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Appeal
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July 15, 2005

MEMORANDUM

**Re: 1423391 Ontario Inc. o/a Supreme Car Sales and Harpreet Kang v.
Registrar, Motor Vehicle Dealers Act**

Enclosed herewith please find a copy of the Ruling of the Licence Appeal Tribunal with respect to this matter.

DISTRIBUTION LIST:

Anthony E. Bak, Counsel for the Applicant
A. Michael Rothe, Counsel for the Registrar, *Motor Vehicle Dealers Act*

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1423391 ONTARIO INC. O/A SUPREME CAR SALES AND HARPREET KANG

APPEAL FROM PROPOSALS OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATIONS

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

APPEARANCES: ANTHONY E. BAK, Counsel, representing 1423391 Ontario INC.
o/a Supreme Car Sales and Harpreet Kang

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

DATE OF
HEARING: May 26, 2005

Toronto

RULING ON A PRELIMINARY MATTER

BACKGROUND

By Notice of Proposal dated January 17, 2005 the Registrar, *Motor Vehicle Dealers Act* (the Act), acting under section 7 of the Act, proposed to refuse the registration of 1423391 Ontario Inc. ("the numbered company") and Harpreet Kang ("Kang") (collectively, "the Applicants") 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 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 disentanglement to registration under the Act. Therefore, the Registrar is unwilling to register 1423391 Ontario Inc. o/a Supreme Car Sales and Harpreet Kang under the Motor Vehicle Dealers Act.

The numbered company was registered as a motor vehicle dealer from September 3, 2002 until November 15, 2003. Kang, who is the sole director of the numbered company, was registered as a motor vehicle salesperson from July 10, 1997 until November 15, 2004. The numbered company and Kang applied for registration on November 23, 2004. Question 9 on the application to be registered as a motor vehicle salesperson asks: "Have you ever been found guilty or convicted of an offence under any law or are any charges pending?" Kang answered this question in the negative. A criminal record search indicated that Kang was charged with the offence of possession of stolen property on September 23, 2004.

On January 20, 2005, the numbered company and Kang appealed the proposal to the Tribunal.

The Registrar filed a Notice of Further and Other Particulars on May 12, 2005 in which he amended the first paragraph of the Notice of Proposal such that the date of the expiration of the numbered company's registration was November 15, 2004 (and not 2003). The Registrar stated that certain information had come to his attention relating to the fitness of the numbered company and Kang to be registered. The Registrar stated that (a) the numbered company is operating as a motor vehicle dealer without the benefit of registration and (b) Kang is operating as a motor vehicle salesperson without benefit of registration.

The hearing of the appeal commenced on May 26, 2005 at which time counsel for the Applicants brought an oral motion with inadequate notice to the Respondent in which he sought to strike out the Notice of Further and Other Particulars on the grounds that it was lawful to do so. Counsel for the Respondent submitted that this Notice was served and filed in accordance with law. The Tribunal adjourned the hearing of the appeal so as to permit the parties the opportunity of filing written submissions on this issue.

APPLICANT'S SUBMISSIONS

The Applicant's Counsel submitted that the Notice of Further and Other Particulars should have been served on his client in a more timely fashion. This Notice was served thirteen days prior to the hearing. The revocation of the right to be registered under the Act interferes with the registrant's ability to earn a living. The Registrar must strictly comply with the provisions of section 7 of the Act. The Registrar should only deny or revoke licence following a thorough investigation and after weighing all of the evidence in a reasoned and judicious manner. The registrant should receive the reasons for the proposal contemporaneously with the issuance of the proposal. In this case the Registrar deliberately held back making complete disclosure until 13 days before the hearing.

Counsel for the Applicant admitted that the Proposal dated January 13, 2005 complied with the provisions of section 7 of the Act; such that the only reasons for proposing to deny registration related to the Kang's non-disclosure of the pending criminal charge.

The Registrar was not subject to any time frame in making the proposal whereas the Applicant has to file the appeal within the 15 day time period imposed under subsection 7(2) of the Act failing which the Registrar's proposal become operable. By filing the Notice of Further and Other Particulars the Registrar is "attempting to expand on the scope of the legislation and in essence, retroactively, attempt to justify the decision reached on January 17, 2005." The Registrar's conduct is analogous to the laying of different and unrelated charges in a criminal matter or the stating of a new cause of action or head of damages in a civil matter at the eve of a trial.

The filing of the Notice of Further and Other Particulars is not authorized by statute nor is there any "statutorily mandated form authorizing same." Full particulars should be given at the time the original Notice of Proposal is issued.

