

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Citation: 1722670 Ontario Inc. o/a Expedia Cruiseshipcenters, Collingwood v. Registrar,
Travel Industry Act, 2018 ONLAT TIA 11866

Tribunal File Number:11866/TIA

Appeal under s. 11 (5) of the Travel Industry Act, 2002, S.O. 2002, c. 30, Sch D. from a
Notice of Proposal to revoke a registration

Between:

1722670 Ontario Inc. o/a Expedia Cruiseshipcenters, Collingwood

Appellant

and

Registrar, Travel Industry Act, 2002

Respondent

DECISION AND ORDER

Adjudicator:

Jennifer Friedland

Appearances:

For the Appellant:

Douglas Fry, Owner and Director of the appellant

For the Respondent:

Susan Deer and Timothy Snell, Counsel

Dates and place of Hearing:

Toronto, ON, September 6 and 24, 2019

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] The appellant, 1722670 Ontario Inc. o/a Expedia Cruiseshipcenters, Collingwood, is a registered travel agent under the *Travel Industry Act* (the “Act”).¹ It sells cruises, air tickets and package tours to the public and is a franchisee of Expedia CruiseShipCenters. Its sole director and officer is Douglas Fry. The appellant has appealed a notice of proposal issued by the registrar on November 20, 2018 to revoke its registration.
- [2] The primary basis for the registrar’s proposal is that the appellant has been regularly late filing its financial statements, occasionally late filing its compensation fund forms, and has failed to maintain the required amount of working capital at year end. For the most part, the appellant has managed to correct the working capital shortfall given some time, until recently. A correction of approximately \$47,000 is required to correct the current shortfall. The registrar’s position is that because of these breaches, the appellant is not entitled to registration. Furthermore, the respondent submits that the appellant has been given many opportunities to come into compliance and should now have its registration revoked.
- [3] The appellant does not dispute that there have been problems but seeks a less drastic remedy. It submits that it has made a number of changes to better meet the filing deadlines; and that by Mr. Fry selling his matrimonial home (which will have occurred by the time of this decision), he will be able to correct the working capital shortfall and not face a similar problem going forward. The appellant asks to maintain its registration with conditions.
- [4] Both parties have made submissions on conditions, should I find in the appellant’s favour.

ISSUE

- [5] The issue in this case is whether the registrar should be directed to carry out its proposal to revoke the appellant’s registration.

RESULT

- [6] For the reasons outlined below, I find that while the appellant has had obvious difficulties with compliance in certain areas, it is not necessary to revoke its registration in order to protect the public. A less drastic remedy is preferable in the circumstances of this particular case.

¹ S.O. 2002, c. 30, Sch D

- [7] I therefore substitute my own opinion for that of the registrar under s. 11(5) of the Act and direct the registrar to refrain from carrying out its proposal to revoke the appellant's registration. Instead, the appellant's registration shall continue with conditions as set out in the Order below.

THE LAW

- [8] The Act and Ontario Regulation 26/05 (the "Regulation") made under the Act prescribe registration requirements for travel industry salespersons.
- [9] Section 10 of the Act provides that the registrar may revoke a registration if, in his or her opinion, the registrant is not entitled to registration under s. 8.
- [10] Section 8 of the Act sets out a number of factors which may disentitle an applicant from registration. The factors relied on by the registrar in this case are that:

8(1)(d)(iv) The past conduct of the applicant'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.

8(1)(e) The applicant, or an interested person, is carrying on activities in contravention of the Act or Regulations; and

8(1)(f) The applicant is in breach of a condition of the registration.

The onus is on the registrar to prove, on a balance of probabilities, the facts it relies on in support of its position that the appellant is not entitled to registration.

- [11] With respect to the question of whether the appellant's past conduct affords reasonable grounds to believe that business will not be carried on in accordance with the law and with integrity and honesty, the standard is somewhat less than a balance of probabilities.² I need not be satisfied that it is more likely than not, that the business will not be carried on in accordance with the law and with integrity and honesty. At the same time, "the reasonable grounds for belief" has to be more than "mere suspicion." Reasonable grounds for belief "will exist where there is an objective basis for the belief which is based on compelling and credible information".³ Moreover, there must be a nexus between the appellant's past conduct and its ability to conduct business as a travel agent serving the interests of the public.⁴

² See 2203099 Ontario Ltd. o/a Jax Bar & Grill v. Registrar, Alcohol and Gaming, 2013 CanLII 51164 (ON LAT) and Ontario (Alcohol and Gaming Commission, Registrar, v. 751809 Ontario Inc. (c.o.b. Famous Flesh Gordon's), 2013 ONCA 157.

³ Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's), 2013 ONCA 157 at para. 18, citing *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 114.

⁴ See *CS v. Registrar, Real Estate and Business Brokers Act*, 2002, 2019 ONSC 1652 (CanLII) at para 32.

- [12] Following a hearing, the Tribunal has the discretion under s. 11(5) of the Act to order the registrar to carry out the proposal, or the Tribunal may substitute its opinion for that of the registrar and may attach conditions to its order or to a registration. This means that even if I find that the appellant is not presumptively entitled to registration under s. 8 of the Act, I must still decide whether revocation is the appropriate consequence. In doing so, I can consider attaching conditions to the appellant's registration or to my Order.
- [13] Note that my view of the statutory framework differs from that of the registrar who submits in its written closing argument that "the sole issue in this proceeding is whether the registrar has sufficient grounds for revoking [the appellant's] registration." With respect, that is not the sole issue. First, a hearing of a notice of proposal is a hearing *de novo* in which the Tribunal does not owe deference to the registrar's decision.⁵ Moreover, as confirmed by the Divisional Court in *Arulappu v. Registrar, Real Estate and Business Brokers Act*,⁶ even if the Tribunal finds that the appellant is not entitled to registration for any of the reasons set out in the entitlement provisions of the statute, it must still consider whether revocation is the appropriate remedy.

FACTS

- [14] I heard evidence on behalf of the registrar from Sanja Skrbic, the Director of Finance and Financial Compliance at the Travel Industry Council of Ontario (TICO); and from Douglas Fry, the sole director and owner of the appellant agency. Various records and documents were entered as exhibits on consent.
- [15] The facts underlying the registrar's proposal are largely not in dispute and can be summarized as follows.

Late filing of financial statements

- [16] Section 22 of the Regulation requires the appellant to file annual financial statements within 3-months of its year end. The appellant has been late filing its financial statements every year since 2012 except in 2014 when it changed its fiscal year-end and provided satisfactory interim statements. It also filed on time in 2019.
- [17] The length of the appellant's delay in filing its financial statements has been as follows:

Year	Due Date	Date Filed	Length of Delay
2012	Due Dec 31, 2012	May 17, 2013	4 ½ months
2013	Due Dec 31, 2013	May 16, 2014	4 ½ months

⁵ *Zahariev v. Ontario (Registrar of Motor Vehicle Dealers and Salespersons)*, 2005 CanLII 44815 at paras. 7-12 (Div. Ct.).

⁶ 2011 ONSC 797 (CanLII)

2014	Changed fiscal year end, interim statements provided and satisfactory		
2015	Due Aug 31, 2015	Nov 26, 2015	2 ¾ months
2016	Due Aug 31, 2016	Feb 23, 2017	5 ¾ months
2017	Due Aug 31, 2017	Nov 22, 2017	2 ¾ months
2018	Due Aug 31, 2018 NOP	March 14, 2019	6 ½ months
2019	Due Aug 31, 2019	July 31, 2019	On time

Working capital shortfall

[18] Section 24 of the Regulation requires the appellant to maintain minimum working capital in a certain amount depending on the company's sales in the previous fiscal year. Based on the appellant's sales, the amount of working capital required to be maintained was usually either \$10,000 or \$20,000. In most years, the appellant's financial statements showed a working capital shortfall at its year end. This required it to correct the shortfall. It was able to do so to the satisfaction of the registrar in most years but has not been able to fully correct the shortfall carried over since its 2018 financial statements were submitted.

[19] The particulars of the corrections required and the time it took the appellant to make the correction is set out in the following table:

Year	Correction required as per	Time before correction made
2012	\$2,070	5 days ⁷
2013	\$8,489	13 days
2014	\$18,125 (Interim statement)	Corrected by new year end - shortfall for 2014 not
2015	\$16,342	16 days
2016	\$24,807	Corrections of \$18,206 made over two months
2017	\$36,016	Corrected. Shortfall not alleged in NoP
2018	\$56,490	Shortfall carried over to 2019 statements filed 4
2019	\$67,994	Partial correction of \$20,000 ⁸

Late filing of Form 1s

[20] The appellant has a requirement under section 50 of the Regulation to contribute to TICO's Compensation Fund. Registrants are required to submit a "Form 1" outlining their sales, accompanied by a cheque for their semi-annual fund contributions. The Form 1 and payment must be submitted within 90 days of their fiscal year end and fiscal half year end.

