

IN THE MATTER OF AN APPEAL BY

PETER FRYER

TO SECTION 127(c) OF THE *FAIR TRADING ACT*,
BEING CHAPTER F-2 OF THE REVISED STATUTES OF ALBERTA, 2000
AND THE *AUTOMOTIVE BUSINESS REGULATION*, Reg.152/2013.

AND

IN THE MATTER OF THE DECISION BY
THE ALBERTA MOTOR VEHICLE INDUSTRY COUNCIL ("AMVIC")
TO REFUSE PROVINCIAL AUTOMOTIVE SALESPERSON REGISTRATION
UNDER THE *FAIR TRADING ACT* TO PETER FRYER ON FEBRUARY 22, 2017

REASONS FOR DECISION

Panel Chair: Cindy Clark
Members: Don Humphreys

Appearances: Peter Fryer

P.Hale, legal counsel (Shores Jardine LLP) for the Respondent

Appeal Heard: May 12, 2017
Main Boardroom, Capilano Centre
9945 50 Street
Edmonton, Alberta

1. Introduction

This is an appeal under s. 22 of the *Automotive Business Regulation* from a decision of the Director of Fair Trading (as delegated) (the "Director") to refuse the provincial automotive salesperson registration of Peter Fryer under s. 127(c) of the *Fair Trading Act*.

2. Jurisdiction

The *Fair Trading Act* and the *Automotive Business Regulation* regulate, among other things, automotive business licences and salesperson registrations in Alberta.

Under s. 104 of the *Fair Trading Act*, no person may engage in the automotive sales business unless that person holds a licence that authorizes the person to engage in that business.

Pursuant to s. 16 of the *Automotive Business Regulation*, a salesperson of an automotive sales business operator must be registered for automotive sales before acting on behalf of the business operator.

The Director's jurisdiction with respect to automotive business licences and salesperson registrations is found in s. 127 of the *Fair Trading Act*: The Director may refuse to issue or

renew a licence, may cancel or suspend a licence and may impose terms and conditions on a licence for the following reasons:

- (a) the applicant or licensee does not or no longer meets the requirements of this *Act* and the regulations with respect to the class of licence applied for or held;
- (b) the applicant or licensee or any of its officers or employees:
 - (i) fails to comply with an order of the Director under section 129 or 157, unless, in the case of an order under section 129 or 157, the order has been stayed,
 - (ii) fails to comply with a direction of the Director under section 151(5),
 - (iii) furnishes false information or misrepresents any fact or circumstance to an inspector or to the Director
 - (iv) fails to comply with an undertaking under this *Act*,
 - (v) has, in the Director's opinion, contravened this *Act* or the regulations or a predecessor of this *Act*,
 - (v.1) fails to comply with any other legislation that may be applicable,
 - (vi) fails to pay a fine imposed under this *Act* or a predecessor of this *Act* or under a conviction or fails to comply with an order made in relation to a conviction,
 - (vii) is convicted of an offence referred to in section 125 or is serving a sentence imposed under a conviction, or
 - (viii) fails to pay, in accordance with the notice of administrative penalty and the regulations, an administrative penalty imposed under this *Act*;
- (c) in the opinion of the Director, it is in the public interest to do so.

Section 18 of the *Automotive Business Regulation* provides that sections 125, 127 and 128 of the *Fair Trading Act* apply, with necessary changes, to the registration of salespersons. Accordingly, section 127 of the *Fair Trading Act* applies to both automotive business licences and salesperson registrations.

Under section 22(1) of the *Automotive Business Regulation* a person whose registration has been refused under section 127 of the *Fair Trading Act* may appeal in accordance with the process established by the Director. Section 22 also gives the Director the authority to establish an appeal process and to form or designate an appeal body.

In accordance with s. 22(2) of the *Automotive Business Regulation*, AMVIC created the AMVIC Salesperson Appeal Committee Policy (the "Appeal Policy"). The Appeal Policy allows an Appellant to appeal a decision of AMVIC by delivering a written Notice of Appeal

to the Executive Director within 30 days after AMVIC issues notice of its decision to the Appellant.

