FINANCIAL AND CONSUMER SERVICES tribunal DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *Financial and Consumer Services Commission v. McKellar et al.*, 2021 NBFCST 3

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *REAL ESTATE AGENTS ACT,* S.N.B. 2011, c 215, THE *MORTGAGE BROKERS ACT,* S.N.B. 2014, c 41, AND THE *SECURITIES ACT,* S.N.B. 2004, c S-5.5

Docket: MS-001-2021

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

John Albert McKellar and 668054 N.B. LTD,

Respondents.

DECISION

RESTRICTION ON PUBLICATION: This decision has been anonymized to comply with the *Right to Information and Protection of Privacy Act,* S.N.B. 2009, c R-10.6.

PANEL:	Lucie LaBoissonnière, Tribunal Member
DATE OF HEARING:	May 27, 2021
WRITTEN REASONS:	June 14, 2021
APPEARANCES :	Mark McElman, Financial and Consumer Services Commission John Albert McKellar, per se No one appearing on behalf of 668054 N.B. LTD.

I. DECISION

1. The Financial and Consumer Services Commission's (Commission) request to change the hearing format is denied.

II. OVERVIEW

2. The Commission brings this motion requesting that the Tribunal change the hearing format of these enforcement proceedings from the usual format to an oral hearing with evidence presented by way of *Affidavit* because the respondents have not filed a *Defence* within the prescribed time. In the context of this motion, the Commission also contends that the respondents' participatory rights in these proceedings should be curtailed given their failure to file a *Defence.* This is the first time since the adoption of its *Rules of Procedure* in 2018 that the Tribunal is asked to consider a change in hearing format in an enforcement proceeding.

3. John McKellar appeared at the motion and is self-represented in these proceedings. A representative for 668054 N.B. LTD did not appear at the motion hearing and there may be an issue surrounding service of the *Statement of Allegations* upon that respondent that will be determined at the eventual hearing on the merits.

III. ISSUES

4. The issues raised on this motion are the following:

    a) What are the participatory rights of the respondents at the merits and sanctions hearings given their failure to file a *Defence*?

    b) Should the format of the merits and sanctions hearings be changed to an oral hearing with evidence provided by way of *Affidavit*?

IV. ANALYSIS

A. PARTICIPATORY RIGHTS OF THE RESPONDENTS

5. The Commission contends that the respondents' failure to file a *Defence* prohibits them from presenting any evidence at the merits and sanctions hearings, whether the hearing is conducted as an oral hearing with the *viva voce* testimony of witnesses or as an oral hearing with the presentation of evidence by *Affidavit.* The Commission asks the Tribunal to treat the respondents as though they were noted in default as can be done by a plaintiff under Rule 21 of the New Brunswick *Rules of Court* when a defendant fails to file a defence within the prescribed time. The Commission contends that the failure to file a *Defence* should result in a process that is less favourable to the respondents and that, in these circumstances, no unfairness results from prohibiting the respondents from adducing evidence at the hearing. The Commission further contends that it would be prejudiced if the respondents are afforded full participatory rights at the hearing; it argued at the motion hearing that it would not know what to prove at the hearing if the respondents are permitted full participatory rights. According to the Commission, this would be tantamount to a trial by ambush.

6. I cannot accept the Commission's position. Neither financial and consumer services legislation, nor the Tribunal's *Rules of Procedure* grant the Tribunal the authority to note a respondent in default or otherwise curtail its participatory rights when it fails to file a *Defence*. In addition, Rule 21 of the New Brunswick *Rules of Court* is not applicable to proceedings conducted by administrative tribunals and, as such, does not provide any guidance in this motion.

