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January 12, 2009

**MEMORANDUM**

***Re: John Byers o/a Fleetwood Auto  
v.  
Registrar, Motor Vehicle Dealers Act***

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

**DISTRIBUTION LIST:**

John Byers o/a Fleetwood Auto, Applicant  
Yovanka McBean, Paralegal for OMVIC

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JOHN BYERS O/A FLEETWOOD AUTO

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

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: JOHN BYERS, unrepresented  
(the "Applicant")

YOVANKA McBEAN, Paralegal, representing the Registrar, *Motor  
Vehicle Dealers Act* (the "Registrar")

DATES OF HEARING: November 24, December 4 and 9, 2008

Toronto

### REASONS FOR DECISION AND ORDER

This is an appeal by the Applicant to the Licence Appeal Tribunal (the "Tribunal") pursuant to section 7(2) of the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42 (the "Act"), appealing the Notice of Proposal to Revoke Registration of the Applicant, issued by the Registrar under the Act and dated December 6, 2007.

### BACKGROUND

The Notice of Proposal to Revoke 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 conduct and financial position are inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act.

**PARTICULARS**

The reasons for this proposal are:

1. Timothy John Byers (a.k.a. John Byers) o/a Fleetwood Auto (the "Dealer") is currently registered as a motor vehicle dealer and was originally registered on or about December 22, 2000.
2. The Dealer was registered on terms and conditions imposed by the Licence Appeal Tribunal (LAT) by way of a Consent Order released on or about December 15, 2000. A copy of which is attached hereto as Schedule "A" to this proposal.
3. On or about November 22, 2002, the Dealer submitted a short form application for renewal of registration.

4. On the November 22, 2002 short form application question 1(a) asks:

"Are there any charges pending or has the applicant been found guilty or convicted under any law?"

The Dealer answered "no".

5. On the November 22, 2002 short for (*sic*) application question 1(b) asks:

"Has the applicant had a licence of any kind revoked, refused, suspended or cancelled?"

The Dealer answered "no".

6. On or about November 16, 2004, the Dealer submitted a short form application for renewal of registration.

7. On the November 16, 2004 short form application question 1(a) asks:

"Are there any charges pending or has the applicant been found guilty or convicted under any law?"

The Dealer answered "no".

8. On the November 16, 2004 short form application question 1(b) asks:

"Has the applicant had a licence of any kind revoked, refused, suspended or cancelled?"

The Dealer answered "no".

9. On or about December 14, 2006, the Dealer submitted a short form application for reinstatement of registration.

10. On the December 14, 2006 short form application question 1(a) asks:

"Are there any charges pending or has the applicant been found guilty or convicted under any law?"

The Dealer answered "no".

11. On the December 14, 2006 short form application question 1(b) asks:

“Has the applicant had a licence of any kind revoked, refused, suspended or cancelled?”

The Dealer answered “no”.
12. On the December 14, 2006 short form application question 1(c) asks:

“Has the applicant declared bankruptcy, been involved in bankruptcy proceedings, or are there any outstanding judgements or court orders against the applicant?”

The Dealer answered “yes”.
13. The Dealer’s agent attached a letter to the December 14, 2006 short form application indicating that Mr. Byers “may have had an HTA violation since his original registration” and acknowledged “the OMVIC compensation fund judgment”.
14. John Byers has had his Driver’s Licence suspended 16 times since first being licenced as a driver in Ontario.
15. John Byers has 8 *Highway Traffic Act* convictions for “Driving While Licence is Suspended”.
16. On or about February 3, 2003 John Byers was convicted with respect to the Dealer making a false statement in a safety standards certificate, pursuant to section 99(2) of the *Highway Traffic Act*.
17. The Dealer has breached his LAT Ordered terms and conditions of registration.
18. On or about March 30, 2006 the Motor Vehicle Dealers Compensation Fund (MVDCF) paid a claim in the amount of \$4,313.54 to [name deleted], a consumer of the Dealer, in respect of a judgement she had obtained against the Dealer that related to a vehicle purchase.
19. As at the date of this proposal, the Dealer has failed to repay the MVDCF the monies that were paid out on his behalf.
20. On or about November 21, 2007, [name deleted], a consumer, obtained a judgement against the Dealer in the amount of \$4,021.26 in respect of a motorcycle purchased by the consumer from the Dealer.
21. 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.
22. As a result of failure to comply with the *Retail Sales Tax Act*, the Dealer is indebted to the Ministry of Revenue in the amount of \$209,268.94 as at June 25, 2007.

