

**Licence
Appeal
Tribunal**

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January 20, 2005

MEMORANDUM

***Re: Alireza Arshadnejad v.
Registrar, Motor Vehicle Dealers Act***

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

DISTRIBUTION LIST:

Harold H. Cohen, Q.C., Counsel for the Applicant
A. Michael Rothe, Counsel for Ontario Motor Vehicle Industry Council

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ALIREZA ARSHADNEJAD

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

TO REFUSE REGISTRATION

TRIBUNAL: KENNETH S. JEPSON, Vice-Chair

APPEARANCES: HAROLD H. COHEN, Q.C., Counsel, representing the Applicant

A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: December 8, 2004

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal before the Licence Appeal Tribunal ("the Tribunal") pursuant to section 7 of the *Motor Vehicle Dealers Act* ("the Act"). The appeal is from a Notice of Proposal to Refuse Registration ("the Notice of Proposal") dated July 28, 2004, made by the designated Registrar under the Act. The Proposal seeks to refuse the registration of Mr. Alireza Arshadnejad ("the Applicant") as a motor vehicle salesperson under the Act.

By written Notice of Appeal the Applicant advised the Tribunal that he required a hearing pursuant to Section 7(2) of the Act.

At this appeal, the Applicant was represented by Mr. Harold H. Cohen, Q.C. The Registrar was represented by Mr. Michael Rothe, counsel.

The Tribunal heard evidence from one witness called by the Registrar: Ms. Jean Cameron. The Applicant gave evidence on his own behalf. Also testifying on behalf of the Applicant was Mr. S, his former sales manager. The Tribunal also considered documentary evidence (Exhibits #1-3) tendered by both the Registrar and the Applicant.

THE ISSUE

The Applicant's registration was previously refused by this Tribunal. The Proposal to Refuse in this case results from a further application for registration pursuant to section 8 of the Act. Consequently, the issue to be decided in this appeal is whether there is new or other evidence, or whether it is clear that material circumstances have changed, such that the Applicant's registration should now be granted.

BACKGROUND AND EVIDENCE

(i) Prior Tribunal Decision and Further Application

The Registrar refused the Applicant's registration on this further application because in the Registrar's view the Applicant's past conduct affords reasonable grounds to believe that he will not carry on business as a motor vehicle salesperson with in accordance with the law and with honesty and integrity.

The Proposal summarizes Mr. Arshadnejad's prior registration, and the prior refusal of registration in 2003, upheld by this Tribunal, in December 2003. The current application, a further application pursuant to section 8 of the Act, was submitted on or about May 4, 2004. With respect to grounds for refusing the current application, the Proposal indicates that in response to the question on the application form as to whether he had against him prior criminal convictions or charges, Mr. Arshadnejad answered "yes" and stated the following:

I was charge [sic] in 1990 for drinking and driving wich [sic] I thought it was dismiss [sic] but is not and after 14 year [sic] it is in my record
In 2001 I was charge [sic] for being involed [sic] on a fraud after I went to court and paid the fine it was a conditional discharge.

The Proposal states with respect to the fraud charge:

The fraud involved the Applicant participating in a scheme to defraud an insurance company by falsely reporting a vehicle as stolen. The purpose of the fraud was for the Applicant to receive payment of a loan he had provided to a motor vehicle dealer.

The Proposal indicates that the Applicant's past conduct is inconsistent with the intention and objective of the Act, and proposes to refuse registration.

As noted in the Proposal, Mr. Arshadnejad had a previous application for registration refused in March 2003. He appealed to this Tribunal. That resulted in a prior decision of this Tribunal regarding Mr. Arshadnejad's registration, dated December 23, 2003. The Panel set out its findings of fact at page 2 of the decision:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Applicant was originally registered as a motor vehicle salesperson pursuant to the Act

- from July 27, 1999 until August 1, 2001;
2. The Applicant submitted a re-instatement application for registration as a motor vehicle on or about March 31, 2003;
 3. The Applicant as at the date of the Proposal was not registered as a salesperson pursuant to the Act;
 4. The Proposal was issued by the Registrar on May 21, 2003 and the Applicant's Appeal was dated May 27, 2003;
 5. The Applicant did not disclose on his application for registration a criminal conviction on May 2, 1990 in answer to a question on the application, which required him to do so;
 6. The Applicant did not disclose in his application for registration criminal charges on June 22, 2002 in answer to a question on the application which required him to do so; and
 7. The Applicant participated in a scheme, which was led directly to criminal charges being laid against the Applicant for Fraud over \$5000 and Public Mischief.

