

**Licence
Appeal
Tribunal**

12th Floor
1 St. Clair Ave. W.
Toronto ON M4V 1K6

Telephone: (416) 314-4260
1-800-255-2214

Fax: (416) 314-4270
(416) 314-6307
1-800-720-5292

**Tribunal
d'appel en
matière de permis**

12^e étage
1 av St. Clair O
Toronto ON M4V 1K6

Téléphone : (416) 314-4260
1-800-255-2214

Télécopieur : (416) 314-4270
(416) 314-6307
1-800-720-5292



July 25, 2005

MEMORANDUM

***Re: Wissam Kayali 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:

Wissam Kayali, Applicant
Aviva R. Harari, Counsel for Registrar, *Motor Vehicle Dealers Act*



WISSAM (SAM) KAYALI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT* TO
REFUSE REGISTRATION OF WISSAM (SAM) KAYALI

TRIBUNAL: F. BRUCE FITZPATRICK, Vice Chair

APPEARANCES: WISSAM (SAM) KAYALI, Applicant, representing himself
YOVANKA McBEAN, Agent for the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: July 7, 2005 Toronto

REASONS FOR DECISION AND ORDER

This matter came before the Licence Appeal Tribunal (the "Tribunal") arising out of a notice of proposal issued under the *Motor Vehicle Dealers Act* (the "Act"). The notice of proposal dated January 17th, 2005, and amended on January 21st, 2005, proposed to refuse the registration of Wissam (Sam) Kayali (the "Applicant") as a motor vehicle sales person under the provisions of the Act. The Applicant appealed the proposal to refuse registration to the Tribunal by notice of appeal dated January 7th, 2005, received by the Tribunal on January 31st, 2005.

The notice of proposal to refuse stated, among other things, that the Applicant's past conduct was inconsistent with the intention and objective of the Act and therefore warranted disentitlement to registration under the Act.

The proposal listed particulars as being that the Applicant falsely answered a question concerning any past conviction of offence under any law and that a criminal record search on the Applicant revealed the following convictions:

1. Theft under \$5,000.00 – October 13th, 1999.
2. Possession of property obtained by crime over \$5,000.00.

3. Possession of a Schedule III substance for the purpose of trafficking – September 4th, 2001.

The issue before this Tribunal is whether or not the Registrar had sufficient grounds to support a belief that the Applicant would not carry on business in accordance with law and with integrity and honesty.

The Registrar called two witnesses.

The Registrar first called Constable Jeff Dunham of the City of London Police Force. Constable Dunham is a 15 year veteran with the London Police. He identified the Applicant before the Tribunal as a person with whom he had prior dealings in the context of a criminal investigation which occurred in 1998. Constable Dunham testified as to the circumstances concerning the three offences for which the Applicant had been convicted. A summary of the nature of the charges by way of London Police charge sheets were introduced as evidence before the Tribunal. Also, an endorsement from the Superior Court of Justice was entered with respect to the charges for which sentence was entered on September 4th, 2001. Further, the Registrar offered through Constable Dunham a copy of a criminal record check held in the CPIC identification databanks as of November 19th, 2004, confirming that the Applicant indeed had been convicted of three offences as noted above.

The Registrar also called Michael Rothe. He is counsel and chief privacy officer for the Ontario Motor Vehicle Industry Council and a member of the Law Society of Upper Canada. Mr. Rothe testified as to the basis for the Registrar's position concerning its refusal to register the Applicant as a motor vehicle salesperson. Mr. Rothe indicated the Registrar's concern that, in the first instance, the Applicant did not disclose the fact of his previous criminal convictions, and further when questioned, responded in writing in a manner that did not impress the Registrar as being indicative that the Applicant had indeed appreciated the nature of his previous criminal actions and indeed attempted to minimize these convictions and indicated a failure to accept responsibility for his actions. This was set out in a letter by the Applicant to the Registrar dated December 22nd, 2004, which was entered into evidence. Among other things, the Applicant stated "I was simply at the wrong place in the wrong time, I had done nothing wrong to be punished for".

Mr. Rothe testified that it's significant for the Registrar to ensure that all registered motor vehicle salespersons act with honesty and integrity as the disclosure based motor vehicle dealer industry requires participants to act in an honest manner. The Registrar believed that the Applicant's answer was deliberately untruthful and that the nature of the offences were serious enough in the context of the position which the Applicant was seeking, namely, a motor vehicle salesperson to warrant his disqualification.

