

Tribunals Ontario

Tribunaux décisionnels Ontario

Licence Appeal Tribunal

Tribunal d'appel en matière de permis



Citation: Bai v. Registrar, *Real Estate and Business Brokers Act 2002*, 2021 ONLAT REBBA 13216

Date: 2021-04-08

File Number: 13216 REBBA

Appeal from a Notice of Proposal by the Registrar, *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sch. B - to Revoke Registration

Between:

Lili Bai

Appellant

and

Registrar, *Real Estate and Business Brokers Act, 2002*

Respondent

INTERIM DECISION AND ORDER

ADJUDICATOR: Patricia McQuaid, Vice-Chair

APPEARANCES:

For the Appellant: Gary Caplan, Counsel

For the Respondent: Shane Smith, Counsel

Michael Collis, Counsel

Heard by videoconference: March 30 and 31, 2021

Background

- [1] On March 4, 2021, the Registrar issued a Notice of Proposal (the “NOP”) to revoke Lili Bai’s registration as a broker under the *Real Estate and Business Brokers Act, 2002* (the “Act”), citing several statutory grounds for the revocation as set out in section 10 (1)(a) of the Act:
- i. Having regard to her financial position, she cannot reasonably be expected to be financially responsible in the conduct of business; and
 - ii. Her past conduct affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty; and

On the same date, the Registrar issued an Immediate Suspension Order (the “Order”) pursuant to s. 15 of the Act which states that where the Registrar proposes to revoke a registration under the Act and if the Registrar considers it in the public interest to do so, the Registrar may, by order, temporarily suspend a registration.

- [2] Ms. Bai filed a Notice of Appeal of the NOP, requesting a hearing in this matter, on March 17, 2021. Pursuant to s. 15(3) of the Act, if a hearing is requested, the Order expires 15 days after the written request for hearing is received by the Tribunal, but the Tribunal may extend the time of the expiration until the hearing is concluded, if a hearing is commenced within the 15-day period.
- [3] A hearing was commenced on March 30, 2021. By agreement of the parties, only two issues were addressed at this time: the continuation of the Order and the appellant’s request for an order pursuant to Rule 13.1 of the Tribunal’s Rules of Practice¹ sealing or limiting public access to all or part of the Tribunal record. At the conclusion of the hearing on these issues on March 31st, I ordered that the Order would remain in place pending issuance of this decision. In this decision, I will first deal with the extension of the Order and will then address the motion for the limitation on public access to the Tribunal record.

¹ Licence Appeal Tribunal, Animal Care Review Board and Fire Safety Commission Common Rules of Practice and Procedure, Version1 (October 2, 2017)

Result

- [4] For the reasons that follow, I set aside the Immediate Suspension Order dated March 4, 2021. Further, the request to seal the record is denied.

Evidence and Analysis

Issue 1: Should the Order of Immediate Suspension remain in place until the hearing related to the NOP is concluded?

- [5] Counsel for the Registrar acknowledges that the Registrar bears the evidentiary burden to establish that it is in the public interest that the suspension be extended pending the outcome of the hearing. Counsel for the Registrar submitted that there are two facets to that determination of the question in issue. First the Registrar must establish a prima facie or credible case that the conduct on which he relies occurred and forms a reasonable basis for the allegations. Second, I must determine, based on the evidence presented, that the nature of the conduct and circumstances are such that it is a matter of public interest that the registration remain suspended. Counsel for the appellant and the respondent agree that I cannot at this stage make findings of fact, on a balance of probabilities, regarding the allegations in the NOP. The entirety of the parties' evidence on the issues is not before me. The evidence heard on March 30th focussed on allegations to the extent necessary to determine the issue of the Order's continuation.
- [6] Three witnesses testified at the hearing: Paul Mackrell, an investigator with the Real Estate Council of Ontario, the appellant, Lili Bai and Sammy Hui, Ms. Bai's business partner at their brokerage. Mr. Mackrell testified about his investigation of the complaint that ultimately resulted in the issuance of the NOP. Ms. Bai provided a narrative somewhat at odds with that described by Mr. Mackrell in his testimony.
- [7] The crux of the Registrar's case, as laid out through Mr. Mackrell's evidence is that Ms. Bai took advantage of a vulnerable client for personal gain and then was untruthful in her responses to Mr. Mackrell throughout the investigation. I am not using the client's name in this decision, as his identity is not critical to it, but understand that at a full hearing in this case, the client and his adult children will likely testify. The allegations are serious. The appellant has admitted that she accepted two iPhones from the client as gifts, as well as approximately \$9,000 in cash, discussed a personal loan from the client in the amount of \$460,000 (which did not come to pass though the client appears to have sought a bank draft in her favour), all in and around the time when she was acting for the client in an approximately \$18.5 million sale of one of his commercial properties in which Mr. Hui was acting for the prospective purchaser. The sale did not come to pass, but there are allegations concerning the listing and dealings in that regard. The appellant also admits that she was not entirely truthful or forthcoming about the