⁷ The registrar had alleged that the appellant took 3 months to correct the 2013 shortfall, however it appears that the registrar's position is based on a typo in its 2017 Notice of Proposal which alleges that notice of the shortfall was provided to the appellant March 24, 2013. However, notice was, in fact, provided May 24, 2013 and corrected by May 29, 2013 (see p 174 of Exhibit 3).

⁸ This figure is taken from the registrar's submissions on conditions dated November 13, 2019. The amount takes into consideration \$10,000 that TICO is holding as security.

[21] The appellant has been late submitting its Form 1s and required contributions as follows:

Form 1 Submission	Length of Delay
2012 – half year	2-3 days late
2012 – year end	no allegation of late filing
2013 – half year	12 days late
2013 – year end	no allegation of late filing
2014 – half year	no allegation of late filing
2014 – year end	no allegation of late filing
2015 – half year	39 days late
2015 – year end	8 days late
2016 – half year	29 days late
2016 – year end	no allegation of late filing
2017 – half year	no allegation of late filing
2017 – year end	no allegation of late filing
2018 – half year	no allegation of late filing
2018 – year end	no allegation of late filing
2019 – half year	no allegation of late filing
2019 – year end	no allegation of late filing

Other Issues

[22] No other issues are raised against the appellant.

[23] The appellant has never been the subject of a complaint to the registrar.

Prior Notices of Proposal, Minutes of Settlement and Consent Orders

[24] The registrar has addressed the appellant’s shortcomings, described above, by issuing notices of proposals to revoke its licence. There was no evidence of an approach taken by the registrar other than to issue warning letters, accommodate some extensions, and then file a notice of proposal. When asked what sort of support TICO provides its registrants facing difficulties such as Mr. Fry’s, Ms. Skrbic identified that there were “webinars” available.

[25] The registrar’s first notice of proposal to revoke the appellant’s registration was issued on March 12, 2013, when the appellant’s 2012 financial statements (due December 31, 2012) were late. The registrar withdrew its proposal after the appellant filed its financial statement and promptly corrected his working capital deficit.

- [26] The registrar's second notice of proposal to revoke the appellant's registration was issued on October 1, 2017, when the appellant's 2017 financial statements (due August 31, 2017) had not been filed. The appellant's financial statements were then filed on November 22, 2017 and the matter resolved by Minutes of Settlement dated April 13, 2018. The Minutes required the appellant to file his 2018 statements and Forms 1s on time and to maintain the required amount of working capital.
- [27] The Notice of Proposal now before me was issued November 20, 2018, when the appellant did not file his 2018 financial statements on time despite the Minutes of Settlement entered into earlier that year. A notice of further particulars was then filed by the registrar on March 21, 2018, after the appellant's financial statements were received, identifying a negative working capital of \$36,490 which required a correction of \$56,490. In its notice, the registrar indicated that even if the appellant made the correction, it would still seek to revoke the appellant's registration.
- [28] A hearing was set for June 2019 before the Tribunal. However, it was adjourned at the appellant's request by order of the Tribunal dated June 18, 2019. The order attached conditions to the appellant's registration made on consent and stipulated that if the appellant failed to abide by any of the terms of the order, the respondent could request that the Tribunal reschedule the hearing.
- [29] The conditions attached to the Tribunal's adjournment order included requiring the appellant's 2019 financial statements to be subject to a review engagement completed by a licensed Chartered Public Accountant of the registrar's choosing and then filed on or before July 31, 2019. The appellant complied with that provision of the Order.
- [30] However, the order also required the appellant to correct any capital deficiency within 15 days from it being identified by the registrar and he has not yet been able to correct the shortfall identified. The appellant's 2019 financial statements showed a continuing working capital shortfall requiring \$67,994 to correct. Mr. Fry has since made a correction of \$20,000, leaving \$47,994 still to be corrected.
- [31] As further described below, the appellant intended to sell his house during the period of the adjournment and correct the shortfall from the proceeds of sale, however, he was unable to list the house for sale until after that period. He notified the registrar of his inability to meet that portion of the adjournment order and the matter proceeded to a hearing.

The appellant's evidence

- [32] The appellant, through Mr. Fry, does not take issue with the above facts, nor does he attempt to justify them, though he does provide some context.

[33] Mr. Fry, who is 67 years old, described how he and his wife started the appellant agency in 2011. He described how it was difficult to build the business at first as customers had loyalty elsewhere. By 2017, however, the business had increased 60% over the previous year and now shows a profit. He has many returning travelers.

