

## REASONS FOR DECISION OF THE TORONTO LICENSING TRIBUNAL

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**Dates of**

**Hearing:** November 7 and 8, and December 19, 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

**Counsel for Municipal Licensing and Standards:** David Gourlay

**Counsel for Applicant 2405490 Ontario Ltd.:** James Renihan

**Counsel for Intervener 2623304 Ontario Inc.:** Noel Gerry

### A. INTRODUCTION

- [1] This is a case about a body-rub parlour, Minx Spa, with 58 charges and 23 convictions for violating City by-laws, in addition to a 45-day licence suspension in a Tribunal-approved joint resolution in October 2016.
- [2] The issue in this case is the penalty that the Tribunal should impose on the Applicant, 2405490 Ontario Ltd. (the "Applicant"). Municipal Licensing & Standards (MLS) asks for revocation of the licence.
- [3] The Applicant has sold its business to a purchaser, subject to approval by the Tribunal, in the related case of MLS Report No. 7034, involving 2623304 Ontario Inc. (the "Purchaser"). The outcome of this case (MLS Report No. 7028) may affect the pending sale of Minx Spa.
- [4] This case raises major issues about the factors and principles that the Tribunal should use to decide the penalty when there is a serious pattern of non-compliance. For body-rub parlour licences, this appears to be the first case in which Municipal Licensing & Standards (MLS) has asked for a revocation. There are many other cases where it appears that MLS and the licence-holder agreed to resolve an enforcement case by asking the Tribunal to approve the sale of the body-rub parlour to new owners. These cases may have included conditions for the new owner, such as prohibiting certain persons from being involved in the body-rub parlour operations, or requiring payment of any outstanding or pending fines for by-law convictions of the previous owner.

- [5] The Tribunal finds that the Applicant and its owner, Elliott Stone, have shown blatant disregard for their obligation to comply with the by-laws that apply to the operation of body-rub parlours. Licensees cannot expect to be allowed to continue operating if they show this kind of widespread, persistent and deliberate non-compliance with the law. In these kinds of serious cases, especially where the licensed business is very profitable, simply prohibiting further non-compliant operation is not enough. This case requires a penalty that imposes serious enough financial consequences to be a general deterrence for non-compliance and to uphold public confidence in the regulatory system. At the same time, the impact of the penalty on the Applicant must not be so extreme that it goes beyond what is required by deterrence and it becomes more punitive in nature.
- [6] For the reasons set out below, the Tribunal is ordering that the licence be revoked, which will be effective only after a suspension of 180 days. The business may still be sold during this time, but the full period of suspension must be fulfilled before any potential transfer of the licence. This penalty will effectively shut down Minx Spa, with no new body-rub parlour being permitted to open in its place for at least 180 days.

### Background

- [7] The Applicant is the Holder of a Body-Rub Parlour Owner/Operator Licence, operating as Minx Spa. The owner, sole officer and president of the Applicant company is Elliott Stone.
- [8] The Applicant bought the body-rub parlour business named Blue Pearl Spa at this location (3598 Dufferin Street). The Tribunal approved the cancellation of the Blue Pearl Spa licence, and the issuance of the new licence for this Applicant. Minx Spa started operating on June 19, 2014.
- [9] The Applicant is now trying to sell this business to the Purchaser. There is an Agreement of Sale and Purchase dated April 17, 2018.
- [10] There are two related MLS Reports that are before the Tribunal. The first is MLS Report 7028, dated May 3, 2018, in which MLS seeks to revoke the Applicant's licence. This is the current case (also known as the "Conduct case") that was heard by the Tribunal on November 7 and 8, and December 19, 2018.
- [11] The second case is MLS Report 7034, which concerns the sale of Minx Spa – that is, the possible cancellation of the Applicant's licence and the possible issuance of a new licence to the Purchaser ("Sale case"). Under section 361 of Chapter 545 of the Toronto Municipal Code, no more than 25 body-rub parlour owner licences are allowed. All 25 licences have been granted at this time.
- [12] After its first two years of operations, MLS sought to deny renewal of the Applicant's licence because of numerous by-law convictions and charges. This case came before the Tribunal on October 27, 2016, when the licence was

renewed under a proposed resolution on consent of the Applicant and MLS. This involved a suspension for 45 days, with conditions and a three-year probation period.

- [13] Since that time, there have been 58 new by-law charges. These charges involve matters such as unlicensed attendants, locked access door, cameras on the premises, improper advertising, opening after hours, table mats not in good repair, liquor, failing to keep records, services not on the list filed with MLS, etc.
- [14] The Sale case has not yet been heard, although both the Applicant and the Purchaser have been involved with MLS in several motions and case management matters, before this same Tribunal hearing panel.
- [15] The Applicant (Vendor) and the Purchaser made a motion to have the Sale case heard first. MLS opposed this motion. The two Applicants did not agree to have their cases combined or heard together. After the motion hearing on October 25, 2018, the Tribunal issued the following decision on October 29, 2018 (with reasons that followed shortly afterward):
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.

