

**Licence
Appeal
Tribunal**

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March 30, 2005

MEMORANDUM

Re: Savcho Zahariev o/a Janex 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:

Marie L. Francis, Counsel for Applicant
A. Michael Rothe, Counsel for OMVIC

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SAVCHO ZAHARIEV O/A JANEX

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

TO REVOKE REGISTRATION

TRIBUNAL: DANIEL LAURIN , VICE-CHAIR
DOUGLAS R. WALLACE, VICE-CHAIR

APPEARANCES: MARIE L. FRANCIS, Counsel, representing the Applicant.

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

DATE OF HEARING: February 16, 2005 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively.) The Notice of Proposal dated July 26, 2004 proposed to revoke the registration of Savcho Zahariev o/a Janex, as a motor vehicle dealer under the Act.

In his Proposal, the Registrar gave the following as his Reasons:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act. Therefore the Registrar is unwilling to continue to register Savcho Zahariev o/a Janex under the Motor Vehicle Dealers Act.

In support of his Proposal the Registrar provided Particulars which, in part, stated that Savcho Zahariev o/a Janex failed to make full disclosure of charges summarized in the chart below:

| DATE | CHARGE | DISPOSITION |
|------------------|-------------------------|---|
| November 7, 1997 | Fraud over \$ 5,000 | 6 months conditional sentence order of probation for 3 years including, 60 hours of community work – 10 hours per month for 6 months and a restitution order of \$15,500.78 to Regional Municipality of Ottawa Carleton \$200 per last day of the month beginning at the end of November 1997 |
| October 9, 2003 | Prohibited from driving | Suspended by Ministry of Transportation |

THE LAW:

Section 3 of the *Motor Vehicle Dealers Act* (the "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 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.

Section 6 of the *Act* states as follows;

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.

CASE LAW: Submitted by the Applicant:

(1) *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record, which he had disclosed in his application but he had not disclosed three further convictions, which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant had rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself.

(2) *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O.J. No.603, Ontario Superior Court of Justice Divisional Court

This was an appeal by the Motor Vehicle Dealers Registrar from the Tribunal's decision not to revoke the dealer's licence. The dealer was convicted of two counts of tampering with odometers and selling an insurance wreck without disclosure. The Registrar issued a proposal to revoke the registration based on the non-disclosure of those facts.

The Tribunal in first instance found that the odometers were replaced because they were faulty and the dealer did not adjust the new ones to match the faulty ones. The Tribunal found no intention to deceive and placed them under certain conditions.

The Court ruled that they did not want to substitute their views with the judge of the first instance who had reached conclusions of his own as to credibility, which is a matter peculiarly within the competence of one who sees and hears the witnesses.

(3) *Robert Larry Norman, LAT, May 28, 2004 – File name: 1901.mvda.Norman*

This was an appeal by Robert Larry Norman from a decision of the Registrar under the *Motor Vehicle Dealers Act* to refuse registration in light of the Applicant's past conduct. The Applicant failed to disclose all of his convictions. He had answered positively to question 9 on the application form, did disclose a conviction for assault in 1999 but failed to disclose two charges pending against him at the time: Possession of Stolen Property and charges in relation with section 327 1(c) of the *Excise Tax Act*, which was related with the GST.

In this decision, there was reference to the following case law:

- *William G. Long v. Registrar, Motor Vehicle Dealers Act*, Licence Appeal Tribunal, released August 16, 2002.
- *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court
- *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales and Omar Hassan Rahim* (2003-02-11) Ontario Superior Court of Justice Divisional Court; and
- *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shahidi* (2003-03-04) Ontario Superior Court of Justice Divisional Court

In this case the Applicant had been employed in the car sales business for at least 23 years. He was registered during that period until his registration lapsed. The Applicant failed to disclose criminal and excise charges pending against him in his bankruptcy, however, his failure to do so was based on his belief that the charges would be dismissed or withdrawn (and they were in fact stayed, a procedure which will result in their becoming non-prosecutable in time.) A letter from his employer clarifies his reasons for this. The Tribunal found there was insufficient evidence of intention to deceive the Registrar.