The appellant's evidence regarding the late filing of financial statements

[34] With respect to the late filings of the appellant's financial statements, Mr. Fry described how he initially faced a "steep learning curve." He did not receive formal training from head office as contracted (presumably he means from Expedia) and initially hired a local accountant who did not know how to prepare financial statements or TICO reporting for travel agents.

[35] In 2014, to address the problems with his first accountant, Mr. Fry hired two new and experienced accountants; one as a bookkeeper and the other to prepare the financial statements.

[36] For the most part, Mr. Fry's problem with late filing after 2014 resulted from a combination of delay on the part of Mr. Fry in getting his accounts to his bookkeeper and then delay on his accountants' parts in finalizing the statements.

[37] In 2015 and 2016, Mr. Fry made incremental progress in advancing the delivery of his own accounts, managing to at least provide his own accounts to his bookkeeper in advance of the filing deadline. However, this did not necessarily advance the delivery of the final statements to TICO as his accountants frequently required further information from Mr. Fry.

[38] In 2017, Mr. Fry had improved his practices further and was only 3-4 days behind an agreement to get his accounts to his bookkeeper before the last week in June of that year when his wife fell and broke her shoulder. Mr. Fry explained that his wife was responsible for about 50% of the business, with Mr. Fry handling about 30% and his travel consultants managing the rest. With his wife injured, he had to manage her share of clients, manage the office operations, and look after his wife. It is in this context, that he was unable to finalize his accounts as he had expected by the end of June. Instead, he delivered them to his bookkeeper mid-August. The bookkeeper then had questions, and revisions were made in September. The final documents went to the accountant on October 3, 2017, but by then the registrar had already issued its second notice of proposal.

[39] In 2018, Mr. Fry's purported intention to file on time met with a new obstacle when the accountant who had prepared the appellant's financial statements for the past four years told him, in May of that year, that he was no longer able to assist the appellant. Mr. Fry acknowledges that he should have started his search for a new accountant right away. He explained, however, that he was concentrating on

completing his books and assumed that he would be able to find an accountant without difficulty. He described how in or around June and July of that year, he spoke to seven accountants and interviewed three, but not all could do what TICO needed and others had issues with timing. He finally hired a new accountant in mid-September. He was told by the new accountant that it would take 4-6 weeks to complete the financial statements, but the accountant did not in fact finish them until January. By then the registrar had issued its latest proposal, which is the subject of this appeal.⁹

- [40] In 2019, the appellant's financial statements were filed on time. As per the adjournment order granted June 18, 2019, these financial statements were subject to a review engagement by a licensed chartered public accountant of the registrar's choosing who was also designated an Inspector under the Act. The Inspector had free access of all relevant documents, and, among other powers, could request the production of any documents or records of the appellant. There are no issues alleged with respect to Mr. Fry's compliance with the Inspector's requests for documents and the financial statements were filed by July 31, 2019 as required by the order.

The appellant's evidence regarding working capital shortfalls

- [41] With respect to the working capital issue, Mr. Fry acknowledges that this has been an ongoing issue but that whenever it has been identified, he has managed to rectify the shortfall, until recently. The primary cause of the recurring shortfall appears to be that as the business does better, the amount of working capital that the business is required to maintain increases. At the same time, Mr. Fry and his wife borrowed initially to get the business off the ground and now have personal liabilities which they have been paying down by borrowing from the capital funds of the business. Mr. Fry testified to having credit card debt and debt on a line of credit of approximately \$45,000. It is those debts that have led to the working capital shortfall.
- [42] Mr. Fry also testified that the manner in which his company runs its business does not involve taking money from customers, and therefore his risk of incurring liabilities (which is what the requirement for working capital is meant to hedge against) is reduced. He is aware that this does not reduce his culpability in failing to maintain the required amount of working capital and he acknowledges that TICO, as a regulator, does not control how a registrant conducts its business. For example, the appellant could, tomorrow, change its practice and begin to take consumer money, thereby increasing its risk to consumers. However, Mr. Fry

⁹ There is a discrepancy in the evidence as to the timing of when Mr. Fry's 2018 statements were completed. Mr. Fry testified they were completed by January 2019, and that he assumed that his new accountant would deliver them directly to TICO as had been his prior accountant's practice. However, TICO did not receive them until March 2019 and asks me to make an adverse inference against Mr. Fry regarding this delay, suggesting that he sat on the financial statements to hide his working capital deficit. I decline to make this inference on the basis I accept Mr. Fry's evidence that the accounts were complete in January 2019 and that it was through miscommunication that they did not get to TICO until March 2019.

described how the business had no plan to change its current practice. He therefore relies on this point only to note that in the specific context of the agency's way of doing business, there was no risk to the consumer. Ms. Skrbic agreed to this point in cross-examination.