## GROUNDS FOR APPEAL

The Notice of Appeal (entered as Exhibit #2) sets out the grounds of appeal in one paragraph, as follows:

1. Particulars set out in the Proposal to Revoke are incorrect, or were disclosed at the time of Application.

At issue in this appeal are the short form applications of 2002, 2004 and 2006, where the Applicant answered "no" to questions relating to pending charges or convictions, and "no" to licence suspensions. The Applicant did disclose his conviction history up to the date of his first application for registration and the Tribunal concludes that the real ground of appeal is that it was unnecessary and not required for him to disclose the same record at subsequent renewals.

## ISSUES

1. Does the past conduct of the Applicant afford reasonable grounds for the belief that the Applicant will not be financially responsible in the conduct of business and that he 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 Notice of Proposal to Revoke Registration?

## THE LAW

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 Act. For ease of reference, they are set out below:

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.
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.
- (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.
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 therefor, 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.

## EVIDENCE

The first witness called by the Registrar was Jennifer Brake. Ms. Brake is a Field Collections Officer with the Ontario Ministry of Revenue. She has spent 26 years in the Collections Department of the Ministry. She deals with referrals from inside Collections Officers and attends at business premises to follow up on non-payment of taxes. She explained the retail sales tax regime as it applies in Ontario. Vendors have reporting and remittance obligations. They may be required to report and remit monthly, quarterly or semi-annually. Along with the report, vendors are required to submit payment in full for any retail sales tax that they have collected. If the requirement is to file monthly, as it currently is in the Applicant's case, the report and remittance must be received by the 23<sup>rd</sup> of the immediately succeeding month. Vendors are permitted to deduct 5% of the total tax owing, as compensation for their administrative costs in collecting and remitting the tax, and the balance is deemed to be trust funds collected on behalf of the Government of Ontario by the Vendor as agent.

The premise of the system is that vendors will self-report tax collected in an honest manner. To encourage honesty, the Ministry conducts periodic audits. Audits may be triggered by a report of business activity or as part of a regular inspection regime.

The first step in an audit is to request documents from the Vendor. The audit department will send up to three letters requesting documentary disclosure. If disclosure is not forthcoming, the audit department will estimate tax owing. In the case of a motor vehicle dealer, the audit department will contact the Ministry of Transportation of Ontario to determine the number of vehicles transferred by a particular dealer and the sales price. Once the audit is completed, an assessment notice is sent and the Vendor has 180 days to appeal the assessment. In the case of the Applicant, an audit was conducted in early June 2002 and an assessment notice was received at the end of June 2002. The audit found \$64,896.54 owing in unremitted retail sales tax. Ms. Brake is unaware of any Notice of Objection received within the 180 days allowed with respect to the June 2002 assessment. A second audit was conducted in December 2006 and \$74,462.60 was found owing in unremitted retail sales tax. The assessment was sent to the Applicant on March 23, 2007, and Ms. Brake is unaware of any Notice of Objection received by the Ministry within the 180 day appeal period with respect to the December 2006 audit.

As of November 20, 2008, Ms. Brake has calculated that the total unremitted retail sales tax is \$237,781.95 for the Applicant operating as Fleetwood Auto. The amount has been calculated using unpaid returns, estimated returns and levied assessments. In cross-examination, Ms. Brake stated that the current estimate of monthly tax owing is \$3,000.00 per month, notwithstanding that the Applicant reported tax owing in the area of between \$500.00 to \$1,200.00 for each month in the preceding years. No explanation was given for the \$3,000.00 estimate. Estimates have been used, as the Applicant has not filed a return since November 2007. The September 2007 return was not filed and the October 2007 return was filed in December 2007.

