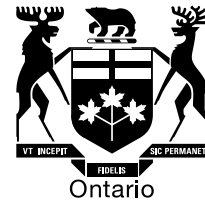


LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards
Tribunals Ontario



Citation: 10611 TIA v. Registrar, *Travel Industry Act, 2002*, 2017 ONLAT-10611/TIA

Date: 2017-08-02

File Number: 10611/TIA

Appeal under section 11(2) of the *Travel Industry Act, 2002*, S.O. 2002, c.30, Sch. D
from a Notice of Proposal by the Registrar - to Revoke Registration

Between:

Butterfield and Robinson Inc.

Appellant

and

Registrar, *Travel Industry Act, 2002*

Respondent

DECISION AND ORDER

Panel: Mary Ann Spencer, Member
Stephen Scharbach, Member

Appearances:

For the Appellant: Christopher Cosgriffe, Counsel and Ryan Watkins, Counsel

For the Respondent: Soussanna Karas, Counsel and Jennifer Shin, Counsel

Place and dates of hearing:

Toronto, Ontario
June 5 and 29, 2017

REASONS FOR DECISION AND ORDER

A. OVERVIEW

- [1] This is a hearing before the Licence Appeal Tribunal (the “Tribunal”) arising out of a Notice of Proposal issued by the Registrar, *Travel Industry Act, 2002* (the “Registrar” and the “Act” respectively). The Notice dated January 3, 2017 proposes to revoke the registration of Butterfield and Robinson Inc. (the “appellant”) as a travel wholesaler and travel agent under the Act on the basis that the appellant is carrying on activities in contravention of Ontario Regulation 26/05 under the Act (the “Regulation”) and that there are reasonable grounds for belief that the business will not be carried on in accordance with the law and with integrity and honesty.
- [2] Specifically, the Registrar alleges that the appellant’s practice of depositing customer funds received by credit card payment into a U.S. domiciled bank account, which is not designated as a trust account under the Act, before transferring the funds to its designated Ontario Travel Industry Trust Account, contravenes the trust accounting provisions of the Regulation.
- [3] In her closing submission, Ms Karas advised that the Registrar was no longer seeking revocation of the appellant’s registration but is asking the Tribunal to order the appellant’s compliance with the Regulation.
- [4] The appellant’s position is that it is not in contravention of the regulatory provisions because all customer funds are deposited to the designated trust account within the two banking days required by the Regulation which does not state that the funds must be directly deposited to that account.
- [5] For the reasons below, we order the Registrar not to carry out the proposal to revoke the appellant’s registration but to register the appellant subject to the condition that, within 60 days of the date of release of this decision, it either arrange to have all customer funds paid by credit card directly deposited to the designated Ontario Travel Industry Trust Account or provide security in accordance with the provisions of section 28(1) of the Regulation.

B. ISSUES:

- [6] The issue to be decided in this appeal is whether there are grounds for the revocation of the appellant’s registration under the Act. To decide this issue we must answer the following:

1. Is the appellant carrying on activities that are in contravention of the Act? Specifically, is the appellant in compliance with the trust accounting provisions set out in section 27(3) of the Regulation?
2. Does the past conduct of its officers or directors afford reasonable grounds for belief that the business of the appellant will not be carried on in accordance with the law and with integrity and honesty?

