

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



DATE: 2017-05-05
FILE: 9863/MVDA
CASE NAME: 9863 v. Registrar, *Motor Vehicle Dealers Act, 2002*

Appeal from a Notice of Proposal by the Registrar, *Motor Vehicle Dealers Act, 2002*,
S.O. 2002, c. 30, Sch. B - to Revoke Registration

Mirramin Kamali-Mafroujaki o/a Top Quality Auto Sales

Appellant

-and-

Registrar, *Motor Vehicle Dealers Act, 2002*

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Avril A. Farlam, Vice-Chair

APPEARANCES:

For the Appellant: Symon Zucker, Counsel

For the Respondent: Michael Rusek, Counsel
Diana Mojico, Student-at-Law

Heard in Toronto: February 27, 2017

REASONS FOR DECISION AND ORDER

OVERVIEW

1. On July 31, 2014 the Licence Appeal Tribunal (the “Tribunal”) ordered the revocation of the Appellant’s registration as a motor vehicle dealer. The Appellant appealed to the Divisional Court.
2. On September 29, 2014 the Tribunal ordered a stay of its order pending the Divisional Court appeal.
3. On June 19, 2015 the Divisional Court ordered that the decision of the Tribunal be set aside and the matter remitted back to a differently constituted Tribunal for a fresh hearing.

The fresh hearing was held on February 27, 2017 to consider the appeal of Mr. Kamali-Mafroujaki o/a Top Quality Auto Sales (the “Appellant”) to the Tribunal from a Notice of Proposal (the “Proposal”) issued by the Registrar, *Motor Vehicle Dealers Act, 2002* (the “Registrar” and the “Act”), dated February 11, 2014, which proposes to revoke the registration of the Appellant as a dealer under the Act.

There are two grounds for the Proposal which can be summarized as follows:

1. The past conduct affords reasonable grounds for belief that the Appellant will not carry on business in accordance with law, integrity and honesty.
2. The Appellant provided a false statement on the application for registration in 2012 and 2013.

The Registrar’s Counsel indicated that the third ground in the Proposal (failure to register business name) is no longer being relied on by the Registrar.

BACKGROUND

The background facts are not in dispute. Counsel for both parties submitted an Agreed Statement of Facts as follows:

Agreed Statement of Facts

1. The trade in motor vehicles in the province of Ontario is regulated by the *Motor Vehicle Dealers Act, 2002* (the “MVDA”). Any person who trades in motor vehicles must be registered under the MVDA.
2. Kamali-Mafroujaki was first registered as a motor vehicle dealer under the MVDA in July, 2001. At all material times, he was the owner, controlling mind and sole proprietor of Top Quality Auto Sales.

3. On July 27, 2011 Kamali-Mafroujaki was visiting another dealership when he asked the female motor vehicle salesperson he was speaking with to join him in looking at a particular used car. He complimented her on her eyes and then asked some personal questions, which she declined to answer. Kamali-Mafroujaki also asked the victim to dinner three times and she refused.
4. He then grabbed the victim by the arm and tried to kiss her on the lips. When the victim tried to pull away, Kamali-Mafroujaki wrapped his arms around her in a bear-hug and requiring her to push against his stomach to free herself. Kamali-Mafroujaki then latched onto the victim's arm, but she was able to run into the dealership's office. Kamali-Mafroujaki followed her there, subsequently being ordered off of the property by the manager.
5. The police were called and Kamali-Mafroujaki was arrested and charged with sexual assault.
6. A trial was held in the Ontario Court of Justice and Kamali-Mafroujaki was convicted of sexual assault by Justice Armstrong on July 4, 2013. He was later sentenced to, among other things, two years of probation together with a requirement to register as a sexual offender and an order to undergo counselling under the supervision of a probation officer, if directed.
7. Kamali-Mafroujaki has since paid his fine and complied with his probation order.
8. On October 16, 2016, the Ontario Superior Court of Justice dismissed Kamali-Mafroujaki's appeal of his sexual assault conviction and sentence.
9. On January 18, 2017, the Ontario Court of Appeal refused Kamali-Mafroujaki leave to further appeal his sexual assault conviction and sentence.
10. On April 16, 2012, while still facing the sexual assault charge, Kamali-Mafroujaki submitted his annual MVDA registration renewal form to the Registrar.
11. One of the questions posed on the application form is question 5 in Section G of the form, which reads:
 - a. Has the registrant ever been found guilty or convicted of an offense under any law, or are there any charges pending? **Make sure to include those cases where a conditional, absolute discharge, state charges or pardon has been ordered/granted. This question refers to charges under any law. Accordingly, you may need to answer yes even if a criminal record (or other) check has come back clean.** [Emphasis in original.]