7. Mr. McKellar stated at the motion hearing that he did not file a *Defence* because he did not have the money to retain a lawyer. In reviewing the *Defence* (Form 5), I do find it to be a rather formal document that can be difficult to navigate for self-represented litigants. When completing a *Defence,* the respondent is asked to provide the following information:

    - the facts the respondent admits or does not dispute in the *Statement of Allegations,*
    - the facts the respondent denies in the *Statement of Allegations,*
    - the facts for which the respondent has no knowledge in the *Statement of Allegations*,
    - its version of the facts, and
    - any additional facts upon which it relies in opposing the allegations or penalties in the *Statement of Allegations.*

8. The Commission has not demonstrated that it is prejudiced when the respondent does not file a *Defence.* There is no merit to the Commission's argument that it will not know what to prove at the hearing if the respondents participate and have not filed a *Defence.* Regardless of whether the respondents file a *Defence* or not*,* the Commission bears the burden of proving its allegations against the respondents on a balance of probabilities.

9. I also find there is no merit to the Commission's argument that allowing a respondent who has not filed a *Defence* to participate in the hearing, by adducing evidence and arguments, amounts to a trial by ambush. The Tribunal's *Rules of Procedure* set out procedures that allow the Commission to know the respondent's position in advance of the hearing:

    - The respondent must provide a copy of all documents it intends to introduce into evidence at the hearing (Rule 10.3). A respondent who fails to provide a document may not refer to it nor introduce it in evidence at the hearing without the permission of the Tribunal, which may be on any conditions that the Tribunal considers just (Rule 10.5);

    - The respondent must provide a list of all witnesses it intends to call at the hearing and provide a description of the anticipated testimony of each witness (Rule 10.2). A respondent who fails to list a witness or fails to provide a description of each witness' anticipated testimony may not call that person as a witness without the permission of the Tribunal, which may be on any conditions as the Tribunal considers just (Rule 10.5);

    - The respondent who intends to call an expert witness must inform the Commission of the

intent to call the expert witness and the issue on which the expert will give evidence. In addition, the respondent must provide the Commission with a copy of the expert's report (Rule 10.6). Once again, a respondent who fails to comply with this requirement cannot call the expert as a witness nor refer to the expert report or introduce it in evidence at the hearing without the permission of the Tribunal, which may be on any conditions as the Tribunal considers just (Rule 10.7).

- The respondent must provide a *Statement of Position* setting out its legal arguments in relation to the hearing.

10. While not argued by the parties, I note that other provincial securities jurisdictions in Canada do not require a respondent to file a defence. A quick review reveals that this is the case in Ontario and British Columbia.

11. As will be discussed further in my reasons, enforcement proceedings require that the Tribunal afford a high degree of procedural fairness to the parties. In my view, curtailing the respondents' participatory rights due to a failure to file a *Defence,* in the absence of specific authority to do so, would fall short of the high degree of procedural fairness required in these proceedings.

B. CHANGE IN HEARING FORMAT

12. The hearing in an enforcement proceeding is usually conducted as an oral hearing with the evidence presented through the testimony of witnesses and the introduction into evidence of documentary and material evidence. There is a direct examination, cross-examination and re-examination of witnesses. The parties can also present oral arguments. In short, the hearing resembles a trial before a court.

1. Onus

13. The Commission contends that the respondents' failure to file a *Defence* within the prescribed time or at all in these enforcement proceedings*,* reverses the onus of proving that the hearing format should be changed. According to the Commission, in these circumstances, the respondents must prove that the alternate hearing format requested by it, being an oral hearing with evidence presented by way of *Affidavit,* should not be ordered.

14. I find no merit to this argument. The *Rules of Procedure* clearly place the onus on the party requesting the change in hearing format to satisfy the Tribunal that the change should be ordered. Rule 7.10, which applies specifically to enforcement proceedings, clearly places the onus on the Commission to request the change in hearing format:

> **7.10 Hearing**
>
> *Application of Part 13*
>
> (1) Part 13 governing hearings applies to an enforcement proceeding.

Request for alternative hearing format where no Defence filed

(2) Where a respondent has not filed a *Defence* within the time set out in these *Rules*, the Commission may request to proceed to a combination of an oral and written hearing pursuant to Part 13, with the evidence being provided by way of *Affidavit* (Form 10).

15. Part 13 is referenced in Rule 7.10 and it also places the onus clearly on the party requesting the change in the hearing format:

13.2 Hearing format

[…]

Usual form of hearing

(2) Subject to rule 13.2(2) or unless otherwise directed or ordered by the Tribunal, the usual form of a hearing is an oral hearing.