## **B. FINDING – GROUNDS FOR DENIAL OF LICENCE**

- [16] The Tribunal finds that the grounds for denial to renew the Applicant's body-rub parlour licence have been met, in accordance with section 4(C) of Chapter 545 of the Toronto Municipal Code. The relevant sections are as follows, with the main provision in section 4(C)(1)(c) appearing to be the most applicable:
- (c) The applicant is a corporation and its conduct or the conduct of its officers, directors, employees or agents affords reasonable grounds for belief that its trade, business or occupation has not been, or will not be, carried on in accordance with law and with integrity and honesty; or
  - (d) There are reasonable grounds for belief that the premises, accommodation, equipment or facilities in respect of which the licence is required have not complied, or will not comply, with the provisions of this chapter or any other law; or

- (e) The conduct of the applicant or other circumstances afford reasonable grounds for belief that the carrying on of the business by the applicant has infringed, or would infringe, the rights of other members of the public, or has endangered, or would endanger, the health or safety of other members of the public.

[17] In his final submissions, counsel for the Applicant stated that he did not contest that there are grounds for denying the licence, and that the focus of this case is on the appropriate penalty. At the same time, due to the pending by-law charges before the court, he was not making any admission about those possible offences.

[18] Almost all of the evidence presented at this hearing through MLS Report 7028 and the witnesses was relevant to both this finding issue and the main issue of penalty.

## C. PENALTY

### LAW

[19] The following sections in Chapter 545 of the Municipal Code apply to the authority of the Tribunal to impose a penalty on the Applicant. Section 3(B)(3) requires the Tribunal to:

- (a) Uphold the spirit and intent of the Municipal Code;
- ...
- (c) Have regard for the need to balance the protection of the public interest with the need for licensees to make a livelihood;
- ...

[20] Sections 6(C) and (D) set out the penalty decisions that the Tribunal can make after finding that there are grounds for denial of the licence. The most relevant provisions are:

C. The Toronto Licensing Tribunal may, for any of the reasons set out in §545-4C of this chapter:

- (1) Suspend or revoke any licence issued under this chapter;
- (2) Impose such conditions upon a licence as it considers appropriate and as are authorized by law;
- ...

D. Conditions on licences.

- (1) Despite Subsection C of this section, the Toronto Licensing Tribunal may, having regard to the conduct of the business by the licensee, suspend the passing of penalty and direct that the licence continue on such conditions as the Toronto Licensing Tribunal considers just and as are authorized by law.
- ...

## ISSUES

[21] In deciding the appropriate penalty, the following major issues are raised in this case:

- (a) How should the Tribunal balance the protection of the public interest with the need for licensee to make a livelihood?
- (b) In addition to this balancing of public and private interests, what are the other factors and objectives to consider when deciding the appropriate penalty? This may include the seriousness of the non-compliance, the enforcement history, public confidence in the regulatory system, specific and general deterrence, likelihood of future compliance, fairness, proportionality, and so forth.
- (c) Should the Tribunal suspend the Applicant's licence, with possible conditions, or should the Tribunal revoke the licence?
- (d) Even if the Tribunal revokes or suspends the licence, should the Tribunal exercise its discretion to stay the carrying out of that penalty and continue the licence with certain conditions?

[22] In considering these issues, the Tribunal finds that the facts of this case support two outcomes. First, the Applicant, as represented through Mr. Stone, should not be permitted to continue operating a body-rub parlour – this meets the objective of deterrence (both specific and general) and not allowing future non-compliant operations. Second, there should be serious consequences for the serious non-compliance that has occurred – this also meets the objective of deterrence, to support compliance with by-laws and Tribunal orders, as well as to uphold public confidence in the regulatory system.

[23] The Tribunal finds that these two outcomes can be met by revoking the licence, with a delayed effective date that will allow the Applicant to potentially sell the business, but only after a 180-day suspension of its operations before any new owner is licensed.

## EVIDENCE AND ANALYSIS

[24] The evidence presented by MLS consisted of over 1,200 pages in MLS Report 7028 (Exhibit 1), and testimony from seven witnesses. In addition to the Supervisor, Andrea DiMatteo, who introduced the MLS Report, there were six Municipal Standards Officers (MSOs), who testified about their site inspections at Minx Spa and the by-law charges laid as a result of those visits.

[25] There were a few minor disputes over some of the documentary and oral evidence, but nothing that affected the credibility of the MSO witnesses or the relevant findings of the Tribunal. Mr. Stone was evasive in some of his answers about non-

compliance (for example, regarding his late hours of operation), but also very forthright in other parts. In the end, very little in this case turns on credibility. It is clear from the evidence that there was a consistent pattern of deliberate non-compliance with many by-law provisions and licence conditions almost from the beginning of operations in June 2014.

[26] In the updated MLS Report, there is a chart of charges and convictions against the Applicant, at pages 1074 to 1085. There are 81 items in this chart, starting from October 17, 2014 to June 16, 2018. As noted by counsel for MLS, it almost does not make any difference how many charges or convictions there are because the by-law violations are ongoing.