12. Despite the charge of sexual assault pending against him, Kamali-Mafroujaki answered this question “No”.
13. One year later, after several criminal court appearances, Kamali-Mafroujaki again falsely answered “No” to question 5, section G on his annual MVDA registration renewal form.
14. This resulted in a *Provincial Offences Act* charge for providing false information to the Registrar, to which Kamali-Mafroujaki pleaded guilty and agreed to pay a \$5,000 fine.
15. It also led to the issuance by the Registrar of a proposal to revoke his MVDA registration for failure to comply with Section 6 of the Act.

THE EVIDENCE

Registrar’s Evidence

Andrea Korth is the Business Standards Coordinator for the Ontario Motor Vehicle Industry Council (“OMVIC”) which is the designated administrative authority for the Act. Ms. Korth testified that the Act is consumer protection legislation and OMVIC oversees registrants. She explained that section 6 of the Act prescribes the entitlement to registration and prescribes the conditions for disqualification. An applicant applies for registration or renewal by filling out an application form. OMVIC provides the form and the applicant fills out the form. The application contains questions about conduct and criminal background. An applicant can call OMVIC with any questions about the application form.

Criminal background is important so that the Registrar can assess if an applicant is likely to carry on business in accordance with the Act. A criminal background does not automatically disqualify an applicant to registration. Each case is looked at on a case by case basis and it depends on the nature of the offence and how the applicant explains it. There are other registrants with criminal backgrounds. More serious offences and offences that take place within the industry attract additional scrutiny. All registrants are required to take a course about operating and the rules of the industry. Honesty and integrity are covered in the course. Ms. Korth admitted that there is nothing in the educational materials or course that explains “charges pending”. “Charges pending” is not in bold like some of the words in question 5 on the application.

Ms. Korth said that she is familiar with the Appellant's file. He is registered as a sole proprietor wholesale dealer and has been since 2001. The Appellant took the course. There is no record of him ever calling OMVIC with a question about the application form. Ms. Korth identified the Appellant's dealership applications for renewal dated April 2012 and April 2013. In both applications question 5 is answered "no". She stated that this was not true. The Appellant had been charged with sexual assault on July 31, 2011, pleaded not guilty and was found guilty. He was sentenced to probation on September 9, 2013. She said that the court documents show there were six court appearances by the Appellant or his counsel between April 2012 and April 2013. Ms. Korth stated that the Appellant unsuccessfully appealed his conviction and the appeal process ended January, 2017. Ms. Korth explained that Section H of the application form also requires the applicant to certify that the information provided is "...to the best of my knowledge and belief, true". The Appellant signed Section H of the application form in both 2012 and 2013.

Ms. Korth testified that OMVIC laid a charge under the *Provincial Offences Act* against the Appellant in respect of both the 2012 and 2013 applications. She stated that as a result of a plea deal the Appellant pled guilty to the 2013 count, the 2012 count was withdrawn and the Appellant agreed to a \$5,000 fine plus victim surcharge. The fine was paid by the Appellant. The Registrar then issued a Notice of Proposal dated February 11, 2014 which proposed to revoke the registration of the Appellant as a dealer under the Act. Ms. Korth said that she doesn't know if the Notice of Proposal was disclosed to the Appellant in the negotiation of the plea deal. She doesn't know what was said to the Appellant about this.

Ms. Korth testified that the Appellant has completed his probation, has no other record of criminal behaviour, no other complaints from the public and no complaints by other registrants or dealers. There have been no complaints regarding the Appellant's honesty or integrity in the sixteen years he has been licensed under the Act. She stated that the Registrar is concerned because this is an industry specific assault between two registrants while working and because false information was given on two applications for renewal. There are no terms and conditions which would be appropriate to place on the Appellant's registration.

