

IN THE MATTER OF
the *Real Estate Agents Act*
S.N.B. 2011, c.215, as amended

- and -

IN THE MATTER OF
Gilles Essiembre

REASONS FOR DECISION & ORDER OF THE DIRECTOR OF CONSUMER AFFAIRS

Date of Opportunity to be Heard: 16 November 2017

Date of Decision: 10 January 2018

Date of Reasons for Decision: 5 February 2018

Heard Before

Alaina M. Nicholson
As Acting Director of Consumer Affairs

BACKGROUND

[1] This matter involves a request by Staff ("Staff") of the Financial and Consumer Services Commission (FCNB) to the acting Director of Consumer Affairs ("Director") to review Mr. Gilles Essiembre's ("Mr. Essiembre") suitability to hold a real estate salesperson's licence pursuant to section 10(1) of the *Real Estate Agents Act* (the "Act"). Staff were concerned that misstatements on Mr. Essiembre's licence application affected his suitability to hold a real estate salesperson's licence.

[2] Staff requested that the Director either consider terms and conditions on the licence pursuant to section 10(1.1) of the *Act* or a suspension or cancellation of the licence pursuant to section 10(2) of the *Act*.

10(1.1) The Director may at any time restrict a licence by imposing any terms and conditions that he or she considers appropriate on the licence.

10(2) The Director may suspend or cancel a licence if he or she is of the opinion it is in the public interest to do so.

[3] Mr. Essiembre submitted his sworn application, dated 8 September 2017, for a real estate salesperson's licence on 15 September 2017.

[4] The New Brunswick Real Estate Association (NBREA) granted Mr. Essiembre membership in their association effective 25 September 2017. This fulfilled the remaining requirement needed for the Director to issue a real estate salesperson licence to Mr. Essiembre.

[5] The Director issued Mr. Essiembre that licence without restriction on 25 September 2017.

[6] Subsequent to that Staff became aware of outstanding judgment registered against Mr. Essiembre that was not disclosed as required on his application.

[7] Mr. Essiembre was advised about concerns of misstatements on his application by letter from the Staff on 13 October 2017. The letter referenced an outstanding judgement registered against him and provided reference to the court file numbers. The letter made reference to the answers he provided on his sworn application in which he responded 'No' to the questions about court judgements against him. The letter also advised Mr. Essiembre of the matters under consideration as related to suitability; and the concern over specific misstatements on his licence application. In addition, the letter identified the specific information that formed the basis of the concerns.

[8] Mr. Essiembre was advised through the letter that he would be given an opportunity to provide any additional information or rationale to aid the Director in reviewing his suitability. He was advised this was his opportunity to be heard by the Director before a decision was made on his suitability for continued licensure. He was advised that he could request an oral or written opportunity to be heard and that he had the right to counsel, and he was provided with disclosure of all information before the Director regarding his suitability.

[9] The right to have an opportunity to be heard is in accordance with sections 10(1.3) and (2.1) of the *Act*. These sections are as follows:

10(1.3) *The Director shall not refuse an application for a licence or impose terms and conditions on the licence without giving the applicant or licensee an opportunity to be heard.*

10(2.1) *The Director shall not suspend or cancel a licence without giving the licensee an opportunity to be heard.*

[10] Mr. Essiembre contacted Staff on 26 October 2017 and requested an in-person opportunity to be heard.

[11] Mr. Essiembre was advised by email on 27 October 2017 that the date for the Opportunity to be Heard was set for 3:30 pm on 16 November 2017 at the FCNB's office in Fredericton.

[12] Mr. Essiembre met with the Director on 16 November 2017. Also in attendance were Robyn Gallant, Compliance Officer for Consumer Affairs and Rick Hancox, Chief Executive Officer. Mr. Essiembre chose not to be represented by counsel.

[13] At the opportunity to be heard, staff provided a summary of their concerns and the basis for them. Mr. Essiembre spoke and provided an explanation and rationale for his misstatements. In addition, he responded to the Director's questions. He provided no additional documentation.