In addition, the Panel went on to find that the Applicant's evidence at the hearing showed he did not understand his duties and obligations under the Act. It found that the Applicant's evidence showed he was willing to put his desire to earn a living and support his family ahead of other considerations, and that "integrity as a motor vehicle salesperson is critically impaired by self interest..." The Panel stated it was in accord with the Registrar's conclusions set forth in its Proposal, and confirmed refusal of the Applicant's registration.

(ii) Further Evidence at this Appeal

Ms. Jean Cameron gave evidence on behalf of the Registrar. Ms. Cameron is a Senior Inspector for the designated registration authority, the Ontario Motor Vehicle Council (OMVIC). She reviewed the documents entered into evidence in support of the facts stated in the Notice of Proposal. These included a letter from Mr. Arshadnejad which explained the circumstances that led to him being involved with the insurance fraud. Also reviewed were documents from the criminal courts evidencing the charge, conviction and sentencing on the fraud charge.

The police synopsis for the fraud charge was in evidence. It described how Mr. Arshadnejad obtained from a former employer, in place of wages, a 1989 Mercedes 300. Mr. Arshadnejad drove the car to a lot belonging to an acquaintance, and then reported it stolen. He obtained \$12,500.00 from the insurance company.

The court documents show that Mr. Arshadnejad pleaded guilty to one count of Fraud over \$5000. One count of Public Mischief was withdrawn. On the fraud count, he received a conditional discharge and was sentenced to six months probation and ordered to pay restitution in the amount of \$6000.

Ms. Cameron indicated that in the view of the Registrar, the Applicant's fraud that involved willful deceit, was an economic crime, and was industry related. As such, it supported refusal of registration.

In referring to the \$6000 in restitution paid, Ms. Cameron noted that the actual amount of the fraud was \$12,500. That amount is shown in the Synopsis for the two charges. She further testified, based on information from the insurance company involved, that the figure

of \$12,500 was the value of the car, and the actual costs incurred by the insurer exceeded that amount.

It was acknowledged by counsel for the Registrar that while Ms. Cameron referred to Mr. Arshadnejad's "conviction" for fraud, a conditional discharge is not technically a criminal conviction.

In his evidence, Mr. Arshadnejad did not dispute the facts set out in the Notice of Proposal at issue in this appeal. He did not dispute that on the prior registration application he failed to disclose his prior convictions and pending charge. He also did not dispute that he participated in the fraud scheme, although he did indicate that the scheme was proposed by the other individual involved. According to Mr. Arshadnejad's letter of explanation, referred to above, the other person involved in the fraud was an individual who ran an auto dealership. Mr. Arshadnejad was working for him, and they became friends. The other individual pressured Mr. Arshadnejad to engage in the false insurance scheme. The letter also notes Mr. Arshadnejad very much regrets his involvement in the fraud and asks for a second chance.

Mr. Arshadnejad noted that he served his probation and paid the \$6000 in restitution to the insurance company. In cross-examination, he was unable to state with certainty whether this represented complete restitution; knew only that he paid the amount he had been ordered to pay by the court.

Mr. Arshadnejad confirmed his history in the industry. He originally had a dealership, a sole proprietorship, which he ran alone from 1997 until 1999. In 1999 he registered as a salesperson, and worked from July 1999 until August 2001 for the "N" Auto. It was while working at this dealership that he falsely reported the Mercedes stolen. From February to April 2003 he worked as a salesperson for another dealer ("Q Auto"). In March 2003 his registration was first denied, leading to the first Tribunal decision in December 2003.

Mr. Arshadnejad testified that he never had any complaints from customers or problems during his earlier time as a dealer, nor when he worked for "N" Auto. He also testified that while working at Q Auto he sold many cars and was the top seller at the dealership during the short time he was there. He stated he never had any customer complaints and that he always dealt with customers with complete honesty. He noted that he had repeat business from customers, indicating their satisfaction with him.

