SUPREME COURT OF NOVA SCOTIA

Citation: Ryan v. Nova Scotia (Registry of Motor Vehicles), 2014 NSSC 91

Date: 20140306
Docket: Hfx. No. 420367
Registry: Halifax

Between:

John Donald Ryan

Applicant

v.

Crystal Rafuse, Deputy Registrar of Motor Vehicles

Respondent

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: February 4, 2014, in Halifax, Nova Scotia

Counsel: Donald Murray, Q.C., for the Applicant
Angela Jones, for the Respondent

By the Court:

[1] The applicant, John Donald Ryan, seeks judicial review of a decision of the Deputy Registrar Motor Vehicle Records and Compliance, Crystal Rafuse, in which the Deputy Registrar determined that he is ineligible to participate in the Alcohol Ignition Interlock Program (A.I.I.P.), as he is permanently barred from obtaining a license pursuant to s. 67(21A) of the *Motor Vehicle Act.* That subsection provides:

> 67(21A) Notwithstanding anything contained in this Section, where a driver's license is revoked for the fourth time for a violation of section 249.2, 249.3, 249.4, 253, 254, subsection 255(1) or subsection 259(4) of the *Criminal Code*, no application may be made pursuant to this Section for the restoration of the driver's license or privilege of obtaining a driver's license and, for greater certainty, the revocation of the driver's license is permanent.

[2] Mr. Ryan's counsel wrote the Deputy Registrar, Driver Compliance on January 24, 2012 inquiring as to the number of revocations his client had received.

[3] The Supervisor of Mandatory Suspensions and Revocations, Mary Ann Flemming, responded on February 13, 2012, in part, as follows:

> In December 1999 Nova Scotia introduced legislation that required a permanent revocation of driving privileges for individuals convicted of four or more alcohol-related Criminal Code Convictions within a ten year time frame. Those with four or more such convictions cannot be entered into the Alcohol Ignition Interlock Program.
>
> A review of Mr. Ryan's driving history indicates the following convictions within a ten year time frame.
>
> Impaired Driving - January 28, 1998
>
> Refuse Breathalyzer - September 25, 2003
>
> Impaired Driving - June 2, 2005
>
> Operation of a Motor Vehicle While Disqualified - June 2, 2005.

[4] Following each of these convictions notices were provided by the Registry of Motor Vehicles indicating that Mr. Ryan's privilege of obtaining a driver's license was revoked. In particular, Mr. Ryan was advised on June 2, 2005, by letter from the Deputy Registrar, that as a result of his conviction for impaired driving on June 2, 2005, his license was revoked "for an indefinite period".

[5] On the same date, the Deputy Registrar also wrote to him in a separate letter and advised that because of his conviction for the operation of a motor vehicle while disqualified, his privilege of obtaining a driver's license was permanently revoked.

[6] In the June 2, 2005, letter, Ms. Rafuse stated:

> This letter is to inform you that your privilege of obtaining a driver's license is revoked permanently beginning JUNE 2, 2005. This action has been taken pursuant to Section 278 of the Motor Vehicle Act as a result of four or more revocations against your driver's license within the last 10 years.
>
> For your information the following is a record of convictions relating to the above revocation:
>
> - IMPAIRED DRIVING - JANUARY 28, 1998
> - REFUSE BREATHALYZER - SEPTEMBER 25, 2003
> - IMPAIRED DRIVING - JUNE 2, 2005
> - OPERATION OF A MOTOR VEHICLE WHILE DISQUALIFIED - JUNE 2, 2005
>
> You are advised that continuing to drive a motor vehicle will result in further penalties.

[7] Thus Mr. Ryan was aware shortly after June 2, 2005 that he was permanently barred due to the two convictions arising out of the June 2, 2005 incident. He took no action to challenge this decision until he initiated this application for judicial review on October 9, 2013.

[8] On August 29, 2013 Mr. Ryan's counsel wrote the Supervisor of Mandatory Suspensions and Revocations stating the applicant's desire to apply to the A.I.I.P., and provided a notice of intention under s. 67(18) of the *Motor Vehicle Act* to apply for the restoration of the applicant's driver's license.

