

**Licence  
Appeal  
Tribunal**

12<sup>th</sup> 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<sup>e</sup> 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



January 24, 2006

**MEMORANDUM**



**Re: *Bernard B. Frohlick 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:**

Bernard B. Frohlick, Applicant  
A. Michael Rothe, Counsel for Registrar, *Motor Vehicle Dealers Act*

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BERNARD B. FROHLICK

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

TO REFUSE REGISTRATION

TRIBUNAL: ANDREW DIAMOND, Vice-Chair Presiding

APPEARANCES: BERNARD B. FROHLICK, Applicant

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

DATE OF  
HEARING: December 2, 2005

Sudbury

### REASONS FOR DECISION AND ORDER

#### BACKGROUND:

The Registrar under *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively) acting under section 7 of the Act proposed to refuse Bernard Frohlick (the "Applicant") registration as a motor vehicle salesperson 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 out 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 *the Applicant* under the *Motor Vehicle Dealers Act*.

The particulars relating to the refusal were stated as follows:

1. The Applicant applied for registration as a motor vehicle salesperson on or about February 25, 2005. He proposed to work for 1552524 Ontario Inc. o/a Bernie's 1<sup>st</sup> Choice Auto (the "New Dealership").

2. The Applicant was previously registered from or before November 30, 1982 until on or about March 4, 2003.
3. 510315 Ontario Limited o/a Bernie's Used Cars (the "Original Dealership") is an Ontario corporation that was registered as a motor vehicle dealer from on or before November 15, 1984 until on or about March 4, 2003.
4. The Applicant is the sole officer and director of the Original Dealership.
5. The Applicant was discharged from bankruptcy on or about December 4, 2004.
6. On or about February 10, 2004 the Original Dealership was found guilty of one count of willful evasion of retail sales tax pursuant to the *Retail Sales Tax Act*. The Original Dealership was given a suspended sentence.
7. On or about February 10, 2004 the Applicant was found guilty of one count of willful evasion of retail sales tax pursuant to the *Retail Sales Tax Act*. The Applicant was fined \$40,000.00 plus \$5.00 costs and a victim surcharge of \$8,051.00

## EVIDENCE

While the evidence is summarized below the Applicant admits to the wrong doing alleged by the Registrar. As a result the only issue is: what is the appropriate disposition of the Application?

The Tribunal had the benefit of hearing three witnesses: Ms. Louise Cohn a Manager of Inspection for the Ontario Motor Vehicle Industry Council ("OMVIC"); the Applicant Mr. Bernard Frohlick; and Mr. Maurice Bradley who was called by the Applicant as a character witness.

### Testimony of Ms. Cohn:

Ms. Cohn testified that she is a Manager of Inspection for OMVIC. Ms. Cohn explained that OMVIC is a not for profit corporation that is designated with the responsibility of administering the Act and its regulations.

Referring to her function as a Manager of Inspections Ms. Cohn stated that she supervises 10 field inspectors and became familiar with the Applicant, and his application for registration as a salesperson of motor vehicles.

Ms. Cohn testifies that the Applicant had been registered as a dealer from 1982-2003 under the Act. This Original Dealership operated under the name Bernie's Used Cars. The Applicant was the sole officer and director of the Original Dealership.

It was Ms. Cohn's evidence that in March of 2003 the Applicant advised OMVIC that he and the Original Dealership were bankrupt and were ceasing operation. The Applicant then requested a new registration for a company to be controlled by his wife Linda Frohlick. The New Dealership was registered by OMVIC on February 26, 2003.

Ms. Cohn testified that for the time between March 1, 1999 and January 23, 2002 the Original Dealership failed to pay to the Government of Ontario the sales tax it had collected on cars that it had sold. The total of the taxes collected but not paid totaled \$81,663.00. The Information setting out the charges against the Original Dealership is found at Exhibit 3 tab 4. The Information for the Applicant is found at Exhibit 3 tab 5.

As set out in the two Informations, both the Applicant and the Original Dealership were each charged with 17 counts of failing to remit Provincial Sales Tax collected on the sale of used cars. All but one charge against each of the Original Dealership and the Applicant were withdrawn. Both the Original Dealership and the Applicant pled guilty to one count each. The sentence for the Original Dealership was suspended and the Applicant was personally fined \$40,000 plus a victim surcharge of \$8,051 plus costs of \$5.00. The Applicant has been making monthly installment payments to pay off the fine.

It was Ms. Cohn's position that the past conduct of the Applicant, including failure to comply with the law, and the misuse of trust combined with the current proposal to work for his wife seem to be a scheme to allow the Applicant to continue to work in the same capacity as before. The current sponsor (the New Dealership) is owned by the Applicant's wife. OMVIC takes the position that if the Applicant is permitted to be registered as a salesperson for the New Dealership nothing will have changed.

Ms. Cohn, under cross examination, acknowledged that OMVIC had never received a consumer complaint about the Applicant or the Original Dealership and that the Applicant was fully cooperative with OMVIC's investigation of him and the Original Dealership.