Mr. Arshadnejad stressed that he understands his duties and responsibilities under the Act and that when he was working as a salesperson he always provided full information to purchasers.

Mr. Arshadnejad noted that he regretted his involvement in the fraud scheme, and that he needed to work in car sales to support his family.

Also called to give evidence on behalf of Mr. Arshadnejad was S, his former supervisor at Q auto. Mr. S testified he is the Sales and Administration Manager at Q Auto. He worked

with Mr. Arshadnejad for approximately three months, from April 2003 to June 2003. S testified that Mr. Arshadnejad was one of his most dedicated salespersons and was an outstanding achiever. He indicated that, based on certain sales performance measures, Mr. Arshadnejad had a very high percentage of positive outcomes from customer contacts. He also noted that during that period Mr. Arshadnejad sold more cars per week than any other salesperson.

When asked whether he would reemploy Mr. Arshadnejad if his registration was granted, S indicated that he "strongly" wanted him back and would be prepared to sign any guarantee or bond that might be required.

THE LAW

Sections 5 and 6 of the *Motor Vehicle Dealers Act* set out the basic conditions for registration for individuals. Section 5(1) states in part:

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.

Section 6.(1) of the Act states:

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.

Section 7(2) of the Act provides that an applicant whose registration has been refused has the right to request a hearing before this Tribunal. On appeal to this Tribunal, it is now clear, in light of *Shine Car Sales*, that the standard of review of the Registrar's decision is correctness. There is no deference to the Registrar. The matter is approached *de novo*; the Tribunal must consider for itself the conditions for registration set out in s.5 of the Act, uninhibited by the Registrar's decision, and determine if the conditions are met. (see *Taylor v. Registrar, Motor Vehicle Dealers Act*, LAT November 10, 2004).

In this case, the Applicant had an initial application refused under section 6, with the appeal to this Tribunal subsequently confirming the Registrar's decision. He then brought a further application which has been refused. The section of the Act which provides for this is section 8, which states:

8. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

As a result, in this case it is necessary to determine the correct interpretation of section 8, and what constitutes “new or other evidence” or when “material circumstances have changed” for the purposes of that provision.

FINDINGS AND CONCLUSIONS

In this case the Tribunal must determine whether Mr. Arshadnejad is entitled to registration notwithstanding a relatively recent decision of this Tribunal denying his registration. As noted above, section 8 of the Act specifically provides for applicants to make a “further application” for registration. The section provides that such application may be made “upon new or other evidence or where it is clear that material circumstances have changed.”

Counsel for both parties advised that they were unable to locate any prior decision of this Tribunal interpreting section 8, and the Tribunal’s own searches confirm that there appear to be no such decisions. There is therefore no specific guidance as to the correct interpretation and application of section 8. In *Hassan Kassem Hassan v. Ontario (Registrar of Motor Vehicles)*, [2001] O.J. No. 421 the Ontario Court of Appeal held that on a further application under section 8 the Registrar cannot refuse to consider the application; they must render a decision. However, the Court of Appeal made it clear they were addressing a process issue only. The Court made no finding on what might be required to actually succeed on the *substance* of an application under section 8.

In my view, on a proper reading of section 8 in the context of the Act as a whole, the section is not intended to allow an applicant to simply re-litigate a matter already decided. The section is not worded as a simple opportunity to obtain a “reconsideration” on the same facts. The construction of the section is such as to clearly imply that there must be “new or other evidence”, or a material change in circumstances, on which to base the further application. As a result, the focus of any appeal from a refusal under this section must be squarely on the new evidence or material change. Such a focus is necessary to guard against a risk of inconsistent decisions by the same adjudicative body on the same evidence. I would not be free to grant registration where this Tribunal had previously refused it solely on this basis that I took a different view of the case. This Tribunal should not make decisions overruling itself. If there is to be a different result, that result must be based on the “new or other evidence” or a material change in circumstances.

What new evidence or material change in circumstances has been presented in this case? From the evidence presented and the submissions on behalf of the Applicant, the Tribunal finds that the circumstances or pieces of evidence that were presented as having changed from the prior appeal are as follows.