[9] On September 16, 2013, the Deputy Registrar of Motor Vehicles replied to counsel's letter stating that since the applicant's driver's license was permanently revoked pursuant to s. 67(21A) of the *Motor Vehicle Act* in 2005, he did not meet the eligibility requirements for the A.I.I.P. The basis for the Deputy Registrar's determination was that his driving history revealed four revocations of his driver's license of which he had been notified in 2005.

[10] Mr. Ryan now asserts that the two convictions of June 2, 2005 should be treated as one revocation and, therefore, s. 67(21A) would not apply and his license would not be "permanently" revoked. Therefore, he submits he could apply for the restoration of his driver's license. Mr. Ryan asserts in his written submission of January 14, 2014:

> The legislation, properly interpreted and applied to Mr. Ryan's driving record, only mandates a calculation of 3 revocations: January 28, 1998; September 25, 2003; and June 2, 2005.
>
> Mr. Ryan should therefore, in our view, be considered as an "indefinite" revocation pursuant to s. 67(5)(ba) of the *Motor Vehicle Act*. That would make him eligible for acceptance into the Alcohol Ignition Interlock Program, and thus eligible to be re-licensed if he meets the other requirements of the program. If so permitted, Mr. Ryan would be required to participate in the program for a minimum of three years.
>
> It is the submission of the Applicant that the legislation should be interpreted properly to provide Mr. Ryan with that opportunity to be relicensed.

[11] Mr. Ryan filed his notice for judicial review on October 9, 2013. He seeks review on the following grounds:

i. That s. 67(21A) of the *Motor Vehicle Act* renders a person ineligible for the Alcohol Ignition Interlock Program whose driver's license has been revoked for a fourth time within 10 years, but not a person who has simply acquired four alcohol-related driving convictions within 10 years.

ii. Based on a reading of ss. 67(4), 67(5ba), 67(5A), 67(18), 67(22A), 274 and 278 of the *Motor Vehicle Act*, the Deputy Registrar should only count three revocations within 10 years against the applicant for the offences dated January 28, 1998, September 25, 2003, and June 2, 2005, when a single transaction grounded two convictions.

iii. Three revocations against the applicant, rather than four, would classify the applicant as an "indefinite revocation" under the *Act* and thus eligible for the restoration of driving privileges, and eligible for admission to the Alcohol Ignition Interlock Program.

iv. The applicant requests an order directing the Deputy Registrar to determine pursuant to the *Motor Vehicle Act* that the applicant's license has only been revoked three times within a 10 year period, rather than four times.

Issues:

i. Is there a reviewable decision?

ii. If so, what is the applicable standard of review?

iii. Does the decision of the Registrar meet the standard of review?

Issue 1 - Is there a reviewable decision?

[12] The respondent acknowledges that Ms. Rafuse made an administrative decision, but not a discretionary decision.

[13] The respondent submits that the Deputy Registrar's denial of Mr. Ryan's eligibility for the A.I.I. Program was merely an administrative declaration based upon Mr. Ryan's driver abstract. Therefore, it is submitted, her conclusion was made without discretion, in accordance with the *Motor Vehicle Act*, and cannot be reviewed by this court.

[14] The respondent submits that Civil Procedure Rule 7.01 defines a "decision" as being discretionary. Rule 7.01 states as follows:

> Interpretation in Rule 7
>
> 7.01 In this Rule,
>
> "decision", includes all of the following:
>
> (i) an action taken, or purportedly taken, under legislation,
>
> (ii) an omission to take action required, or purportedly required, by legislation,
>
> (iii) a failure to make a decision;
>
> "decision-making authority" includes anyone who makes, neglects to make, takes, or neglects to take a decision.