The Applicant testified on his own behalf. The Applicant freely admitted that the convictions had all been registered and he pled guilty to all the charges. The Applicant explained that his lawyer had urged him to plead guilty. The Registrar objected to this

evidence and the objection was duly noted. However, in the circumstances, the Tribunal took account of the fact that the Applicant continued to protest that the charges were insignificant and that he did not participate in the trafficking of an illegal substance, notwithstanding the fact that he pled guilty to such an offence.

The Applicant testified that he did not think the matter would get as far as a Tribunal hearing. He indicated the reason that he had not answered "yes" to the question about a criminal record was that he was aware of another licenced salesperson in the dealership where he had been temporarily employed, having been convicted of drunk driving and failing to disclose that to the Registrar and having been registered nonetheless. The Applicant testified that he believed that he could simply "get it by" the Registrar by not answering the question in a truthful manner.

The Applicant indicated he graduated from Fanshawe College and that the job he had with Highbury Ford was one he very much enjoyed and represented the best job he had to date since graduating from college. He indicated he had no trouble with the law since the convictions at issue and that he passed his certification test for his MVDA licence with an 86% mark.

Under cross-examination, the Applicant was asked concerning his failure to disclose the theft charge. The Applicant explained that the matter simply involved a \$10.00 watch at a flea market and he had completely forgotten about it when he filled out the application.

The Applicant freely acknowledged that he knew the Registrar would rely on the information he provided in order to make a decision about whether or not it should register him as a motor vehicle salesperson.

Based on the oral evidence and the documentary evidence before the Tribunal, the Tribunal finds the following as fact.

1. The Applicant was convicted of three criminal offences:
 - (a) theft under \$5,000.00 contrary to Section 334(b) of the Criminal Code of Canada;
 - (b) possession of property obtained by crime over \$5,000.00 contrary to Section 355(a) of the Criminal Code of Canada;
 - (c) possession of a Schedule III substance for the purpose of trafficking contrary to Section 5(2) of the *Controlled Drugs and Substances Act*.
2. The Applicant knowingly answered the question on the application with respect to the Criminal Code in a false way.
3. The Applicant answered falsely in the hopes that the Registrar would not check his criminal record.

4. The Applicant does not believe that the matters for which he was found guilty would indicate that he was not capable of acting in accordance with law and with integrity and honesty.

THE LAW

Section 3 of the *Motor Vehicle Dealers 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.(1)(b) of the *Motor Vehicle Dealers Act* states:

- 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
- (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 of the Act states:

6. 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.

CASE LAW

The case of *Brenner v. OMVIC* [1983] O.J. #1017 (Divisional Court) contains the proper test for cases of this type. More recently, the Divisional Court commenting on *Brenner* in *Shine Car Sales v Registrar* [2003] O.J. #603 noted that the Tribunal must direct itself to the issue as to whether or not 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. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out its proposal.

DECISION

The Applicant urged the Tribunal to give him a second chance. Unfortunately, the Tribunal believes that the Applicant's "second chance" came when he had the opportunity to answer truthfully on the registration and he chose not to do so.

While the Tribunal appreciated the Applicant's candor while testifying under oath, it was influenced in particular by the Applicant's admission that he believed there was an opportunity that the Registrar would not check his criminal record and he correspondingly chose to answer questions concerning his past in a false manner.

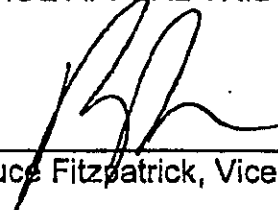
The Applicant's candor, in the Tribunal's opinion, has come a little too late to convince the Tribunal that indeed the Applicant's past conduct was indicative of the fact that the Applicant would not act in accordance with the law or with integrity and honesty.

Although no witnesses from the dealership where the Applicant had worked were called, the Tribunal is concerned by the Applicant's testimony that he was in part influenced by some person who, in effect, encouraged him to lie, and he acted on that apparent improper influence.

The Applicant's attempt to minimize his convictions and the situation concerning the charges flies in the face of the facts surrounding his conviction and did not impress the Tribunal. The Tribunal finds that 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. Accordingly the Tribunal, relying on the Divisional Court test from *Brenner* and further elucidated in *Shine*, finds it should not order the Registrar to refrain from carrying out its proposal.

Therefore, in light of the above, and by virtue of the authority vested in the Tribunal under Section 7(4) of the Act, the Tribunal directs the Registrar to carry out its proposal to refuse registration to the Applicant.

LICENCE APPEAL TRIBUNAL



F. Bruce Fitzpatrick, Vice Chair

RELEASED: July 25, 2005

FILE NAME: 2787.mvda.Kayali.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.