First, Mr. Arshadnejad has now pleaded guilty to the fraud charge, been sentenced, and that sentence has been completed. As of the prior decision, the fraud charge had been laid but not resolved.

Second, Mr. Arshadnejad has given evidence at the hearing of this appeal that he “now understands” his duties and obligations under the Act. This was presented as a change, given that the prior decision found that Mr. Arshadnejad did not understand those obligations.

Third, in this appeal there is no issue of the Applicant having failed to disclose his prior criminal convictions or charges on his application form. On this further application, Mr. Arshadnejad admitted to both the 1990 conviction and the recent fraud conviction. In the original application, these were not disclosed, and the prior Tribunal decision was based at least in part on this non-disclosure.

Fourth, in this appeal there was the evidence of a character witness on behalf of Mr. Arshadnejad, Mr. S. There was no evidence of this type in the prior appeal.

In argument and in Mr. Arshadnejad’s evidence, it was clear that of the points listed above, the Applicant relied most strongly on the first: that he has now received a discharge from the Fraud charge and has satisfied the criminal justice system. There was no dispute about the facts surrounding the plea and sentencing. These were evidenced in the criminal court documentation, testified to by Mr. Arshadnejad, and not disputed by either party. The Tribunal finds that Mr. Arshadnejad did plead guilty to the Fraud, there was a finding of guilt, he received a conditional discharge, paid \$6000 in restitution, and served six months probation.

In considering the significance of the subsequent criminal process, it is important to note that the prior Panel of the Tribunal found as a fact that:

The Applicant participated in a scheme, which was led directly to criminal charges being laid against the Applicant for Fraud over \$5000 and Public Mischief.

Thus, even though the charges had not been disposed of, the prior Panel found that Mr. Arshadnejad participated in the scheme. While it is not entirely clear from the Panel’s reasons the extent to which this finding formed the basis of the refusal to register, it implicitly formed at least part of that basis. Even if it did not, the finding of fact means that a subsequent criminal process simply confirming that Mr. Arshadnejad did indeed participate in a fraud does not represent a material change.

In pointing to his conditional discharge and sentencing, it was argued that Mr. Arshadnejad absolved himself his wrongdoing. Mr. Cohen stressed that Mr. Arshadnejad received a discharge. He also stressed that, having complied with his sentence, the courts have “released” him.

Refusal of registration under the Act is not punitive. The Act directs the Registrar and the Tribunal to consider the elements set out in section 5 – specifically, in this case, whether the past conduct of the applicant affords reasonable grounds to believe he will not in future will act in accordance with the law and with honesty and integrity. Where criminal conduct may give rise to such a belief, it is the conduct itself that does so, not the criminal consequences. Thus, the fact that Mr. Arshadnejad has satisfied the criminal justice

system does not mean that his conduct in participating in fraud is expunged for the purposes of registration under this Act. And, this failure to find that his prior behaviour is expunged by the criminal process is not a further punishment. Rather, it is simply a function of the fact that the issue is different: it is not criminal responsibility, but predicting future conduct based on past conduct.

It should be noted that because the registration process is concerned only with past conduct and not the classification of that conduct by the courts, the distinction between a conditional discharge, which is not technically a criminal conviction, and an actual criminal conviction, is of little relevance in itself. The conditional discharge still results from a finding of guilt — or, in this case, an admission of guilt by way of a plea — such that the accused is still found to have both carried out the acts and possessed the necessary mental element for the offence.

The fact that Mr. Arshadnejad has satisfied the criminal justice system by paying restitution and serving probation has relevance to the issue here only to the extent that the criminal process may have a deterrent effect on Mr. Arshadnejad, making it less likely that he will engage in this kind of conduct in future. The Tribunal finds that in this case any such effect is not enough to mitigate the inference from his past behaviour. Indeed, the criminal process in this case is not as significant as it might have been. Mr. Arshadnejad received a conditional discharge, and though he paid restitution it was not even, the Tribunal finds, the full amount of the insurance payout.

There are other factors which would, if present, carry more weight in persuading the Tribunal that Mr. Arshadnejad's past conduct is not predictive of future conduct. One of the most important of these is the passage of time, coupled with demonstrated conduct during that time that would be consistent with registration. However, relatively little time has passed since the events leading to the fraud charge. The events occurred in 2001, and the resolution of the charges was as recent as June 2003.

