

REASONS FOR MOTION DECISION OF THE TORONTO LICENSING TRIBUNAL

Date of Hearing: October 25, 2018

Panel: Gary Yee, Hearing Panel Chair; Anu Bakshi, Victoria Romero, Panel Members

Re: 2405490 Ontario Ltd., o/a Minx Spa (Report No. 7028)
Elliott Maurice Stone, President
Holder of Body Rub Parlour Owner/Operator's Licence No. B38-4418734
And
2623304 Ontario Inc., o/a Minx Spa (Report No. 7034)
Christopher Kavchak, Director
Applicant for a Body Rub Parlour Owner/Operators Licence
(Application No. B826497)

Counsel for Municipal Licensing and Standards: David Gourlay

Counsel for Applicant 2405490 Ontario Ltd.: James Renihan

Counsel for Applicant 2623304 Ontario Inc.: Noel Gerry

A. INTRODUCTION

- [1] The Tribunal conducted a motion hearing on October 25, 2018, to hear both the Applicants' motion about which of these two hearings should go first. November 7 and 8, 2018, had been scheduled for the hearing of Municipal Licensing and Standards (MLS) Report No. 7028.
- [2] The Applicant, 2405490 Ontario Ltd. (the "Vendor"), is the Holder of a Body Rub Parlour Owner/Operator Licence, operating as Minx Spa. The Vendor is selling this business to the Purchaser, 2623304 Ontario Inc. (the "Purchaser"). There is an Agreement of Sale and Purchase dated April 17, 2018. Both the Vendor and Purchaser are Applicants in this motion.
- [3] There are two related MLS Reports that are before the Tribunal. The first is MLS Report 7028, dated May 3, 2018, which MLS relies upon to revoke, suspend or place conditions on the Vendor's licence ("Conduct case"). The second is MLS Report 7034, which concerns the sale of Minx Spa – that is, the possible cancellation of the Vendor's licence and the possible issuance of a new licence to the Purchaser ("Sale case").
- [4] The Vendor was before the Tribunal on October 27, 2016, when its licence was renewed under a proposed resolution on consent. This involved a suspension for 45 days, with conditions that followed during a three-year probation period. Since that time, there have been some by-law convictions and many new charges. There are currently 58 pending charges. The charges involve matters such as unlicensed attendants, cameras on the premises, improper advertising, and opening after hours.

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- [5] The procedural history of these two related cases may be found in the Motion Decision dated September 11, 2018. This Motion Decision dealt only with the Conduct case (MLS Report No. 7028), adjourning it to November 7 and 8, 2018. The Tribunal noted that further scheduling and case management arrangements may be needed to coordinate the Conduct case and the Sale case (MLS Report No. 7034).
- [6] Both Applicants made a motion to have the Sale case heard first. MLS opposed this motion.
- [7] The Tribunal reserved its decision at the end of the motion hearing on October 25, 2018. The Tribunal notified the parties on Monday, October 29, 2018, of the Order that is set out at the end of this Decision – namely, that the Conduct case would be heard first. These are the written reasons for this Order.

B. ANALYSIS

- [8] The Applicants' main submissions may be summarized as follows:
 - (a) the Sale case hearing would be simpler than the Conduct case hearing;
 - (b) if the Purchaser succeeds in the Sale case, then the Conduct case would not need to be heard; and
 - (c) If the Conduct case is heard first and the Vendor's licence is revoked, the Purchaser would lose its right to be heard on the Sale case, according to MLS's position (which the Applicants disagree with).
- [9] In addition to opposing the Applicants' submissions, MLS's main submission was that there is a public interest in having the Conduct case heard and decided. MLS Counsel submitted that the public's confidence in the licensing regime would be affected if the Conduct case hearing might be rendered moot in the event that the Vendor's licence is automatically terminated by the sale being approved in the Sale case.
 - (a) Effect of revocation of Vendor's licence
- [10] Counsel for the Purchaser disagreed with MLS Counsel that revoking the licence would make the Sale case moot. Mr. Gerry said that any revocation would lead to a licence slot becoming available, and therefore, the Purchaser should be first in line to get a hearing about its application. This was based on his interpretation of s. 340, which MLS Counsel disagreed with. The Tribunal does not need to decide this issue for the purposes of this Motion Hearing.
- [11] Counsel for the Vendor submits that the public interest would be met by simply terminating the Vendor's licence with an approved sale, since a sale would mean that the Vendor would no longer be operating the body rub parlour. Mr. Renihan stated that going beyond this to stop the Vendor from selling its business would be pure punishment, and not needed to meet the public interest in having a business that was complying with the law. He noted that the Vendor would still be liable for the possible outcome from the outstanding by-law charges.

