



Neutral Citation: 2017-BCRMD-001

**IN THE MATTER OF THE MOTOR DEALER ACT R.S.B.C. 1996 C. 316
AND THE SALESPERSON LICENSING REGULATION B.C. REG. 241/2004**

RE:

**STEPHEN L. TYERS
(Proposed Salesperson Licence #206059)**

Applicant

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: December 6, 2016 at Surrey, British Columbia

Appearances For

Stephen L. Tyers

In Person

For the Authority

Hong Wong, Manager of Licensing
Kim Murphy, Licensing Officer
Bill Manhas, Compliance Officer

INTRODUCTION

[1] Stephen L. Tyers applied for a salesperson licence from the Vehicle Sales Authority (the "Authority"). The staff of the Authority raised concerns regarding Mr. Tyers' criminal conviction for sexual assault.

[2] Mr. Tyers was convicted by Judge Smith of the B.C. Provincial Court on May 2, 2013 and Judge Smith sentenced Mr. Tyers on June 17, 2014. Mr. Tyers was convicted of one count of sexual assault to a female at a chiropractic clinic on February 21, 2011. Mr. Tyers was sentenced to 12 months incarceration followed by two years of probation with 10 conditions: *R v. Tyers* 2014 BCPA 140 (BC Prov. Ct.). Mr. Tyers appealed his conviction and the Court of Appeal upheld the conviction: *R v. Tyers* 2015 BCCA 507 (BC Court of Appeal)

BAN ON PUBLICATION OF CRIMINAL COMPLAINANT'S IDENTITY

[3] At trial and on appeal, a ban on the publication of evidence that would identify the complainant had been imposed. This publication ban continues indefinitely until otherwise ordered by the court. These reasons are written in conformity with that ban.

POSITION OF THE PARTIES

(a) *The Authority*

[4] The Authority's position can be summarized as follows:

- (a) Mr. Tyers was convicted of sexual assault which occurred in his work setting with one of his patients,
- (b) Mr. Tyers is not remorseful regarding his convicted conduct and maintains he did nothing wrong,
- (c) Mr. Tyers was not fully forthcoming when asked about the conditions of his probation. Mr. Tyers only identified two of the ten conditions,
- (d) Mr. Tyers submitted only a few pages of the evaluation done on him for the purpose of sentencing in the B.C. Provincial Court, and
- (e) During Compliance Officer Bill Manhas's interview of Mr. Tyers, Mr. Tyers suggested he was continuing to provide chiropractic services while unlicensed but stated he could do so, so long as he told the patients he was unlicensed and they agreed to his services.

(b) *Mr. Tyers*

[5] Mr. Tyers' position can be summarized as follows:

- (a) He was wrongfully convicted of sexual assault. Mr. Tyers maintains that his patient was upset and he only hugged her and kissed her on the cheek in order to console her,
- (b) He is not remorseful because he does not believe he did anything wrong. He says stating he is remorseful would be a lie,
- (c) He says what he did wrong was he was with the female patient alone and he should have had someone with him,
- (d) He only stated two of the more important conditions imposed by the Court and has not memorized all the conditions,
- (e) He took issue with some of the evidence provided by Compliance Officer Bill Manhas in his report.
- (f) His sentencing report shows he is low-moderate risk to re-offend,
- (g) He has the support of the dealer principal of TriCity Mitsubishi who is willing to employ him,
- (h) TriCity Mitsubishi is aware of his criminal conviction and conditions on probation, and
- (i) He has the support of his wife, his neighbours and community.

[6] Mr. Tyers provided several letters of reference in support of his application and his wife attended and participated at the hearing.

LEGAL PRINCIPLES

(a) Licensing

[7] Where a person applying for a salesperson licence has a criminal record, the following legal principles apply:

[22] The Registrar points out that refusing to issue a license because of a criminal conviction that is unrelated to the intended license is prohibited under s. 14 of the *Human Rights Code*, RSBC 1996, c. 210. Case law has determined that whether or not convictions are related must be looked at in context, considering all the circumstances of the case: *B.C. Council of Licensed Practical Nurses v. Mans & Humphreys v. B.C. Council of Human Rights*, 1993 CanLII 1501 (B.C. Court of Appeal) and *Woodward Stores (British Columbia) Ltd. v. McCartney*, 1983 CanLII 444 (B.C. Supreme Court).