C. EVIDENCE:

- [6] An Agreed Statement of Facts was entered into evidence. Richard Smart, the President and Chief Executive Officer of the Travel Industry Council of Ontario (“TICO”) and the Registrar and Director under the Act, and Sanja Skrbic, TICO’s Director of Financial Compliance, testified on behalf of the Registrar. Paul Christopher, the Chief Financial Officer of the appellant, testified on its behalf.
- [7] The appellant was registered as a travel agent and a travel wholesaler in October, 1983. It provides tours throughout the world and packages its own tours, quoting all of its travel services and requiring payment in US dollars. Approximately 70% of its payments are made by credit card.
- [8] Payments made by cheque or wire transfer are directly deposited to a Toronto CIBC account which has been designated as the Travel Industry Trust Account under the Act. Payments made by credit card are processed through a “gateway” application which coordinates the authorization of the transaction between the cardholder’s account and two acquiring banks. The acquiring banks accumulate the funds in batches and then transfer the funds to the appellant’s merchant bank account which is held by the Bank of America (“BOA”) in Chicago, Illinois. The appellant transfers the balance of the BOA account to the CIBC Trust account within two banking days.
- [9] The BOA account is not designated as a trust account. Mr. Christopher testified that the appellant was advised by the BOA that this was not possible. However, the appellant treats the funds in the BOA account as funds held in trust for customers. Only customer funds are deposited to the account, and it is treated as a trust account in the appellant’s general ledger and its financial statements.
- [10] Mr. Smart testified that the mandate of TICO is consumer protection. As a progressive regulator, it seeks to create a fair and trusted marketplace where consumers will have confidence in their travel purchases. He described trust accounts as the cornerstone of consumer protection.

[11] Mr. Smart stated that the only issue for the Registrar is the appellant's interpretation of s. 27(3) of the Regulation with respect to trust accounting. He acknowledged that this does not state that customer funds must be *directly* deposited to the trust account within two banking days.

[12] Mr. Smart's position is that the appellant's practice of transferring funds from its BOA merchant account to its Ontario Travel Industry Trust Account within two banking days does not constitute compliance with the Regulation; to confirm the "certainties of the trust", payments processed through credit card transactions must be linked directly to the trust account. He testified that the requirement to deposit funds within two banking days has been a provision since the Act was first written in 1974. In his view, this provision was drafted as a practical consideration to allow travel agencies time to prepare deposits of cash and cheques.

[13] Mr. Smart testified that the appellant's BOA account is not a trust account, even if it only contains customer funds and the appellant treats it as a trust account, because it is not designated as one. As a general account, it can be used for multiple purposes and the bank could have rights of offset against it. No matter how quickly the funds are moved from the BOA account, they could be seen to have been "tainted" by being deposited to a general account.

[14] Mr. Smart explained TICO's experience with the 2009 bankruptcy of Conquest Vacations. The registrant had co-mingled its trust and general funds. Because the co-mingling created uncertainty as to the trust, the account was ruled not to be a trust and TICO was treated as an unsecured creditor in the bankruptcy proceedings. As a result, the Travel Industry Compensation Fund was required to pay over \$1,000,000 in claims. However, he acknowledged that he is not aware of any circumstances where the appellant has misused or co-mingled trust funds, and he is aware that it has no indebtedness to the BOA, which Mr. Christopher confirmed in his testimony.

[15] However, Mr. Smart stated that TICO has no jurisdiction over the Chicago BOA account. He explained that notwithstanding the fact that the appellant is treating its BOA account as a trust account, TICO has no authority over it because TICO's jurisdiction extends only to Ontario. For example, the Director under the Act has the ability to freeze trust accounts to prevent registrants from carrying on unacceptable activities but can do this only in Ontario.

[16] Mr. Smart testified that following the bankruptcy of Conquest Vacations, TICO introduced a standardized formal trust declaration that must be signed by all registrants using trust accounting. He explained that this document is not a

substitute for trust accounting but is used to ensure clarity of the purposes of the trust account. The appellant executed a trust declaration on November 28, 2013.