THE FACTS

[14] After reviewing the information submitted by Staff and the explanation and statements from Mr. Essiembre, I find the following as facts:

- a) Mr. Essiembre confirmed at the Opportunity to be Heard that he had all the documents relied upon by staff as listed in FCNB letter of 13 October 2017;
- b) The standard Application for Licence under the *Real Estate Agents Act* asks, among others, the following question:
 - a. 12h. Are there any court judgments against you that have not been satisfied?
- c) Mr. Essiembre responded 'No' to this question in his 8 September 2017 sworn application;
- d) One outstanding judgments exists against Mr. Essiembre;
- e) Court File No. MSC-393-2015 – Meredith G. Bateman v. Gilles Essiembre;
- f) Mr. Essiembre was previously successful in real estate (top 3% in Royal LePage Atlantic), but had undergone significant life changes since 2013 which negatively impacted his professional career;
- g) Mr. Essiembre indicated that he thought he had answered the application questions honestly and that was unaware there was a judgment registered against him, but that he was aware that he owed outstanding legal costs; and
- h) Mr. Essiembre indicated that had been in contact with the judgment creditor to pay off the debt over a nine month period, and that he had asked for confirmation of this payment plan in time for the Opportunity to be Heard, but he had not yet received it.

[15] At the closure of the Opportunity to be Heard, the Director requested that Mr. Essiembre provide an acknowledgement from the judgment creditor of the payment plan.

[16] On 17 November 2017 the Director issued a decision via letter to Mr. Essiembre indicating that his licence to trade in real estate would remain active, if he undertook to provide the following:

- a. Written confirmation by the 15 December 2017 that the judgment creditor has agreed to a payment arrangement to satisfy the outstanding judgment in the amount of \$2,913.05 (Case: MSC-393-2015);
- b. Confirmation that satisfactory payments have been made, as agreed to in the arrangement; and
- c. Confirmation that the judgment has been satisfied and released, pending payment in full.

[17] The following is a chronology of events that occurred since the above undertaking was issued:

- a. 21 November 2017: Mr. Essiembre emailed indicating he and his manager were trying to contact the judgment creditor and would forward all necessary information once contact was made;
- b. 11 December 2017: Staff received a notice of cancellation of Mr. Essiembre's licence from Mr. Essiembre's licensed manager at Royal LePage Atlantic;
- c. 14 December 2017: Staff received an email from Mr. Essiembre stating that his failure to meet the undertaking - as a result of the judgment creditor not agreeing to a payment plan - had resulted in his licensed manager cancelling his licence, and at this time he requested that FCNB reconsider his suitability to be licensed.
- d. 21 December 2017: Staff provided Mr. Essiembre with a notice advising of his right for a second opportunity to be heard, given that he had failed to provide written confirmation of a payment arrangement which, during the first Opportunity to be Heard, he indicated had been negotiated;
- e. 21 December 2017: Mr. Essiembre provided a written response which indicated that he had attempted to negotiate a payment plan over a nine month period with the judgment creditor, but was unsuccessful, and therefore could not provide our office with the requested documentation; and
- f. 29 December 2017: Mr. Essiembre followed up with an additional email to Staff wherein he indicated that he intended to fulfill his payment to judgment creditor in 2018.

FCNB'S MANDATE

[18] The *Financial and Consumer Services Act*, in Section 2(a) provides that the purpose of the *Act* is to 'enable the Commission to provide regulatory services that protect public interest and enhance public confidence in the regulated sectors...'.

[19] The *Financial and Consumer Services Act*, in Section 12(2)(b) provides that *the Commission shall administer the financial and consumer services legislation*, which as per subsection 1(q) includes the *Real Estate Agents Act*.

[20] Prior to suspending, cancelling or imposing terms and conditions on a licensee, the Director must consider the appropriateness of any action taken. In making this determination it is necessary to consider the mandate of the FCNB and whether or not the Respondent is suitable to hold a licence and that the issuance of a licence is not objectionable for *any* reason.

[21] Consumer protection is a fundamental consideration and a key purpose of the FCNB's mandate. It is a key responsibility of the Director, as the gatekeeper to the industry to determine suitability of an applicant or a licensee and allow that person to operate in the sector.

THE PROCESS OF DETERMINING SUITABILITY

[22] Section 10(1) of the *Act* requires that 'the Director is satisfied that the applicant is suitable to be licensed'. The review of suitability covers a number of aspects including education, qualifications, financial stability and integrity. These all have a significant bearing on a candidate's suitability to hold a salesperson's licence and operate in the real estate sector.