The Director's decision to refuse the salesperson registration of Peter Fryer was issued on February 22, 2017. A Notice of Appeal was filed on February 24, 2017. A Panel for the appeal hearing was established in accordance with the Appeal Policy.

On the morning of the appeal the Panel was advised that one of the members would not be attending. The remaining panel members elected to remove the absent member from the Panel and to continue with two panel members in accordance with section 3 (ii)(g) of the Appeal Policy. The parties to the appeal were advised of this decision and agreed to proceed with the appeal before the two member Panel.

At the outset of the appeal counsel for AMVIC reviewed the authority of the Appeal Panel and the relevant legislation as outlined in the previous sections. Mr. Fryer did not raise any objection to the composition or jurisdiction of the Appeal Panel.

3. Evidence before the Appeal Panel

Counsel for AMVIC outlined a chronology of events leading up to the Director's decision to refuse Mr. Fryer's salesperson registration and entered a collection of documents in support of that chronology as Exhibit 1. Exhibit 1 consists of the decision of the Director dated February 22, 2017 and additional documents tabbed 2 to 5.

Counsel for AMVIC also called evidence from Stephanie Page, the AMVIC Manager of Licensing and Consumer Services relating to Mr. Fryer's salesperson registration and his licensing history with AMVIC.

Mr. Fryer provided evidence on his own behalf and entered a number of exhibits. He also called C. Mousseau to provide character evidence and evidence regarding Mr Fryer's previous employment as a salesperson in the automotive industry.

Based on the testimony from Ms. Page and Mr. Fryer and the exhibits that were entered into evidence in the proceedings, it appears that many of the basic facts giving rise to the Director's decision are not in dispute.

In particular, counsel for AMVIC provided a summary of Mr. Fryer's criminal record and although Mr. Fryer took issue with the seriousness of some aspects of the charges and convictions, he did not take issue with its accuracy.

The Panel finds that Mr. Fryer has an extensive criminal history dating back to 1977. That criminal history includes convictions relating to [REDACTED]

[REDACTED] Mr. Fryer's criminal history also includes a large number of convictions for failing to appear, failing to comply with terms of probation and failing to comply with recognizance leading to incarceration. Mr. Fryer's most recent conviction was a conviction for trespassing as a result of a guilty plea in January of 2016. There were a number of other charges laid in 2015 that were withdrawn in conjunction with this 2016 guilty plea and conviction. There were also a number of charges laid against Mr. Fryer in 2013 and 2014 that were withdrawn or dismissed.

The evidence before the Panel also established certain facts in relation to Mr. Fryer's licensing history in the automotive industry which the Panel considers relevant to this Appeal.

By way of summary, Mr. Fryer applied for registration with AMVIC as a salesperson in 2003 and 2006 and was refused registration following administrative reviews in both instances. In July of 2009, Mr. Fryer was granted a 90 day conditional registration, but less than two months later his employment was terminated. The registration was then cancelled for non-payment of fees in 2010. AMVIC has no record of Mr. Fryer working as a salesperson after it received the termination notice. Mr. Fryer then applied for a salesperson's license in British Columbia. His application was denied in a decision of the Registrar of Motor Dealers dated December 13, 2013 (Exhibit 1 Tab 5) and that decision was upheld in the Supreme Court of British Columbia on February 13, 2015 (Exhibit 1 Tab 4). On February 24, 2015 Mr. Fryer applied to AMVIC for salesperson registration and his application was referred to the Director for an administrative review. The Director refused Mr. Fryer's application in March of 2015 and Mr. Fryer appealed to an appeal panel. The appeal panel upheld the refusal (Exhibit 1 Tab 3). Mr. Fryer reapplied to AMVIC for a salesperson registration in September of 2015. That application was referred to an administrative review and refused by way of a decision by the Director dated September 29, 2015. The September 2015 decision was not appealed by Mr. Fryer. The application currently at issue was made by Mr. Fryer to AMVIC in December of 2016.