phones, the cash payment or the loan when questioned by Mr. Mackrell in March and July 2020.

- [8] The issue of the client's vulnerability is a crucial aspect of the allegations. In Mr. Mackrell's evidence the client is described as 'somewhat incapacitated' and perhaps suffering from dementia. The client's adult children who initiated the complaint against the appellant characterize her actions as "elder abuse". However, there was no persuasive evidence before me (though there was much suggestion from various persons to whom Mr. Mackrell spoke, as reflected in his investigation notes) on which I could consider, at this stage, making an assessment, in the context of the allegations, of the client's cognitive impairment. I note here too that the appellant, in her Notice of Appeal, and in testimony before me raised the issue of sexual harassment by the client, suggesting that it may have factored into her acceptance of money from the client and explained that the embarrassment and shame she felt as a result of the sexual overtures caused her to be less than truthful during the investigation.
- [9] Given these elements to the allegations, and the defence to them, there will be very personal, significant and uncomfortable issues to be canvassed at the hearing on the NOP – the client's cognitive abilities and assertions of sexual harassment. At this stage, based on the witness' testimony. I can reasonably conclude that some of the events alleged in the NOP occurred. I am not, however, in a position to determine whether the facts, on a balance of probabilities, support a revocation, nor am I called upon to do so. I am satisfied though that the Registrar has satisfied the first part of the 'test' for continuation of the Order- a prima facie case.
- [10] The next issue I must consider is whether the public interest requires that the suspension continue pending the outcome of the hearing. Counsel for the Registrar has referred me to two cases.² Both cases highlight the fact that consumer protection and the public interest are paramount considerations in regulated businesses like that of a real estate broker or motor vehicle dealer. In both the *Stolberg* and *Marcel Motors* cases the Tribunal decided that the immediate suspension orders should remain in place.

² *Stolberg v. Registrar, Real Estate and Business Brokers Act, 2002*, 2018 ONLAT-REBBA 11025 (Interim Decision and Order January 24, 2018) and *11640(Marcel Motors et al) v. Registrar, Motor Vehicle Dealers Act, 2002*, 2018 CanLII 12950004 (ONLAT)