As noted above, the conviction itself is not a change, but rather a confirmation of facts as found in the first appeal. The service of the criminal sentence is not sufficient in itself to be a material change in circumstances that would justify allowing registration. In so finding, the Tribunal notes that if satisfying the criminal process were sufficient to expunge the past criminal behaviour, neither the Registrar nor the Tribunal could draw an inference of likely unacceptable conduct based on past criminal behaviour in any case where the criminal process was complete. Moreover, to accept the completion of the criminal process as nullifying any inference from the past criminal behaviour would be to ignore the distinction between the criminal process and the registration requirements, described above.

Another change from the prior appeal is the absence of a non-disclosure issue. The Tribunal finds this is not significant new evidence nor is it a material change sufficient to allow registration. The non-disclosure on the initial application was a serious omission, given the pending changes of industry-related fraud. The fact that Mr. Arshadnejad has corrected that omission on his reapplication does not carry much weight. The disclosure in this further application came after he had already been refused registration the first time,

by both the Registrar and the Tribunal, in part due to the non-disclosure. By the time of the re-application, Mr. Arshadnejad would have been well aware not only that the Registrar knew of his criminal past in any event, but also that non-disclosure would be fatal to the application. In these circumstances, his disclosure, while certainly the correct action in the circumstances, cannot unfortunately be said to carry much predicative weight regarding his honest and integrity.

A similar analysis applies to Mr. Arshadnejad's testimony that he now understands his duties and obligations under the Act. Stated at this juncture, this amounts to little more than an acknowledgement of the wrongfulness of his past conduct, and pledge that he will adhere to the requirements in the future. The Tribunal finds that when the prior Panel found that Mr. Arshadnejad did not "understand" his obligations, this was intended not in the sense that he could not recite them, but in the sense that his values did not accord with those obligations. His testimony now to the contrary cannot be considered significant new evidence or a material change where there is no concrete behaviour to support the statement. The absence of such concrete evidence is due again, in part, to the relatively short time that has passed since the first registration attempt.

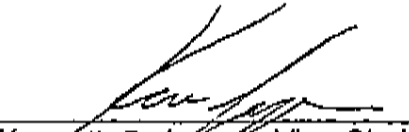
The final potentially significant new evidence is the testimony of S. S testified in a forthright manner and there were no significant inconsistencies with any other evidence. The Tribunal is prepared to accept S's evidence that in his personal view and experience, Mr. Arshadnejad was a good salesperson. However, S worked with Mr. Arshadnejad for only three months. That is a relatively short time on which to form a deep impression of the character of a person. In addition, S's evidence focused to a large extent on the fact that Mr. Arshadnejad was good at completing sales and appeared to achieve reasonable customer satisfaction. High sales volume is not in itself highly relevant to whether or not an individual is likely to conduct themselves in accordance with the Act. With respect to customer satisfaction, the fact that Mr. Arshadnejad may have had no difficulties in the three months to which S's testimony pertains can hardly be pointed to as a lengthy track record. Overall, the Tribunal finds that the new evidence in the form of S's testimony on behalf of the Applicant is not sufficiently significant, relative to the key issue of the Applicant's likely future conduct, as to overcome the other evidence against the Applicant, including all of the grounds for which registration was initially refused in the first application.

For all of the above reasons, the Tribunal finds that Mr. Arshadnejad has not presented either sufficiently significant new evidence nor evidence of a material change in circumstances that would warrant a decision different than the previous Tribunal decision. Taken as a whole, the evidence, in particular the fraud on an insurer and non-disclosure on his initial application March 31, 2003, still supports a reasonable inference that Mr. Arshadnejad is not likely to conduct himself in a manner consistent with section 5 of the Act. Accordingly, the Tribunal must direct the Registrar to refuse the Applicant's registration.

DECISION

The appeal is denied. Pursuant to section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out its Proposal dated July 28, 2004 to refuse the Applicant's registration as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL



Kenneth S. Jepson, Vice-Chair

Released: January 20, 2005

Filename: 2540.mvda.Arshadnejad

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.