

**Licence
Appeal
Tribunal**

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December 13, 2004

MEMORANDUM***Re: Nicola Battista 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:

Nicola Battista, Applicant
Aviva Harari, Counsel for OMVIC

Licence Tribunal
Appeal d'appel en
Tribunal matière de permis



NICOLA BATTISTA

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

TO REVOKE REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN Q.C., Vice-Chair
SIMON DANN, Member

APPEARANCES: NICOLA BATTISTA, the Applicant, in person

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

DATE OF HEARING: November 23, 2004 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing that arises out of a Notice of Proposal (the "Proposal") dated June 29, 2004, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively) and supplemented by a Notice of Further and Other Particulars dated November 3, 2004, under which the Registrar seeks to refuse the registration of Nicola Battista (the Applicant) as a motor vehicle salesperson under the Act. The Registrar based his proposal to refuse the registration of the Applicant under section 7 of the Act for the following 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 their business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is 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 Nicola Battista under the *Motor Vehicle Dealers Act*.

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

1. The Applicant applied for reinstatement of registration as a motor vehicle salesperson on or about April 30, 2004. He proposes to work for Colombo Chrysler Jeep Dodge Inc.
2. The Applicant was originally registered on or about November 4, 2002. The Applicant has subsequently engaged in conduct resulting in charges being laid against him.
3. A criminal report revealed the following:

July 2, 1981	B & E With Intent
October 13, 1981	Fraud Under \$200
November 8, 1983	Drive While Ability Impaired
July 31, 1985	Fail to Comply with Recognizance
	Attempted Theft over \$200
September 11, 1986	Possession of Burglar Tools
February 11, 1991	Possession of Narcotic
July 8, 1991	Obstruct Peace Officer
July 22, 1991	Possession of Narcotic
February 10, 1992	Robbery
February 12, 1993	Parole Violator
March 19, 1993	Robbery (x10)
April 22, 2000	Statutory Release Violator
January 22, 2001	Statutory Release Violator

4. The Applicant engaged in conduct, which resulted in the following charges:

September 17, 2003	Assault with a Weapon
	Aggravated Assault

The Notice of Further and Other Particulars added the following allegation:

It is further alleged as follows:

1. Paragraph 2 of the Notice of Proposal dated June 29, 2004 is amended by adding:
The Applicant's registration of November 4, 2004 was subject to terms and conditions.

Evidence Given on Behalf of The Registrar:

Neil Scott Petersen

Neil Scott Petersen is a Toronto police officer who was on duty when the Applicant was brought to the police station by several police officers on September 14, 2003 following his arrest on the assault and cocaine possession charges. Mr. Petersen stated that he learned from the arresting officers that the Applicant, having ingested cocaine and while in a paranoid state, stabbed his father-in-law in the neck with a pair of scissors. The assault charges laid against the Applicant were dismissed when the Applicant's father-in-law could not attend court due to illness. Officer Peterson came to learn that the Applicant had plead guilty to two charges of possession of cocaine in early 2004. Ms Harari, counsel for the Registrar, showed this witness a copy of the Applicant's criminal record which did not disclose the fact that the Applicant had been charged with the assault and cocaine possession charges. It was Officer Peterson's experience that it may take many months for particulars of recent criminal charges to be recorded on a printout of a person's criminal record. The assault charges levied against the Applicant were dismissed by a judge of the Ontario Court of Justice on October 29, 2004. (Exhibit 6)

Laura Gordon

Laura Gordon is the Director of Compliance for OMVIC and who is familiar with the Applicant's application for re-registration. Ms Gordon stated that OMVIC is a non-profit corporation that administers a statute designed to protect the public.

Ms Gordon referred to the Applicant being registered as a motor vehicle salesperson on terms and conditions on November 2, 2002. Although the Applicant did not initially disclose his criminal record, he subsequently admitted his criminal record and his addiction to drugs. He filed several letters of support and made reference to the positive steps he had taken towards rehabilitation. He had the support of his dealer. Ms Gordon stated that the Applicant had been given a generous break when he was permitted to become registered as a motor vehicle salesperson.

Under the terms and conditions attached to his registration the Applicant was obligated to immediately tell the Registrar if he was subsequently charged with any criminal offence, to provide a letter from his physician every three months confirming that he was drug free and to seek re-registration were he to change employers. The Applicant worked for Colombo Chrysler Jeep Dodge Inc. from October 10, 2002 until September 15, 2003. He then worked for another dealer for just over three weeks in April 2004 as unregistered salesperson. Ms Gordon stated that OMVIC had received incomplete transfer of registration forms relating to the Applicant's new employment that were apparently not acted upon.

When the Applicant applied for re-registration in April 2004 he admitted his two recent convictions for cocaine possession and failure to comply with his bail terms for which he was sentenced to a 30 day term of imprisonment. He also referred to the assault charges that were then pending against him. Ms. Gordon stated that the Applicant provided OMVIC with full, accurate and honest disclosure and that he provided several letters of support. Ms. Gordon referred to the fact that the Applicant had taken cocaine when he went to a party with two fellow employees. She stated that the Registrar is concerned with the Applicant's long-term rehabilitation. Based on the Applicant's past conduct, there has been insufficient positive conduct to merit re-registration.

The Applicant's Evidence:

Nicola Battista

Mr. Battista admitted his criminal record and his past addiction to drugs. He referred to the positive steps at rehabilitation he has made. He has been involved in a weekly addiction outpatient aftercare counselling programme he has been taking at a Toronto hospital. His physician wrote a letter advising that the Applicant has responded very well to his methadone maintenance treatment programme. The physician endorsed the Applicant's attempt to register.