[27] There are 23 convictions in this chart, covering by-law offences occurring between October 17, 2014 and June 18, 2016. These convictions resulted in a \$500 fine for each conviction, with three resulting in a \$615 fine. The offences included:

- open after hours
- permit liquor on premises
- hire unlicensed person
- locked access door
- no owner/operator in attendance

[28] There are 58 outstanding by-law charges that have not been heard by the courts. These cover alleged offences from September 17, 2017 to June 16, 2018. The alleged offences include those types in the list above, as well as the following:

- fail to provide access to all areas
- cameras or recording devices
- use unauthorized advertising
- table mat not in good repair
- unauthorized rates
- permit services to be charged - not on list
- fail to keep records
- fail to give itemized bill.

[29] The Tribunal notes that its role is not to make findings of guilt or innocence regarding these by-law offences. That is for the court to decide, using the criminal standard of proof beyond a reasonable doubt. The Tribunal makes findings of fact based on a balance of probabilities, in the context of regulating body-rub parlours. In the context of this case, the Tribunal only needs to make whatever findings are relevant for the purposes of assessing an appropriate non-criminal penalty.

[30] Specifically, the evidence shows conduct of the Applicant not meeting the licensing requirements in various sections of Article XXXI of the Municipal Code. One category concerns hours of operation, cameras, locked doors and unauthorized advertising. These are four areas where Mr. Stone freely admitted his non-compliance.

[31] Furthermore, when the Applicant's counsel asked Mr. Stone what he would do if his licence was not revoked, he stated that he cannot run this business safely with unlocked doors and no security cameras, and he cannot run it profitably without advertising, opening after 9:00 p.m., or having cameras to help against theft. It is the non-compliance in these four areas, and Mr. Stone's frank statement that he could not or would not comply in these areas, that most strongly support the serious penalty of revocation.

(a) Hours of Operation

[32] Under section 355(A) of Chapter 545 of the Municipal Code, body-rub parlours are not permitted to operate outside of 9:00 a.m. to 9:00 p.m. on Mondays to Saturdays, and 12:00 p.m. to 5:00 p.m. on Sundays and holidays. The Minx Spa website refers to hours as late as 5:00 a.m. Mr. Stone testified that Minx Spa is open until 4:00 a.m. every day.

[33] Mr. Stone also admitted to opening after midnight starting just a few months after opening up in 2014, even though he had signed the Minx Spa business plan that referenced the shorter hours from the Municipal Code (see page 19 of MLS Report).

[34] Mr. Stone tried to justify these hours by saying that he had to compete and stay profitable because not one of the 25 body-rub parlours in Toronto closes before 2:00 a.m., and that some places do not close until 6 a.m.

[35] In his closing submissions, counsel for the Applicant was careful to point out that he is not suggesting that the Applicant is somehow entitled to violate the by-laws because every other business is doing so, but he submits that this is relevant to assessing a fair and proportionate penalty.

(b) Locked Doors

[36] Under section 355(D) of Chapter 545, body-rub parlours must ensure that the main door providing entry by the public is kept unlocked. Minx Spa's main entrance has two doors, with the exterior one being unlocked, but the inner door being locked. You have to press a buzzer to get the staff inside to unlock the second door and gain entry.

[37] Mr. Stone testified that he needed to keep the door locked for safety reasons. Soon after opening, he and his staff were robbed by four men who came in with knives. After that, he installed the locks on the second entry door. He said that he knew that a majority of body-rub parlours had locked doors.

(c) Cameras

[38] Under section 358 of Chapter 545, body-rub parlours are not permitted to use any cameras. There are 15 security cameras inside and outside the premises, along

with a clearly visible monitor showing the images on the screen. No cameras are in the rooms used for the services. Mr. Stone said that he had thought in the beginning that the only prohibition was against any cameras in the treatment rooms. The cameras had been there when he bought the business.

[39] Mr. Stone testified that the cameras were for security reasons, including protection from internal theft, since there is a lot of cash in this business. He said that every body-rub parlour he has seen in Mississauga, Brampton and Toronto has cameras. He also said he had previously owned two body-rub parlours in Brampton, where by-laws allowed for security cameras, locked doors and 24 hours of operations.

[40] Mr. Stone admitted that he removed the cameras for an inspection for the current sale of the business. He had been told that unplugging the recording machine was not good enough. But then, within days after that inspection, he put the cameras back up and they remain up at this time.

(d) Unauthorized Advertising

[41] Section 349 of Chapter 545 prohibits any signs or advertising unless it is specifically permitted by this section. The section does not appear to permit any online (Internet) advertising. The MLS Report has clear evidence of a Minx Spa website, as well as some advertising in other websites.

[42] Similar to the operating hours issue, Mr. Stone testified that he has to do this kind of advertising to stay profitable, because “every other body-rub parlour” has websites. He stated that he recently delegated all advertising to his managers, and he does not always get to see the content. But he had to let a manager go because she did online advertising that was too graphic and had too much detail.