Section 8 of the Statutory Powers Procedure Act is of no assistance to the Registrar because it only deals with the particulars of the misconduct alleged; the failure to disclose the existence of the pending criminal charges. The issue of acting as an unregistered dealer and salesperson has nothing to do with the initial reason stated for refusing registration and is an attempt by the Registrar to circumvent the provisions of section 7 of the Act.

The fact that the Tribunal and its predecessor, the Commercial Registration Appeal Tribunal may have allowed and relied upon "Further and Other Particulars" in other cases is irrelevant.

If the Tribunal were to sanction the use of further and other particulars it would sanction a contravention of the Act. Such conduct may also be abusive of the process. The Registrar could propose revocation at any time and for any reason. If an appeal is filed within the 15-day period and the Registrar is permitted to file further and other particulars, the Registrar would be permitted to investigate the Applicants' conduct until the eve of the hearing, which is what happened in this case.

The practice of resorting to the filing further and other particulars at the eve of a hearing is tantamount to trial by ambush. It is an abuse that cannot be cured by the granting of an adjournment.

RESPONDENT'S SUBMISSIONS

The Respondent (Registrar) submitted under section 8 of the Statutory Powers Procedures Act, individuals facing serious allegations regarding their good character, the propriety of their conduct or their competence are afforded a reasonable opportunity to defend themselves from these allegations at a hearing on the merits. The issue is simply one of notice which must be given sufficiently in advance of the hearing so that a proper defence may be developed. It is the Registrar who must comply with section 8. The Tribunal must be satisfied at the hearing that the Registrar has complied with section 8 so that the Applicant is not surprised by the serious allegations or by the evidence. Where the Tribunal

thinks that section 8 has not been complied with to the prejudice of the Applicant, then the Tribunal should grant an adjournment. The numbered company and Kang have each been given adequate time and sufficient particulars relating to their conduct to adequately defend themselves of the allegation raised in the Notice of Further and Other Particulars and to support their position that they have not contravened section 5 of the Act.

The Tribunal must marshal all of the relevant facts in order to make an informed and reasoned decision. It is neither in the Tribunal's interest nor in the public interest to exclude any allegation of misconduct that arose prior to the hearing. Past conduct is not static and fixed at the date of the Proposal. The Tribunal must consider the evidence given at the hearing. It must consider the cumulative effect of the Applicants' past conduct. Allegations of breaches of section 5 of the Act cannot be ignored just because they came to the attention of the Registrar after the initial proposal is issued. In *Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda* [1994] O.J. No. 954, the Ontario Divisional Court stated that all aspects of the Applicant's past conduct is potentially relevant, notwithstanding that it was the subject of a previous proposal. It is the totality of the past conduct, considered in the light of more recent circumstances that provide the basis for relief.

Section 7 of the Act mandates the Registrar to serve notice of his proposal on the Applicant and must provides written reasons for the proposal. Subsection 7(1) of the Act is a restatement of the second part of section 8 of the Statutory Powers Procedures Act that requires that an Applicant be furnished with particulars of the allegations in the circumstances therein provided.

The Registrar has complied with the Act in this case and has provided the Applicants with timely notice of the particulars upon which he relies. The fact that a supplemental notice might be forthcoming was indicated on the Notice of Proposal thereby minimizing any surprise or prejudice to the Applicants. The Applicants have had adequate time to defend themselves. If the Tribunal finds that the Applicants have not been given adequate time, then the appropriate remedy is for the Tribunal to grant an adjournment and not to strike out the Notice of Further and Other Particulars.

THE LAW

The statutory provisions relevant to this matter are found in sections 5 and 7 of the Act and in section 8 of the Statutory Powers Procedures Act. These sections read 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. R.S.O. 1990, c. M.42, s. 5 (1).

Conditions of registration

- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations. R.S.O. 1990, c. M.42, s. 5 (2).

Refusal to register

- 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. R.S.O. 1990, c. M.42, s. 6 (1).

Suspension or revocation

- (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. R.S.O. 1990, c. M.42, s. 6 (2).

Notice of proposal to refuse or revoke

- 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. R.S.O. 1990, c. M.42, s. 7 (1).

Notice requiring hearing

- (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. R.S.O. 1990, c. M.42, s. 7 (2).

Powers of Registrar where no 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). R.S.O. 1990, c. M.42, s. 7 (3).

Powers of Tribunal where hearing

- (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. R.S.O. 1990, c. M.42, s. 7 (4).

Conditions of order

- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act. R.S.O. 1990, c. M.42, s. 7 (5).

Where character, etc., of a party is in issue

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto. R.S.O. 1990, c. S.22, s. 8.