Evidence for the Appellant

Cindy McAdam and Agata Triolo testified on behalf of the Appellant. Ms. McAdam is employed by Manheim Auctions and has done business with the Appellant for the past two years. She meets him each week at the auction. She has met his son. They talk about family and vacations when not discussing business. She stated he has never acted inappropriately with her and has never been dishonest with her. She is aware of the conviction for sexual assault and cannot see him repeating that behaviour.

Agata Triolo works at a dealership selling used vehicles. Her dealership has purchased vehicles from the Appellant and a number of other dealers. Typically she has dealt with him three or four times a month for the past five or six years. Ms. Triolo testified that she has never felt uncomfortable with the Appellant and he has never done anything inappropriate to her. She has been alone with him on test drives. She is aware of the conviction for sexual assault. Ms. Triolo said that he has never misled her financially or otherwise.

The Appellant testified that he is 48 years of age, married and lives with his wife and children aged 18, 14 and one year. He came to Canada in 1993 and is the sole support of his family. Until 2001 he studied English and attended high school and college. He has no other skills than being a dealer. For sixteen years he has never had a complaint from the public or another dealer. He primarily deals with other dealers and has dealt with over three thousand vehicles in sixteen years of business.

He attended counselling with Moshiri Psychological Services. This is recorded in a report dated November 18, 2011. He was on probation for two years and saw his probation officer Jessica Thiessen bi-weekly. He never missed seeing her. Ms. Thiessen did not suggest that he obtain any counselling. On September 8, 2015 he completed his probation and Ms. Thiessen wrote a letter dated December 22, 2015 confirming this. After his probation was over he went to see Denise D'Alessandro, a psychotherapist for counselling. Ms. D'Alessandro wrote a letter dated December 22, 2015 confirming this.

The Appellant testified that he is very sorry this has happened. He made a mistake when he answered question 5 on his 2012 and 2013 applications. He reviewed the application with his wife because English is not his first language and he was not sure about the question. He misunderstood the wording "charges pending". He didn't know if he would be found guilty or not. The Appellant testified that he didn't call OMVIC because he thought he had answered the question correctly. He told OMVIC he made a mistake and he didn't understand the question after they sent a letter and came to his office. He has taken responsibility for this and paid the fine.

THE LAW

The Act states in part as follows:

Registration

6. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
 - (a) the applicant is not a corporation and,

- (i) having regard to the applicant's financial position or the financial position of an interested person in respect of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business,
- (ii) the past conduct of the applicant or of an interested person in respect 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
- (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;

Section 6 (1) of the Act establishes that there is a right to registration if the Appellant has met the prescribed requirements unless the Registrar can prove, on a balance of probabilities, that the Appellant does not meet the requirements of section 6 (1) (a) (i), (ii) or (iii).

The Registrar relies on section 6 (1) (a) (ii) and (iii) in respect of the Appellant. Therefore, the Registrar must prove, on a balance of probabilities, that the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not meet the standard of conduct required by Section 6 (1) (a) (ii) or that the Appellant has provided a false statement in an application for renewal of registration as set out in section 6 (1) (a) (iii).

The application of the statutory test requires the Tribunal to examine the Appellant's past conduct as a whole.

ISSUE

The Tribunal must decide whether or not the Registrar has established grounds for revoking the Appellant's registration as a motor vehicle dealer under Section 6 (1) (a) (ii) and (iii) of the Act.

APPLICATION OF LAW TO FACTS

The Registrar must prove, on a balance of probabilities, that the Appellant's registration should be revoked. The Appellant is entitled to continued registration unless one of the grounds in section 6 of the Act applies.

The Registrar argues that the Appellant should not be entitled to registration because:

1. The past conduct, being the sexual assault for which the Appellant was convicted, affords reasonable grounds for belief that the Appellant will not carry on business in accordance with law, integrity and honesty (section 6 (1) (a) (ii) of the Act); or
2. The Appellant provided a false statement on the application for registration in 2012 and 2013 (section 6 (1) (a) (iii) of the Act).

Past Conduct

The Registrar submitted that there are two reasons why the past conduct of the Appellant should result in the revocation of the Appellant's registration as follows:

- (a) The sexual assault, and
- (b) The false statements made in two separate applications in 2012 and 2013.