Fleetwood Auto was registered as a Vendor in 1999. In addition, the Ministry has determined from its audits that another entity operated by the Applicant, identified as Timothy Byers Car Dealership, also has failed to remit retail sales tax in the amount of approximately \$26,000.00. It has assigned that entity a Non-Registered Vendor number and maintains an account in that name. Ms. Brake testified that the auditor must have found some information in the review of the records that suggested the name, Timothy Byers Car Dealership.

Ms. Brake has had dealings with the Applicant in an attempt to resolve the amounts outstanding. She has received correspondence from the Applicant and referred it to an inside Collections Officer, as her duties do not include responding to correspondence. She has also had telephone discussions with the Applicant concerning the amount owing. She stated that in September 2008, she discussed the total tax outstanding with the Applicant. The Applicant denied that he owed in excess of \$200,000.00. He estimated his back tax liability in the area of \$60,000.00 to \$70,000.00.

Using, without conceding, the Applicant's admitted numbers and adding current estimates of unremitted tax, Ms. Brake calculates that the Applicant's calculation of his tax liability would be in the area of \$110,000.00, to the date of the hearing.

Ms. Brake did not disagree with the Applicant, in cross-examination, concerning ongoing correspondence that he has had with the Ministry to attempt to have the Ministry re-open the two assessments. She advised the Tribunal that it was the Ministry's position that those attempts were too late. She acknowledged that the Applicant has now filed a Notice of Objection, and she is aware that he has brought an application for judicial review seeking to recalculate his past tax liability. The Ministry takes the position that he is out of time and that all assessed amounts are due and owing. In cross-examination, the Applicant asked the witness if she recalled a strike in the public service in 2003. She did, it being her recollection that there was a strike in February or March of 2003. She recalled that it was cold outside. When asked if it was possible that a Notice of Objection filed during the strike would have been lost, she stated that it was not possible. She testified that managers were still operating the various departments and that most of the auditors crossed the picket line. Later she reviewed the date on the 2002 Notice of Assessment, and noted that the time to file a Notice of Objection had expired before the public service strike had commenced in 2003.

The next witness called by the Registrar was Yvonne Hallitt. Ms. Hallitt is the Administrator of the Motor Vehicle Dealers Compensation Fund ("MVDCF"), a position she has occupied for 11 years. Her duties include vetting and preparing claims, and presentation of claims to the Board of Trustees ("Board"). The MVDCF is funded by a one time \$300.00 levee on new registrants. In addition to Ms. Hallitt, there is a fund manager and the Board of Trustees. The Board is under a fiduciary duty to pay out genuine claims and to seek to recoup payouts from dealers.

Ms. Hallitt received a claim from a consumer arising out of the failure of the Applicant to pay a judgment. The substance of the claim was that the consumer had purchased a vehicle from the Applicant. Included in the purchase was a power train warranty valid for a three month period. Within the warranty period, the engine required replacement. When the consumer contacted the warranty company, she was advised that she had no coverage. She purchased a replacement engine and sued the Applicant for compensation. She succeeded in her law suit and was awarded the value of the replacement engine plus costs and filing fees. The judgment specifically finds that the Applicant failed to register the vehicle with the warranty company.

Ms. Hallitt asked the claimant to forward a copy of the judgment. She then contacted the Applicant, by telephone and letter, to give him the opportunity to make payment in full without intervention by the MVDCF. No response was received from the Applicant and no payment was made to the consumer, so Ms. Hallitt prepared the file for presentation to the Board. The claim was approved and payment made to the consumer in and around March 30, 2006. Attempts to have the Applicant reimburse the fund have so far had partial success.

Of an approximately \$4,500 judgment, the amount of \$2,263.54 is still outstanding despite a lapse of over 30 months since the fund sought reimbursement. Ms. Hallitt has recently been informed by the collection agency acting for the MVDCF that the balance is expected shortly.

While dealing with this complaint, Ms. Hallitt received a telephone call from the Applicant. The Applicant stated that he would not pay a penny. He stated that he would voluntarily give up his registration because he did not need to be registered to sell cars, as he had sold cars for seven years before he was registered. Ms. Hallitt confirmed that the Applicant wanted to voluntarily surrender his registration and, after discussions with her supervisor, she entered the surrender of registration into the Registrar's records.