(e) Other Non-Compliance with By-laws

[43] The Tribunal also received a great deal of the evidence about many other areas of non-compliance. These include infractions in areas where Mr. Stone said he has tried to improve on, such as using unlicensed body-rubbers, and not having beds in good repair.

[44] This category of non-compliance also includes infractions that are partly disputed in terms of the interpretation of the evidence, or of the by-law requirements. These include areas such as having liquor on the premises, not having an authorized operator onsite at all times, failing to keep proper records, permitting rates or services that are not authorized by the list filed with MLS, failing to keep records, and failing to give an itemized receipt.

[45] Some of these infractions or allegations are minor. For example, it is clear that nothing in this penalty decision turns on whether the liquor bottles found onsite in a few of the inspections were evidence of by-law violations, or if there were other explanations such as those offered by Mr. Stone in his testimony. These



explanations included his statement that these must have been empty bottles brought in from outside, and that there was one time that he came downstairs into the body-rub parlour from his apartment upstairs while holding a beer.

- [46] Other infractions are more major, such as using unlicensed body-rubbers. Mr. Stone tried to explain away some of the times when this happened. He referred to his managers letting unlicensed body-rubbers work there, or a body-rubber with a licence for another body-rub parlour and not yet changing the licence to refer to Minx Spa, or letting someone work who was in the process of getting their criminal record check and their body-rubber licence. Mr. Stone also said that he was absent for more than usual in the first part of 2018 because his father in Florida was having many health problems.
- [47] None of these explanations helped Mr. Stone's case. In the end, he is responsible, of course, for his staff. He said he would try to avoid more problems with unlicensed body-rubbers. This is at least better in comparison to what he said about the by-law provisions about hours, doors, cameras and advertising – areas in which he essentially said that he would or could not comply. However, the Tribunal did not hear about any credible plan for ensuring no further use of unlicensed body-rubbers.
- [48] Another concern is that Minx Spa, as indicated by Mr. Stone, allows customers to pay body-rubbers directly for services that are not in the list filed with MLS. That list only includes rates for use of a room. The posted list at Minx Spa includes these room fees but also a list of specific services that appear to be sexual in nature, such as "nude massage", "body slide" or "VIP." These services also had prices listed.
- [49] Mr. Stone's testimony was that the listed prices for these additional services are only guidelines for the customer. A customer pays that room fee to Minx Spa, but then the customer pays the body-rubber directly for additional services. These additional transactions are negotiated between those two persons, and that money does not go through Minx Spa. Mr. Stone said that these transactions would be in cash, as far as he knows.
- [50] Mr. Stone took the position that he only had to file the room rates with MLS, not these additional services. Counsel for MLS argued that this was a violation of the Municipal Code. A glance at section 350 of Chapter 545 would appear to support MLS's position. This section requires a body-rub parlour to file with MLS a "copy of the list of all services offered, performed or solicited in, upon or at the said body-rub parlour, and of the respective fees charged for such services, ..." It is difficult to see how this could be said to cover only the price for using a room, and not the actual services performed by the body-rubber in that room.
- [51] The Tribunal notes that Chapter 545 of the Toronto Municipal Code defines a "body-rub" as: "Includes the kneading, manipulating, rubbing, massaging, touching, or stimulating, by any means, of a person's body or part thereof but does not

include medical or therapeutic treatment given by a person otherwise duly qualified, licensed or registered so to do under the laws of the Province of Ontario.”

[52] However, as noted earlier, the justification for the penalty ordered by the Tribunal in this case does not require detailed findings about the nature or extent of the infractions in this category. There is already enough clear evidence of significant past and future non-compliance with the by-law provisions about hours, doors, cameras and advertising. Another relevant area is the enforcement history of this Applicant, including non-compliance with Tribunal orders.

(f) Non-Compliance with Tribunal Orders

[53] In addition to the extensive history of non-compliance with the by-laws, the Applicant also has not complied with the two Tribunal orders, in 2014 and 2016. The first Tribunal order on June 19, 2014 (at page 199 of the MLS Report) approved a joint proposed resolution to issue a body-rub parlour licence to the Applicant when it bought the business from Blue Pearl Spa. This previous operator was facing MLS enforcement action due to serious problems involving many by-law offences and some criminal offences that were related to fraud and prostitution.

[54] This Tribunal approved the sale to the Applicant with conditions that included prohibiting certain persons in the previous business from continuing in any role with the new business (Minx Spa). There was also a two-year probation period for Minx Spa, with certain reporting requirements.

[55] The other Tribunal order was on October 27, 2016. This was also a joint proposed resolution between the Applicant and MLS, following an MLS Report outlining numerous by-law charges and convictions. The Tribunal renewed Minx Spa's licence with a three-year probation period that included certain conditions. These conditions included the standard reporting obligations, but also an immediate suspension for 45 days. The Tribunal agrees with the point made by MLS counsel that this is one of the Tribunal's most significant penalties short of a revocation.