- [17] It is Mr. Smart's view that a trust declaration cannot be a means of "opting out" of the regulatory trust accounting requirements. Asked by Mr. Cosgriffe if the trust declaration was instituted to create a common law trust, Mr. Smart agreed it was and stated it was designed to remove any ambiguity that the trust account is for the protection of consumers.
- [18] Mr. Christopher testified that the appellant viewed the trust declaration as requiring the appellant to treat the customer funds in the BOA account as trust funds, notwithstanding the fact that the BOA could not designate the account as a trust account. The parties agree that in April, 2014, Ms Skrbic wrote in an e-mail to Mr. Christopher "that the trust declaration we have on file is sufficient". Both Mr. Smart and Ms Skrbic testified that former Registrar, Michael Pepper, accepted the trust declaration as satisfying the trust accounting requirements. Ms Skrbic also acknowledged that in a May 9, 2014 e-mail to she sent to Mr. Christopher, she wrote that the declaration "eliminated the need...to designate the foreign account as Travel Industry Trust account".
- [19] Asked if TICO was alleging that the accounts were not being operated as trust accounts, Ms Skrbic stated that she did not know. However, she testified that the appellant failed to include a trust disclosure with its financial statements for its 2013 fiscal year. In July, 2014, she discussed this with Mr. Christopher and that is when she learned that the BOA account was not being operated as a trust account.
- [20] Ms Skrbic testified that a conference call was subsequently held in October, 2014 with herself, Registrar Pepper and Mr. Christopher. In preparation for the call on October 29, 2014, Ms Skrbic sent an e-mail to Mr. Pepper asking if he would accept the BOA account as a non-designated trust account. Mr. Pepper's e-mailed reply was that he would only accept it if the bank would provide an undertaking to accept a "Director's Freeze" on the account ahead of any other creditors. Ms Skrbic confirmed that the outcome of the conference call was that Mr. Pepper agreed to accept the submission of monthly financial statements from the appellant in lieu of the appellant designating an Ontario trust account.
- [21] On March 6, 2015, shortly after assuming the position of Registrar, Mr. Smart met with Mr. Christopher to discuss trust accounting compliance options. On April 9, 2015, Mr. Christopher advised Mr. Smart that the appellant was designating an Ontario domiciled CIBC trust account but, because it used a US merchant bank, it would not be able to deposit credit card payments directly to that account. The merchant bank required deposits be made to a US domiciled account.

[22] On May 22, 2015, Mr. Christopher wrote to Mr. Smart and advised that all cash and cheque deposits would be made directly to the CIBC account and all credit card funds would be transferred within two days. On October 6, 2015, he advised that he was continuing to seek alternative US based card processors. He also advised that the appellant, having sought legal advice, believed that its banking procedure was in compliance.

[23] Mr. Christopher investigated the possibility of using a processor offering to process US funds through a Canadian account but on November 10, 2015 wrote to advise Ms Skrbic that the difficulty with this option would be that the appellant's customers would be required to pay a foreign exchange fee of 2.5% or more. He testified that he also advised TICO this would be an unfair burden to the appellant's business.

[24] On March 24, 2016, Mr. Christopher wrote Ms Skrbic to advise that the appellant had opened new accounts with another bank which would be able to provide direct deposit of credit card funds to its Ontario trust account. However, on May 4, 2016, he again wrote to advise that the bank had told the appellant this would not be possible.

[25] On September 13, 2016, Mr. Smart wrote Mr. Christopher and advised that the Regulation required either direct deposit of funds into a designated trust account held by a Canadian Schedule I or II bank or the provision of security in lieu and warned that failure to comply would result in further action. On January 3, 2016, after subsequent discussions did not resolve the issue, the Registrar issued the Notice of Proposal.

D. LAW:

[26] Section 8 of the Act sets out the provisions with respect to registration of applicants. The relevant provisions are as follows:

8. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,

(d) the applicant is a corporation and,

(iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty

(e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;

[27] The Registrar may revoke a registration under s. 10(1) of the Act if, in the Registrar's opinion, the registrant is not entitled to registration under s. 8 of the Act:

10. (1) Subject to section 11, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 8.

[28] On appeal to the Tribunal, s. 11(5) of the Act states that the Tribunal may "direct the registrar to carry out the registrar's proposal or substitute its opinion for that of the registrar and the Tribunal may attach conditions to its order or to a registration."