[23] The Registrar states that the requirement to examine a person's past conduct demonstrates an overarching concern with public safety. Past conduct is the statutory tool by which the Registrar can determine if applicants will be governable, act in accordance with the law and conduct themselves with honesty and integrity. Salespersons are in a position of trust with the buying public who rely on them to give clear and honest information about buying motor vehicles. The public also expects safety to be a priority if taking a test drive with a salesperson. Lastly, integrity is important because salespersons may be privy to customer's confidential personal information including home address and financial information.

- *Fryer v. Motor Vehicle Sales Authority of British Columbia*, 2015 BCSC 279 (BC Supreme Court); affirming *Re: Peter Fryer*, (December 13, 2013, Hearing File No. 13-11-005, Registrar).

[8] As between the interest of an individual to be licensed and of protecting the public interest, the public interest is paramount: *Pacific International et al v. B.C. Securities Commission* 2002 BCCA 421 (B.C. Court of Appeal) at paragraph 12.

[9] While there is no automatic right to be licensed under the legislation, the onus is on the Authority to show why Mr. Tyers should not be granted a license. The burden of proof is the civil burden which is on a balance of probabilities: *F.H. v. McDougall* [2008] 3 S.C.R. 41, 2008 SCC 53 (Supreme Court of Canada).

(b) Relitigation of criminal convictions

[10] Much of Mr. Tyers's submissions and evidence focused on his view that he was wrongfully convicted. Mr. Tyers stated that if he had a better lawyer and had been allowed to call another witness then he would not have been convicted. Mr. Tyers says he was naïve about the criminal justice system.

[11] If a person disagrees with a criminal conviction, they must appeal that conviction following the process established for appeals. A person may not attempt to relitigate that conviction in another venue. Doing so is called a collateral attack and is prohibited. It may also be an abuse of process by relitigation: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (Supreme Court of Canada). As stated by the Supreme Court of Canada in *Toronto (City)* at paragraph 46:

...A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum...

And at paragraph 56:

I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects...

[12] The Supreme Court of Canada's *Toronto (City)* case involved a grievor who was before a labour arbitrator who was considering the grievor's criminal conviction and whether the grievor should be reinstated in his job. The Supreme Court of Canada agreed with the appellate court that the labour arbitrator was not in a position to properly assess the criminal conviction. The Supreme Court of Canada quoted the judge of the Ontario Court of Appeal, at paragraph 56:

Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver

could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

And the Supreme Court of Canada further stated at paragraph 58:

In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court — or the jury —, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. **The arbitrator was required as a matter of law to give full effect to the conviction.** As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal. (bolding added).

[13] I have heard only Mr. Tyers's evidence regarding his criminal conviction. Mr. Tyers was convicted of sexual assault by Judge Smith of the B.C. Provincial Court following criminal evidentiary procedures. Judge Smith heard all the evidence and observed witness testimony while applying the more exacting burden of proof beyond a reasonable doubt to that evidence. That criminal conviction was upheld by the B.C. Court of Appeal. As a matter of law, I must give full effect to that criminal conviction and the findings of fact by the Court contained in its reasons.

DISUCSSION

(a) Criminal Conviction related to licence

[14] I find Mr. Tyers's criminal conviction is related to the issuance of a salesperson licence. I take into consideration those types of factors identified in *Woodward Stores (British Columbia) Ltd. v. McCartney*, 1983 CanLII 444 (B.C. Supreme Court) at paragraph 9. In Mr. Tyers's case:

- (a) If Mr. Tyers was to repeat the conduct, there would be significant harm to a consumer or consumers and to the public's confidence in the industry;
- (b) The offence occurred in 2011, the conviction was in 2013, sentencing was in 2014 and the appeal decision was in 2015. Mr. Tyers was incarcerated on December 10, 2015, and released on August 7, 2016;
- (c) Mr. Tyers is on probation with conditions;
- (d) Mr. Tyers has not expressed remorse and continues to blame the criminal complainant;
- (e) Mr. Tyers is still working on rehabilitation while on probation and on a waiting list for a program;
- (f) Judge Smith of the B.C. Provincial Court found that Mr. Tyers was in a position of trust when the offence was committed, as Mr. Tyers was a professional providing a service to a vulnerable patient who had a physical disablement due to a prior stroke: see *R v. Tyers* (Provincial Court) at paragraphs 2 – 7, and 41;
- (g) Judge Smith also found the conduct was planned and deliberate, with Mr. Tyers building the patient's trust overtime and then arranging the appointment with the patient to be after hours when no one else was in the clinic: see *R v. Tyers* (Provincial Court) at paragraphs 3 and 41;
- (h) Judge Smith further found that Mr. Tyers convinced the patient to do energy treatment on chakras that was not recognized by the chiropractic or naturopathic professional disciplines: see *R v. Tyers* (Provincial Court) at paragraphs 3 and 41; and
- (i) Judge Smith further found that Mr. Tyers arranged the after-hours session as he knew his employer would object to Mr. Tyers using alternative techniques: *R. v. Tyers* (Provincial Court) at paragraph 41.