(4) *Peter Fong v. Registrar, Motor Vehicle Dealers Act, LAT, August 17, 2004*

This was an appeal of the Registrar under the *Motor Vehicle Dealers Act* to refuse registration in light of the Applicant's past conduct. On his application in October 2003, at question number 9, Mr. Fong had disclosed a conviction for having obtained credit by false practice in 1995. However, he failed to do so for convictions on seven counts of false pretences over \$1,000 in 1995. These convictions were related to a fraudulent scheme with the bank in which they were disguised as loans and the scheme was discovered when it was not possible to continue to make payments.

The Tribunal stated the following:

In the present case, the Applicant is a 54 year old man who spent most of his adult life in the automotive sales field. He committed a serious offence, involving fraudulent conduct over an extended period of time, which only stopped when he was caught. But he has evidently had no further involvement in dishonest activity in more than 10 years, and he frankly and fairly took responsibility for his past behaviour, which he appears to sincerely regret and which had cost him a great deal, including a period of incarceration. To uphold the decision of the Registrar to refuse the Applicant registration on these facts would amount to holding that anyone who engages in automotive fraud is subject to a lifetime ban on employment in the automotive sales field. This goes well beyond what the legislation has prescribed, and ignores the principle of balance set out in the *Shahidi* decision completely. The Tribunal was reluctant to grant registration to a man with this criminal record but if any case shows rehabilitation justifying registration, this is the one. The Tribunal is satisfied that the public can be protected by imposing conditions on the Applicant's registration.

CASE LAW: Submitted by the Respondent:

(5) *Re: Joseph B. Houkayem v. Registrar, Motor Vehicle Dealers Act, LAT March 26, 2003*

This was an appeal by Joseph B. Houkayem from a decision of the Registrar under the *Motor Vehicle Dealers Act* to a proposal to refuse registration in light of the Applicant's past conduct. The Applicant answered negatively at question 9 of his application, however it was found out later that he had been convicted for a count of fraud over \$5,000 in September 28, 2001. The Social Services Departments overpaid the Applicant for \$47,191.15 and the Applicant failed to make any restitution.

(6) *George Iyamu o/a Carera Auto Sales, LAT, January 20, 2005*

This was an appeal from a decision of the Registrar under the *Motor Vehicle Dealers Act* to a proposal to refuse registration in light of the Applicant's past conduct. The Applicant submitted an application in June of 2002, but he had 2 previous convictions, one for fraudulent use of a credit card in 1992 and the other for 3 counts of fraud under \$1000.00 in 1994. In this case the Tribunal found that the Registrar did not commit an error in refusing the application in light of the past conduct of the Applicant since the criminal convictions were serious in nature and recent in time.

On page 8, the Tribunal stated:

All the convictions registered against the Applicant relate to fraud which by its very definition indicates an intentional perversion of truth that results in injury to another. Such convictions do have a direct bearing on an individual's ability to conduct and comport himself with honesty and integrity in business. The Applicant's fraud convictions did not occur in the distant past but are recent in nature.

(7) *Re: Carol Goddard v. Registrar, Motor Vehicle Dealers Act, LAT February 8, 2005*

This was an appeal from a decision of the Registrar under the *Motor Vehicle Dealers Act* to a proposal to refuse registration in light of the Applicant's past conduct. The Applicant submitted an application, but failed to disclose a previous conviction for fraud against the Ontario Works Social Services for the Peel Region over a period of 48 months. She was sentenced to 3 years probation and ordered to pay restitution for a total of \$8,553.26 over that same period. She had made only two payments of \$85.00 each for a total of \$170.00 towards that debt.

In this case the Tribunal stated, at page 7:

Ms Goddard agrees that she was convicted of fraud in November 2003. She had defrauded the Ontario Works department of Peel Region by collecting Ontario Works monies while not declaring other income. Ms Goddard stated that she did so because her estranged spouse did not pay his support payments. While this is unfortunate that is not an excuse for defrauding the Ontario Works Department. If her estranged spouse had paid his support payments she would have had to declare those payments as income as well, so her explanation does not help her with this situation.