Ms. Hallitt then reviewed a second consumer complaint that had proceeded to judgment. In this claim, the consumer purchased a new Kazuma motorcycle. Following numerous problems with the vehicle, the consumer was eventually advised that the vehicle was not made by Kazuma and that it was of unknown manufacture. She sought rescission of the contract on the basis of material non-disclosure and was successful. The court specifically found that the Applicant had misrepresented the vehicle to the consumer. The matter has been appealed, so the MVDCF claim file has been put on hold pending the outcome of the appeal.

Laura Halbert was the last witness called by the Registrar. Ms. Halbert is the Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC"), the Registrar's office under the Act. OMVIC was established in 1997 to administer the Act, and Ms. Halbert joined OMVIC in April 1997. She is also the Manager of the MVDCF. Ms. Halbert defined four roles for OMVIC. OMVIC is responsible for the registration of motor vehicle dealers and salespersons. It will conduct inspections and audits of dealerships. It will investigate dealers and salespersons for wrongdoing and take appropriate measures. It also has a complaints resolution function, attempting to resolve consumer complaints by mediating between the consumer and the dealer.

In outlining the Registrar's position, Ms. Halbert is of the view that the Applicant runs afoul of all of the grounds for denial of registration under s. 5 of the Act. She is of the opinion that the failure to remit retail sales tax and to file returns, as required, indicates financial irresponsibility. The failure to reimburse the MVDCF in a timely manner, together with the Applicant's refusal to deal with the consumer complaints long before a claim is made to the MVDCF, indicates financial irresponsibility.

There are numerous occasions where Ms. Halbert is of the opinion that the Applicant has demonstrated a lack of ability to operate in accordance with law, or with integrity and honesty. Ms. Halbert reviewed the Consent Order of this Tribunal issued on December 15, 2000. In particular, Ms. Halbert drew the Tribunal's attention to paragraph 2 which states:

1. The Dealer agrees if he is convicted under any law of an industry specific offence or if he convicted (*sic*) under the *Criminal Code*, his registration is automatically revoked.
2. The Dealer agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.<sup>1</sup>

Ms. Halbert then reviewed Tabs 6 through 9 of Exhibit #3. Tab 6 indicates that prior to 2000, the Applicant was convicted of four offences under the *Criminal Code*. Tab 7 shows that in 2003, the Applicant was convicted of making a false statement in a safety standards certificate. Tab 8 indicates forty-seven convictions under the *Highway Traffic Act* or related legislation since 1981. Ms. Halbert added that there is now a 2008 conviction. Tab 9 indicates that the Applicant has had his licence suspended sixteen times up to April 2006 for failure to pay fines. Ms. Halbert stated that she has checked recently and the number is now eighteen times. Ms. Halbert then reviewed the 2002, 2004 and 2006 renewals and noted that they appeared to be signed by the Applicant. She drew the Tribunal's attention to the negative answers in Section A, Question 1 a) and b) on each of the applications, that is, that the Applicant had represented on each renewal he had never been charged or had any kind of licence suspended or revoked. Ms. Halbert acknowledged that a letter from James deRoux accompanied the December 2006 reinstatement application. The letter states that the Applicant:

may have had an HTA violation since his original registration, but I do not have particulars, and am not sure if you require them. If so please advise and I will obtain and forward a licence abstract.

Mr. Byers has not had any criminal charges/convictions since his original OMVIC registration. He has an old criminal record (in excess of 15 years ago) which your records should disclose. He is in the process of obtaining a pardon for those convictions.

Ms. Halbert points out that the letter mentions a singular HTA offence, whereas by 2006 there were several, including the charge relating to a false safety standards certificate. She further points out that there is no mention the judgment is being appealed.

Ms. Halbert testified that the failure to reimburse consumers causes the Registrar particular concern. There is a concern that a consumer with a legitimate complaint, which was ultimately reduced to a judgment, was "made to jump hoops" and was "stonewalled" by the Applicant. The MVDCF was also "stonewalled". Nothing was straightforward with the Applicant and consumers were disadvantaged. The claim to the fund and the reticence to reimburse the fund is of great concern. Ms. Halbert explained that the MVDCF is funded entirely by a one time contribution by new registrants. It is not an insurer and is not funded on an actuarial calculation. The behaviour, in Ms. Halbert's view, does not demonstrate honesty.

