



## **DECISION**

**IN THE MATTER OF the dealer's licence of F & D AUTO SALES LTD. being suspended by the Registrar of Motor Vehicles by correspondence dated October 24, 2008 and January 2, 2009.**

**-and-**

**IN THE MATTER OF AN APPEAL TO THE MOTOR CARRIER BOARD pursuant to s. 17(7) of New Brunswick Regulation 83-42 under the *Motor Vehicle Act*, Chapter M-17, S.N.B.**

**June 19, 2009**

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**Appeal Heard:** April 28, 2009

**Appellant:** Mr. Allison Whitehead, Q.C., Solicitor  
Mr. Douglas Dunphy, F & D Auto Sales Ltd

**Respondent:** Ms. Nancy E. Forbes, NB Department of Justice  
Mr. Charles A. O'Donnell, Registrar of Motor Vehicles

**Witnesses:** Mr. Thomas Walton, former Supervisor of Vehicle Licensing

**New Brunswick Energy and Utilities Board:**

Mr. Cyril Johnston, Vice-Chairman  
Mr. Don Barnett, Member  
Mr. Yvon Normandeau, Member  
Mr. Steve Toner, Member

Ms. Lorraine R. Légère, Board Secretary  
Ms. Ellen Desmond, Board Counsel  
Mr. David Keenan, Advisor

## DECISION

### INTRODUCTION

This is an appeal by F & D Auto Sales Ltd. (“F & D Auto” or “the appellant”) from decisions of the Registrar of Motor Vehicles (“the Registrar”) suspending and then refusing to reinstate F & D Auto’s motor vehicle dealer’s license.

Mr. Douglas Dunphy has operated a car sales business for nearly forty years. He has operated this business through F & D Auto since 1980. Prior to 1990 he operated the business from his previous home at 210 McNeill Avenue. In 1990 he moved the business to his new home at nearby 34 Burpee Street in Fredericton. The business was operated from that location until the suspension of its dealer’s license.

F & D Auto has never operated its business as a traditional used car lot. It has no signage or other advertising to indicate cars are for sale at 34 Burpee Street. The vehicles are stored out of sight behind a fence. Very few customers physically attended at 34 Burpee Street. Mr. Dunphy estimated that perhaps one or two customers would visit at his home each week. This is not to be confused with the one or two vehicles sold by F & D Auto during an average week.

F & D Auto’s business practice has always been, where possible, to bring the vehicles to the customers. Transactions are initiated in a number of ways. Regular customers or commercial customers will often telephone Mr. Dunphy to request a particular make and model, which he would then attempt to locate on the customer’s behalf. Historically, many sales were initiated by newspaper advertisements. In recent years up to 70% of sales have been initiated by posting vehicles for sale on internet sites. Interested parties respond to the ads by email or telephone and a meeting is arranged at the home of the potential purchaser or another agreed upon location. All financing and sale documentation is prepared in advance and brought to the meeting. If an agreement is reached the documentation is completed on the spot and the transaction is concluded.

Mr. Dunphy’s business model is central to the issues that have arisen between his company, the Registrar and the City of Fredericton. It is critical to understand that his basic way of doing business has changed little over the years, apart from taking advantage of new opportunities offered by the internet.

## TIMELINESS OF THE APPEAL

The issue of the timeliness of the appeal was raised in closing arguments. The governing portions of the regulations are sections 17(6) and 17(7) of Regulation 83-42 to the *Motor Vehicle Act (the "Act")*. These sub-sections read as follows:

**17(6)** The Motor Carrier Board is designated as the body to which appeals may be made from any decision of the Registrar in relation to applications for and the issuance, renewal, suspension, cancellation and reinstatement of licences of dealers and wreckers.

**17(7)** An appeal referred to in subsection (6) shall be in writing, signed by the appellant or the agent of the appellant and delivered to the Secretary of the Motor Carrier Board within thirty days after the receipt by the appellant of the Registrar's decision.

The timeline of correspondence relevant to this issue, and to the matter as a whole, is as follows:

- October 24, 2008 - Susan McCracken, Deputy Registrar, writes to F & D Auto advising that its dealer's license has been "revoked" because his "business location has not been properly zoned to operate a car dealership."
- October 27, 2008 - Mr. Whitehead, counsel for F & D Auto, writes to the Registrar advising of F & D Auto's intention to appeal.
- October 29, 2008 - Charles O'Donnell, the Registrar, replies to Mr. Whitehead's letter. He refers to a "suspension" of the license and indicates that if the zoning issue "can be corrected then this would alter the situation."
- December 22, 2008 - Marcello Battilana, Senior Planner with the City of Fredericton writes to Mr. Whitehead advising that the City will permit the administration of F & D Auto and the storage of vehicles as legal non-conforming uses of 34 Burpee Street, but will not permit on site transactions or advertisements. This letter is forwarded to the Registrar.