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- [12] However, MLS Counsel suggested that there may be cases where the public interest in ensuring compliance with the law requires that the licence be revoked even if it means that the licence holder can no longer sell its body rub business.
- [13] The Tribunal notes that these will be arguments about the penalty, and this would arise only if the Tribunal finds that there are reasonable grounds to believe that the Applicant has not or will not carry on its trade, business or occupation in accordance with the law, and with integrity and honesty (see s. 4(C) of Chapter 545 of the Municipal Code). In addition, there are other possible penalties such as suspension or placing conditions on a licence.
- [14] If the Tribunal is in a situation where it must consider if revocation is an appropriate penalty, the Tribunal will also presumably consider the severity of the impact of that penalty on the Vendor and Purchaser – namely, if it may mean that a sale is voided – and balance that with the public interest and any other appropriate considerations when making an order as to penalty.
- [15] In view of this analysis of the possible need to assess revocation as a possible penalty, the Tribunal finds that it would be difficult to go ahead with the Sale case hearing first and possibly make a decision to approve the sale and issue the licence to the Purchaser, if a possible penalty in the Conduct case could be that the Vendor's licence should be revoked and consequently, the sale might be voided (keeping in mind that the Tribunal is not deciding at this time if a revocation would make the Sale case moot).

(b) Which case is simpler to hear?

- [16] On the issue of which case may be simpler to hear, Counsel for the Vendor suggested that any evidence about the Vendor's conduct would not be relevant in the Sale case. But MLS Counsel stated that he would seek to introduce evidence about the Vendor's conduct in the Sale case. Mr. Gourlay said this will include MLS Report No. 7028, and the findings of the Tribunal in the Conduct case, if the Tribunal decided that first.
- [17] The Tribunal notes that the Sale case must involve the Tribunal's consideration of the public interest. Section 340(D) of Chapter 545 of the Municipal Code says that the Tribunal may refuse to issue a licence to the Purchaser if the Tribunal "is of the opinion that it is not in the public interest." Counsel for MLS argues that the Tribunal must consider the Vendor's non-compliance when deciding if the sale is in the public interest.
- [18] For the purposes of this Motion, without having to make a final decision on this issue, the Tribunal finds that the broad wording in s. 340(D) suggests that MLS has at least a reasonable argument that the conduct of the Vendor could be relevant to assessing the public interest in deciding whether to issue a licence to the Purchaser.
- [19] If the Sale case were to be heard first, it is possible that MLS will argue, as noted above, that it is in the public interest that the Vendor's alleged non-compliance is so serious that its licence should be revoked even if this may lead to the sale being voided.

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[20] Therefore, it is not obvious enough to the Tribunal that the Sale case would be significantly simpler or shorter to be heard without having first heard the Conduct case.

(c) Purchaser's interest in the Conduct case

[21] The Tribunal heard various competing interpretations about the possible effect on the Sale case if the Conduct case goes first and results in the revocation of the licence. The Counsel were not fully arguing this issue and the Tribunal was not in a position to decide this issue at the Motion Hearing.

[22] If the Tribunal hears the Conduct case first, and if it gets to a point where the possible outcome may be revocation of the Vendor's licence, then the Tribunal can address the Purchaser's interest in the effect of a revocation by permitting the Purchaser to appear at the Conduct case hearing and make submissions about this issue, including the possibility of the Tribunal going ahead with the Sale case hearing before making a final decision on the Conduct case.

C. CONCLUSION

[23] The Tribunal notes that these two cases have many interrelated issues and impacts. The Tribunal respects the right of the Applicants to not consent to having their two cases combined or heard at the same time – see section 9.1 of the Statutory Powers Procedure Act:

Proceedings involving similar questions

9.1 (1) If two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may,

- (a) combine the proceedings or any part of them, with the consent of the parties;
- (b) hear the proceedings at the same time, with the consent of the parties;
- (c) hear the proceedings one immediately after the other; or
- (d) stay one or more of the proceedings until after the determination of another one of them.

[24] For the reasons set out above, the Tribunal will proceed to hear the Conduct case first, on November 7 and 8, 2018. As a public hearing, Counsel for the Purchaser may be present even though the Purchaser is not a party in this Conduct case. But the Tribunal will consider any requests from Mr. Gerry to participate as the need arises.

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D. DECISION

[25] The Tribunal ordered the following in a written communication to the parties on October 29, 2018:

1. The Conduct case will be heard first, on Wednesday and Thursday, November 7 and 8, 2018.
2. At the end of hearing the Conduct case, the Tribunal will consider whether to hear the Sales case before making a decision on the Conduct case. In addition to the two parties, Counsel for the Purchaser will also have an opportunity to make submissions about this issue.
3. Any further participation by Counsel for the Purchaser in other parts of the hearing of the Conduct case may be decided by the Tribunal if the need arises during the hearing.

Gary Yee, Hearing Panel Chair

Anu Bakshi, Panel Member, concurring

Victoria Romero, Panel Member, concurring

Reference: Minute No. 195 & 196/18

Date Signed: November 2, 2018