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<sup>1</sup> The Consent Order is Schedule "A" to the Notice of Proposal, Exhibit #3, Tab 1, commencing at page 5

Equally, the failure to remit retail sales tax in a timely manner and to prepare tax returns, as required, speaks to a lack of honesty and integrity. The sum total of the behaviour indicates a lack of financial responsibility.

In dealing with the LAT Order that permitted the Applicant to become registered in the first place, Ms. Halbert is of the view that its language is clear. The Applicant was under an obligation to disclose his whole criminal and provincial conviction record at each renewal. He failed to do so. He was also under a duty to disclose suspensions of his driver's licence. In cross-examination, she testified that the Registrar accepts the renewal applications at face value. The applications misstate the facts and mislead. In the Registrar's view, as formulated by Ms. Halbert, the Applicant meets all of the grounds for denial of registration as set out in s. 5 of the Act.

James deRoux was the first witness called by the Applicant. Mr. deRoux was called to the Bar of Ontario in 1984 but was disbarred in 1986. He then acted as a paralegal until the new registration scheme was implemented. He withdrew his application for registration. Since 2000, he has been carrying out administrative work on a part-time employment basis for the Applicant. He works two to three days per week.

The first issue Mr. deRoux addressed was the repayment of the consumer complaint. He stated that in August 2008 he attended at Scotiabank, and obtained a money order for what he believed to be the outstanding balance. He forwarded the money order to the collection agency representing the Registrar. He has now determined that the money order was not cashed and steps are being taken to replace it.

Mr. deRoux acted for the Applicant with respect to the conviction for issuing a false safety standards certificate. He stated that the charge stemmed from a clerical error. There was no suggestion that the vehicle was unsafe, simply that the wrong odometer reading had been entered on the face of the certificate. The Applicant conceded that it was a mistake and was fined \$100.00 notwithstanding a statutory minimum fine of \$400.00. The safety standards certificate was filled out by Donna O'Laughlin. The Applicant does not read or write very well and relies on others to do his paperwork.

Mr. deRoux completed the December 2006 renewal application on behalf of the Applicant. The Applicant then signed it. He answered "no" to the questions in issue. With respect to Question 1 a), he testified that he misread it. He thought it related only to previously undisclosed convictions or charges. He did, however, forward the letter dated December 13, 2006, in the belief that a driver's abstract would disclose all HTA convictions, including the safety standards certificate conviction. He did not feel other HTA convictions required disclosure, including the driver's licence suspensions. He received no reply to the letter. He identified the handwriting in Tabs 3 and 4 as that of Donna O'Laughlin.

Because of the Applicant's reading difficulties, it is the policy of the Applicant to request that all correspondence be in writing. It can then be reviewed by Mr. deRoux or another literate person to avoid misunderstanding.

When dealing with consumer complaints, if initial attempts to resolve the complaint have not been successful, Mr. deRoux will ask, in writing, for the return of the vehicle for inspection. Following an inspection, there will be an attempt to resolve the problem with the consumer. Mr. deRoux did not give any evidence directly concerning the consumer complaint paid out by the fund.

Mr. deRoux's involvement with the Applicant extends to the pre-registration period. He negotiated the terms and conditions with the Registrar. His evidence was that there was no negotiation. The Registrar sent the terms and said "sign". As the Applicant's legal advisor at the time, Mr. deRoux advised the Applicant of the content of the terms and conditions of registration. He did not have them in front of him when he completed the December 2006 renewal.

Mr. deRoux believed that all the answers in the renewal were correct. He stated that, due to a clerical mix-up at the Ministry of Transportation of Ontario ("MTO"), the Applicant had two driver's licence numbers. MTO merged the two records without notice to the Applicant causing confusion, and the Applicant believed he had a clean record. The issue was taken on appeal with respect to a driving while suspended charge and the conviction was upheld. Notwithstanding that licence suspensions were an issue set out in the Notice of Proposal, Mr. deRoux did not think of advising the Applicant to disclose documentation concerning the issue of the two licences for use at the hearing.