[15] The above factors make Mr. Tyers's criminal conviction related to the issuance of a salesperson licence because all of the above factors considered together show Mr. Tyers deliberately breached the trust of a vulnerable person within the work setting and in a way to try and hide his conduct from his employer. It also shows Mr. Tyers was willing to perform an unrecognized treatment on a patient and try and hide that fact from his employer. Mr. Tyers does not express remorse, does not believe he did anything wrong, and has yet to complete rehabilitation and is still on probation. He was recently released from incarceration. To his credit, Mr. Tyers says he started a meditation group and participated in a spiritual program while incarcerated.

[16] Performing unrecognized treatments and hiding that fact from his employer goes to Mr. Tyers's governability.

[17] Based on the above factors and the evidence presented, I find there is a risk of harm to the public if Mr. Tyers is granted a salesperson licence.

(b) Can conditions on Mr. Tyers licence mitigate the public risk?

[18] The B.C. Provincial Court imposed a condition on Mr. Tyers that he not provide chiropractic or other medical services on female patients without a third party adult approved by his probation officer being present. This condition was imposed in 2014 at the time of sentencing.

[19] Mr. Tyers provided two pages of a several page sentencing report indicating he is low-moderate risk to re-offend. That report was prepared for the purposes of sentencing in 2014. In discussing that report, Judge Smith of the Provincial Court noted Mr. Tyers was willing to participate in treatment and stated at paragraph 39 of his decision:

...I hope that his participation in and completion of treatment will assist Mr. Tyers to:

- a. reduce his risk of reoffending;
- b. understand why he committed this offence; and
- c. accept responsibility for committing this offence so he no longer blames Ms. H.

In the evidence before me Mr. Tyers continues to deny any wrong doing and continues to blame the criminal complainant and the criminal justice system. This raises a concern that his risk of reoffending has not reduced. Mr. Tyers remains at least a low-moderate risk of reoffending as noted by Judge Smith.

[20] Mr. Tyers admits to hugging and kissing on the cheek of a female patient who was emotional in order to console her. At the hearing, Mr. Tyers stated his error was not having someone present while attending to his patient. Mr. Tyers appears to lack insight that his admitting to hugging and kissing on the cheek of an emotional vulnerable female patient while providing professional services is in and of itself concerning conduct.

[21] Mr. Tyers provided many letters of reference in the form of letters and emails. The majority pre-date September 26, 2014. Based on the context of some emails associated with the letters, some of the letters appear to have been provided for the purpose of the sentencing hearing before Judge Smith on June 17, 2014. Those letters do little to provide a reference of Mr. Tyers since September

26, 2014, and which can attest to his conduct, rehabilitation or remorse since his sentencing and incarceration.

[22] Mr. Tyers presented a typed, unsigned and undated letter from a former patient. The letter indicates the writer was a senior psychologist at Riverview Hospital. The writer notes they were a patient of Mr. Tyers over a 6 week period. Based on the context of the letter, this appears to have been somewhere between 2009 and 2010. The writer states they have been in contact with Mr. Tyers on an irregular basis since then. The letter describes Mr. Tyers providing his services in a professional manner. The writer does not state he evaluated Mr. Tyers on a professional basis. This letter expresses the writer's view of Mr. Tyers services at the time they were provided. The letter being undated and unsigned and legally hearsay, I have to place little weight on this letter.