[15] The respondent submits that the legislation refers to an action, an admission or a failure, which implies that only discretionary decisions may form the basis of a judicial review. At para. 15 of its submission, the respondent sets out its position as follows:

> 15. The respondent submits that there is no "decision" by the Registrar for this Court to review because based upon the information contained in the Applicant's Driver's abstract the Deputy Registrar had no choice but to refuse the Applicant from entering into the Alcohol Interlock Ignition Program. There was no discretion or decision making authority granted to the Registrar in this matter. The Deputy Registrar was merely following the legislative provisions in the *Motor Vehicle Act* and Regulations to form an administrative conclusion. Therefore, the Respondent respectfully submits that there is no decision which can form the basis of a judicial review as outlined in Rule 7 of the Nova Scotia *Civil Procedure Rules.*

[16] In support of its position, the respondent refers to comments made by Justice Rosinski in *Antigonish/Guysborough Federation of Agriculture v. Antigonish County (Municipality),* 2012 NSSC 352, affirmed at 2013 NSCA 71, at para. 90:

> ...Asking the question who is the "decision maker" suggests that a "decision" has been made. The making of a decision necessarily involves an exercise of discretion. Not every action taken by a statutory body is a "decision." For

> example, if the Registrar of Motor Vehicles receives proper information that a particular driver has been found guilty of speeding under the *Motor Vehicle Act*, the Registrar will automatically take certain administrative measures -- possibly the addition of points to the person's driving record abstract, or issuing an automatic suspension of driving privileges, etc. In such situations the statutory body did not have a choice -- once it was presented with the required preconditions, it had to act in a specific manner.

[17] I am satisfied that no reviewable discretionary decision has been made in these proceedings. The Deputy Registrar was carrying out a purely administrative function based on the driving abstract before her. If Mr. Ryan did not have four revocations, he would be eligible for participation in the A.I.I. Program.

[18] In view of the relevant legislation and regulations, it is clear that the Registrar has no discretion once a driver's license has been permanently revoked. For example, s. 7 of the *Alcohol Ignition Interlock Program Regulations*, N.S. Reg 298/2008, states:

> Review of application by Registrar
>
> 7 (1) The Registrar may consider any applicant for participation in the Program who meets the eligibility requirements in Section 5 and who submits an application in accordance with Section 6.

[19] Section 5(1) of the Regulations provides as follows:

> Eligibility for Program
>
> 5 (1) A person described in Section 4 may apply to the Registrar to participate in the Program during their revocation period if they meet all of the following criteria:
>
> (b) they are not otherwise prohibited or otherwise disqualified from driving under another provision of the Act or a law of another jurisdiction...

[20] Because Mr. Ryan had four revocations he did not qualify for the A.I.I.P. under ss. 5(1)(b) and 7 of the Regulations. Therefore, the Registrar had no discretion but was required to determine that he was not qualified to participate in the A.I.I.P.

[21] I am satisfied that there has been no decision which can be reviewed. The Deputy Registrar carried out a purely administrative function based on Mr. Ryan's driving abstract. I would dismiss the application by Mr. Ryan on this basis.

[22] Further, I would also dismiss Mr. Ryan's challenge to the number of revocations shown on his driving abstract because he is now statute-barred from challenging the number of revocations.

[23] As noted earlier, Mr. Ryan was advised by letter on June 2, 2005 as to his permanent revocation of his driving privileges. I am satisfied that any challenge to the number of revocations shown in the abstract should have been made in 2005 when the applicant was notified of the permanent revocation of his license. Civil Procedure Rule 7.05(1) sets out the time frame for filing for judicial review:

> Judicial review application
>
> 7.05(1) A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
>
> (a) twenty-five days after the day the decision is communicated to the person;
>
> (b) six months after the day the decision is made.

[24] I also would dismiss this application because Mr. Ryan is out of time in bringing his application as he was notified of the permanent revocation of his privilege of obtaining a driver's license on June 2, 2005.

[25] However, in the event that I am wrong in my conclusion that there is no reviewable decision and that any challenge to the number of revocations on the applicant's driving abstract is statute-barred, I will go on to do a review of the "decision" of Ms. Rafuse that Mr. Ryan was not eligible for participation in the A.I.I. Program.

[26] The question, then, is the appropriate standard of review and whether the respondent has breached that standard.

Issue 2 - What is the applicable standard of review?

[27] The parties submit and, I agree, that the standard of review is correctness.

[28] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, Justices Bastarache and LeBel, in their majority reasons, described the standard of correctness as follows, at para. 50:

> ...When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer..

[29] The question is whether the Deputy Registrar erred in denying the applicant’s entry into the A.I.I.P.

Issue 3 - Does the Registrar’s decision meet the standard of review?