ANALYSIS

The Applicant challenges both the legal efficacy and the timeliness of the Registrar's serving and filing the Notice of Further and Other Particulars. To address these issues it is necessary to examine the events leading to the hearing of the appeal.

Upon concluding his examination of the applications for registration made by the Applicants, the Registrar stated that he had reasonable grounds for believing that the Applicants would not carry on business in accordance with law and with honesty and integrity as referred to in paragraph 5(1)(b) and subparagraph 5(1)(c)(ii) of the Act. The basis for this belief stemmed from fact that Kang initially did not disclose the existence of the pending criminal charge laid against him at the time he and the numbered company submitted their applications for registration. The Registrar thereupon proposed to deny the Applicants registration because he opined that they were disentitled to registration under section 5 of the Act. He then served notice of his proposal upon the Applicants in the manner prescribed in subsection 7(1) of the Act.

The serving of the Notice of Proposal is an inchoate act. The proposal does not become operable in law until another event occurs. Within fifteen days after service of the Notice of Proposal the applicant may require a hearing by the Tribunal in which case he must serve notice of the appeal in writing upon the Tribunal and the Registrar. Where the applicant does not require a hearing by the Tribunal, the Registrar may carry out his proposal. If an applicant requires a hearing, then the proposal is not carried out until the Tribunal, acting under subsections 7(4) and (5) of the Act directs the Registrar to do so with or without the imposition of terms and conditions.

In this case, the Registrar served and filed the Notice of Further and Other Particulars during the inchoate period. The hearing had not been held. The Tribunal had not made an order on the merits of the case. The further and other particulars refers to the type of conduct proscribed in paragraph 5(1) (a) and subparagraph 5(1)(c)(ii) of the Act, namely, carrying on business in a manner not authorized by law which formed the basis for the Proposal to deny registrations. At all relevant times the Applicants' past conduct allegedly gave the Registrar reasonable grounds for believing that the Applicants would not carry on

business in accordance with law and with honesty and integrity. In the case *Faccenda* case, supra, Mr. Justice Adams stated at paragraph 3 of the reasons for decision "... all past conduct is potentially relevant, notwithstanding that it was the subject of a previous proposal. It is the totality of the past conduct, considered in the light of more current circumstances, which forms the basis for relief". In *Faccenda*, the Ontario Divisional Court was concerned with the application of subsection 6 (1) of the Real Estate and Business Brokers Act, R.S.O. 1990, C.R.4 which is similar to subsection 5 (1) of the Act. The fact that the Court there referred to past conduct in a previous proposal is irrelevant. It is the totality of the past conduct and not the number of proposals that must be assessed.

In the Notice of Proposal served upon the Applicants the Registrar gave notice that he may provide further and other particulars of any other matters herein or in respect of any other matter including further grounds for refusal/revocation of registration.

By way of analogy to civil proceedings, in the recent case of *Zurich Indemnity Co. of Canada v. Matthews* 2005 CanLII 14130 the Ontario Court of Appeal referred to the fact that "Rule 26 of the Rules of Civil Procedure provides that the court shall grant leave to amend a pleading at any stage of an action absent prejudice that is not compensable by costs or an adjournment. Case law makes it clear that the motion judge has the jurisdiction to refuse to allow amendments that are not tenable in law."

The Applicants will not be prejudiced at the hearing. They know why the Registrar proposes to deny them registration and have had adequate time to respond to the proposal in a meaningful fashion. Their right to a complete defence has not been placed in jeopardy by the serving upon them of the Notice of Further and Other Particulars, which are tenable in law.

If the Tribunal were to accede to the Applicants' motion, the Registrar may be forced to serve and file a new proposal denying the Applicants registration under paragraph 5 (1) (a) and subparagraph 5(1)(c)(ii) of the Act for those reasons referred to in the Notice of Further and Other Particulars. There would then be two proposals made against the same Applicants for the same legal reason. There would then be two appeals pending. Assuming no prejudice to the Applicants, then it would be in the interest of judicial economy or administrative efficiency to avoid a multiplicity of proceedings and to consolidate both hearings.

Under section 10 of the Tribunal's Rules of Practice a party must disclose the documentation upon which he or she relies within 10 days of the hearing. In this case the Notice of Further and Other Particulars was served upon the Applicants 13 days prior to the hearing. This notice was therefore filed in a timely manner. If the Applicants felt oppressed by the date in which they received this Notice, then they could have sought an adjournment.

ORDER

For these reasons, the Tribunal dismisses the motion brought by the Applicants to strike the Notice of Further and Other Particulars.

LICENCE APPEAL TRIBUNAL



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

Released: July 15, 2005

File: 2782.mvda.Kang.primnry.doc