



Information Sheet

Licence Appeal Tribunal

DUE DILIGENCE under Section 50.2 of the Highway Traffic Act

This information sheet is intended to provide general information. It does not constitute legal advice and is specific to the time when it is first issued. If you wish to obtain legal advice, you should consult a person licensed by the Law Society of Upper Canada (www.lsuc.on.ca) for representation.

Introduction

This information sheet provides information that you should know for an appeal from an order impounding either a personal or commercial motor vehicle due to the driver of the vehicle having a suspended licence. You should refer to the *Highway Traffic Act*, R.S.O. 1990 c. H.8 as amended, Section 50.2.

“Due Diligence” under the Highway Traffic Act

Section 50.2 of the *Highway Traffic Act* provides that one of the grounds to appeal an order impounding a motor vehicle is:

“...(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension...”.

What Constitutes “Due Diligence” in law?

The Shorter Oxford Dictionary defines the two words “due” and “diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling *to* by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Black’s Law Dictionary (6th ed., p. 457) defines due diligence as:

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

The courts have held that to rely on a defence of due diligence, a person must show:

- a) that the person took all reasonable steps to prevent non-compliance with the law, and
- b) that at the time of the non-compliance, the person had an honest and reasonable belief in a set of facts that, if true, would have resulted in there not being any non-compliance.

Where there is an employer/employee relationship, the employer must show that the act took place without the employer's direction or approval, and that the employer exercised all reasonable care by establishing a proper system to prevent suspended drivers from driving its vehicles and by taking reasonable steps to ensure the effective operation of the system. If the employer is a corporation, the issue is whether the due diligence was taken by those who are the directing mind and will of the corporation.

The Legislature intended that owners of motor vehicles try to determine whether or not the licence of the person who is to drive the owner's car has a valid licence, not under suspension. If you knowingly let someone who does not have a valid driver's licence drive your motor vehicle, you are not complying with the law. However, a person who lets another person drive their vehicle often does not know whether the person has his/her licence suspended or does not have a valid licence. In order to address this, the law requires that owners make inquiries so as to be satisfied that the person who is to drive the vehicle is entitled to do so.

To prove due diligence in your appeal, you must bring evidence to the Tribunal that establishes on a balance of probabilities (i.e. more likely than not) that:

- a) you took all reasonable steps to attempt to determine that the driver's licence of the driver was not then under suspension, so as to prevent your motor vehicle from being driven by a suspended driver, and
- b) at the time the person whose licence was suspended was driving your motor vehicle, you had an honest and reasonable belief that the person's driver's licence was not suspended; or
- c) if you are a corporation, those in the corporation who are the directing mind and will of the corporation established a proper system to try to determine that the licence of the employee was valid and to prevent suspended drivers from operating company vehicles, and that reasonable steps were taken to ensure the system was effectively operating.

What do you need to do at the Tribunal hearing?

The evidence that establishes that you took all reasonable steps can be either oral testimony or documentary. Please bear in mind, however, that oral evidence may not be sufficient to establish that you have met the test. This is particularly so for businesses and corporations that are generally expected to make thorough inquiries regarding employees and others who may operate motor vehicles.

At the hearing, witnesses tell the Tribunal what their personal knowledge is of the situation under oath or affirmation. Witnesses can refer to documents or things like photographs that show that in your fact situation, you meet both parts a) and either of b) or c) above.

The evidence should deal with what steps you took to attempt to determine that the driver's licence was not suspended so as to prevent your motor vehicle from being driven by a suspended driver, and that those steps were reasonable in your circumstances, and that these steps were all of the steps you could reasonably take.

Your evidence also needs to deal with what you believed honestly and reasonably as to the status of the driver's licence.