[29] The requirements with respect to a registrant's bank accounts and trust accounts are set out in sections 26 and 27 of the Regulation:

26. (1) A registrant shall maintain all accounts in Ontario in a bank listed in Schedule I or II to the *Bank Act (Canada)*, a loan or trust corporation or a credit union as defined in the *Credit Unions and Caisses Populaires Act, 1994*.

(3) The registrant shall promptly deposit all funds received as payment for travel services into such an account.

27. (1) A registrant shall maintain a trust account for all money received from customers for travel services.

(2) The trust account shall be designated as a *Travel Industry Act* trust account.

(3) A registrant shall hold all money received from customers for travel services in trust and shall deposit all such money into the trust account within two banking days after receiving it.

E. SUBMISSIONS:

Registrar's Submissions

[30] Ms Karas submitted that the appellant's practice of depositing credit card payments into its BOA account before transferring them to its Ontario Travel Industry Trust Account puts consumers at risk. The Registrar acknowledges that s. 27(3) of the Regulation does not state that funds must be directly deposited within two banking days of their receipt. However, it is the Registrar's position that sections 26 and 27 of the Regulation must be read together. The appellant's accounts must be located in Ontario and, as required by s. 26(3) of the Regulation, funds must be promptly deposited to them, which Ms Karas argued means by the most direct route. The fact that s. 27(3) provides for two banking days for deposit to the trust account is a long standing provision to allow travel agents the time to deposit cheques and cash.

[31] The fact that the appellant first deposits consumer funds to an American domiciled BOA account places them outside of the jurisdiction of the Act and the protection mechanisms it provides and therefore places the funds at risk. Notwithstanding the fact that the appellant may treat the BOA account as a trust account, it is not legally designated as a trust account by the bank and the funds are not protected from third party claims.

[32] Ms Karas submitted that the appellant has chosen not to deposit its credit card payments directly to its CIBC Ontario Travel Industry Trust Account because its customers would pay a premium and this would place it at a competitive disadvantage. The appellant cannot “pick and choose” its compliance with the regulatory requirements based on financial convenience.

Appellant’s Submissions

[33] Mr. Cosgriffe submitted that the only issue before the Tribunal is the interpretation of s. 27(3) of the Regulation and noted that the Registrar’s Notice of Proposal makes no mention of s. 26. There is no basis for the revocation of the appellant’s registration. It is in compliance with s. 27(3); it treats all funds it receives from customers as trust funds on receipt and transfers all funds deposited in the BOA account to the CIBC designated trust account within two banking days. It follows TICO’s trust accounting guidelines and there have been no issues with its financial reporting. It has responded to all requests from TICO and there have been no complaints or claims to TICO.

[34] The Registrar approved the November 28, 2013 trust declaration and therefore consented to the appellant having more than one account, including the BOA account. Sections 2.5 and 2.6 of the trust declaration create a trust. Funds can be held in trust in a bank account which is not designated as a trust account. There is no evidence of co-mingling of funds in the BOA account.

[35] Mr. Cosgriffe argued that a system that allows cheques and cash to be deposited within two banking days but requires credit card payments to be directly deposited makes no sense. Rather, the appellant’s position is that the Legislature specifically contemplated the reality that credit card transactions are accumulated and paid in batches. To require a direct link between credit card transactions and the trust account puts another system in place. If that was the Legislature’s intention, it would have been addressed in the Regulation when it was written in 2005.

[36] The appellant has designated the CIBC account as a Travel Industry Trust Account and all customer funds are deposited to it within two banking days of receipt. Therefore, TICO's jurisdiction over the funds is not denied. There is no evidence to support that the purpose of the Act is frustrated by the appellant's processes.

[37] Finally, Mr. Cosgriffe advised us that the government is conducting a review of the Act and submitted a copy of the "Phase 2 Report of the *Travel Industry Act, 2002* Review" which was recently released for comment. He noted that the report proposes to remove the trust accounting requirements from the Regulation.

