



Citation: Eves v. Registrar, *Real Estate and Business Brokers Act, 2002*, 2022
ONLAT REBBA 12991

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Appeal from a Notice of Proposal of the Registrar, *Real Estate and Business Brokers Act, 2002*, to Revoke Registration

Between:

R.W. Todd Eves

Appellant

and

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

Respondent

DECISION AND ORDER

Adjudicator: **Colin Osterberg, Member**

Appearances:

For the Appellant: Dan Schofield, Paralegal

For the Respondent: Michael Collis, Counsel

Heard by Videoconference: **December 13 and 14, 2021**

REASONS FOR DECISION AND ORDER

A. OVERVIEW

- [1] Pursuant to a Notice of Proposal (“NOP”) dated October 29, 2020, the Registrar proposed to revoke the registration of R.W. Todd Eves (the “appellant”) as a real estate salesperson under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C (the “Act”) and Regulations.
- [2] The Registrar seeks to revoke the appellant’s registration on the grounds that:
- a. the appellant cannot reasonably be expected to be financially responsible in the conduct of business based on his assignment in bankruptcy which has not been discharged and his failure to repay monies he borrowed from a client;
 - b. the past conduct of the appellant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty based on his failure to comply with his legal obligations as an undischarged bankrupt and the circumstances surrounding the loan from his client; and
 - c. the appellant breached a condition of his registration that required him to notify his broker that his registration was subject to conditions.
- [3] The appellant appeals the Registrar’s NOP to the Tribunal. He argues that his ongoing bankruptcy status was caused by the negligence of his trustee in bankruptcy; he failed to repay the loan he took from his client due to the illegal rate of interest being charged as well as his wife’s illness; he complied with his obligations as an undischarged bankrupt; and his breach of the condition of registration was minor and unintentional.
- [4] Section 10(1) of the *Act* establishes a presumptive right to registration if the appellant has met the prescribed requirements. The presumption may be rebutted if the Registrar can prove, on a balance of probabilities, that the appellant falls within one of the grounds outlined in s. 10(1)(a) or s. 10(1)(f).
- [5] Under s. 10(2) of the *Act*, a registration is subject to such conditions that are either consented to by the applicant, applied by the Registrar under s. 13 of the *Act*, as ordered by the Tribunal, or as are prescribed. Section 14 of the *Act* provides that the Registrar may propose to apply conditions to a registration, and that the Tribunal may direct the Registrar to carry out its proposal or substitute its

opinion for that of the Registrar and attach conditions to its order or to a registration.

B. ISSUES

- [6] The first issue to be decided is whether, having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business according to s. 10(1)(a)(i) of the *Act*.
- [7] The second issue to be decided is whether the past conduct of the appellant affords reasonable grounds to believe that he will not carry on business in accordance with law and with integrity and honesty according to s. 10(1)(a)(ii) of the *Act*.
- [8] The third issue to be decided is whether the appellant is in breach of a condition of his registration according to s. 10(1)(f) of the *Act*.
- [9] If the answer to any of these questions is in the affirmative, then the fourth issue to be decided is whether revocation is the only outcome or whether the public interest can be adequately protected through maintaining registration but attaching conditions to it.

C. EVIDENCE AND ANALYSIS

Financial Responsibility

- [10] Under s. 10(1)(a)(i) of the *Act*, the Tribunal must determine whether the appellant cannot reasonably be expected to be financially responsible in the conduct of business based on his current financial position.
- [11] The Registrar argues that the appellant's two bankruptcies, significant tax indebtedness, and failure to repay a client loan in a timely way, are all evidence that the appellant cannot reasonably be expected to be financially responsible in the conduct of business.
- [12] The appellant's first bankruptcy was in 1991. He was discharged in November 1992. The appellant then failed to file tax returns from 1995 to 2003 resulting in accumulating tax arrears and he made a second assignment in bankruptcy on February 5, 2003. The evidence presented at the hearing, shows that at the time of the second assignment the appellant had no assets and total liabilities of \$123,467.