It is difficult to have marital situation where one ends up in a shelter for a time with one's children. The Tribunal is sympathetic to Ms Goddard who has certainly had many hardships in her life recently. But as pointed out by Hosseini-Rad, these considerations cannot determine whether or not the Applicant gets registered as a salesperson.

(8) Registrar of Alcohol and Gaming v. Hosseini-Rad, [2004] Superior Court of Justice, Divisional Court 29/03

This was an appeal by the Registrar of the Board of Alcohol and Gaming Commission of Ontario from a decision allowing Hosseini-Rad's application to deliver liquor at a person's home.

The Applicant had failed to disclose recent criminal convictions all related to a highly emotional matrimonial dispute with his wife. The convictions included assault, breach of undertaking, assault with a weapon and failure to comply with probation. The Board in first instance granted the application.

The Court stated the following at page 3:

Furthermore, the Board has further erred in law in the following respects. After having reviewed several instances of dishonesty, deception and lying by the respondent, the Board found "the applicant's evidence totally lacking in credibility, and choose to place no reliance upon it." Despite having made that finding, the Board, in its decision, referred extensively to evidence adduced by the respondent concerning his marriage difficulties and took those circumstances into account in deciding whether or not to grant the licence. Having rejected his evidence, it could not reasonably be suggested that the Board could then take his evidence as true and consider his evidence as establishing facts which the Board could take into account in determining whether or not a licence should be granted. This is an unreasonable conclusion.

Furthermore, even if the Board had determined that the respondent was credible in his evidence concerning his marital separation and the circumstances surrounding his criminal convictions, these facts were irrelevant to the application once the Board determined that the respondent made a false statement on his application.

The Tribunal would like to comment on two of the cases submitted by the Applicant, the cases of *Shine* and *Brenner*.

The test established by the *Brenner* decision has been considered and applied on a regular basis since 1983 by adjudicators and the law community in general.

In the unanimous *Shine* decision in 2003 appeal judge Lane stated that this test remains the proper test to be applied.

However, he also cautioned that this test does not establish a rule that the Registrar must be shown to be wrong.

He also pointed out that the Registrar is an investigator and not a trier of fact and that accordingly the Tribunal should consider all relevant evidence in each case and should adopt an uninhibited approach during a hearing. The Registrar's position must be evaluated with the rest of the evidence by the trier of fact, the Tribunal, and the Tribunal and only the Tribunal can decide on the credibility of each witnesses.

ISSUES:

The legal issue in this case is whether the Registrar is right in his intention to revoke the Applicant's registration as a motor vehicle sales person under the Act on the basis of the Applicant's past conduct including his criminal record, his failure to reimburse the balance owed in relation with the restitution order, his failure to disclose his previous convictions on numerous occasions, and particulars of the offence in answer to question 9 on the Application Registration from which he filed with OMVIC.

EVIDENCE:

The evidence presented to the Tribunal by the Registrar at the hearing consisted of documentary evidence as well as oral testimony.

Witness for the Registrar

The Tribunal heard evidence from one witness called by the Registrar: Mary Jane South. Ms. South has been the Deputy Registrar with the Respondent since the inception of the Ontario Motor Vehicle Industry Council (OMVIC, the body charged with enforcing the Act and synonymous with the "Registrar" in this decision) in January 1999. Under her supervision, OMVIC employees carry out four main functions under the Act: registration, which is her main function; inspection teams who attend to inspect; investigators who lay

charges; and mediators who deal with consumer complaints. The Act for her is a public-protection statute to ensure, in accordance with Section 5, that dealers and salespersons are "acting with integrity and according to law". She put a lot of emphasis during her testimony on the fact that she regards voluntary disclosure as a "very important test" in relation with the integrity and honesty of an Applicant.