#### Testimony of Bernard B. Frohlick Applicant

At the outset of his testimony the Applicant admitted his failure to remit the sales taxes collected. He was not proud of what he had done. The Applicant then went on to explain his actions and how this occurred without any excuses.

The Applicant testified that he had only a grade 7 education; is 59 years of age and has been a car dealer since 1979. From 1979 up until approximately 1999 everything went smoothly. The Applicant testified that he sold thousands of cars with no consumer or other complaints.

In or about 1999 a finance company that specializes in financing used car dealers offered to increase the Applicants line of credit so that he could buy more used cars at the commercial used car auctions. The Applicant, by his own admission, thought that

this would give him an opportunity to have a bigger dealership and make more money. Unfortunately things did not turn out that way. The finance company insisted on being paid within 60 days of the purchase of the car from the auction regardless of whether the car they had financed had been sold by the Applicant. The Applicant testified that some months he did pay his retail sales tax, but other months there was no money left. The Applicant testified that it was always his intention to pay the taxes as he made more money. The Applicant elected to continue to satisfy his primary creditor the finance company so that he could stay in business, but in so doing he got farther and farther behind in his taxes and with other creditors. Eventually the Applicant declared bankruptcy.

As a result of his bankruptcy the Applicant has lost the equity in his house as well as his life savings. Furthermore the criminal fine survives the bankruptcy and he continues to make payments towards paying off the fine.

The Applicant testified, and the documentary evidence supports his claim that he borrowed money in an attempt to settle the Government of Ontario's tax claim. The Applicant could not raise enough to make an offer of full restitution, and his offer to settle was rejected. As a result the Applicant was charged and pled guilty. The Applicant testified that he wants to pay off his fine. However, he has attempted to find alternative employment with only limited success and has concluded that the one thing he does well is sell used cars and is now applying for registration as a salesman so that he can provide for his family.

The Applicant testified that he will only buy and sell the cars and that his wife, who has taken the requisite OMVIC course will deal with the books and supervise him. However, under cross-examination the Applicant admitted that in the Original Dealership his wife also kept the books, but in the Second Dealership she would have the control of its operation.

The Applicant testified that he knew the sales tax money was trust money that was not his and he attempted to assure the Tribunal that this will not happen again.

## **CHARACTER EVIDENCE**

The Applicant produced character evidence in two forms. The first was in the form of a letter from the accountant of the Original Dealership, Mr. Mark Laberge CA who is a partner with the professional corporation Laberge Venne & Partners in Sudbury. Mr. Laberge stated in his letter in part that:

I have known [the Applicant] since childhood...

I was the accountant for [the Applicant and the Original Dealership] for nearly 20 years. In all my experience with him, he has always been hard working, honest and fair in all of his dealings in business and personal matters.

The only problem he has had is the retail sales tax mess that he got into in 2002. I do not believe that he did not pay the RST in any attempt to be dishonest or malicious in any way. I believe that it was a combination of his business being undercapitalized, having a run of bad vehicles on which he lost money, very stiff competition from non-registered and registered dealers and general short-fall of funds. I believe he knew that the RST had to be paid and that he fully intended to pay it...

The second letter, from Mr. David Reynolds Vice President of BDO Dunwoody Limited, the Applicant's Trustee in Bankruptcy, confirms the Applicant's attempts to make partial restitution which was rejected.

The Tribunal appreciates that the Registrar did not have the opportunity to cross examine the authors of the letters and that as a result they ought not to be admitted. In the alternative the Registrar submits that the letters be given the appropriate weight as the evidence could not be tested through cross examination. While the Tribunal appreciates the submissions of the Registrar with respect to the above two letters, the Tribunal also had the benefit of hearing both in direct and under cross examination from a third character witness whose evidence was consistent with the reference letters.

#### Testimony of Mr. Maurice Bradley

Mr. Bradley was called by the Applicant as a character witness. Mr. Bradley testified that he has known the Applicant since 1969 and has always found him to be very trustworthy. Mr. Bradley advised the Tribunal that he has had on going business dealings with the Applicant and has on occasion loaned money to the Applicant which has always been repaid.

The witness went on to advise the Tribunal that in his opinion, if the Tribunal sees fit to grant the Applicant a licence to sell cars he believes they (he and his wife) have a future in the used car business in Sudbury.

It is not uncommon for the Tribunal to hear character evidence in support of an Applicant. However, the Tribunal was particularly impressed with the evidence of Mr. Bradley in that it was industry specific credible and compelling.

Mr. Bradley testified that he has been in the business of selling cars in Sudbury for over 41 years and has personally sold over 7,000 cars. He is employed by one of the leading franchise dealers (Dan Corbett Chev Olds) in Sudbury, has held most positions, including management with the dealership and is intimately familiar with the industry, OMVIC and its duties and responsibilities.