The appellant's plan to address the issues raised

- [43] To ensure that the company's financial statements are now filed on time, Mr. Fry has provided a timeline that he has arranged with his new accountant. This involves Mr. Fry providing his accounts within four to six weeks of the company's year end and the accountant completing the financial statements within eight weeks of the year end. A letter from Mr. Fry's accountant was admitted into evidence confirming his agreement with this plan. Mr. Fry testified that he and his accountant would have been able to have met this timeline in 2019 as well, but TICO wished to arrange its own accounting firm as part of the adjournment agreement.
- [44] With respect to addressing the working capital issue, Mr. Fry recognizes that he cannot continue to hope for indulgences with respect to being short on working capital. At the same time, he does not wish to lose his business and his livelihood. He believes that he and his wife have managed to build up the business now to the point where they are making a profit, have customer loyalty and the opportunity to continue to grow. Therefore, to address the working capital issue once and for all, they have decided to sell their matrimonial home. This will allow them to pay down their debts with the proceeds of sale, infuse capital into the business and not face the working capital problem in the future.
- [45] At the time of the hearing, Mr. Fry had not yet listed the house for sale, although he had been saying that he intended to since at least June 2019. Following closing submissions (and with the consent of the registrar that I could receive subsequent evidence on this issue), Mr. Fry confirmed that the house was now listed. It was set to close in December. In his written submissions on conditions, delivered November 8, 2019, Mr. Fry stated that he will resolve the working capital issue once and for all by the end of November 2019.
- [46] With respect to the Form 1s, there was evidence presented regarding a lag-time between when Mr. Fry would post his forms and payments by mail and when they would actually arrive at TICO's office. He testified that he has now addressed the issue and there does not appear to be any dispute about this. There have been no allegations of late filing of Form 1s since 2016.
- [47] In his closing submissions, Mr. Fry noted that it would have been helpful if TICO would have sent an inspector, at some point, to provide guidance about how to make improvements with his business practices. He stated that this happened one time when his business first opened but never since and that the Inspector was very helpful. He recognizes that TICO cannot send an Inspector to every agency where

there are issues but thought that an inspection on premise could have proven invaluable in his case.

The Registrar's Position

- [48] The registrar asserts that the above failures to comply with the Act and the Regulation show that the appellant is in breach of the terms of its registration, is carrying on activities in contravention of the legislation, and that its past conduct affords reasonable grounds to believe that the appellant will not carry on business in accordance with the law and with honesty and integrity.
- [49] The registrar further submits that the appellant has been given too many opportunities to comply with the legislation and the terms of its registration and should not be given any further chances.
- [50] The registrar states that it is crucial for TICO to be able to monitor the financial health of a company by receiving its financial statements in accordance with the timelines provided. Regarding capital shortfalls, the registrar submits that there is a risk and potential for fraud when a registrant has a working capital shortfall. The registrar does not appear to put much weight on the minimal lateness of the appellant's Form 1 filings.
- [51] The registrar has provided conditions that it has asked the Tribunal to impose, should I not direct the registrar to carry out its proposal. Those conditions include the requirement to provide security for the current shortfall in working capital.

The Appellant's Position

- [52] Mr. Fry asks that the Tribunal not direct the registrar to carry out its proposal. He asserts that with the sale of his house he will be able to fix the working capital issue so that it does not recur. With respect to late filings, he submits that the agency has changed its practices such that its books can now be completed in a timely way, and he has an agreement with his accountant assuring him that the financial statements can be completed within the timeline set by the Act and the Regulation.
- [53] Mr. Fry invites the Tribunal to note the attention that his company dedicates to its customers, the manner in which the business is growing and how he and his wife have worked hard to build up loyalty with their consumers. In addition, he calls attention to the fact that there have been no complaints against him and the low risk that his business model imposes on the consumer.
- [54] Mr. Fry has offered a counter-proposal to the registrar's proposed conditions should the Tribunal not direct the registrar to carry out its proposal. These conditions shall be addressed below.

ANALYSIS

- [55] The issue in this case comes down to whether the appellant's failings should result in the revocation of its licence.