[56] The evidence shows that an MSO attended on December 13, 2016, which was the second day after Minx Spa reopened from its suspension. There was continued non-compliance with the hours, doors, cameras and website, as well as other by-law requirements. This pattern of non-compliance has continued since that time.

[57] There was also evidence about non-compliance with the condition in the Tribunal order to report any new charges and convictions to MLS within three business days. This evidence was presented in notations made by MLS staff in the chart of charges and convictions at pages 1074 to 1085 of the MLS Report. This chart of 81 items shows MLS notations saying that charges were not reported – there were 45 instances during several time periods since 2016. As for the 23 convictions, there was only one notation of a failure to report to MLS.

- [58] Mr. Stone testified that he relied upon his lawyer to take care of reporting the charges or convictions to MLS. He said that there may have been miscommunication between himself and his staff or lawyer in the earlier days about this task. He also said that there were some cases when he may not have received the by-law offence tickets or he received them late in the mail. He testified that any tickets he received himself or from his staff, he would give it to his lawyer.
- [59] Counsel for the Applicant submitted that these notations by MLS were not reliable evidence of breaching the condition to report. However, the Tribunal notes that that it is difficult to prove the absence of something – that is, that the Applicant has not reported a charge or conviction to MLS. In the usual course, it would appear impractical and unnecessary for MLS to present one or more witnesses to testify about the lack of a report or a late report for each item in the chart. Hearsay evidence can be accepted by tribunals.
- [60] At the same time, where this kind of hearsay evidence may be challenged, MLS needs to be ready to provide more information about how this information was gathered by MLS staff. Furthermore, the MLS notations must be weighed with the Applicant's testimony about how he did or tried to meet his reporting obligations.
- [61] When considering all of the documentary evidence and Mr. Stone's testimony, the Tribunal finds that it is likely that at least some of these 45 notations were actual instances where there was no reporting of charges to MLS. Mr. Stone's attempts to explain why some charges might not have been reported suggest that he had no reliable system in place to ensure that this reporting condition would be met. It is not enough to rely on your staff or lawyer without checking at least occasionally to see if the reporting is being done fully and on time.
- [62] In the end, it appears that the failure to comply with this reporting condition is not deliberate or unfixable enough to be much of a factor in the Tribunal's decision to impose a serious penalty in this case. The more concerning issue regarding the compliance with Tribunal orders is the continuing non-compliance with the by-laws while on probation and after a 45-day suspension of its licence. These Tribunal orders provided warning or notice to the Applicant that further non-compliance would surely lead to more serious penalties, which may be a longer suspension or perhaps even revocation.

(g) Need to Make a Livelihood

- [63] The Tribunal is directed by section 3(B)(3)(c) of Chapter 545 of the Municipal Code to "have regard for the need to balance the protection of the public interest with the need for licensees to make a livelihood." This recognizes that the licensing decisions can have serious impacts on the lives of the licensees who appear before us. At the same time, the public interest requires significant weight to be placed on the effective regulation of these businesses and occupations. Effective regulation promotes the public interest, which includes (but is not limited to) health and safety.

- [64] Strictly speaking, the licensee in this case is the Applicant company (2405490 Ontario Ltd.), but the Tribunal is satisfied in this case to follow the approach of both counsel and consider the circumstances of Mr. Stone, who is the sole owner of this corporation.
- [65] Mr. Stone testified that he has assets that include the building (although it is heavily mortgaged) and another co-owned property, as well as his annual profit from Minx Spa in the area of \$200,000. He is relatively young and can find other employment or start another business. He has no dependants. The Tribunal has no concerns along the lines of its more common cases regarding persons in licensed occupations that are on the much lower end of the pay scale. In cases involving taxi drivers, for example, the licensee may not have other viable options to make a living, or the loss of their work income may seriously affect them or their family. It would be these kinds of circumstances where the Tribunal may make a decision to not revoke or suspend a licence, and try to impose conditions that would still protect the public interest.
- [66] In this case, there is little in Mr. Stone's personal circumstances that would justify using section 3(B)(3)(c) to give any weight to any need he may have to continue making a living as a body-rub parlour owner. But the evidence about Mr. Stone's personal circumstances is still very relevant to assessing what an appropriate penalty would be. For example, the impact of a suspension or revocation on the Applicant will differ from licensee to licensee, and this must be considered by the Tribunal. This is consistent with the principle of proportionality, as presented by counsel for the Applicant.

(h) Factors in Assessing Penalty

- [67] When assessing an appropriate penalty in a regulatory scheme, there are many factors that are to be considered. Some of these factors may appear similar to the principles of sentencing in the criminal courts – for example, specific and general deterrence. But the Tribunal is of course not the same as a criminal court. The Tribunal's role is not to "punish" the non-compliant licensee.
- [68] Generally, regulatory systems balance the individual right of licensees to conduct their business or occupation with the City's right to regulate that business or occupation in the public interest. The nature of this balance is shown in the wording of the Municipal Code, which is the law that the Tribunal must apply.
- [69] Section 3(B)(3)(c) has already been discussed above, regarding the need to make a livelihood.
- [70] Section 4(C)(1) is very informative. It states that an applicant is "entitled to be issued the licence or renewal, except for" the grounds for denial listed in that section. These refer to reasonable grounds for belief in relation to matters such as carrying on the business or occupation:

- in accordance with the law
- with integrity
- with honesty
- not breaching Chapter 545 of the Municipal Code, or any other law
- not infringing the rights of members of the public
- not endangering the health or safety of members of the public.