There was some conflicting evidence about whether or not Mr. Fryer had been registered as a salesperson with AMVIC in 2001 and 2002. Ms. Page testified that AMVIC's records did not show that Mr. Fryer was registered with AMVIC from 2000 to 2002 and that Mr. Fryer applied for registration in November of 2002, but failed to attend an administrative review and no registration was issued. Mr. Fryer disputed the accuracy of AMVIC's records. There was evidence through Mr. Mousseau that Mr. Fryer had worked for him as a salesperson and as a finance manager for a period of over a year around that time. Mr. Mousseau testified that Mr. Fryer was registered with AMVIC at the time. Exhibit 2 in the appeal is an AMVIC complaint cover sheet in relation to a complaint against "P.J. Auto Sales d/b/a Peter Fryer" which indicates that a complaint was made by an individual in 2000 about Mr. Fryer alleging that Mr. Fryer acted as a broker in relation to a consumer transaction. Mr. Fryer testified that this complaint was only in relation to his work with a finance company and not as a salesperson. Given its decision in this matter, the Panel does not consider it necessary to find as a fact whether or not Mr. Fryer worked as an unregistered salesperson in 2001 and 2002 as this would make no difference to the outcome.

Appeal Panel Decision

In his decision of February 22, 2017, the Director concluded the nature and extent of Mr. Fryer's criminal history was such that it was not in the public interest to grant Mr. Fryer a salesperson registration. The Director also recommended that Mr. Fryer not reapply with AMVIC for a salesperson registration until he had avoided any criminal charges or convictions for at least 5 years.

The decision to be made by the Appeal Panel on an appeal from the Director's decision is set out in section 3(ii)(o) of the Appeal Policy which states:

The Panel shall determine if the decision by AMVIC that is the subject of the Appeal was consistent with the provisions of the *Fair Trading Act*, the *Designation of the Trades and Business Regulation*, the *Automotive Business Regulation*, and the bylaws and policies of AMVIC.

It is the decision of this Appeal Panel to uphold the decision of the Director to refuse to grant a salesperson registration to Mr. Fryer. The Panel agrees with the conclusion reached by the Director that it is not in the public interest to grant Mr. Fryer a salesperson registration and accordingly the Panel finds that the Director's decision was consistent with the FTA and associated regulations.

In reaching this conclusion, the Panel reviewed and considered the decisions made by the Supreme Court of British Columbia and the AMVIC Appeal Panel in 2015 in relation to Mr. Fryer's previous applications for salesperson registration in British Columbia and Alberta contained in Exhibit 1. The Panel found certain reasoning in those decisions to be logical and persuasive in terms of refusing Mr. Fryer's registration. However, the Panel agrees with and accepts the submissions of counsel for AMVIC that it is not bound to follow any of those decisions, and the Panel did not consider itself bound by those decisions in reaching its determination.

Mr. Fryer's main arguments as to why his appeal should be granted notwithstanding his criminal history were:

1. None of his charges or convictions were in any way related to his work in the automotive industry or to consumers he had dealt with in the industry.
2. He had not had any serious convictions since 2012. He advised that despite charges being laid in 2013 and 2014 these were withdrawn and dismissed. He did not consider the 2016 conviction for trespass to be serious, pointing out that all of the other charges had been withdrawn and suggesting that the only reason he pleaded to trespass was because he could not afford a lawyer to fight the matter.
3. He was willing to comply with any conditions that AMVIC would impose and to accept that if any legal issue arise, even a parking ticket, he could lose his registration.
4. He was a good person, who had been married 40 years, had children and grandchildren to support. He produced a letter of reference from an individual with his current employer (Exhibit 3) and also referenced the character reference letters that had been produced as part of his 2015 appeal to the previous AMVIC Salesperson Appeal Panel (Exhibit 4). He also called Mr. Mousseau as a character reference.
5. He took issue with his treatment in British Columbia, saying that the finding by the Registrar that he had provided false or incomplete declarations on his application form and that he worked as a salesperson in Alberta while unlicensed were incorrect, and that the finding that he worked as a salesperson in British Columbia was unfair because his employer had told him that he was allowed to work so it was their fault, and that the Registrar had been provided with that information.