The witness pointed out that the Applicant concealed his conviction for fraud on many occasions after his initial application of July 5th 1997 (at which time he had not been charged with any offence). However, after his conviction for fraud dated November 7th 1997, he made several renewal applications:

- (i) September 06, 1999 business application,
- (ii) September 24, 1999 individual application,
- (iii) September 29, 2001 business application,
- (iv) September 23, 2003 business application.

In addition, the witness pointed out, in answer to a question from the Applicant's counsel that there were at least nine serious violations to the Standards of Business Practice of OMVIC over the last 2 years in relation with the business operated by the Applicant, Janex.

On January 8, 2004, a letter was sent to the Applicant by Laura Gordon, Director, Compliance section at OMVIC, requesting written explanations for a conviction in November 1997 and further details in relation to a restitution order bearing the same date. The Applicant replied in writing on January 20, 2004, admitting the facts surrounding his conviction, but failing to provide details in relation to the restitution order. A second letter was sent to the Applicant on March 13, 2004, requesting more information in relation to the restitution order. Mrs. Gordon spoke with the Applicant over the phone on March 26 and 30, 2004 and it seems that the Applicant was confused and left many questions without answers in relation with the restitution order. He told Mrs. Gordon that there was still a balance owing on the initial amount of \$15,000 and that he was paying on a sporadic basis but did not provide further details. Finally, the Applicant made a payment of \$200.00 on March 30, 2004 and sent proof of payment to Mrs. Gordon by fax.

The evidence presented to the Tribunal by the Applicant at the hearing consisted of oral testimony.

Witness for the Applicant

The Applicant, Mr. Savcho Zahariev o/a Janex, testified that he arrived in Canada in December of 1990 and he had experienced difficulties with the English language. He collected welfare benefits for approximately 6 months after the date of his arrival and then started to work in the construction business for O'Riley Brothers as an insulator on a part time basis. He started to work on a full time basis sometime during 1995 and stopped collecting welfare benefits in November of that year.

When the Applicant was asked why he failed to disclose his criminal record in question 9 on the various renewal applications, he explained that he was afraid that if he disclosed it, his application for the licence would be turned down by OMVIC.

When asked why he did not pay the balance of the restitution order which amounted to close to \$9,000.00, he told the Tribunal that his lawyer at the time told him that he did not have to continue to make restitution payments after the expiration of his period of probation. (3 years)

With regard to the charge of prohibited driving, he told the Tribunal that it was his ex-wife who was involved in this suspension and that he had nothing to do with it. He explained that he called the Ministry of Transportation and that everything was resolved in his favour.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that the Applicant filed his initial application for registration on July 5th 1997. A police check performed on July 7, 1997 by the Ottawa-Carleton Police came back negative and registration was granted shortly after that date. An officer from the Ottawa-Carleton Regional Police Service laid an information on July 10th 1997 before a Justice of the Peace for an indictment for fraud over \$5,000 against the Applicant and a promise to appear was issued for July 30 1997. The Applicant did not show up and a warrant of arrest was issued against him. He was arrested and subsequently released on bail on September 25, 1997.

The Applicant pleaded guilty on November 7th 1997 and received a term of probation for a period of 3 years. An order of restitution was a condition of the probation and payments of \$200 per month were made towards the total amount of \$15,500.78 for a period of 3 years.

After his initial application in July 1997, and his conviction on November 1997, the Applicant made four other renewal applications from 1999 through 2003.

Following the last renewal application of September 23, 2003, a police check was performed by the Ontario Provincial Police and a report dated October 29, 2003 came back positive and was later sent to the Registrar's office. In January 8th 2004, the Applicant was contacted by letter by the Registrar's office following the discovery of previous convictions under his name, and he was asked to provide written explanations, to prevent the issuance of a proposal to revoke his licence.

The Applicant wrote a letter to the Registrar on January 20, 2004 in which he provided the following details:

I obtained copy of the police report (attached). I 1992 as a new emigrant in the country I did work for construction company while receiving social assistance for myself, wife and son. At this time I was language barrier as well. I'm not trying to excuse myself, it was entirely my fault. So when in 1997 Provincial Government found out about this I fully cooperate with

them, admit everything and was given conditional sentence for 6 months plus some community hours.