- [71] As with most regulatory schemes, the presumption is that the applicant has a right to a licence. The list above shows the nature of the reasons when this right can be taken away. This guides the Tribunal, not only in deciding if there is non-compliance, but also in deciding what objectives or outcomes are important when deciding on an appropriate penalty. It is obvious that there is a very important concern over non-compliance with the law.
- [72] Promoting compliance with the law is basically future-looking. Past violations are relevant because past conduct is usually a reliable indicator of future conduct. Generally, in assessing the appropriate penalty, which may include conditions, the Tribunal should consider the likelihood of the Applicant's future non-compliance. Will the licensee carry on its business in accordance with the law?
- [73] Future compliance can be promoted by both specific and general deterrence – that is, what will prevent or discourage further violations by this licensee, and what will prevent or discourage further violations by other licensees?
- [74] In addition to ensuring compliance with the law, there are also other public interest factors that are interconnected, many of which are related to compliance. The public interest certainly includes matters such as health and safety, and consumer protection. It may also include factors related to access to services, products and employment. There are also less concrete factors such as public confidence and respect for the law and for the integrity of the regulatory system.
- [75] The Tribunal must also consider factors that are more about the individual licensee. There is also a public interest in fairness and proportionality for the licensee, as well as consistency in approaches and outcomes. Penalty is a case by case process based on the facts before the Tribunal. This includes looking at the seriousness of the impact on the specific licensee.
- [76] The approach of progressive discipline is consistent with both the public interest in compliance and fairness to the licensee. Where non-compliance recurs, there generally should be a greater penalty, unless there are exceptional circumstances otherwise.
- [77] Both counsel agreed that the more important issue in this case is general deterrence, not specific deterrence. But MLS counsel also noted the need to consider specific deterrence for the possible new owner of the body-rub parlour.

[78] Not surprisingly, MLS focused on the public interest and compliance factors, while the Applicant focused on fairness and proportionality.

(i) Suspension, Revocation, Stay, Conditions?

[79] In considering all these factors, the most striking point about this case is the nature of the non-compliance by the Applicant. The non-compliance is widespread, persistent and deliberate. In addition, Mr. Stone's testimony strongly supports a finding that the Applicant will continue to refuse to comply with the by-law requirements for shorter hours, unlocked entry door, no cameras and no Internet advertising. But even without his frank statements, the Tribunal would have had enough evidence to find that future compliance would be very unlikely.

[80] Mr. Stone suggested reasons why he could or would not comply with these parts of the by-law, for safety or commercial viability reasons (or both). His counsel also submitted that there were no risks to health and safety arising from the longer operating hours, locked access door, security cameras and website.

[81] But the Tribunal is not here to judge the reasonableness or appropriateness of these legal requirements. Furthermore, regulating businesses is not just about health and safety. There are also important public interests, such as neighbourhood interests. The Tribunal agrees with counsel for MLS that it should be assumed that the public interest is expressed through these provisions in the law. It is up to the government (Toronto City Council in this case) to review or change those laws if it chooses to do so.

[82] Counsel for the Applicant submitted that the evidence showed three facts that would support no revocation:

- MLS has never before sought to revoke a body-rub parlour licence;
- body-rub parlours, at least in the Toronto West district, have routinely and repeatedly been charged with the same by-law offences; and
- revocation would result in significant financial harm to the Applicant.

[83] Counsel submitted that Minx Spa should not receive the ultimate penalty of revocation for operating in the same manner as other body-rub parlours. He also said it would be unfair for the City or the Tribunal to use Minx Spa as a "test case" for a new enforcement approach, or as an example to "send a message" to the public and the other body-rub parlours.

[84] The Tribunal had permitted counsel for the Applicant to ask questions to each of the six MSO witnesses about the charges and outcomes that they directly knew about for each of the approximately one dozen body-rub parlours that they had inspected in the Toronto West district. These questions led to limited information from each witness, since most of them could not recall the number of charges for each location.