- [13] The evidence shows that the appellant failed to attend a discharge hearing that was held on July 28, 2004 and was not discharged at that time. On January 17, 2008 the appellant signed a consent to a conditional discharge but failed to satisfy the conditions and failed to attend a discharge hearing that was held on February 9, 2011. He remained undischarged. On May 1, 2012, the appellant's bankruptcy trustee was discharged.
- [14] According to the appellant, he retained a bankruptcy lawyer, Matthew Harris, in 2015 or 2016 to help him obtain a discharge. According to Mr. Harris, he tried to secure a discharge in court, but the court refused to sign an order unless there was an agreement with Canada Revenue Agency ("CRA") regarding post-bankruptcy taxes owing. Mr. Harris tried to negotiate a resolution with CRA but was unsuccessful.
- [15] The appellant says that his first trustee in bankruptcy was incompetent and did not tell him about various court dates which caused him to miss those dates and which extended the duration of his second bankruptcy. He alleges that, by the time Mr. Harris became involved, interest and penalties on the appellant's tax debts had accumulated to such a degree, that he was unable to resolve the bankruptcy.
- [16] The appellant did not present evidence to support his allegation that his prolonged bankruptcy is the result of the actions, or inaction, of his representatives. However, even if his representatives did contribute to the long duration of the proceedings, that does not persuade me that the appellant is without responsibility. The appellant declared bankruptcy in 2003 largely as the result of his failure to pay taxes since 1995. He basically ignored the bankruptcy proceedings and continued to fail to file tax returns after 2003 which resulted in additional arrears. Although interest and penalties added to his debt, the CRA records show that the appellant's failure to file tax returns on time and to pay taxes owing also contributed significantly to the arrears. By the time he retained Mr. Harris in 2015 or 2016, twelve or thirteen years had passed, his trustee had been discharged for at least three years, and his tax arrears were unmanageable.
- [17] Requirements to Pay issued by the CRA resulted in the recovery of some of the tax arrears owing, however as of December 9, 2019 the appellant owed income tax arrears totalling \$308,835.58 and HST arrears of \$85,489.96. The appellant testified that these debts have increased since that time and are now well over \$400,000 combined.

- [18] The appellant made a consumer proposal in 2018, but the CRA refused to agree to the proposal. According to Mr. Harris, the appellant has no realistic way of being discharged from bankruptcy at this time or in the foreseeable future. According to the appellant, his net income from selling houses over the last two years has been approximately \$30,000 and \$60,000. He has no plan for satisfying his debt to CRA or obtaining a discharge from bankruptcy.
- [19] The appellant's second bankruptcy was primarily due to his failure to pay taxes from 1995 to 2003. That he remains undischarged is his responsibility whether or not his trustee contributed to in some way. He continued to fail to file tax returns in a timely way and to accumulate tax arrears for 19 years to the present. His tax arrears include failure to make HST remittances. These are monies paid to him by clients and which he is required to hold in trust for the CRA and are not monies which are the appellant's to use as he decides. He is now over \$400,000 in debt to CRA and has no realistic way of extricating himself from that debt. These circumstances are strong evidence that the appellant has not been financially responsible for many years up to the present and that this will continue in the future.
- [20] With respect to the client loan, on November 20, 2018 the appellant borrowed \$15,000 from Suk-Min Lee, for whom he was acting as a real estate salesperson. The appellant signed a promissory note by which he undertook to pay to Mr. Lee the sum of \$17,000 no later than January 7, 2019. An interest penalty was agreed at \$200 per day until the full amount of the loan was repaid. The full amount of that loan has not been paid. The appellant, with a \$5,000 contribution from his daughter, paid about \$7,250 toward the debt by the summer of 2019 and paid another \$7,750 two weeks before the commencement of this hearing, for a total paid to date in the amount of \$15,000. Since January 2019, Mr. Lee requested repayment of the amounts owing on many occasions as evidenced by numerous text messages submitted in evidence. The appellant promised to repay the money with interest on many occasions since then only to fail to make good on those promises.
- [21] Mr. Lee gave evidence at the hearing. He is obviously frustrated by the failure of the appellant to repay the debt and this frustration led to his filing of a complaint with the Real Estate Council of Ontario in October 2019. Mr. Lee states that he is not in the business of lending money and he did so on this occasion because he trusted the appellant based on their business relationship and the fact that the appellant was a licenced real estate professional. He says that he and his wife have suffered both financially and emotionally as the result of the failure of the appellant to live up to his promises.