Registrant is in breach of conditions of registration

- [56] There is no dispute on the facts. The appellant has repeatedly failed to file its financial statements on time. It has repeatedly failed to maintain the required amount of working capital. It has also been occasionally late filing Form 1s. Separately and together, these facts show the appellant to be in breach of the Act and the Regulation and in breach of the terms of its registration. This means it is no longer presumptively entitled to registration under s. 8(1)(f) of the Act and entitles the registrar to propose to revoke its registration as it has done.

Activities in contravention of the Act or Regulation

- [57] The registrar's proposal also alleges that the appellant is disentitled to registration under s. 8(1)(e) because "the registrant, or an interested person, is carrying on activities in contravention of the Act or Regulations." I am not persuaded that the appellant being late filing its financial statements or Form 1s, or failing to maintain the required working capital, constitute "activities" within the meaning of this provision, though I recognize that there are a number of cases that consider any breach of the legislation to fit within this provision. In my view, this provision captures the *doing* of something that is against the Act or Regulations (e.g. falsely advertising, improperly taking funds from the trust account), not the failure to do something. In any case, it is unnecessary for me to decide this issue here. The facts underlying the registrar's proposal are well-enough captured under s. 8(1)(f), disentitling the appellant to registration because it is in breach of the conditions of registration.

Past conduct of officers or directors

- [58] The registrar's proposal also alleges that the appellant is disentitled to registration under s. 8(1)(d)(iv) on the basis that the past conduct of its officers or directors or of an interested person (in this case, Mr. Fry), affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty.
- [59] In considering this allegation, I am mindful of the opportunities that the appellant has been given in the past to correct the identified issues, including the agreements Mr. Fry made to settle the registrar's prior proposals. I am also mindful of the appellant's breach of the Tribunal's adjournment order, where it was unable to correct the current working capital shortfall in the provided timeframe, though it did comply with the other terms of the order. While the appellant's prior breaches do not

weigh in its favour, I accept that Mr. Fry now has a plan in place that will address these shortcomings once and for all.

- [60] I accept that the appellant will be able to correct the working capital shortfall with the proceeds from the sale of Mr. Fry's house which has been listed and will likely have closed by the date of the release of this decision. With respect to being able to comply with the financial statement filing deadlines, I accept Mr. Fry's evidence that but for his wife breaking her shoulder in 2017 and his accountant retiring at the last minute in 2018, the appellant would have been able to meet the prescribed deadlines over the past three years; and did meet that deadline in 2019. This is not to diminish the appellant and Mr. Fry's responsibility to comply with the requirements of the Act and the Regulation despite those intervening factors. Rather, it is to explain why I accept that Mr. Fry's process has changed sufficiently that late filing is not likely to prove a problem in the future.
- [61] With respect to the appellant's few late filings of its Form 1s, I am not persuaded that this is a significant factor. Its lateness was occasional, minimal and explained. Moreover, it has not been late filing its Form 1 since 2016.
- [62] Given my findings above, I do not have reasonable grounds to believe that Mr. Fry's past conduct means that the appellant's business will not be carried on in accordance with the law in the future.
- [63] Moreover, I find that Mr. Fry's past conduct does not in any way call into question his honesty or integrity, which I consider also relevant to this analysis. Although there was one suggestion in the evidence led by the registrar that Mr. Fry purposely withheld his 2018 financial statement because he did not want to address the working capital shortfall, I have accepted Mr. Fry's evidence as to the reason for that delay (see footnote #9, above) and reject the registrar's submission in this regard.
- [64] The registrar has also suggested that a failure to maintain sufficient working capital increases the risk and potential for Mr. Fry to commit fraud and misappropriate client funds. However, I find this to be speculation without basis on the facts before me. I accept that the general purpose of the working capital requirement is aimed at reducing risk to consumers, and I accept that the registrar cannot control whether the appellant will, tomorrow, change its business practices and hold consumer funds in trust. However, I cannot leap from this possibility to there being a risk in the appellant's case that it would then misappropriate those funds to meet its working capital requirement or other financial shortfalls. Moreover, as the registrar has acknowledged, the appellant's current business model does not put the consumer at risk.
- [65] In response to the lack of current risk to the consumer, the registrar relies on Ontario (Registrar of Real Estate and Business Brokers) v. Vogelsberg (Ont. Div.