- [11] As stated in the *Stolberg* decision, and as noted above, the Respondent bears the evidentiary burden to present evidence that it is in the public interest that the suspension be extended. In *Stolberg*, the Tribunal stated that the conduct which instigated the notice of proposal was not an isolated incident. In *Marcel Motors*, the appellants had a history of noncompliance. The Tribunal was dealing with a second notice of proposal – the first had been resolved through a consent order. Shortly after that consent agreement, the regulator received more consumer complaints for the same conduct and at least 19 inquiries related to the appellants' conduct.
- [12] In the usual course, a registrant, after issuance of a notice of proposal and their appeal of it, continues to work pending the outcome of the appeal. Immediate suspension orders are a rare exception. Here, the appellant has been registered as a broker since 2013. Unlike the *Marcel Motors* case, there is no evidence before me of any prior complaints against her or disciplinary action taken by the regulator. There is no evidence as there was in *Stolberg* that the conduct was the continuation of a pattern of conduct. It might be argued that that there is, allegedly more than one incident vis a vis this client, but the allegations are isolated to the appellant's interactions with him over a three-month period in 2020.
- [13] I agree with the Registrar that these are very serious allegations. I also note that the Registrar's assertion that the conduct is at "the high end of consumer harm and protection" are grounded in a belief that the appellant took advantage of a vulnerable client for financial gain. As stated above, the client's vulnerability is not a factual determination I can make at this stage, based on the evidence presented. The client's children, perhaps understandably given their concern and outrage, queried "how many other people she had done this to" in their communications with Mr. Mackrell, but there is no suggestion in the evidence of similar incidents with other individuals. Based on the evidence presented at this stage, I do not conclude that the appellant is a risk to engage in the same type of conduct that has led to this proceeding.
- [14] Therefore, I conclude that the Registrar has not met the evidentiary burden to establish that the public interest requires that Order be extended. However, it is incumbent upon the parties to bring this matter to a hearing expeditiously given the serious issues alleged. Counsel have indicated that this may require four days of hearing and that expert evidence regarding the client's capacity may be needed. To facilitate the efficient case management of this matter and ensure that there is no undue delay, I will direct that a case conference be scheduled promptly. I am not seized of this matter.

Issue 2: Should an order issue pursuant to Rule 13.1 of the Rules of Practice to limit public access to all or part of the record?

- [15] In her Notice of Appeal, the appellant has recounted several instances when she alleges that the client touched or sexually harassed her. Prior to the Notice of Appeal she states that she mentioned these incidents to no one, and feels shame and disgrace in relation to them. Because of the sensitive and personal nature of the evidence that will be called, she is requesting that evidence heard in that regard be sealed. The Registrar opposes this request.
- [16] The Tribunal is subject to the ‘open court’ principle. This means that Tribunal proceedings are presumptively open to the public. Moreover, documents filed as evidence with the Tribunal are also presumptively open to the public. However, pursuant to Rule 13.1 of its *Common Rules*, the Tribunal may limit access to a record of proceeding or limit access to all or part of a document or record to protect the confidentiality of personal or sensitive information as it considers appropriate, in relation to, for example, intimate financial or personal matters. When such a request is made, I must ask myself whether the present circumstances pose a serious risk to the proper administration of justice or meet the threshold required to override the open court principle.³
- [17] It is not uncommon for the Tribunal to hear medical and other highly personal information. It is also not uncommon for the Tribunal to make an order intended to protect certain sensitive information. However, a sealing order is rare because it has the most restrictive impact on the open court principle. As such, it should only be ordered in situations where less restrictive confidentiality orders will not protect the interests forming the basis for the request for the confidentiality order.
- [18] I agree that the incidents alleged by the appellant may cause embarrassment to her and potentially to the client. Some of these facts may be at the heart of her defence to the Registrar’s allegations. With no intent to diminish the impact of those incidents, at this stage, I cannot conclude that the alleged conduct rises to the level of explicit and personal matters that would warrant a sealing order. The allegations made are not so exceptional that they outweigh the important interests of the parties and the public in an open and transparent process.
- [19] My decision at this stage does not preclude the parties from renewing a Rule 13.1 request at the hearing when other highly personal matters may come to the fore. This could warrant another assessment of this issue. The parties may also wish to consider requesting a less restrictive order, such as a publication ban.

³ *Dagenais v. Canadian Broadcasting Corporation*, 1994 CanLII39 (SCC); *Van Der Zander v. Ottawa Police Services Board*, 2019 HRTO 1522 (CanLII)

ORDER

[20] Therefore, for the reasons set out above, I order as follows:

- a. The Order of Immediate Suspension is set aside.
- b. A case conference shall be scheduled to take place within two weeks of this Order.
- c. The request to seal the Tribunal record is denied.

LICENCE APPEAL TRIBUNAL

A handwritten signature in cursive script, reading "Patricia McQuaid", enclosed in a thin rectangular border.

Patricia McQuaid, Vice-Chair

Released: April 08, 2021