In response to those arguments, counsel for AMVIC argued:

1. While none of the criminal charges or convictions were directly related to transactions in the automotive industry or customers in that industry, many of them had aspects that reflected on Mr. Fryer's honesty and integrity which are key to consumer protection under the *Fair Trading Act*. Because salespeople deal directly with the public, convictions with an element of violence or theft are of concern, but the concept of public interest is broader than physical or economic harm or risk. To allow registration of an individual with this type of history would legitimately shake the confidence of the public in the regulatory regime enforced by AMVIC.

2. Despite Mr. Fryer's testimony that he took responsibility for his convictions, he also downplayed their seriousness. For example Mr. Fryer initially suggested that anything that had occurred after 2010 was "minor stuff". He also characterized his failures to comply with recognizance and failures to appear as not being serious because they led to very short periods of incarceration, but did concede on cross-examinations that failing to comply with court orders and other legal requirements was of some significance. Counsel for AMVIC did not agree with Mr. Fryer's characterization of his more recent criminal history.

3. Imposing conditions on Mr. Fryer did not appear to be a reasonable or acceptable solution to address concerns relating to Mr. Fryer's conduct. Mr. Fryer had in the neighbourhood of 19 convictions for failing to comply with court orders and conditions of probation. Mr. Fryer's failure to comply with conditions imposed by law in the face of incarceration suggests with a degree of finality that he is not governable and would not comply with conditions that could be imposed by AMVIC.

4. Although she was sympathetic to Mr. Fryer's personal circumstances and his desire to support his family, Mr. Fryer's criminal history did not represent of short-lived lack of judgment a long time ago, but a pattern of repeated offences over a 40 year period, during which Mr. Fryer had not managed to string together 5 consecutive years without being charged or convicted of a criminal offence, other than between 1988 and 1995. Counsel also provided some evidence by way of news articles (Exhibit 5) that the individual who had provided Mr. Fryer's letter of reference had been the subject of a number of criminal charges for trafficking and possession of stolen property and one of the owners of the business was a convicted criminal. This evidence was offered in response to the letter of reference, and not on the basis that Mr. Fryer should be associated with this criminal behaviour.

5. There was some evidence before the Panel that if Mr. Fryer was acting as a salesperson in Alberta in 2001 and 2002 that this occurred without proper registration. The evidence also established that Mr. Fryer had acted as a salesperson in British Columbia without a license. His employer had confirmed in a letter marked as part of Exhibit 5 that a partner in the dealership had told Mr. Fryer it would sign a surety to enable Mr. Fryer to work for them, but also stated this did not take place. The letter did not go so far as to say that the dealership told Mr. Fryer that he was authorized to work. In any event it is Mr. Fryer's responsibility to ensure regulatory compliance and he was aware of the licensing requirement and did not meet it. Most importantly, neither of these were key factors in the decisions by the Registrar or the Supreme Court to disallow Mr. Fryer's license there.

The Panel accepts the submissions by counsel for AMVIC that the criminal history at issue in this case is of such nature and extent that it raises concerns in terms of consumer

protection and consumer confidence in the automotive industry. A similar argument was made by the Registrar in British Columbia in opposing Mr. Fryer's judicial review application there:

...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 person information including home address and financial information. (Exhibit 1 Tab 6 @ para. 23).