Ct.)¹⁰ for the proposition that “when a Registrant does not comply with the legislation, it is still a wrongful act and the fact that no one is hurt is irrelevant.” With respect, however, that is not the holding in *Vogelsberg*. The Court in that case was not referring to non-compliance with the legislation generally. It was referring to the act of interfering with a trust account, stating that interfering with a trust account was a wrongful act and the fact that no one was hurt is irrelevant. This is because interfering with a trust account is not just a breach of the legislation, it is also a breach of fiduciary duty and a dishonest act in and of itself which calls into question a registrant’s honesty and integrity. Breaching the legislation by being late with one’s filings and short on one’s working capital does not, on its face, speak to one’s honesty and integrity in the same way as interfering with a trust account. Certainly, I have found no basis to reach that conclusion in this case.

- [66] As set out above, Mr. Fry has already taken meaningful steps to change the appellant’s process so that its financial statements are filed on time in the future; and I accept that the working capital shortfall will be corrected with the sale of Mr. Fry’s house. In my view, the steps Mr. Fry has taken to address the concerns raised and his acknowledgement of responsibility throughout these proceedings, also forms part of his “past conduct”. Taken as a whole, this conduct does not afford reasonable grounds for me to believe that the appellant will not carry on its business as a travel agency in accordance with the law and with honesty and integrity.

Prior cases of revocation

- [67] This case is different than other cases before this Tribunal where an appellant’s registration has been revoked. For example, the registrar relies on *10507 o/a Riva Tours and Travel Inc. v. Registrar, Travel Industry Act, 200211* at p 13 for the proposition that if there is no evidence of change, then revocation is required. In this case, I am satisfied that Mr. Fry has provided evidence of change; both with respect to how the appellant has changed its practice to allow for more timely filing of its financial statements, and by following through with the sale of his house in order to address the working capital shortfall in a way that makes it unlikely to be an issue in the future. Moreover, in *Riva Tours*, there was evidence that the appellant was making improper payments from its trust account, that it was unable to produce a number of sales records and invoices upon request and that it was not providing proper invoices to its consumers. The latter factors are not alleged against the appellant.
- [68] The registrar also relies on *8563 o/a 99 Travel & Tours Inc v. Registrar, Travel Industry Act, 200212* at p. 5 para 3 for a similar proposition that when an appellant has been given repeated chances to comply with the Act and could not be specific

¹⁰ [1994] O.J. No. 226 at para 2 (Ont. Div. Ct.)

¹¹ 2017 CanLII 23909 (ON LAT) (“Riva Tours”)

¹² 2014 CanLII 86272 (ON LAT) (“99

about what it would do differently to ensue compliance with the Act in the future, the Registration must be revoked. I reiterate here that I have accepted Mr. Fry's evidence as to what the appellant will do differently in the future. I note further that in 99 Travel, there was evidence that the appellant had provided false financial information and altered bank records. This, of course, also called into question 99 Travel's honesty and integrity in a way that distinguishes that case from the facts before me.

- [69] In other cases where a registration has been revoked by the Tribunal due to late filing and working capital deficits, the working capital deficit was much higher than in the case before me. For example, in 7099 v. Registrar, Travel Industry Act, 200213, a registration was revoked on evidence showing a year-end working capital deficit year after year for five years between \$112,000 to \$322,000, with the average being \$230,000. Moreover, the Tribunal in that case was not satisfied that there was a sufficient plan to address the shortfall. As well, in that case, there was evidence of a supplier complaint against the appellant for failing to meet its financial obligations. Again, this is not the case here.

CONCLUSION

- [70] While I find that the appellant has been in breach of the conditions of its registration by filing its financial statements late and failing to maintain the minimum working capital, I accept that Mr. Fry has taken meaningful steps to cure these deficiencies. I acknowledge that he has breached orders and agreements respecting his filing and capital requirements. However, having fully considered the circumstances surrounding those breaches, I find they do not establish a lack of integrity or honesty on Mr. Fry's part, did not put the public consumer at risk and ought not to attract the severe penalty of revocation.
- [71] Given my findings above, I am substituting my own opinion for that of the registrar and ordering that the appellant's registration continue with the conditions below.
- [72] I shall add one more point because I do not intend for this decision to stand for the proposition that it is acceptable for a person subject to the Act's requirements to be late filing financial statements or to fail to maintain the appropriate working capital. My decision is very fact specific and reflects the fact that the appellant provided compelling and credible evidence about the steps that it has taken and will continue to take to correct the issues that lie at the heart of the registrar's proposal. I appreciate that the registrar must take a broader view. If late filings were condoned, it would be impossible for TICO to actually do its job as a regulator. And if working capital shortfalls were tolerated across the industry, then consumers would surely be at risk. But having proposed to revoke the appellant's registration on this basis, and the appellant having appealed that proposal, the process allows me to now be

¹³ 2012 CanLII 46007 (ON LAT)

the final arbiter of whether the end result should be the revocation of the appellant's registration. I do not believe such a drastic outcome is necessary to protect the consumers of the travel industry in the particular circumstances of this case.