[23] Mr. Tyers points out one letter/email from B.K. dated May 19, 2014. B.K. indicates they know of the criminal complainant through B.K.'s first cousin. The use of this letter would be to try and impeach the credibility of the criminal complaint as a means to show Mr. Tyers did not commit the crime he is convicted of committing. I may not use the letter for that purpose as noted above: *Toronto (City)*. Having read the letter/email, I would note that B.K. states they do not actually know the criminal complainant and B.K.'s views are based on what they have heard from their immediate family "back home." The email would constitute double hearsay and its contents viewed as unreliable and its content is not helpful.

[24] There is a letter from the dealer principal of TriCity Mitsubishi which is undated. However the contents of the letter indicate it is fairly recent. It indicates Mr. Tyers has acted professionally while at the dealership and that they have no concerns based on their interaction with Mr. Tyers. It does not say how long Mr. Tyers has been at the dealership and in what capacity. This letter provides some insight into how Mr. Tyers currently handles himself at the dealership and reflects positively on his governability.

[25] There was a letter dated November 29, 2016, from Mr. Tyers probation officer. The probation officer notes Mr. Tyers has been compliant with his reporting conditions and there are no known breaches as of the date of the letter. The probation officer believes Mr. Tyers has been open and honest in his reporting as confirmed to the probation officer by Mr. Tyers's wife. The probation officer notes Mr. Tyers is on a waiting list for one of their programs. This letter also reflects positively on Mr. Tyers's governability.

[26] Mr. Tyers is amenable to having a condition on his licence that he not personally assist female customers on test drives. While such a condition could be imposed, the question is could it be effectively monitored?

[27] My concerns are:

- (a) The serious physical harm that could occur should Mr. Tyers reoffend;
- (b) Mr. Tyers was found to act in a way to hide conduct from his employer as he knew his employer would object to that conduct, indicating difficulty in governing Mr. Tyers;
- (c) Mr. Tyers's view that he did nothing wrong and that he continues to blame the criminal complainant and others for his conviction, a view which has not changed since his conviction, sentencing and incarceration;
- (d) Mr. Tyers is still on probation and still taking steps to rehabilitate;
- (e) While the letters from the dealer and the probation officer indicate Mr. Tyers is abiding by his conditions and acting positively, those letters reflect Mr. Tyers's conduct within 16 weeks of his release from incarceration. In my view, 16 weeks of good behaviour while on probation is insufficient to establish a reliable pattern of behaviour to gauge with an acceptable degree of certainty, Mr. Tyers's future conduct.

Based on these concerns, it is my opinion that the level of oversight by the Authority to ensure Mr. Tyers does not deal with female customers on test drives would have to be almost continuous in order to provide sufficient public protection in accord with the public interest. This is administratively unachievable for the Authority. While the dealership could be held responsible should Mr. Tyers re-offend, that is an after the harm occurs approach to regulating. The role of a regulator is to try and prevent future harm from occurring wherever possible: *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 per Cory. J.

[28] In coming to these conclusions I have also taken into account that this is Mr. Tyers's only criminal conviction, the many letters of support, and the support of his wife who attended the hearing.

(c) Comments on other concerns raised by the Authority

[29] I do not find anything untoward regarding Mr. Tyers initially advising the Authority of only two of his ten conditions of probation. I find that Mr. Tyers's explanation was generally reasonable. Mr. Tyers could have provided a better explanation by stating he has ten conditions but could only remember two.

[30] I will not address the Authority's concerns about Mr. Tyers possibly practicing as a chiropractor while not licensed. Mr. Tyers explained that what he does is not chiropractic services as defined under the *Health Professions Act*. It is not within my jurisdiction to assess whether Mr. Tyers is or is not acting as a chiropractor without a licence.

DECISION

[31] Based on my considerations noted above, I find that it would not be in the public interest to issue a salesperson licence to Mr. Tyers at this time. Mr. Tyers needs to continue his rehabilitation to reduce his level of risk to the public, to establish a longer history of compliance in order to gauge his future compliance, and to rebuild society's ability to trust him.

[32] Given all the evidence in support of Mr. Tyers, such as the letters of support and this being his only conviction, I would be willing to review an application from Mr. Tyer's once he has completed his rehabilitation work and his probation. Whether a licence would be issued will depend on the facts at the time of the review.

REVIEW OF THIS DECISION

[33] This decision may be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. Such a petition must be commenced within 60 days of the date this decision is issued: section 7.1(t) of the *Motor Dealer Act* and section 57 of the *Administrative Tribunals Act*.

Date: January 10, 2017



Ian Christman, Registrar