F. ANALYSIS:

[38] The onus is on the Registrar to prove to the Tribunal that the appellant's registration should be revoked. The appellant is entitled to registration unless one of the grounds in section 8 of the Act applies. The Tribunal must make an independent assessment as to whether or not those grounds have been proven.

[39] In making our decision, we have assigned no weight to Mr. Cosgriffe's submission of the Phase 2 Report of the *Travel Industry Act, 2002* Review which proposes the removal of trust accounting requirements from the Regulation. We note that the Report contains a number of proposals on which comment is invited. Whether the Act and Regulation are ultimately revised is not relevant to our decision; we must apply the law as it is currently written.

Issue 1: Activities in Contravention of the Act or Regulations

[40] The first issue before us is whether or not the appellant has been carrying on activities that are in contravention of the Act or regulations. Specifically, is the appellant in breach of the provisions of s. 27(3) of the Regulation?

[41] There is no dispute between the parties that the appellant deposits customer funds to its Ontario Travel Industry Trust Account within two banking days. The question to be decided is whether or not the appellant is in breach of the Regulation because the funds are not *directly* deposited to the Ontario account.

[42] Both Ms Karas and Mr. Cosgriffe cited Dreidger's modern principle of statutory interpretation to support their interpretation of s. 27(3) of the Regulation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Both counsel also referred to s. 64(1) of the *Ontario Legislation Act*:

An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Ms Karas submitted that sections 26 and 27 of the Regulation must be interpreted broadly to ensure the protection of consumer funds which is the intent of the legislation and the object of the Act. Mr. Cosgriffe submitted that the only meaning of s.27(3) in its grammatical and ordinary sense is that the registrant must deposit funds into the designated trust account within two banking days.

- [43] The Act is consumer protection legislation. It sets out requirements for travel industry participants to ensure a fair marketplace where consumers can have confidence in their travel purchases. Ms Karas referred us to *Ontario (Travel Council of Ontario) v. Gray* 2010 ONCA 518 (CanLII), a case in which the Court addressed the definition of travel agent. At paragraph 18, the Court states “the clear purpose of the Act is to regulate the travel industry in the interest of the travelling public”.
- [44] A key component of the consumer protection provisions set out in the Act is the requirement that registrants hold funds received from customers for travel services in trust. This ensures that the funds are used only for the purpose of purchasing those travel services and protects those funds until the services are procured. We note that there is no dispute between the parties that customer funds must be held in trust.
- [45] There is no evidence before the Tribunal that the appellant does not treat the credit card payments deposited to its American domiciled BOA account as trust funds. Mr. Christopher’s testimony is that the appellant has upheld the provisions of the trust declaration it signed on November 28, 2013. Paragraph 2.6 of the declaration states “all Funds deposited into the Trust Account shall at all times be held for the benefit of customers. At no time shall any part of the Trust Account be used or diverted to purposes other than for the exclusive benefit of customers.”
- [46] However, there is no evidence before us that the BOA currently recognizes or would, if necessary, recognize the trust created by the trust declaration. Nor is there any evidence before us that American courts would uphold the trust declaration and therefore there is no evidence that the funds are protected while on deposit in the BOA account. In this regard, we note that paragraph 5.4 of the declaration states that its “validity, construction, interpretation and legal effect shall be governed by the laws and judicial decisions of Ontario”.