Kathy Preston was the second witness called by the Applicant. She has been a bookkeeper for 25 years and runs Central Tax Service, a bookkeeping company. She has had a long business involvement with the Applicant. The Applicant initially operated a limousine company from his home. He then moved to the premises on Highway 90. One of the businesses at the new premises was the sale of cars on a consignment basis. Owners would drop their cars off at the Applicant's premises and persons interested in buying the car would then deal with the owner to complete the purchase. The business is now Fleetwood Auto. In 2002, the Applicant brought Ms. Preston a letter from the Ministry of Finance (now the Ministry of Revenue) enclosing an audit. She noted that the audit had been prepared from figures obtained from MTO. After marrying up the list accompanying the audit with her figures, she determined that retail sales tax had been paid at the time of transfer of the cars and the assessment was seeking double payment. She contacted the auditor in question by telephone. He advised her that the Applicant's remedy was to file a Notice of Objection, so she drafted a letter dated October 4, 2002 and forwarded it to the Ministry in the belief that it would suffice as a Notice of Objection.<sup>2</sup> A few weeks later, she received a call from the Ministry advising her that she would need to file a formal Notice of Objection within the time frame permitted under the Act. She believed the timeframe was 160 days, so she moved expeditiously to file a formal Notice of Objection within 160 days. She sent both the letter of October 4, 2002 and the Notice of Objection by registered mail. Thereafter, Ms. Preston had telephone discussions with Ministry personnel and was advised that the file had been assigned. She followed up many times.

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<sup>2</sup> Exhibit #6

In Ms. Preston's view, the Applicant did not owe any money on the assessment of June 2002. The Applicant was operating the "park and sell" consignment operation. Retail sales tax was paid on each car at MTO as a condition of the transfer of registration. Ms. Preston was not involved on the assessment of 2006. K.H. of her office handled that matter and dealt with the auditor. Ms. Preston could give no evidence regarding the 2006 audit.

Donna O'Laughlin gave evidence about her role in filling out the safety standards certificate and completing the renewal applications in 2002 and 2004. She has been employed by the Applicant since before 2000, when he became a dealer. As a general rule, given the Applicant's reading and writing difficulties, it is Ms. O'Laughlin who handles all of the Applicant's paperwork. She was aware of the major effort the Applicant had to put in order to learn the material to pass his registration qualification exams. It took him well over one year to complete.

One of Ms. O'Laughlin's duties is to fill out safety standards certificates. She recalled the facts surrounding the 2003 charge of issuing a false safety standards certificate. She had a certificate to fill out and she needed the mileage. She went out to the parking lot. There were two vehicles of the same make, model and colour and she looked at the mileage in the wrong one and entered it in the certificate.

Ms. O'Laughlin completed the renewal applications in 2002 and 2004. She had never read the terms of the 2000 LAT Order, so she did not have these in her contemplation when she completed the forms. It was her testimony, however, that she was aware there were terms attached to the Applicant's registration. She is a registered automotive salesperson and is aware of the importance of full disclosure. She was also aware of the 2003 charge concerning the false safety standards certificate. Despite these facts, she failed to disclose the 2003 conviction in the 2004 renewal and made no enquiry about any other facts in filling out the forms. She believed the forms were accurate. She confirmed that the Applicant signed them.

## **FACTS FOUND PROVEN**

The Applicant made ongoing submissions about records in his possession, which established that he did not owe anything in respect of retail sales tax. The problem for the Applicant is the fact that he chose to not produce these records. The Applicant also failed to produce any evidence relating to the 2006 retail sales tax audit or relating to his failure to file retail sales tax returns or make remittances for a period commencing with the month of November 2007. In the absence of such evidence, the Tribunal is forced to conclude that the Applicant is substantially in arrears with respect to his retail sales tax obligations.