The sexual assault occurred on July 27, 2011. The Appellant maintained his innocence, as he was legally entitled to do, throughout the criminal prosecution until the matter was finally disposed of by the Ontario Court of Appeal on January 20, 2017. There is no evidence of the Appellant engaging in any other criminal conduct before or after July 27, 2011. Andrea Korth testified that she was not aware of any other complaints about the Appellant in the sixteen years he has operated his business.

The Appellant successfully completed his probation resulting from the sexual assault conviction. Jessica Thiessen, his probation officer, confirmed in a letter dated December 22, 2015 that the Appellant successfully completed his two year probation on September 8, 2015. Her letter states that the Appellant "...complied with his order and reported regularly".

The Appellant attended a five session counselling program in November, 2011 at Moshiri Psychological Services. The report of Dr. Shahriar Moshiri, a psychologist, describes the Appellant as "...cooperative throughout the sessions. He appeared a calm individual. The client did not seem to be a flirtatious, promiscuous and impulsive individual". In 2015 the Appellant attended personal counselling with Denise D'Alessandro, a psychotherapist. In Ms. D'Alessandro's letter of December 22, 2015 she describes the Appellant as presenting as "...morally sound, responsible, hardworking, and devoted to your wife and family. I believe you dealt thoroughly with the issues that you brought to my attention".

Cindy McAdam and Agata Triolo, both female business associates of the Appellant, testified about their business relationship with the Appellant. Cindy McAdam said that never once has the Appellant made her feel uncomfortable with him and he has never been dishonest with her. Agata Triolo also said that the Appellant has never done anything inappropriate with her or made her feel uncomfortable with him even though she has been alone with him on test drives.

Andrea Korth testified that having a criminal background does not automatically disentitle an applicant to registration. She stated that each application is looked at on a case by case basis. There are other registrants with criminal backgrounds. She stated that offences that take place within the industry attract additional scrutiny.

A criminal conviction does not necessarily disentitle an applicant to registration. Rather, the question is whether the Appellant's past conduct – including the criminal conduct and other conduct – affords reasonable grounds for belief that the Appellant will not carry on business in accordance with the law and with integrity and honesty. The past conduct is to be assessed in relation to the ability of the Appellant to conduct the business of being a motor vehicle dealer.

The sexual assault was committed in 2011. The Appellant successfully completed his probation and has taken responsibility for his actions. He attended counselling in 2011 and 2015. There was no evidence of any other incidents of similar conduct or any complaints at all in the sixteen years since the Appellant has operated his business. Since the sexual assault charge, the Appellant has achieved success in sustaining a law abiding life of honesty and integrity. Two female business associates testified that he has never done anything to make them feel uncomfortable. Taking the evidence in totality, it appears that the sexual assault was an isolated incident for which the Appellant has received counselling and has been sanctioned by the criminal justice system. The Tribunal understands the Registrar's concern about the fact that the sexual assault took place in the context of the business. The Act is intended to protect the public. However, in this particular instance, the evidence suggests that the conduct is unlikely to recur. The Registrar's concern is speculative.

However, the Registrar also relies on the Appellant's failure to answer honestly question 5 on the 2012 and 2013 applications for renewal as reasonable grounds for belief that the Appellant will not carry on business in accordance with law and with integrity and honesty.

The evidence is clear that in January, 2014 the Appellant pleaded guilty to a *Provincial Offences Act* charge of providing false information to the Registrar and paid a fine of \$5,000. This is stated in paragraph 14 of the Agreed Statement of Facts and was confirmed by the testimony of both Ms. Korth and the Appellant. This false information was provided to the Registrar in 2012 despite the charge of sexual assault pending against him as set out in paragraphs 10, 11 and 12 of the Agreed Statement of Facts. One year later, after several court appearances, the Appellant again falsely answered "No" to question 5 on his annual renewal application as set out in paragraph 13 of the Agreed Statement of Facts.

The Appellant testified that he did not knowingly provide this false information and that he made an honest mistake because he did not understand the question due to English not being his first language. The Appellant's testimony is not credible given that court proceedings were underway and there had been several court appearances by either the Appellant and/or his lawyer by April 2013. The Appellant understood and appropriately answered all of the other questions on his renewal application. The Appellant had been completing renewal applications for a decade prior to this incident. The Appellant was able to testify before the Tribunal in English.