- [22] The appellant says that his failure to repay the amounts owing to Mr. Lee was the result of his wife's illness in 2019 and the demands of Mr. Lee to be paid \$200 a day in interest which the appellant argues amounts to an illegal interest rate. He points to several requests from Mr. Lee to make payment in amounts much higher than the original debt owing. I do not accept the appellant's explanation. While the appellant may be excused from making payment in respect of the interest of \$200 a day, which is likely illegal, he provided no reasonable explanation for failing to pay the amount of \$17,000 owing on January 7, 2019. Moreover, while some of the claimed interest may be illegal, the appellant did not pay any interest to Mr. Lee on the \$17,000 owing on January 7, 2019. He provided no explanation for failing to follow through on his promises to make payments to Mr. Lee. The appellant did not even repay the amount Mr. Lee initially loaned him until two weeks before the hearing.
- [23] It is not only the failure of the appellant to pay back the loan that is cause for concern. I find that when the appellant entered into the loan agreement, he must have known that he would probably not be capable of satisfying his obligations under that agreement. The loan became due only six weeks after it was made and the appellant was able to repay almost none of it himself until two years later, just before the hearing commenced. The appellant did not provide any submission or evidence supporting a finding that he would have believed he was in a position to pay back the loan as required. He must have known that the "guarantee" he gave to Mr. Lee was practically worthless when he gave it. This indicates a significant lack of financial responsibility, not to mention a lack of honesty and integrity, on the part of the appellant.
- [24] At the hearing the appellant showed a pattern of refusing to assume responsibility for his financial difficulties. He blamed his ongoing bankruptcy on his trustee despite the facts that the bankruptcy was his responsibility, the trustee was discharged almost 10 years ago, he continued to accrue further debt to CRA, and he appropriated HST remittances, which were monies to be held by him in trust, for himself. With respect to the loan from Mr. Lee, the appellant alleged that Mr. Lee was at fault for the appellant's failure to pay the loan by demanding an illegal rate of interest to be paid. The appellant showed little indication that he accepts responsibility for his current position or that he has taken any steps to fulfill his obligations to CRA or Mr. Lee.
- [25] The evidence presented establishes that the appellant's financial position is such that he cannot reasonably be expected to be financially responsible in the conduct of business. He currently has over \$400,000 of debt and no realistic prospect of repaying it. He failed to deal with his bankruptcy in a timely way and

continued to increase his post-bankruptcy tax arrears for many years. By not remitting HST, the appellant has taken funds from third parties and treated them not as trust funds, but as his own. The proper handling of trust funds is an essential obligation of a real estate professional. While I appreciate that the appellant misappropriated funds that were to be held in trust for the government rather than a client, the improper handling of trust funds is a serious matter which goes directly to whether the appellant can be expected to be financially responsible. Finally, the appellant entered into a loan agreement with a client, Mr. Lee, knowing that it would be very unlikely that he would be able repay the loan and he had failed to do so up to the time of the hearing.

- [26] I am satisfied based on the evidence that the appellant cannot reasonably be expected to be financially responsible in the conduct of business. Financial responsibility in conducting business includes, among other things, the repayment of debts in a timely manner, paying taxes as they accrue and scrupulously dealing with trust monies. The appellant has not done so and has presented no plan to show he will be financially responsible in the future.