While there is evidence that he did file an objection to the 2002 assessment in a timely manner, the Tribunal notes that this assessment relates to approximately \$60,000.00 of the retail sales tax claimed by the Ministry. Penalties and interest amount to another \$40,000.00, the bulk of which appears to stem from the 2002/2003 period.<sup>3</sup> Even allowing for approximately \$100,000.00 where the Applicant may have a genuine dispute, the Tribunal was provided with no evidence to explain why approximately \$140,000.00 of retail sales tax appears to be outstanding.

The \$140,000.00 number is not greatly different from the number calculated by Ms. Brake in her evidence based on her telephone conversation with the Applicant. Using the Applicant's numbers, Ms. Brake calculated that the Applicant's estimate of what is owed as \$110,000.00.

The Tribunal finds that the Applicant has failed to remit retail sales tax for the period from November 2007 to the date of the hearing, and that the Applicant has failed to remit retail sales tax with respect to the 2006 assessment. There would appear to be a genuine dispute relating to the 2002 assessment that does not need to be decided at this time. However, the Tribunal finds that it was not open to the Applicant to use this particular dispute to fail to remit substantial retail sales taxes in later years. The procedure, as outlined by Ms. Brake, was to pay the amount in dispute and file a Notice of Objection. Not even Ms. Preston, the Applicant's bookkeeper at the relevant time, suggested that the assessment had been paid.

A clearer issue for the Tribunal to address on the facts is the failure of the Applicant to make full disclosure of his past licence suspensions, recent HTA convictions and past criminal behaviour in his applications of 2002, 2004 and 2006. It was the Applicant's position, supported by the evidence of Ms. O'Laughlin and Mr. deRoux, that he did not fill out the application forms. It was the evidence of each of the witnesses that the Applicant reviewed the forms after completion and signed them. Notwithstanding Mr. deRoux's involvement with the Applicant's various regulatory and HTA issues over the years, and the fact that the safety standards certificate error was as a result of the actions of Ms. O'Laughlin, both of these persons declined to complete the form as required. The Applicant failed to correct their errors prior to signing. The Tribunal finds that the Applicant failed to make the full and frank disclosure incumbent upon him when filing each of the applications in 2002, 2004 and 2006. The Tribunal does not accept that the Applicant's responsibility to make the requisite disclosure is in any way diminished by the fact that others completed the forms on his behalf.

The Tribunal finds that the failure to make full disclosure was also a breach of the terms and conditions incorporated into the LAT Order of December 2000. The terms and conditions are a continuing obligation of the Applicant at each renewal. While it was the evidence of Mr. deRoux that there was no negotiation over the terms and conditions, the Applicant gained an advantage by entering into them. There was a proposal to deny his registration arising out of the fact that he had been acting as a car dealer while not registered. He told Ms. Hallitt that he had so acted for seven years prior to

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<sup>3</sup> Exhibit #4

registration. The Registrar agreed to register the Applicant on terms and conditions. He was given the benefit of the doubt on that occasion. He then chose to ignore the terms he had entered into commencing with his first renewal in 2002.

With respect to the consumer complaint and the payout from the MVDCF, the Tribunal perceives that the same self justification process is underway that led to the Applicant's difficulties with retail sales tax. In his submissions, the Applicant stated that the consumer had gotten a car for free. His analysis revolved around the fact that she purchased a car from him for approximately \$3,500.00 and had then received judgment for approximately \$4,000.00. In his mind, the consumer had a net profit. It was this position that he put forward to Ms. Hallitt when he told her he would not pay the consumer a penny. The Applicant, of course, fails to understand that the consumer's outlay was in excess of \$7,500.00 for a vehicle retailing at \$3,500.00, and that the basis for the judgment is the failure of the Applicant to register the power train warranty, a benefit the consumer had paid for. The consumer was out of pocket for a replacement engine that should have been covered by the warranty.

Once the consumer complaint and the matter had been reduced to a judgment, the MVDCF became involved. The Applicant was given ample opportunity to deal with the consumer before the fund made its payout. He failed to do so. Instead, he appealed the judgment and lost the appeal. He has had ample opportunity to pay the fund since that time, but had only made partial payment to the date of the hearing. The Tribunal accepts the fact that the Applicant had tried to make the final payment to the fund by way of a money order several months before the hearing, but the question remains regarding a lapse of two years to repay the fund for a relatively minor amount. The Tribunal finds that this period constitutes an excessive delay in repayment and is indicative of financial irresponsibility.