- December 29, 2008 - Mr. Whitehead writes to the Registrar referring to a conversation earlier that day in which the Registrar advised that Mr. Battilana's letter does not permit him "to lift the suspension" of F & D Auto's license.
- January 2, 2009 - The Registrar replies to Mr. Whitehead's December 29<sup>th</sup> letter and confirms that given the restrictions that remain regarding auto sales at 34 Burpee Street, the property is not eligible to be used as the site of a motor vehicle dealership.

The appeal filed refers specifically to two of the above pieces of correspondence, being the letters of October 24, 2008 and January 2, 2009. The Secretary of this Board received the signed appeal on January 29, 2009.

The letter from the Deputy Registrar dated October 24, 2008 was a decision to *revoke* the appellant's license. It is noteworthy that the Registrar does not appear to have the authority to *revoke* a license, apart from the power granted by section 55(2) of the *Act* to cancel a license in the case of a dealer failing to maintain adequate books and records.

The letter of October 29, 2008 from the Registrar confirms the October 24<sup>th</sup> letter and clarifies that the license is *suspended* and not *revoked*.

The letter of January 2, 2009 is a decision to refuse to reinstate the license.

Section 17(6) of the Regulation is set out earlier in this decision and makes it clear that this Board may hear appeals from a dealer with respect to a decision of the Registrar and related to the *reinstatement* of a dealer's license.

The appeal of the Registrar's decision of January 2<sup>nd</sup> was clearly filed on time and will be considered by the Board. The consideration of that decision necessarily requires a review of the appropriateness of the underlying suspension.

The Registrar encouraged the appellant to try and resolve the zoning issue with the City of Fredericton. The appellant did so and did receive permission for substantial non-conforming uses of 34 Burpee Street, though not the right to conduct on site transactions. Under the circumstances, even had the appellant failed to meet the deadline set out in section 17(7) above, the Board believes

that an extension of the deadline would have been appropriate so that the appellant would not be penalized for attempting to work out a solution with the relevant authorities.

## **THE APPEAL OF THE REGISTRAR'S DECISIONS**

The regulations relating to the suspension of a dealer's license are sections 17(2.4), 17(2.5) and 17(2.6). They read as follows:

**17(2.4)** The Registrar may suspend a dealer's licence where the dealer

(a) no longer has an established place of business,

(b) is no longer engaged primarily in the business of buying, selling and servicing motor vehicles,

(c) is no longer able to conduct properly the business of a motor vehicle dealer, or

(d) has failed to maintain a bond filed in accordance with section 18.

**17(2.5)** When deciding whether to suspend a dealer's licence under subsection (2.4), the Registrar shall give consideration to the dealer's financial standing and business integrity.

**17(2.6)** The Registrar may, if satisfied that the conditions leading to the suspension have been corrected, reinstate a dealer's licence suspended under subsection (2.4).

In reviewing these regulations, two points are immediately apparent. The first is that the authority to suspend is *permissive*, rather than mandatory. The Registrar *may* suspend under certain circumstances. He may also exercise his discretion and not suspend the license. On the other hand, when deciding whether to suspend, the regulation *mandates* that certain factors *shall* be taken into consideration, specifically the dealer's "financial standing and business integrity."

The appellant specifically raised this issue in its appeal, citing the regulation and asserting the Registrar had failed to give any or adequate consideration to the appellant's financial standing and business integrity. The Registrar filed a detailed affidavit in response to the appeal and testified at the hearing. Despite the issue being specifically raised, the Registrar adduced no evidence that he

or the Deputy Registrar had in any way considered the appellant's financial standing or business integrity.

The Registrar's failure to give consideration to the appellant's financial standing and business integrity as required by section 17 (2.5) of the regulation is serious and the Board has no hesitation in allowing the appeal on this ground.