Mr. Fryer cannot separate his past conduct from his responsibilities and obligations as a salesperson simply because none of his conduct occurred in that context. There is a relationship between the types of criminal conduct in which he has engaged and his suitability as a salesperson. The fact that Mr. Fryer was charged and convicted of another criminal offence in 2016 is also significant to the Panel, no matter how Mr. Fryer views the circumstances of that conviction, because it suggests that he has not been able to rehabilitate himself or change his behaviour notwithstanding the clear indication from the Registrar and the Director that criminal behaviour is and will continue to be a key consideration in determining his suitability to work in the automotive industry.

The Panel is also concerned by Mr. Fryer's submissions during the appeal that his failure to comply with various court orders and other legal requirements were not particularly serious. In view of Mr. Fryer's demonstrated inability to comply with legal requirements the Panel does not view the imposition of conditions by AMVIC as a reasonable or acceptable option in this case. Even if suitable conditions could be formulated, which the Panel does not accept, there is no evidence to suggest that Mr. Fryer would be in any better position to comply with conditions imposed by AMVIC than those imposed by the Courts.

There was some discussion during the appeal regarding whether or not Mr. Fryer had [REDACTED], and if so whether he was taking steps to address them. It was Mr. Fryer's position that he is not an [REDACTED], but an abuser, and that he was no longer abusing. This is somewhat of a double-edged sword for Mr. Fryer, because it suggests that either he is in denial about his [REDACTED], or that his criminal conduct is not related to [REDACTED]. In either case that means that there is no evidence before the Panel of a change in circumstances that could lead it to conclude that Mr. Fryer's overall pattern of behaviour is likely to change in the near future. The Panel took into consideration the evidence of Mr. Mousseau that when Mr. Fryer worked for him that he always treated the customers well and that he was a successful salesman, but Mr. Fryer worked for Mr. Mousseau 15 years ago and this evidence did not alleviate the Panel's fundamental concerns around consumer protection.

The Panel also wishes to address the Director's recommendation that Mr. Fryer not be permitted to reapply until he has completed at least five years without being charged or convicted of a criminal offence. The Panel agrees with the Director's recommendation and upholds that aspect of his decision as well.

The Panel accepts that a criminal record does not in and of itself bar an individual from ever obtaining a salesperson registration. The Panel recognizes that people can change

their behaviour or demonstrate a material change in circumstances such as evidence of [REDACTED] or evidence of successful control of a previously uncontrolled mental health issue. However, in the absence of evidence of a material change in circumstances, once a determination has been made that as a result of past conduct a particular person is unsuitable for registration it seems reasonable to proceed on the basis that the only way that person can provide evidence of their suitability is by demonstrating different conduct over a period of time. Mr. Fryer has not provided any evidence of a material change in his circumstances. The evidence that was presented by Mr. Fryer in support of his appeal was not appreciably different from the evidence before the Registrar in 2013, the Salesperson Appeal Panel in 2015 or the Director in September of 2015. The only difference was the letter of reference marked as Exhibit 3 and the fact of the 2016 conviction. The Panel did not attach much weight to the new letter of reference, which was similar in nature to letters of reference provided previously, particularly in light of the evidence led by AMVIC about the criminal charges laid against the author and Mr. Fryer's employer. As noted above, the 2016 conviction is a negative development in terms of what evidence was before these previous decision-makers and tends to support the conclusions of those decision-makers that a necessary change in behaviour was unlikely to occur in the near future.

The Panel does not consider it reasonable for AMVIC to be entertaining repeated application for registration in circumstances where the condition of unsuitability can effectively only be cured with the passage of time and an assessment of conduct over that period of time. Given Mr. Fryer's lengthy criminal history the Panel considers it reasonable to preclude Mr. Fryer from applying until at least 5 years has passed from his last criminal conviction. At that time, if circumstances have changed and Mr. Fryer elects to reapply, the determination as to whether or not Mr. Fryer should be granted registration as a salesperson will be up to the Director to decide in all of the circumstances existing at the time.

"original signed by"

Cindy Clark

Chair – AMVIC Salesperson Appeal Committee

May 31/17

Date