[23] Financial stability is important in that a salesperson's decision-making should not be influenced or appear to be influenced by that person's own poor or unstable financial situation. The significance of outstanding financial judgments is a consideration in determining financial stability. In addition, the failure to report outstanding judgments is another factor in determining suitability.

[24] Integrity is also an essential character for a salesperson in order for consumers to have confidence in the industry. Consumers need to know that their real estate agent will be honest and act with integrity when acting on their behalf in what may be one of the largest financial transactions in their life. An applicant's ability to respond truthfully and not be misleading in their answers on their application for a licence is a significant factor in determining their integrity and therefore their suitability to operate in the industry.

[25] Another determination that the Director must make under Section 10(1) is that the issuing of a proposed licence "is not objectionable for any reason". While this provides wide latitude, in this situation it is viewed from the perspective of consumer protection. If a licence is issued or continued does it leave consumers exposed to harm or exploitation?

ANALYSIS

[26] Mr. Essiembre has approximately ten years' experience working in the real estate industry.

[27] Mr. Essiembre's application had a material misstatement. Thoroughness and attention to detail are important attributes for a salesperson undertaking a financially significant transaction on behalf of a client. Clients are relying on the salesperson to see that details are looked after and that agreements and contracts are properly and accurately completed. When these attributes are missing from the salesperson's work on his own application, it does not lend confidence to how he will conduct business on behalf of others.

[28] Honesty and integrity are essential characteristics for those working in the real estate industry. Consumers need to have confidence that the professionals they deal with and whose services they pay for will behave in a proper and ethical manner. While there is no evidence that Mr. Essiembre meant to intentionally mislead the Director when completing his application, his omission of the judgment, compiled with his subsequent suggestion that a payment arrangement had been negotiated when it had

not been, were not truthful and impact the Director's view on his suitability to hold a licence. These circumstances warrant a regulatory response.

[29] A determining consideration is whether Mr. Essiembre's conduct is so objectionable that he should not be allowed to operate in the real estate sector at all, or whether he can conduct himself in a suitable manner with terms and conditions.

[30] Mr. Essiembre reiterated that he now recognizes that he made an error in his application and that his statement during the first Opportunity to be Heard was intended to represent his request for a payment arrangement, rather than an agreement in principle.

[31] Mr. Essiembre responded quickly to the concerns raised by staff and sought the assistance of his manager in attempting to contact the judgement creditor to obtain a payment arrangement in accordance with the undertaking.

[32] Mr. Essiembre's misstatement on his application and his subsequent indication that payment arrangements had been previously negotiated when they had not, do not, in and of themselves, indicate that Mr. Essiembre is not qualified to work in the real estate industry. I find that Mr. Essiembre's outstanding judgment would not have resulted in a refusal to issue a licence with terms and conditions, had he been honest in his original application.

[33] Considering the misstatements above, Mr. Essiembre's explanations, and Mr. Essiembre's previous licensing activity which demonstrates that he can conduct himself in a suitable manner as a real estate salesperson, I find that his licence should be continued with the appropriate terms and conditions.

[34] The Act provides that:

'10(1.1) The Director may at any time restrict a licence by imposing any terms and conditions that he or she considers appropriate on the licence.'

10(1.2) 'A licensee shall comply with the terms and conditions imposed by the Director on the licence'.

DECISION

[35] As noted earlier, Staff received a cancellation notice dated 11 December 2017 from Royal LePage Atlantic advising that Mr. Essiembre was no longer employed with their office. As a result, Mr. Essiembre's licence was cancelled. Mr. Essiembre subsequently requested a decision from the Director regarding his future ability to be licensed under the Act.

[36] I have concluded that a future licence application from Mr. Essiembre could be approved, provided there are no material changes on the new application and no further judgments rendered against Mr. Essiembre, and pending submission of an application supported by a licensed agent, with the following terms and conditions:

- Gilles Essiembre shall provide evidence that the outstanding judgment against him has been satisfied by 31 December 2018; and
- Gilles Essiembre is required to notify the Director of Consumer Affairs immediately of any new judgments issued in which he is named.

DATED at Fredericton, New Brunswick this 5th day of February 2018.



Alaina M. Nicholson
Acting Director, Consumer Affairs
Financial and Consumer Services Commission