The Tribunal finds that the Appellant provided false and misleading information to the Registrar in his applications for renewal in 2012 and 2013. The Tribunal finds that this conduct provides reason to believe that the Appellant will not carry on business in accordance with the law and with integrity and honesty. The Tribunal finds that the Registrar has proven, on a balance of probabilities, that the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not carry on business in accordance with the law and with integrity and honesty within the meaning of section 6 (1) (a) (ii) of the Act.

False statements

The Appellant admits that in 2012, while still facing the sexual assault charge he answered "no" to question 5 on the application form which reads:

"Has the registrant ever been found guilty or convicted of an offence under any law, or are there any charges pending? **Make sure to include those cases where a conditional, absolute discharge, stayed charges or pardon has been ordered/granted. Please note: This questions refers to charges under any law. Accordingly, you may need to answer "yes" even if a criminal record (or other) check has come back clean."**

The Appellant admits giving the same answer in 2013, one year later, after several criminal court appearances. This resulted in a *Provincial Offences Act* charge for providing false information to the Registrar to which the Appellant pleaded guilty to one charge, the other charge was withdrawn and the Appellant agreed to pay a \$5,000 fine and a victim surcharge.

The circumstances surrounding this conviction were put in evidence before the Tribunal. Ms. Korth testified that OMVIC laid the provincial offences charges. There were two counts of falsifying his dealer application, one for 2012 and one for 2013. She said that the Appellant pleaded guilty to one count and the other was withdrawn by agreement. The Appellant was fined \$5,000 plus the victim surcharge, which was paid.

Counsel for both parties agreed that the appropriate test for the Tribunal to apply is whether the Appellant knowingly made false statements on his applications and agreed that the test is set out in *Ontario (Registrar, Motor Vehicle Dealers Act, 2002) v. Vernon*, 2016 ONSC 304 (Div. Ct.), which states:

“[8] The task of the Tribunal, in applying s. 6 (1) (a) (iii), was to determine whether the respondent made a false statement to the Registrar and whether he knowingly did so (*Racco v. Ontario (Registrar, Real Estate and Business Brokers Act, 2002)*, 2015 ONSC 6233 (Div. Ct.) at para. 28. In my view, the Tribunal focused on whether the respondent **deliberately** tried to mislead the Registrar. The Act does not speak to intent or motive; rather, the concern is whether the applicant knowingly made false statements in his application - in this case, about his past criminal activity.

...

[11] In my view, the Tribunal erred in law in focusing on whether the respondent deliberately attempted to mislead the Registrar with respect to his conviction. As described above, the respondent made false statements with respect to the facts underlying the conviction. The issue for the Tribunal was whether the respondent knew the statements were false...”

The Appellant’s testimony that he made an honest mistake on the applications is not credible as discussed above. It is not credible that the Appellant did not know that he had to disclose the sexual assault charge which was still before the court. The application for renewal clearly states “...are there any charges pending?” Several court appearances had taken place before the second false statement was made on the renewal application in April 2013. The Appellant had a decade of experience with the renewal application forms before the false statements were made. Although English is not the Appellant’s first language, he was able to testify at the Tribunal hearing in English. Further, the Appellant pleaded guilty and was convicted of providing false information to the Registrar. The Appellant had a lawyer at the time of the plea and the conviction.

The Tribunal finds that the Registrar has proven, on a balance of probabilities, that the Appellant provided a false statement on the renewal application for registration in 2012 and 2013 within the meaning of section 6 (1)(a)(iii) of the Act.

The Appellant’s Counsel proposed that a condition be placed on the Appellant’s registration that he provide a copy of the Court’s decision in the sexual assault prosecution or alternatively a copy of this Tribunal’s decision to whoever the Appellant may do business with in the future. This was opposed by the Registrar because of enforceability issues. There has been no evidence to suggest that such a condition would be effective or could be enforced. The Tribunal declines to impose this condition.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under the provisions of the Act, the Tribunal directs the Registrar carry out the Proposal.

LICENCE APPEAL TRIBUNAL



Avril A. Farlam, Vice-Chair

Released: May 5, 2017