

THE IMPORTANCE OF MAKING ADEQUATE AND ACCURATE DISCLOSURE

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Have you ever been accused of doing something wrong at some point in time? What about a conviction for something you did not do?

As many readers will know, OMVIC, as part of the application or renewal process, asks the following question:

Has the applicant ever been found guilty or convicted of an offence under any law, or are there any charges pending?

I typically advise my clients that they must answer yes to this question – who hasn't received a ticket for missing a stop sign, or some other traffic violation? Arguably, you should even answer yes to OMVIC's question if you parked illegally and received a parking ticket.

What about more serious accusations (i.e. criminal charges, not convictions)? Or charges against a dealership and/or the dealer principal arising from the death or serious injury of an employee at work? Many people are extremely reluctant to disclose such information in an OMVIC application, especially if they believe they are innocent. The prejudicial effect of a serious accusation is huge – not only will OMVIC likely have reservations about eligibility for continued registration, but an individual's employer, who may be submitting an application on his or her employee's behalf, may have serious concerns. Imagine the economic impact of being refused a transfer of your licence, or being fired, because of a crime you didn't commit.

Most salespersons and dealers are not criminal law experts. They can be forgiven for not knowing what exactly a "conviction" or "pending" charge refers to, and when they occur in the legal process.

Convictions and pending charges are important to be aware of because they can have serious implications on an existing or pending licence. Any conviction or pending charge must be disclosed to OMVIC during the application or renewal process; failure to disclose can result in a refusal to renew, or refusal to register in the case of a first time applicant. Such a mistake, whether innocent or not, would likely be characterized by OMVIC as a false statement in a Proposal to Refuse or Revoke registration... so not only will your mistake be highlighted, but you will be characterized as untruthful.

Now, what if you answer OMVIC's question and make full disclosure - but you declare your innocence? Can this be used against you?

Successful Appeal by Dealership

This past June a dealership (the "**Dealership**") was successful overturning a decision of the Licence Appeal Tribunal which resulted in the revocation of its dealer licence. The Divisional Court clarified what the Tribunal can consider in a hearing where the Registrar, MVDA seeks a revocation.

Background

The Dealership was a sole-proprietorship which had been registered since 2001. Prior to July 2011, the Dealership had no criminal record or violations under the MVDA.

In July 2011, the dealer principal ("**DP**"), was charged with a serious criminal charge. Despite maintaining his innocence, DP was convicted in 2013. DP appealed the conviction.

In April 2012 and April 2013, DP filed registration renewal applications in which he



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stated there were no charges pending against him. Given the outstanding sexual assault charge, these statements were false. Upon learning of the charges, the Registrar charged DP for filing false applications. DP accepted responsibility for his non-disclosure, pled guilty and paid a \$5,000.00 fine.

Subsequently, the Registrar issued a Notice of Proposal to revoke DP's dealership licence. DP appealed the proposal to the Tribunal.

In directing the Registrar to carry out the Proposal, the Tribunal relied on two key factors: (1) DP's denial of wrongdoing amounted to a "failure to take responsibility" for his actions; and (2) doubt of DP's honesty and integrity in light of the criminal judge's finding that DP's evidence regarding the sexual assault was unconvincing.

The Divisional Court Decision

The Court decided that the Tribunal's decision was not reasonable. The Court found that the denial of wrongdoing by DP in his criminal matter did not lead to the conclusion that he failed to take responsibility for his actions. Instead, the Court stated that DP was entitled to assert his innocence and pursue his legal right to appeal his criminal conviction, without having such an act used against him to conclude he "failed to take responsibility". The Court wrote:

"The errors of the Tribunal reflect a fundamental mis-handling by the Tribunal of the criminal proceedings in a manner that strikes at the heart of the values of our system of criminal justice. They strike at the presumption of innocence, the right to full answer and defence, and the right to appeal from a trial decision."

The Court discussed the improper finding against the integrity and honesty of DP by the Tribunal. The Court stated that any comment about DP's denial of the sexual assault could not reflect his general integrity or truthfulness. Ultimately, the Tribunal had to make its own assessment of DP's integrity and honesty based on the evidence before it, and not what the judge who heard the sexual assault matter concluded.

Proper Tribunal Procedure

The Court's decision also provides some guidance on the proper approach by a Tribunal deciding whether to revoke a dealer's license in similar circumstances.

First, while the Tribunal may rely on the fact of a conviction, the Tribunal cannot retry the matter of a criminal conviction itself. (It should be noted, however, that there is a lower standard of proof before the Tribunal than before a Criminal Court. In advance of a conviction, it is possible for the Tribunal to review a set of facts and determine that an individual has likely committed a criminal wrong).

Secondly, a dealer can explain why he or she has not taken remedial steps (such as counselling) by maintaining innocence and pointing to an appeal of a criminal conviction. The Tribunal cannot use the dealer exercising his or her legal rights as a negative factor against him or her.

Finally, the Tribunal is entitled to consider factors that both help (i.e. mitigating) and hurt (i.e. aggravating) a dealer's position. However, the Tribunal cannot conclude that the absence of a mitigating factor is itself an aggravating factor against the dealer. The Court makes it clear that such a decision would be unreasonable.

Being Proactive

In summary, it is important to reach out for legal guidance at an early stage if there is any uncertainty involving an OMVIC application and how best to answer any of the questions. While there is always concern about legal costs taking away from the bottom line, it is typically easiest to manage costs by taking the correct steps at the outset. Obtaining advice on an application is typically much less expensive than hiring a lawyer to defend a Proposal to Refuse or Revoke registration.