[…]

Requesting a change in hearing format

(4) A party may request a change of the hearing format by filing a motion pursuant to Part 9.

16. As the Commission has not provided any caselaw in support of reversing the onus, I find it bears the onus of proving the test for changing the hearing format is met.

2. Analysis under Rule 13.2(5) of the *Rules of Procedure*

17. For the reasons set out below, I find that changing the hearing format to a hearing with evidence presented by way of *Affidavit* would likely cause significant prejudice to Mr. McKellar. As such, I decline to change the hearing format and the hearing will proceed in the usual format, being an oral hearing with the testimony of witnesses and the introduction into evidence of documentary and material evidence.

18. I turn to my analysis of Rule 13.2(5) which sets out the criteria I must consider in deciding whether to order a change in the hearing format. That rule states that I must determine whether changing the hearing format "will likely cause any party significant prejudice". The test and the factors to consider are the following:

13.2 Hearing format

[…]

> (5) In deciding whether to change the hearing format, the Tribunal shall consider whether a hearing format other than an oral hearing will likely cause any party significant prejudice and may consider any relevant factors,[…]
>
> (a) the subject matter of the hearing,
> (b) the nature of the evidence, including whether credibility is an issue and the extent to which facts are in dispute,
> (c) the extent to which the matters in dispute are questions of law,
> (d) the convenience of the parties,
> (e) the cost, efficiency and timeliness of the proceeding,
> (f) avoidance of unnecessary length or delay,
> (g) ensuring a fair and understandable process,
> (h) public participation or public access to the Tribunal's process, and
> (i) any other relevant factors affecting the fulfilment of the Tribunal's statutory mandate.

19. I note that Mr. McKellar has not expressed a position with respect to the test or the factors under this rule. The Commission argues that the balance of convenience favours an alternate hearing format.

(a) The subject matter of the hearing

20. The Commission contends that the subject matter of the hearing is the following:

- whether John McKellar has acted as a real estate agent and mortgage broker without being properly licenced;
- whether John McKellar has engaged in misconduct while acting as an unlicensed real estate agent or mortgage broker;
- whether John McKellar and 668054 N.B. Ltd. have issued securities in New Brunswick in contravention of New Brunswick securities law; and
- whether penalties and sanctions should be ordered against the respondents.

21. In my view, this subject matter of the hearing should be considered in a broader context. These enforcement proceedings are quasi-judicial in nature and akin to disciplinary proceedings. Enforcement proceedings may have serious consequences for respondents. In looking at the *Statement of Allegations* filed by the Commission in this matter, I note that they are seeking a panoply of sanctions against the respondents, ranging from bans from conducting regulated activities in the real estate, mortgage broker and securities sectors, disgorgement of all amounts received by the respondents from their non-compliance with the legislation, and the payment of administrative penalties.

22. I have already found that the Tribunal does not have the authority to curtail the respondents' participatory rights due to their failure to file a *Defence.* I add to this that numerous courts have

recognized that a high degree of procedural fairness is required in disciplinary-type proceedings. [*Kane v University of British Columbia*, [1980] 1 SCR 1105; *Sherwood v New Brunswick (Minister of Justice)*, [1985] NBJ No. 268; *Knight v Indian Head School Division No. 19* [1990] 1 SCR 653]

23. In my view, this high degree of procedural fairness signifies that enforcement proceedings should be conducted in a manner similar to a trial before a court, with the introduction of exhibits, the testimony of witnesses, and the presentation of legal arguments. [*Crandall v. Investment Industry Regulatory Organization of Canada, 2019 NBFCST 7*] I cannot accept that the degree of procedural fairness required in enforcement proceedings automatically decreases where a respondent fails to file a *Defence.*

24. This factor clearly militates in favour of maintaining the usual hearing format. I would add that, aside from exceptional situations, the hearing format in an enforcement proceeding should always be a full oral hearing with the *viva voce* testimony of witnesses to ensure that the procedural fairness requirements are met.