The evidence before the Board strongly suggests that, had the Registrar inquired into the appellant's financial standing and business integrity as required, it would have been very difficult to justify the suspension of the dealer's license. A letter from Mr. Frank Jardine, President of Jardine Auctioneering Inc., indicates that he has been involved in hundreds of transactions with F & D Auto and he describes F & D Auto and Mr. Dunphy as "trusted" and "honorable". Mr. Thomas Walton testified. He was Secretary of the Dealer Licensing Board from 1978 to 1988 and Supervisor of Vehicle Licensing until his retirement in 2000. He knew Mr. Dunphy during all that time and was not aware of any complaint against him. The current Registrar also testified he was unaware of any complaint ever having been made regarding F & D Auto or Mr. Dunphy.

**The Board allows the appeal and directs the Registrar to reinstate the dealer's license of F & D Auto at the 34 Burpee Street location.**

#### **FUTURE LICENSING OF F&D AUTO**

The Board recognizes that the disposition of this appeal may not resolve matters going forward. The Registrar indicated that with no changes to the zoning he would not renew the appellant's license. Both parties indicated a desire for some direction from the Board to avoid the need to repeat the appeal process.

The Board has considered the matter and considers it appropriate to provide some guidance to the parties in this regard.

The stated reason for the suspension of F & D Auto's dealer's license is that its "business location has not been properly zoned to operate a car dealership" (letter from Deputy Registrar, October 24, 2008).

The word “dealership”, which is also used in Mr. O’Donnell’s evidence, does not appear in the *Act* or the General Regulation. The word that is used is “dealer”, which is defined as follows:

“dealer” means a person who carries on or conducts a business of buying or otherwise acquiring vehicles for the purpose of selling those vehicles to the public.

The Board notes that the word “dealer” does not have the same connotation of physical space or physical attributes that the word “dealership” may have.

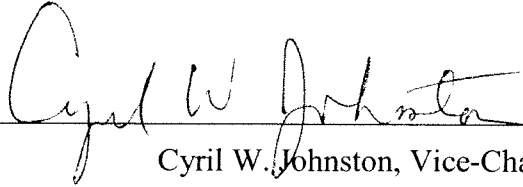
The Registrar’s stated policy on zoning, adopted in January of 2000, was attached to Ms. McCracken’s letter of October 24, 2008. It states that an “applicant must obtain a letter approving (*sic*) the zone is commercial and the operation is permitted.” In the present case, the zoning is not commercial but the appellant has been granted permission for a non-conforming use which permits the operation. While it is true that the non-conforming use granted does not permit on site transactions, the evidence is clear and undisputed that F & D Auto has never sought to conduct transactions on site and has done so only very rarely. The business operation which F & D Auto has conducted and seeks to conduct is permitted by the non-conforming use permission granted by the City. Indeed it is difficult to imagine the City granting a non-conforming use permission which would permit on site transactions, given the evidence that these rarely occurred. Such on site transactions are now not permitted at all.


The facts of this case are unusual. The dealer has operated a certain business model for many years. He has done so successfully and the dealer’s business integrity is well respected. The dealer operates from a location where its particular business model is permitted, but other more common business models would not be. On the facts of this case the Board is of the opinion that zoning does permit the applicant’s particular operation and that the zoning issue should not prevent the Registrar from renewing the Appellant’s license.

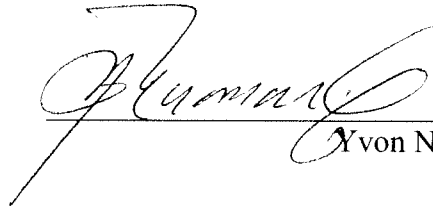
It is the appellant’s long history of conducting business in a certain manner and the non-conforming use permission granted by the City of Fredericton that causes the Board to adopt this position. This ruling should not be considered as a direction to the Registrar to grant a license to any dealer whose place of business is in a location where the zoning will not permit the operation.

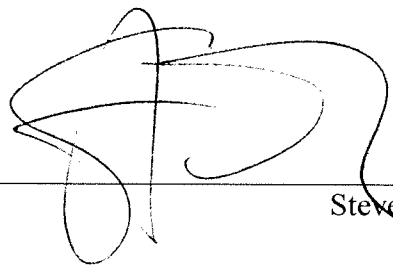


Dated at the City of Saint John, New Brunswick this 19<sup>th</sup> day of June 2009.

  
Cyril W. Johnston, Vice-Chairman

  
Donald Barnett, Member

  
Yvon Normandeau, Member

  
Steve Toner, Member