Mr. Battista admitted that he had been given a second chance and that he has made serious errors for which he has expressed his regret. He knows that his past conduct is wrong. He stated that he is trying to effect a reconciliation with his wife with whom he has a two year old child.

Mr. Battista stated that he enjoyed being a motor vehicle salesperson. He worked hard at this job and did well. He is currently working for Colombo Chrysler Jeep Dodge Inc. as a shuttle bus driver. He would like to be re-registered so that he could earn more money so as to better provide for his family. Prior to his registration, Mr. Battista was a self-employed drywall contractor who was injured on the job. He stated that he no longer could work in that occupation.

Mary Battista

Mary Battista is the wife of Nicola Battista who urged the Tribunal to permit her husband to be registered as a motor vehicle salesperson because, in her opinion, he deserves another chance. She spoke favourably of the Applicant's taking care of their young child while she was outside of Canada for seven weeks attending to an urgent family matter. Mrs. Battista referred to the efforts her husband has made "to get himself straight". She referred to his love of selling cars. If the Applicant were registered he would be able to make a good income which would help assure a better future for her family. When he was working as a salesperson, the Applicant was a happy and enthusiastic person that helped contribute to a happy home life. He provides child support on a voluntary as needed basis.

In cross-examination, Mrs. Battista admitted to living separate from her husband since September 2003. It was a term of the Applicant's bail that he not reside with his wife.

Wayne Connor

Wayne Connor has been the general manager of Colombo Chrysler Jeep Dodge Inc. for about one year. He was familiar with the Applicant's criminal past and his prior addiction to drugs. He had a general knowledge of the Applicant's licensing history. He confirmed that the Applicant was a good salesperson who carried on his business ethically and to the satisfaction of his customers. Mr. Connor supported the Applicant's attempt to be registered. When the Applicant lost his right to sell cars, his employer gave him another job.

THE LAW:

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

4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this Act.

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.

APPLICATION OF LAW TO FACTS

The test the Tribunal should apply to the facts it has found is the test enunciated by the Divisional Court in the case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)*[1983] O.R. No. 1017, which reads as follows:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

In the case of *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales 40 M.V.R. (4th)* 86 the Divisional Court added that:

Brenner must be read carefully. It does not establish a rule that the Registrar must be shown to be wrong in having concluded that there was reason to doubt that the registrant would carry on business inappropriately. The Tribunal approaches the matter uninhibited in any way by the Registrar's view.

The Applicant has a lengthy criminal record dating back to July 1981. It has been apparent that the Applicant has been unable to live up to the terms and conditions imposed upon him by the authorities. He has failed to comply with a recognizance, violated the terms of his parole and on two more recent occasions violated the terms of his statutory release from prison by providing positive urine samples indicating that was not free of drugs.

In September 2003, the Applicant reverted back to cocaine while partying with two fellow employees. The following day he assaulted his father-in-law while under the influence of cocaine. While on bail for the assault charges and cocaine possession charge, the Applicant was charged with a further cocaine possession offence. He was also charged with violating the terms and conditions of his bail. The Applicant was found guilty of the two charges of possession of cocaine in January 2004. The evidence is unclear as to the disposition of the charge of bail violation.

On the positive side, the Tribunal finds that the Applicant has been honest and accurate in his dealings with OMVIC. He has acknowledged his criminal past and his addiction to drugs. He knows that his past conduct is wrong. He has voluntarily taken positive steps to combat his addiction to drugs by being compliant with his methadone treatment and by his attending drug counseling outpatient sessions on a regular basis. He has the support of his employer, his wife, his physician and his lawyer. His father-in-law provided a letter stating that the Applicant's conduct towards him was unintentional and that he supported the Applicant's attempt to be registered as a motor vehicle salesperson. The Applicant has been a successful salesperson. When he lost his ability to sell motor vehicles, the Applicant was able to secure other employment with his dealership. The Applicant is aware of his responsibilities towards his family and would like to contribute positively in that regard.

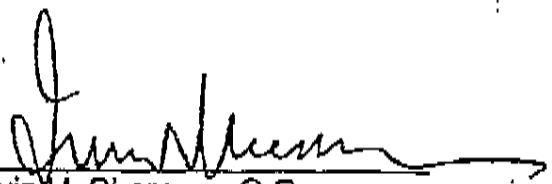
by having the potential to earn a good living as a salesperson. This consideration, while laudable, is irrelevant to the determination as to whether the Applicant should be licensed. *Ontario (Registrar of Alcohol and Gaming) v. Hosseini-Rad [2004] O.J. No. 1272 (Ontario Divisional Court)*.

The Applicant was given a generous break when he permitted to be registered on terms and conditions. His past conduct does not, at this time, inspire confidence that he can fulfill the statutory obligations incumbent upon salespersons as found in section 7 of the Act. This having been said, the Tribunal encourages the Applicant in his efforts at rehabilitation and would encourage him, if he so desires, to seek registration at a future date.

DECISION:

Pursuant 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 June 29, 2004 as supplemented by a Notice of Further and Other Particulars dated November 3, 2004 to refuse the registration of the Applicant as a motor vehicle salesperson under the *Motor Vehicle Dealers Act*.

LICENCE APPEAL TRIBUNAL



Irvin H. Sherman, Q.C.
Vice-Chair

Released: December 13, 2004

File: 2488.mvda.Battista

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.