- [47] There is evidence before the Tribunal that the appellant investigated establishing a BOA trust account in Canada. Ms Skrbic testified with respect to e-mail correspondence dated between August 2012 and February 2013 between Mr. Christopher and BOA official D. Nearing which indicated that the BOA could not establish a trust account in Canada which met the regulatory requirements. Those e-mails indicate the BOA has the ability to open a “segregated funds account” which is described as separating the account’s funds from the assets of the account holder. There is no evidence that the Chicago BOA account has been designated in this or a similar manner.
- [48] Consistent with Dreidger’s principle, we agree with Ms Karas that the trust accounting provisions of s. 27 of the Regulation must be read with s. 26 which sets out general banking requirements. Section 26(1) of the Regulation requires that all accounts of a registrant be maintained in Ontario in a Schedule I or II bank. The trust account, which is a specialized form of account, must meet the requirements of s. 26. While the Registrar did not specifically cite the appellant’s maintenance of an American domiciled account as a breach of the Regulation in the Notice of Proposal, we note that the appellant’s Chicago BOA account does not comply with this provision.
- [49] As Mr. Smart testified, TICO’s jurisdiction is limited to Ontario. Section 23 of the Act permits the director under the Act, under certain circumstances including failure of a registrant, to “order any person having on deposit or controlling any assets or trust funds of a registrant or former registrant to hold those funds or assets”. Section 20 of the Act allows a justice of the peace to issue a search warrant upon application by an investigator where there is suspected contravention of the Act or regulations. While there is no evidence before us that the appellant is at any risk of financial failure nor is there evidence of any need for TICO to conduct an investigation, the fact that these mechanisms could not be used in such circumstances places any customer funds outside Ontario beyond the control of TICO and therefore at risk. Placing those funds at risk is inconsistent with the consumer protection safeguards trust accounts provide.
- [50] Section 26(3) of the Regulation requires a registrant to “promptly” deposit all funds received for travel services. Section 27(3) requires a registrant to deposit all money into the trust account “within two banking days” after receiving it. In his written submission Mr. Cosgriffe argued:

It is submitted that the Legislature specifically contemplated the banking reality that no cardholder’s bank pays directly to the merchant’s bank since a system of accumulation and paying in batches exists for all credit card transactions as described above and admitted by the Registrar. This is why a registrant has two banking days to deposit the customer money into the trust account. The Regulation reflects the practical reality of credit card and banking arrangements.

Mr. Smart testified that the provision has been in place since 1974 and was designed to permit agents time to make cash and cheque deposits.

- [51] Mr. Cosgriffe did not provide us with any evidence to support his position that the legislature specifically contemplated credit card payments when the Regulation was considered. Our review of its predecessors indicates that the provision of two banking days for deposit of funds is long standing. For example, s. 25(3) of Regulation 938 made in 1975 under the former *Travel Industry Act* states “all trust funds received by a travel agent or travel wholesaler whether by cash cheque or otherwise shall be deposited in the trust account...within two banking days of their receipt.”
- [52] We find that section 27(3) provides an allowance which recognizes that depositing to a registrant’s account may not be immediately possible or feasible, regardless of the form of payment. The two banking day provision in s. 27(3) of the Regulation should be read as a modifier of s. 26(3) which requires a registrant to “promptly deposit all funds received as payment for travel services into such an account”, that is to one of the accounts s. 26(1) requires the registrant to maintain. The words “promptly”, with its common meaning of without delay and “to such an account” do not contemplate the introduction of an intermediary deposit before deposit to the accounts the Regulation requires a registrant to maintain. Therefore, we find that s. 27(3) should be interpreted as requiring a registrant to *directly* deposit funds to the trust account.
- [53] We find that the appellant’s practice of depositing credit card payments to its BOA account before transferring them to the Ontario Travel Industry Trust Account does not comply with s. 27(3) of the Regulation. The fact that the appellant treats customer funds received by credit card payment as trust funds when they are in the BOA account is insufficient to eliminate the risk created by depositing them outside of Ontario and TICO’s jurisdiction. There is no evidence to indicate that account is designated as a form of trust account by the bank or that the provisions of the November 28, 2013 trust declaration would be upheld by the BOA or U.S. courts. The Regulation requires all accounts be maintained in Ontario and does not contemplate or support the use of an intermediary account such as the BOA account. Therefore, in accordance with s. 8(e) of the Act, we find that the appellant is carrying on activities in contravention of the regulations.

Issue 2: Past Conduct

- [54] The second issue before us is whether or not the past conduct of the appellant’s officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty.