- [85] But there was enough evidence from this cross-examination of the MLS witnesses for the Tribunal to conclude that body-rub parlours appear to breach their by-law requirements more often than other regulated businesses, and furthermore, that many body-rub parlours, at least in the Toronto West district, have been charged more than a few times for most of the same infractions that Minx Spa has been charged with or committed.
- [86] Counsel for MLS disputed the notion that the entire body-rub parlour industry acts in the same way as Minx Spa. The Tribunal agrees that it does not have enough evidence that all – or even most – other body-rub parlours have as long of a list of charges or convictions as Minx Spa. And there is certainly no evidence of any other case where a body-rub parlour has this kind of record before the Tribunal, specifically the 45-day suspension.
- [87] In the end, it would not have helped the Applicant in this case even if it was able to show that every other body-rub parlour in Toronto had a similar record as Minx Spa. Generally, the Tribunal would not find it helpful to look into whether or why MLS may agree to a sale of a body-rub parlour in some cases, or seek a suspension in some cases but a revocation in other cases. The Tribunal's concern is not about consistent enforcement action by the regulator; it is about making consistent penalty decisions for the cases that come before it.
- [88] When considering consistency in its penalty decisions, the Tribunal would find limited use for other Tribunal orders that approved joint proposed resolutions. The fact that MLS and an applicant may have agreed to a sale with certain conditions in certain cases in the past where there was also serious non-compliance does not provide much guidance to the Tribunal about what penalty is appropriate in this case. There are many reasons behind settlements that may not be obvious on the record, and many reasons why a hearing panel may defer to the regulator's assessment of the public interest.
- [89] In this case, there is one big factor that weighs heavily against the Applicant's arguments about proportionality and consistency in penalties for body-rub parlours. This is the overwhelming evidence that Mr. Stone (as the sole owner) would continue to blatantly and deliberately violate the by-law requirements about the operating hours, unlocked access door, no cameras and unauthorized advertising. If the Tribunal allowed the Applicant to continue operating, it would be approving this kind of widespread, persistent and deliberate non-compliance. In the circumstances of this case, the Tribunal does not believe that Mr. Stone (through his corporation) should be allowed to continue operating the body-rub parlour.
- [90] On the facts of this case, Mr. Stone testified that he would have to sell the business if the licence were not revoked, and indeed, there is a pending sale.
- [91] Counsel for MLS submitted that there was no evidence of a sale before the Tribunal in this hearing. The Tribunal does not find it fair or useful to be limited by this possible omission in the evidence. It is obvious from the procedural history of

this case that the same hearing panel of the Tribunal was involved in adjournment, scheduling and case management motions that involved both this case (the Conduct case) and the related Sale case involving MLS Report No. 7034.

- [92] Indeed, this Conduct case proceeded on the basis of a Tribunal order that permitted the Purchaser's counsel to be present and be called upon to make submissions. Therefore, the Tribunal is prepared to proceed on the factual basis that the Applicant here has sold Minx Spa to Mr. Gerry's client and that there is a pending Tribunal hearing about that matter, which may or may not depend on the outcome of this case.
- [93] In this case, the Applicant is not fighting to continue in its business or occupation, which is in the more typical case where revocation may be an appropriate penalty. The Applicant (as represented through Mr. Stone) wants to sell its business. Therefore, counsel for the Applicant argues that revocation is not needed as a specific deterrent or to protect the public interest.
- [94] But even if revocation is not needed to stop the Applicant from continuing in the body-rub parlour business, counsel for MLS submitted that no other penalty would be enough to ensure compliance in this situation. Counsel emphasized that MLS has gone through many attempts to get the Applicant to comply with the law, including many by-law charges and going to the Tribunal for regulatory enforcement action. This has resulted in 23 by-law convictions with fines of about \$18,000, and 58 pending charges. At the Tribunal, there have been probation orders and a very significant 45-day suspension in 2016. But there has been no change in the Applicant's non-compliance.
- [95] Counsel for MLS stated that another long suspension will not work because specific deterrence has run its course, and the only way to impose compliance is to revoke the licence. However, this ignores the point that this case does not involve the need to deter this Applicant from future non-compliance, since this Applicant is leaving the business. Another person or business would apply for this licence, whether it is revoked without a sale or cancelled because of a sale.
- [96] Counsel for MLS also suggested that some kind of specific deterrence was needed for the purchaser or whoever gets the body-rub parlour licence in place of Minx Spa. He suggested that allowing the Applicant to sell the business would not be good enough, because the new business would continue in the same location with the same neighbours and same customers who may think that it would be operated in the same way. Counsel tried to bring in the former business – Blue Pearl Spa – and its many problems, and use that to argue that this business should not be allowed to continue just because it is sold.
- [97] The Tribunal does not accept this argument that the sale of Minx Spa must be prohibited because letting the Applicant make that sale and letting a new body-rub parlour operate in the same location would not send a strong enough message to meet the public interest or achieve general deterrence.



[98] In this case, a revocation can be ordered to be absolutely sure that the Applicant will not continue in the body-rub parlour business, but this revocation can be stayed to allow the Applicant to potentially sell the business. The Tribunal finds that a long suspension before any sale can create enough specific and general deterrence.

[99] One of the Applicant's main arguments against revocation was that losing the chance to sell its business would cause significant financial harm for the Applicant, essentially meaning Mr. Stone. But the Tribunal did not receive much reliable evidence about this financial impact. Based on just the Applicant's somewhat speculative and unsupported testimony, it could be as high as \$500,000. Mr. Stone testified that he paid \$350,000 for this business when he bought it in 2014, and that he later overpaid about \$160,000 for the building when he bought that later.