(b) The nature of the evidence

25. The Commission contends that the evidence in this matter lends itself to a hearing with *Affidavit* evidence. It argues that credibility is not an issue as proof of the allegations can be reduced, by and large, to a consideration of documentary evidence.

26. While it appears that documentary evidence will play an important role at the hearing, I do not agree that credibility is not an issue. Paragraph 7 of the *Affidavit of Mike Guitar* demonstrates an issue of credibility between Mr. McKellar's statement during his interview and the documentary evidence:

> During the interview, Mr. McKellar generally took the position that he had been approached by R.P., the owner of Property M, to assist with renovations of Property H, so that its owner, Mrs. P, would be in a position to sell the property and complete the purchase of Property M. He described that his involvement in the documentation surrounding the transactions was done as a favour to R.P. However, this position is directly contradicted by other documents.

27. In my view, paragraphs 11, 18, 21 and 22 of the *Affidavit of Mike Guitar* also raise issues of credibility.

(c) Questions of law

28. The Commission contends that this is not the type of case where one would expect there to be a significant dispute with respect to questions of law; the allegations brought by the Commission largely turn on the facts of the case.

29. In my view, this factor will weigh in favour of an alternate hearing format when the issues are largely questions of law that can be addressed by written or oral arguments. Given the Commission's contention that this matter will turn on the facts of the case, I find this factor weighs in favour of an oral hearing.

(d) Convenience of the parties

30. The Commission takes the position that it is difficult to assess issues of convenience where the respondents have not filed a *Defence* and it is unclear the extent to which they intend to participate in the eventual hearing. The Commission adds that, given the ongoing COVID-19 pandemic, convenience may favour an alternate hearing format.

31. I note that both the Commission and the respondents are in the Saint John area. The format requested by the Commission is that of an oral hearing with evidence presented by way of *Affidavit.* Therefore, regardless of whether the hearing proceeds in the usual format or in the format requested by the Commission, the parties will appear before the Tribunal, either in person or virtually depending on public health restrictions surrounding the COVID-19 pandemic. I do not find this factor to be determining as it relates to the request for an alternate format.

(e) Remaining factors

32. The Commission contends that the remaining factors in Rule 13.2(5) are not particularly relevant to the facts of this case. I agree that factors (e), (f) and (h) are not particularly helpful to a determination of this motion. However, factor (h) – ensuring a fair and understandable process – is highly relevant.

33. Mr. McKellar is self-represented. In my view, drafting *Affidavits* for a merits and sanctions hearing in an enforcement proceeding is a complex exercise for anyone without legal training. The *Affidavits* must comply with Rule 9.6(3) of the *Rules of Procedure* and be confined to facts within the personal knowledge of the person making the *Affidavit* and facts as to the information and belief of the person making the *Affidavit* provided the source of the information and belief are stated in the *Affidavit*. The *Affidavits* must be limited to facts and should not contain arguments. They also should not contain inadmissible opinion evidence. *Affidavits* must be prepared for each person that would have given testimony at the hearing. These *Affidavits* should provide evidence on the allegations in the Commission's *Statement of Allegations,* including the elements of these allegations. In my view, very few self-represented litigants would be capable of preparing proper and admissible *Affidavits* for use in an enforcement hearing.

34. I have considered Mr. McKellar's statement at the hearing of this matter, wherein he advised that he does not oppose proceeding by *Affidavit* evidence for the merits and sanctions hearing. However, that is not determining of the issue. The Tribunal must consider the Commission's request based on the criteria set out in the *Rules of Procedure*.

35. I conclude that proceeding by way of *Affidavit* evidence with a self-represented litigant who intends to participate in a hearing would not ensure a fair and meaningful process; it would curtail their meaningful participation. Proceeding in the usual format with the testimony of witnesses is far more likely to ensure a fair and understandable process for Mr. McKellar and self-represented respondents generally. It is much easier for these respondents to testify at the hearing and "tell their story". They are also capable of asking questions of witnesses either in direct examination or cross-examination.

V. CONCLUSION

36. The Commission's motion is denied. The hearing will proceed in the usual format.

DATED this 14th day of June, 2021.

Lucie LaBoissonnière

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