[55] We have found that the appellant is not in compliance with s. 27(3) of the regulation. At face value, this conduct provides reasonable grounds for belief that the Appellant will not carry on business in accordance with the law. However, our review of the lengthy history of correspondence between TICO and the appellant with respect to the appellant's compliance with trust accounting indicates that the appellant made efforts to meet those requirements and kept TICO informed of those efforts.

[56] On April 23, 2013, Mr. Christopher advised that he had set-up a Canadian account with the Bank of America but was unable to designate it as a trust account because it was not a Schedule I or II bank. Subsequently, on November 28, 2013, the appellant and TICO executed the trust declaration. The evidence is that Registrar Pepper accepted this trust declaration as sufficient compliance with the regulatory requirements.

[57] Ms Skrbic testified that when the appellant failed to provide a trust disclosure with its 2013 financial statements, she learned that the appellant was not maintaining the BOA account as a trust account. On April 29, 2014, the appellant was provided with a number of options which included complying with the trust accounting provisions of s. 27 of the Regulation or providing a Letter of Credit in lieu of trust accounting as set out in s. 28 of the Regulation. On June 25, 2014, Mr. Christopher emailed Ms Skrbic. That e-mail indicates that the appellant believed it was compliant:

I remain puzzled by your request for bank statements for trust accounts: we have a small balance in our CIBC account; the majority of our cash is held in US accounts with no formal designation as Trust Accounts as you keep referring to. We signed a trust declaration in lieu of this.

[58] On October 29, 2014, a teleconference was held and compliance options were again presented to Mr. Christopher. Ms Skrbic testified that the result was that Registrar Pepper agreed to accept monthly financial statements in lieu of the appellant designating a Canadian trust account. We note that Ms Karas questioned Ms Skrbic with respect to whether this arrangement was an interim one only. We cannot make that determination because former Registrar Pepper did not testify at this hearing.

[59] Shortly after Mr. Smart assumed the position of Registrar in January 2015, a meeting was held with Mr. Christopher and the appellant was again given options to comply. On April 15, 2015, Mr. Christopher emailed Mr. Smart, advised that the appellant was designating an Ontario CIBC trust account, and suggested that transferring funds regularly from its BOA account would be acceptable. After Mr. Smart rejected this proposal, Mr. Christopher presented a revised plan on

May 22, 2015 to directly deposit customer deposits other than credit cards to the CIBC account and to transfer credit card deposits within two business days.

[60] Further correspondence took place over 2015. On October 6, 2015, Mr. Christopher advised that the appellant consulted with its legal counsel and had reasonable grounds to believe that it was in compliance with the Act. Mr. Christopher did continue to investigate the possibility of using a Canadian based merchant bank to process its U.S. credit card receipts but on November 10, 2015 advised Ms Skrbic that this would force the appellant's customers to pay a premium in the form of a foreign process fee.

[61] In March, 2016, Mr. Christopher advised it was dealing with another Canadian bank which had indicated it could provide services to directly deposit into the Canadian trust account. However, in May, 2016, the bank advised it could not do so. TICO then wrote to the appellant in September, 2016 setting out its compliance requirements. The Tribunal notes that in his September 29, 2016 letter, Mr. Smart wrote:

I wish to acknowledge that TICO appreciates B & R's solid business performance and desire to demonstrate the highest of ethical standards in the travel industry.

Further discussion between the parties failed to resolve the issue, leading to the Registrar issuing the Notice of Proposal.

[62] In determining whether the appellant will carry on business in accordance with the law and with integrity and honesty in the future, we must consider all of the past conduct of its officers and directors.

[63] The evidence is that Registrar Pepper did accept the trust declaration as satisfying the trust accounting requirements and, as late as October 29, 2014, agreed to accept monthly financial statements in lieu of designating a Canadian trust account, whether on an interim basis or not. However, the current Registrar's position with respect to trust accounting has been clear since at least March 6, 2015 when Mr. Christopher met with Mr. Smart. As set out above, the evidence is that the appellant co-operated with TICO and attempted to find a means of complying, notwithstanding the fact that those attempts were not satisfactory to the Registrar.