[100] For cases of this nature, where large amounts of money are involved, the Tribunal would expect better evidence about the potential impact of a penalty on the Applicant.

[101] As for the possible financial impact of a long suspension, the Applicant testified that he earns about \$200,000 net profit each year from this business, which includes his income. This was also not supported by documentary evidence.

[102] The decision about whether there should be a revocation or suspension should look at the desired consequences and objectives. Based on the evidence and the analysis of the issues, the Tribunal finds that protecting the public interest (mainly in specific and general deterrence) and having a fair penalty can both be achieved with a penalty that:

- (a) prohibits the Applicant from continuing in the body-rub parlour business; and
- (b) results in serious consequences for non-compliance – not in the nature of punishment like criminal fines, but in the nature of specific and general deterrence and upholding public confidence in the regulatory scheme.

[103] Both the prohibition against further operations and the serious consequences can be achieved by first revoking the licence, and then staying that revocation to allow the potential sale of the business, but only after a long suspension.

[104] The circumstances of this case support a suspension that is much longer than the already long 45 days in the settlement approved by the Tribunal in October 2016. In assessing all the evidence and factors and exercising its discretion, the Tribunal finds that a 180-day suspension would be appropriate in this case.

[105] The evidence, imperfect as it is, suggests that this could lead to a net loss of over \$100,000 for the Applicant (since he would need to continue paying for his expenses even if the business is shut down). The only evidence of this is from Mr.

Stone's testimony. The Tribunal is prepared to accept that it is unlikely that he makes much less than this. If anything, he may make much more than this, but that would only mean the 180-day suspension would have an impact much greater than \$100,000.

[106]In any event, the Tribunal does not need to be precise in calculating this net loss because its purpose is not to order that the Applicant pay a \$100,000 fine or make some kind of restitution. By making the rough estimates, the Tribunal is only checking that the financial consequences are high enough to be an effective specific and general deterrent and to uphold public confidence, but not so high as to be disproportionate, unfair or punitive for the Applicant.

[107]The Tribunal is aware that a suspension will mean the loss of some jobs. That is why the Tribunal is prepared to have some flexibility in delaying the suspension for up to two weeks to let the Applicant try to mitigate the negative effects on the four managers and as many as 50 body-rubbers.

(j) Purchaser's Interest

[108]At the end of its hearing, the Tribunal heard from all three counsel, including Mr. Gerry (counsel for the Purchaser), about the issue of whether it should delay a decision in this Conduct case until after the Sale case had been heard. There was a concern that a possible revocation of the licence in this case could affect the interests of the Purchaser, perhaps by resulting in the Sale hearing being cancelled if Minx Spa licence is revoked. This may then create a vacant 25th licence that may mean it is open for anyone to apply for, not just the current purchaser of Minx Spa.

[109]As a result of the decision in this case, which allows for a potential sale of Minx Spa, the Tribunal does not find it necessary to wait for the Sale hearing to make the decision in this Conduct case. In any event, the analysis for the penalty in this case would suggest that even if the interests of the Purchaser might be negatively affected by a revocation, there is not much need for this hearing panel to consider the possible impact on the Purchaser when making this penalty decision. That would appear to weigh very little against the significant public interest factors in this case.

## **D. DECISION**

[110]The Tribunal orders the following for the Body-Rub Parlour Owner/Operator's Licence No. B38-4418734 (the "Licence"), held by 2405490 Ontario Ltd., o/a Minx Spa:

1. The Licence shall be revoked. This revocation shall be stayed immediately, under the conditions in the paragraphs below.

2. The Licence shall be suspended for a period of no less than 180 days, subject to paragraph 4. This suspension shall begin February 12, 2019, or on an earlier date that the Applicant and MLS agree to in writing. The Applicant shall deliver the Licence to Municipal Licensing and Standards no later than 12:00 noon on the day that this suspension begins.
3. During the suspension, the Applicant shall pay any fines arising out of any by-law convictions against the Applicant within the time required by the Court, or enter into a written arrangement approved by MLS or the Tribunal for the payment of such fines.
4. The suspension shall end when any one of the following events has occurred:
  - (a) if the Applicant gives written notice that it wishes to cancel its Licence without the sale or transfer of its body-rub parlour, the suspension shall end and the revocation shall take effect on the date given in the Applicant's written notice of cancellation;
  - (b) if the Applicant goes ahead with the sale of its body-rub parlour and if the Tribunal hearing panel in that sale case orders that the Licence be cancelled on the last day of the 180-day suspension as part of approving the sale, then the Licence shall be cancelled no earlier than on the last day of the 180-day suspension and the revocation will no longer be needed; or
  - (c) if the 180-day suspension period ends without any cancellation of the Licence under paragraph 4(a) or (b) above, the revocation shall take effect on the last day of this suspension.

Originally Signed

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Gary Yee, Hearing Panel Chair

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Anu Bakshi, Panel Member, concurring

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Victoria Romero, Panel Member, concurring

Reference: Minute Nos. 197/18, 199/18, 236/18

**Date Signed: January 29, 2019**