[30] A person cannot enter the A.I.I.P. if they have four revocations.

[31] The *Alcohol Ignition Interlock Program Regulations*, N.S. Reg. 298/2008, set out the conditions of the program. Paragraph 4(2)(b) only refers to persons participating in the program that have a second or third revocation. Therefore, I am satisfied that a person with a fourth revocation would not qualify for the program, as their license would be permanently revoked.

[32] Therefore, the issue of the number of revocations on the applicant’s driving record is important. Two revocations arose out of two convictions on June 2, 2005. The applicant says that these two convictions should result in one, not two revocations.

[33] The respondent says that the counting of separate convictions has been a long standing practice of the Registry, and argues at para. 35 of its submission:

> 35. The counting of separate convictions has been a long standing practice of the Registry as noted in the *Jenkins* decision. The issue as to whether the Applicant had three versus four revocations cannot be reviewed as that matter was not determined by the Deputy Registrar but was mandated by

> the *Motor Vehicle Act.* Mr Ryan was advised of his permanent revocation in 2005 by the Registry of Motor Vehicles, but he never requested a review of the decision at that time.

[34] Further at para. 36 the respondent submits:

> 36. The Respondent submits that the issue of the permanent revocation under 67(21A) is not the relevant issue before the court in this judicial review application. The Applicant cannot now question the correctness of his driver's license revocation by way of an interlock application. Accordingly, the interpretation of Section 278(2) is not an issue that can be reviewed. The only issue before the court is whether he was eligible to enter the A.I.I. Program based upon his driver's abstract status as permanently revoked.

[35] Section 5(1) the Regulations sets out the conditions for eligibility into the program. In particular, s. 5(1) states:

> 5(1) A person described in subsection 4 may apply to the Registrar to participate in the program during their revocation period if they meet all of the following criteria:
>
> (b) they are not otherwise prohibited or otherwise disqualified from driving under another provision of the *Act* or a law of another jurisdiction;

[36] I am satisfied that Mr. Ryan did not meet the eligibility requirements in s. 5(1)(b) of the *Alcohol Ignition Interlock Program Regulations* as his license was permanently revoked pursuant to s. 67(21A) and s. 278 of the *Motor Vehicle Act*.

[37] For example in *R. v. Jenkins* (1976), 19 N.S.R. (2d) 1, [1976] N.S.J. No. 506 (S.C.A.D.), the appellant appealed convictions on two charges, one of unlawfully refusing to comply with a demand for a breathalyzer test, and the other of driving a motor vehicle while her ability to drive was impaired by alcohol or a drug. The Nova Scotia Court of Appeal held that there was no error in law in convicting the accused on both counts. The same overall set of circumstances existed for each. Chief Justice MacKeigan held as follows at paras. 4 and 6:

> 4 Despite that partial similarity, we are impressed that the essential elements of the charge under s.235(2) are the demand and the refusal by the accused to take

> the breathalyzer test. That refusal is a vital and important element which does not exist on a charge under s.234, and which only occurs in a s.235 case after all impaired driving has ceased. This distinguishes the s.235 charge and makes the elements under it not substantially the same as those on a charge under s.234.
>
> ...
>
> 6 We conclude that the learned magistrate did not err in convicting on both charges in this case. We reach this conclusion with regret since in the present case, the provincial Motor Vehicle Act will require the Registrar of Motor Vehicles to suspend the appellant's driver's licence for two years, whereas, if she had been convicted of only one of the two offences charged he would have suspended her licence for only six months. That result, smacking of double punishment for the same event, derives from the inflexibility of the automatic suspension provisions of that Act, and cannot be permitted to affect our decision at law.

[38] I am satisfied the Registrar made no error in concluding that Mr. Ryan did not meet the eligibility criteria for the program.

[39] I am satisfied that the two revocations properly arose out of the two convictions on June 2, 2005. I agree with the respondent that the Legislature has mandated by s. 278 of the *Motor Vehicle Act* that the most serious offences, which include these two offences on June 2, 2005 should result in a revocation of a driver’s license and the privilege of obtaining a driver’s license.

[40] The application is dismissed.

[41] Costs to the respondent in the amount of $750.00.

Pickup, J.