ORDER

[73] Pursuant to my authority under s. 11(5) of the Act, I substitute my own opinion for that of the registrar and direct the registrar to refrain from carrying out its proposal to revoke the appellant's registration. Instead, the appellant's registration shall continue with conditions as set out below.

CONDITIONS¹⁴

- 1 The Registrant shall correct its working capital deficiency, being \$57,994, as required by the Regulation and submit to the Registrar proof thereof **on or before January 20, 2020**. The supporting documentation provided to the Registrar as proof shall include a copy of the cheque/transfer instrument and deposit slip and a copy of the Registrant's bank statement for the period when the deposit was made.
- 2 The \$10,000 (the "security") currently held by the Travel Industry Council of Ontario Security shall continue to be held by the Registrar. Upon review of Registrant's financial statements for its 2019/20 fiscal year ("2019/20 Financial Statements"), the Registrar shall:
 - a. Return to the Registrant the \$10,000 (the "security") currently held by the Travel Industry Council of Ontario Security if the office of the Registrar has determined to its satisfaction in its sole and absolute discretion that the Registrant's working capital, including the amount of Security, is in compliance with the Act; or
 - b. continue to hold the Security if the Registrant's working capital, including the amount of Security, is less than required by the Act, but the deficiency is less than or equal to the amount of the Security. The Security may be retained until the office of the Registrar has determined in its sole and absolute discretion that the Registrant's working capital is in compliance with the Act. If upon receiving proof of correction of the working capital deficiency as determined by the Registrar, which proof shall include a copy of the cheque/transfer instrument and deposit slip and complete copy of the Registrant's bank statement for the period when the deposit was made, the Registrar shall return the Security to the Registrant.

¹⁴ These conditions are a combination of those proposed by the registrar and counter-proposed by the appellant. In particular, with respect to whether it is necessary for the appellant to provide security to the registrar in the amount equal to the working capital shortfall, I agree with the appellant that to order this would be to frustrate the appellant's ability to pay off his debts and thereby maintain its working capital.

- 3 In addition to and without limitation to the above, the Registrant shall thereafter at all times maintain the minimum working capital required by the Act. If at any time the office of the Registrar in its sole and absolute discretion, determines that the Registrant's working capital is less than required by the Act, the Registrant shall take necessary steps to correct the Additional Deficiency as required by the Act, and shall submit to the Registrar proof thereof within **15 days** from the request by the Registrar. The supporting documentation provided to the Registrar as proof shall include a copy of the cheque/transfer instrument and deposit slip and a complete copy of the Registrant's bank statement for the period when the deposit was made.
- 4 Without limitation to Section 17 of the Act, the Registrar (including a person designated as an Inspector by the Registrar) may conduct an Inspection of the Registrant, including but not limited to an inspection within twelve months of the date of these Conditions of Registration, in order to ensure compliance with the Act, including without limitation working capital compliance. The Registrant shall respond to any inspection related request from the Inspector the office of the Registrar within five business days of the date of the request.
- 5 In addition to and without limitation to the above, the Registrant shall respond to any and all requests for information from the office of the Registrar in a fulsome and timely manner and is responsible for ensuring that any and all Directors and Officers and Supervisor/Managers of the Registrant respond in a fulsome and timely manner. The Registrant shall respond to all requests for information from the office of Registrar by the due date or time indicated by the office of the Registrar or, if no specific due date or time is indicated, within five business days after the request. The Registrant shall respond to all requests from the office of Registrar in writing if requested by the office of the Registrar.
- 6 In addition to and without limitation to the above, the Registrant shall reimburse the Registrar in the amount of \$4,520, as partial payment of the invoice dated July 31, 2019 (Invoice CINV0260882) for the Review Engagement, completed by Heather Johnston, Partner, BDO Canada LLP, as the Inspector designated under section 17 of the Act, pursuant to the Designation of Inspector Order, dated June 28, 2019. The amount of \$4,520 (representing \$4000 plus HST) shall be paid **on or before January 17, 2020**.
- 7 Should the Registrant fail to comply with these conditions, in addition to any other course of action available to the Registrar at law, the Registrar may immediately issue a Notice of Proposal to Revoke the Registrant's registration and rely, among other things, on the Registrant's failure to comply with these conditions as grounds for the revocation.

Released: December 20, 2019

**Jennifer Friedland,
Adjudicator**