[64] The evidence is also that the appellant has no compliance issues other than its practice of depositing customer funds received by credit card to its BOA account before transferring them to its Ontario Travel Industry Trust account. Mr. Smart testified that the appellant has been compliant with its financial reporting and both

he and Ms Skrbic testified that there have been no complaints to TICO about the appellant nor have there been any claims.

[65] The appellant has committed to comply with the decision of this Tribunal. In his written submissions, Mr. Cosgriffe wrote:

If the Tribunal agrees with the interpretation of the Registrar regarding the requirements of Section 27(3) of the Act then B&R will fully abide by the direction of the Tribunal.

[66] Based on the evidence that the Registrar initially accepted the appellant's trust declaration as compliant with s. 27(3), that the appellant attempted to find a means of complying with the Registrar's requests when the Registrar no longer accepted the declaration as sufficient, that there is no evidence of any other failure to comply with the Act or regulations, and, based on the commitment of the appellant to abide by the Tribunal's direction, we find that the Registrar has failed to prove that the past conduct of the appellant's officers and directors affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty in accordance with s. 8(1)(d)(iv) of the Act.

G. CONCLUSION

[67] We have found that the appellant is in breach of the provisions of section 27(3) of the Regulation and therefore is carrying out activities that are in contravention of the Act and the regulations in accordance with s. 8(1)(e) of the Act. Therefore, grounds for revocation of the appellant's registration have been made out. However, we have also found that the Registrar did not prove the past conduct of the appellant's officers and directors affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty in accordance with s. 8(1)(d)(iv) of the Act.

[68] We note that in her closing submissions, Ms Karas advised that the Registrar is, in fact, not seeking the revocation of the appellant's registration as set out in the January 3, 2017 Notice of Proposal, but is asking the Tribunal to order the appellant's compliance with the regulatory requirements.

[69] The Tribunal has the power under s.11(5) of the Act to substitute its opinion for that of the Registrar. Accordingly, we must consider the appropriate action to direct the Registrar to take, which may, in appropriate cases, include approving the registration with conditions.

[70] Based on our finding with respect to s. 8(1)(d)(iv) of the Act, it would not be appropriate to order the revocation of the appellant's registration. We find that the

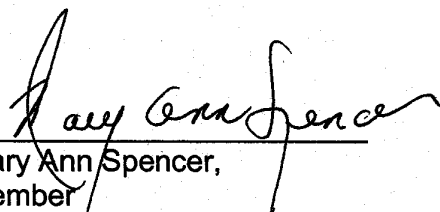
appellant should be registered, subject to the condition that it comply with s. 27(3) of the Regulation and cease its practice of first depositing customer funds received by credit card into its American domiciled BOA account before transferring them to its Ontario Travel Industry Trust Account. In the alternative, in lieu of maintenance of a trust account, the appellant may provide security as set out in s. 28(1) of the Regulation:

28 (1) Despite section 27, a registrant who has been registered and carrying on business continuously for at least one fiscal year may, instead of maintaining a trust account, provide security to the administrative authority in an amount that is equal to or greater than one-sixth of the money that the registrant receives from customers for travel services for the 12-month period ending on the last day accounted for in the most recent annual, semi-annual or quarterly financial statements, as the case may be, required to be filed under section 22.


ORDER:

Pursuant to the authority under section 11(5) of the Act, the Tribunal orders the Registrar not to carry out the Proposal to revoke registration dated January 3, 2017 but to register the appellant subject to the condition that, within 60 days of the date of release of this decision, the appellant either arrange to have all customer funds paid by credit card directly deposited to the designated Ontario Travel Industry Trust account in accordance with section 27(3) of the Regulation or, in the alternative, it provide security in accordance with the provisions of section 28(1) of the Regulation.

LICENCE APPEAL TRIBUNAL



Mary Ann Spencer,
Member



Stephen Scharbach, Member

Released: August 2, 2017