Why I did not disclose this charge? Honestly I was not sure if it is on my criminal record and was hoping they don't keep record of offences like this one. It was not shown on previous criminal search. So I hope you can accept this as explanation.

Regarding licence suspension I did driver licence search (attached).

In 2001 my wife on the way out to work hit another vehicle parked on the side. At this time we were going through separation and she was driving car registered on my name. This is why the court papers were sent to wrong address and I did not know about the accident till my licence was suspended and I received notice in the mail. I contacted the court and my licence was reinstated immediately. Suspension was on October 10, 2003 (see the attached papers) and my application for dealer licence renewal was sent to you before this date.

(sic)

APPLICATION OF LAW TO FACTS:

The Act provides that the Registrar may revoke the registration of an Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business a) in accordance with financial responsibility or b) in accordance with the law and with integrity and honesty. As set out in the *Brenner* case, the Tribunal should only direct the Registrar not to carry out the proposal to revoke if it concludes the Registrar was in error in concluding that this is the case.

The Tribunal finds the following facts to be relevant past conduct:

- The Applicant knew since November 1997 that he had a criminal record.
- After his conviction, he nonetheless had applied 4 times for renewal to the Registrar, being aware that he was lying. When he was put in a position of choosing between honest disclosure and the risk of being refused because of his record, he chose to try to conceal the truth.
- He admitted during examination that he knew that he had a criminal conviction and did nothing to advise the authorities for almost 8 years.
- Even if we accept the explanation of the Applicant in examination that he was confused about the restitution order and that he was not sure that he had to pay the full amount, the fact remains that in March 2004, he knew that there was a balance to be paid, but he decided to make a payment of \$200 on a balance of almost \$9,000 and has not make any other payments since.
- In his letter sent to OMVIC in January 20, 2004, as well as his evidence before the Tribunal, when he described the circumstances surrounding his conviction of November 1997, he appeared to be confused, tried to minimize the facts and trivialized the events. However, on closer examination this does not hold true. He has not submitted any written evidence that would have supported his testimony that he was told not to continue to pay the amount in full.

- In relation with the suspension of his driver's licence in October of 2003, he did not produce any written evidence in support of his testimony either.
- The Tribunal finds that in the present case, relevant information was concealed by the Applicant from November 1997 until January of 2004.
- The Applicant when he had the opportunity to redeem himself in putting his past behind him less than 11 months ago by paying the remainder of the restitution order that should have been paid out many years ago, decided to choose the easy way out and made a symbolic payment of \$200.00. In examination, he admitted that he had the financial means to pay the balance in March 2004, but decided to wait until the day of the hearing to make an offer to reimburse. That in our opinion does not show a settled intention to carry on his legal responsibilities.

The Applicant has not presented any character evidence at the hearing to support his claim that he is honest and likely, in spite of his past problems, to conduct his business with integrity.

The Applicant has not presented evidence that would show that he has made progress in his life and that he will be able to carry on with his business according to the letter of the law, with or without restrictions.

The Applicant when given the opportunity to choose between honesty and immediate advantage, decided to go with the second choice.

The Applicant submitted the case of *Peter Fong* to the Tribunal in order to strengthen his position. However one of the tests applied in this case by the Tribunal to grant registration with conditions was the length of time that had elapsed since the last involvement in dishonest activity. The principle of balance set out in the *Shahidi* case is not met in this instance since there was no honest disclosure until the Applicant's previous convictions were discovered by a routine police check requested by the Registrar's office at the end of 2003. In addition, at the time of this hearing, the Applicant was still in default of payment for more than half of the initial amount owed under a restitution order issued in 1997.

Based on the facts set out above the Tribunal is not satisfied that the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business with integrity, honesty and in accordance with the law.

DECISION:

Therefore by virtue of 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 of July 26, 2004 to revoke the registration of Savcho Zahariev o/a Janex.

LICENCE APPEAL TRIBUNAL



Daniel Laurin, Vice-Chair,
Presiding

Released: March 30, 2005

Filename: 2548.mvda.Zahariev.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.