. He declared his impaired driving, assault, and possession of cocaine convictions. He mentioned that he record has been clean for the last ten months. However, the subsequent OPP background checks disclosed that the Applicant was still under probation for possession of illegal substances (Exhibit #3, page 22).

Mr. Smith also referred the Tribunal to the Police Record Search Certificate of the Applicant, contained in Exhibit #3, page 27, which shows the Applicant's conviction in August 2005, for breach of probation.

Mr. Smith testified that the Applicant is still under probation. He stated that the Applicant was convicted four times and is likely to re-offend. He referred the Tribunal to Exhibit #3, Tab 9, which is the Applicant's driving record. The record shows that the Applicant was convicted 50 times in the last 15 years under various *Highway Traffic Act* offences. He went on to state that these offences are industry related.

In cross-examination, Mr. Smith conceded that someone with a conviction record may have a licence under the Act. He contended that it is not the seriousness of the charge, but the past conduct of the person, like breach of probation. He agreed that people could be rehabilitated, but testified that there is no recent unsupervised positive conduct of the Applicant to show that he has rehabilitated and redeemed himself.

### Testimony of The Applicant

The Applicant is currently a general contractor in construction. He testified as to having had problems with drug abuse in the past. His father was a licensed motor vehicle dealer and used to operate his business from his home. The Applicant inherited three classic cars from his father, and wanted to start his own used cars sale business. In order to meet the requirements of OMVIC, the Applicant took a salesperson course at Georgian College. With respect to the Respondent's allegation that he did not fully disclose his record on his application, the Applicant testified that he might have inadvertently missed listing all his convictions. The Applicant explained the circumstances of his involvement with the law. He testified to stealing some CDs and being convicted in 1988 under section 294 (b) of the Criminal Code of Canada. He agreed that in 1993, he was convicted for impaired driving, and in 2002 he was convicted for the mischief under section 430 of the Criminal Code. He testified that he was under the influence of narcotics and banged the door of a wrong person. He testified that he has paid his fines and is currently under probation.

The Applicant testified that he completed a drug rehabilitation program in September 2007, and also attended the Addiction Day Treatment Program from October 30, 2006 to November 23, 2006, and therefore considers himself as rehabilitated.

In cross-examination, Mr. McCutcheon agreed that he had been on probation a number of times and has re-offended.

## **THE LAW**

Section 7 of the *Motor Vehicle Dealers Act* states as follows:

3. (1) No person shall,
  - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or

- (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 5 of 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
  - (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.

Subsections 7(1) to (5) of the Act provides as follows:

- 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.
- (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
- (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).
- (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.
- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

## REASONS FOR DECISION

The governing legislation, the *Motor Vehicle Dealers Act*, is a consumer protection Act which regulates the retail sales of motor vehicles in Ontario. The legislation requires that people involved in that industry be registered under the Act. While the Act gives an entitlement to registration, it also allows the Registrar to refuse registration on the specified grounds. Those grounds are set forth in section 5 of the Act and the registrant or the applicant is 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 a hearing.

The Applicant's application for registration as a motor vehicle dealer and salesperson was refused on the basis of his past criminal convictions. The only issue for determination in this matter, is whether or not the Applicant's past conduct, in light of his convictions record, affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty. If reasonable grounds for such belief exist, the Applicant is not entitled to registration.

It is clear from the testimony of the Respondent's witness, Mr. Smith, and the Applicant's own testimony, that the Applicant has had a troubled past, particularly having been convicted of theft in June 1988, impaired driving in August 1993, mischief in February 2005, breach of probation in August 2005, and recently being on probation for possession of drugs. The Applicant also had 50 *Highway Traffic Act* convictions between 1991 and 2006. Although, it is not in the Tribunal's jurisdiction to look behind a conviction record, the Tribunal can look into the circumstances and mitigation factors in making its decision pertaining to the Appeal.

The Applicant, in his testimony, tried to down play his conviction under section 294(b) of the Criminal Code by saying that it resulted from an act of stealing a few CDs. There is no doubt, in the Tribunal's view, that the act of stealing and the taking of another's property without consent is fraudulent, and as such involves deceit and dishonesty. The theft committed by the Applicant, although pertaining to something with little monetary value, is serious in nature. The Applicant also testified that his "mischief" conviction was as a result of his mistaking the wrong house for a friend's house, and waking them up at 2 a.m. in the morning. He also insisted that his "assault" conviction resulted from pushing someone, and that he did not have legal counsel and was wrongfully convicted. The Tribunal does not accept the Applicant's position as he had the right to appeal if he felt that he was wrongfully convicted. His pattern of the *Highway Traffic Act* convictions, criminal convictions, and his past conduct stand in stark contradiction to the honesty and integrity required of him to carry on business in accordance with law.

In *Goodarzi (Re)* [2002] O.L.A.T.D. No.81, the Tribunal found, as it does here, that the very nature of the repeated and many traffic violations by the Applicant speaks to the Applicant's disregard for law, and of the Applicant's refusal to act in a lawful and orderly manner. Moreover, the Applicant is currently under probation for possession of drugs. He has yet to show unsupervised conviction free and redeemed conduct.

In a recent case of *Laprise (Re)* [2007] O.L.A.T.D. No 530 Vice Chair, D. R. Wallace, dealing with the issue of the Applicant's probation, held:

Additional authority for the proposition that some time must elapse between the expiration of any period of probation and an application for registration may be found in the decisions of this Tribunal in *Rubin (c.o.b. as Affordable Auto Sales)*, [2000] O.L.A.T.D. No. 377, *Colafranceschi*, [2005] O.L.A.T., *Kenny (Re)* [2005] O.L.A.T.D. No. 60 and *Goddard (Re)*, [2005] O.L.A.T.D. No. 50.

Indeed, the principle has been so consistently applied that this Tribunal has been unable to find a single instance where registration has been granted to an Applicant who was still on probation.

There is no doubt that the important principle in matters of this nature is the promotion and safeguarding of the integrity and honesty of dealers within the motor vehicle industry. To permit the Applicant to become a member of that industry would, in view of his convictions, send an incorrect message to the public at large. The Applicant should be required to redeem himself before he can be considered for registration as a motor vehicle dealer. The lack of honesty and integrity on the part of the Applicant did relate to more than one incident, and reflects poorly for his future business conduct, should he be permitted registration under the Act. Therefore, it is the Tribunal's finding that 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.

## DECISION

The Tribunal, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, upon carefully considering of the evidence, directs the Registrar to carry out his proposal to refuse the registration of the Applicant.

### LICENCE APPEAL TRIBUNAL

  
Harinder Gahir,  
Vice-Chair

*Released: March 25, 2008*

File name: 4491.mccutcheon.mvda.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 approximately three weeks time. The decision will also be available on Quicklaw at a later date.