## **ANALYSIS**

The statute (s. 5) requires the Registrar to register applicants 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; ...

The statutory wording does not define conditions for registration but conditions for denial of registration. It is a significant distinction. The Applicant does not have to show, as a condition of registration, that he falls outside the statutory wording. The Registrar must show that the Applicant falls within the ambit of the statutory wording if the decision to deny registration is to be upheld. Having made that determination, the Registrar must advise the Applicant of the grounds for the determination and the Applicant may appeal to this Tribunal. An appeal to this Tribunal is by way of trial *de novo*. Notwithstanding that the Registrar has exercised a decision making power granted by statute, this Tribunal owes the Registrar no deference on appeal. Before this Tribunal, the Registrar assumes both the investigative and prosecutorial role analogous to the police and crown in a regulatory or criminal matter, and the Tribunal is the trier of fact and law. The Registrar carries the onus of establishing, on a balance of probabilities, that the Applicant is not entitled to registration. Where, as in the present case before this Tribunal, the Applicant is already a registrant, there must be clear and cogent evidence supporting the Registrar's position.

In the factual analysis above, the Tribunal found that, notwithstanding there is a genuine dispute over some of the Applicant's retail sales tax liability, the Applicant is indebted to the people of Ontario in the amount of \$110,000.00 using the Applicant's figures, and \$140,000.00 using the Ministry's figures. It also found that the Applicant has ceased filing monthly returns and making monthly remittances. In numerous decisions, this Tribunal has determined that failure to remit retail sales tax is grounds for revocation of registration. Retail sales taxes are trust funds held by the Applicant for the benefit of all of the people of Ontario. By failing to remit these taxes in the ordinary course, the Applicant is misappropriating trust funds, an action indicating a lack of the requisite honesty and integrity required of a registrant. Continued failure, together with the quantum of the amounts outstanding, indicates a high level of financial irresponsibility.

The Tribunal also finds indications of financial irresponsibility in the excessive delay over repayment to the MVDCF. The amount outstanding is comparatively small, just over \$2,000.00, yet the Applicant has taken two and a half years to attempt to pay off the debt. Overall, the Tribunal finds that, having regard to the Applicant's financial position, that is, debts of \$140,000.00 to the people of Ontario together with difficulty paying off the fund, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

It has been held in previous decisions of this Tribunal that the disclosure obligation in an application form is a first test of integrity. Numerous cases have held that material non-disclosure is grounds to deny registration. Exacerbating the Applicant's behaviour, in this case, is the fact that the Applicant entered into terms and conditions, reduced to an order of this Tribunal, to make full and complete disclosure at each renewal. The disclosure requirement included the disclosure of information already in the possession of the Registrar, such as the Applicant's criminal record. The time to fully canvass why the Registrar needed continual disclosure of information already in its file was during negotiations of the terms.

It may well have been that the Registrar would have amended that term. It is equally likely that the Registrar would have justified the need for the term and it would not have been amended. The fact remains, however, that the Applicant accepted the term and then failed to honour it on each renewal thereafter. By doing so, he failed the first test of integrity. He also breached an order of this Tribunal. In so doing, he demonstrated that he will not carry on business in accordance with law and showed a lack of the integrity and honesty necessary for registration.

The Tribunal finds the failure to make full and frank disclosure at each renewal, sufficient in and of itself for revocation. When added to the misappropriation of trust funds and the financial irresponsibility demonstrated by the Applicant, the Tribunal concludes not only that there is clear and cogent evidence in support of revocation but that the evidence is overwhelming.

## DECISION

By virtue of the authority vested in it pursuant to the provisions of s. 7(4) of the Act, the Tribunal directs the Registrar to carry out the Notice of Proposal, dated December 6, 2007, to revoke the Applicant's registration.

LICENCE APPEAL TRIBUNAL



D. Gregory Flude, Vice-Chair

*RELEASED: January 12, 2009*

FILE NAME: 4610.mvda.Byers.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, may 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. The decision may also be available on Quicklaw at a later date.