Mr. Bradley gave evidence about how competitive the auto sales business is in Sudbury with some 65 dealers. While not condoning for a moment the conduct of the Applicant in failing to pay the sales taxes owed, Mr. Bradley gave evidence as to the background of how the finance companies make arrangements with smaller dealers that do not have the benefit of manufacturers support and how the terms and conditions of those financings are onerous. Having said that, the Tribunal understood Mr. Bradley's

evidence to be that the Applicant had learned that lesson the hard way and that he believes the Applicant will honour his commitments in the future.

Finally Mr. Bradley testified that if the Applicant wanted to work as a used car salesperson for Dan Corbett Chev Olds he would attempt to influence the dealer ownership to sponsor the Applicant. However, Mr. Bradley did note that he was not sure that a large dealership was the right environment for the Applicant as it required a high degree of computer proficiency which he intimated the Applicant did not have.

## FACTS PROVEN

- The Applicant operated the Original Dealership from approximately 1979 to 2002 with no consumer complaints.
- For the period March 1, 1999 to January 23, 2002, the Original Dealership failed to remit Provincial Sales Tax collected on the sale of cars totaling \$81,663.00.
- The Applicant attempted to make partial restitution.
- The Applicant understands that the money collected for sales taxes was not his but was held in trust for the Province of Ontario.
- The Applicant is remorseful for having not paid those taxes.
- The Applicant pled guilty to one count of willful evasion of retail sales tax pursuant to the *Retail Sales Tax Act*.
- The Applicant has applied to work as a salesperson for a dealership owned by his wife (the New Dealership).
- The Original Dealership carried on business under the trade name Bernie's Used Cars. The New Dealership carries on business under the trade name Bernie's 1<sup>st</sup> Choice Auto.

## THE LAW

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

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.

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.

(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.

(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).

(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

(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.

Both parties referred the Tribunal to cases which they submitted were similar in their facts to this case. Not surprisingly these cases reached the opposite conclusion with respect to whether or not an Applicant should be registered depending on which party was relying on which case. This is not surprising and merely highlights what is the underlying law, namely that each case must be judged by the Tribunal on its own merits using the standard of review set out below in the two cases of *Brenner* and *Shine*.

## 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. (4<sup>th</sup>) 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. (emphasis added)

As set out above the facts are not in dispute. The only issue before the Tribunal is: did the Applicant make a mistake which he will never do again? In other words, has he learnt his lesson? Or, is this past conduct indicative of a person who is not honest or trustworthy and should not be permitted to sell cars to members of the public?

### Conditions

The Registrar, while continuing to support its position that the Applicant should not be registered, submits that, in the alternative, if the Tribunal sees fit to register the Applicant, such registration should be made with terms and conditions which would insure that the Applicant was (a) appropriately supervised and (b) was not involved in the management or operation of the dealership.

The Registrar submits that allowing the Applicant to work for a dealership owned by his wife will not provide sufficient supervision. As a result the Registrar suggests limiting the Applicant to being registered as salesperson for a large franchise dealership with an established professional management structure such as that in place at the dealership Mr. Bradley works for. While the Tribunal agrees that conditions of the type suggested by the Registrar are appropriate in certain circumstances, the Tribunal is of the view that such restrictions are not required in this case.

In other cases the Tribunal has placed conditions on an Applicant from being involved in the management of the dealership. However to do that in this case where the dealership is owned by the Applicant's wife, would be creating an unreasonable restriction in the circumstances. The Tribunal does not want to be seen as promoting what will be a fiction of the Applicant not being involved in the management of the dealership. This is a true "mom and pop" operation with the Applicant having over 20 years experience in the industry. Furthermore, from the name of the New Dealership alone, it is clear that the public will believe that the Applicant is active in the management of the dealership. The Applicant and his wife's decision to use the Applicant's name as the business name of the New Dealership speaks volumes that the Applicant and his wife believe that there is still goodwill left in the name in the used car market in Sudbury. This may be the only asset the Applicant has, and the Tribunal is prepared to allow him to capitalize on it.

Based on a full review of all of the evidence, and the relevant law, it is the finding of this Tribunal that the financial position and past conduct of the Applicant does not afford reasonable grounds to believe that the Applicant will not carry on business in accordance with law integrity honesty and in a financially responsible manner.

**DECISION:**

Accordingly, pursuant to the authority vested in it by Section 7. (4) of the *Motor Vehicle Dealers Act*, the Tribunal directs and orders, the Registrar to register the Applicant as a Salesperson on the following terms and conditions:

1. For a period of three years from the date of his registration as a salesperson, the Applicant is not to be registered as a motor vehicle dealer.

LICENCE APPEAL TRIBUNAL



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Andrew Diamond, Vice-Chair

*RELEASED: January 24, 2006*

FILE NAME: 3085.mvda.Frohlick.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.

This decision, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website <http://www.lat.gov.on.ca> in approximately two weeks time. The decision will also be available on Quicklaw at a later date.