The Past Conduct of the Appellant

- [27] The evidence also establishes that the past conduct of the appellant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. With respect to the standard of proof, in applying similar wording in another regulatory statute, the Ontario Court of Appeal stated as follows:

The standard of proof provided by s. 6(2)(d) of the *Act* is that of “reasonable grounds for belief”... As applied to this case, s. 6(2)(d) of the *Act* required the Registrar simply to show that Mr. Barletta’s past or present conduct provides *reasonable grounds for belief that* he will not carry on business in accordance with law and integrity and honour. The Registrar does not have to go so far as to show that Mr. Barletta’s past or present conduct *make it more likely than not* that he will not carry on business as required.¹

- [28] The standard of proof must be more than “mere suspicion” and will be found to exist “where there is an objective basis for the belief which is based on compelling and credible information.”²

¹ *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon’s)*, 2013 ONCA 157 at 18-19.

² *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 114.

- [29] In addition to the circumstances described above, the Registrar argues that the appellant failed to comply with the law relating to his status as an undischarged bankrupt. Section 199 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "*Bankruptcy Act*") makes it an offence for an undischarged bankrupt to engage in a trade or business without disclosing to all persons with whom he enters into a business transaction that he is an undischarged bankrupt or to take a loan of greater than \$1,000 from any person without informing them that he is an undischarged bankrupt.
- [30] The appellant agrees that he never advised any of his real estate clients, including Mr. Lee, that he was an undischarged bankrupt. Mr. Lee testified that he would not have hired the appellant to help him with his real estate transaction, nor would he have agreed to enter into the loan agreement with him, had he known the appellant was an undischarged bankrupt.
- [31] The Registrar argues that the appellant's failure to comply with this requirement of the *Bankruptcy Act* provides reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty under s. 10(1)(a)(ii) of the *Act*. The appellant argues that it is unreasonable to expect him to tell everyone he conducts business with that he is an undischarged bankrupt. He argues that, if he were working as a cashier at Best Buy, it would be absurd to expect him to advise every customer he rings through that he is an undischarged bankrupt, and that this is equally true with respect to his activities as a real estate salesperson and with respect to his loan agreement with Mr. Lee.
- [32] The appellant's position is without merit. The appellant is seeking a registration to act in a highly regulated industry, in which his clients are often conducting the most significant financial transactions of their lives, and where his clients place great trust in the appellant to conduct that transaction within the law, with integrity and with honesty. Whether an undischarged cashier at Best Buy is engaging in a trade or business within the meaning of the *Bankruptcy Act* completely is something I do not need to decide, because in my view it seems clear that a person acting as a real estate agent *is* so engaged. Whether the appellant is an undischarged bankrupt would certainly be relevant to both his clients and any person from whom he sought a loan.
- [33] I find that the appellant was in breach of s. 199 of the *Bankruptcy Act* by failing to advise his clients that he was an undischarged bankrupt and by failing to tell Mr. Lee that fact before borrowing money from him.
- [34] The Registrar also argues that the loan from Mr. Lee was obtained using false representations. The evidence at the hearing was that the appellant approached

Mr. Lee with an offer to lend an unnamed third party \$15,000, for which Mr. Lee would be repaid \$17,000 six weeks later. The appellant told Mr. Lee that the appellant was also lending the third party \$15,000 of his own money. In fact, the appellant admits that he never advanced any of his own money to the third party. Moreover, there was no evidence, other than the appellant's own testimony, that Mr. Lee's money was ever advanced to the third-party borrower. There was no agreement or other communication in evidence with the third-party borrower with respect to this loan. There was no evidence presented that the appellant ever asked the third party for repayment of the monies allegedly advanced by Mr. Lee. Up until the hearing, the appellant refused to disclose the name of the third-party borrower. The promissory note showed the appellant as the borrower.

- [35] I find that the appellant induced Mr. Lee to enter into the loan agreement by stating that the loan was to a third-party, that the appellant was also advancing his own money, that the loan would be of short duration, that the return would be significant, and that the appellant would be effectively guaranteeing repayment of the loan himself. I find that the evidence demonstrated on a balance of probabilities that the loan was in fact made to the appellant, that there was no third-party borrower, that the appellant did not advance any of his own money as Mr. Lee was advised he would, that the appellant had no means of paying the loan back in the short term, and that his guarantee was worthless.
- [36] In summary, by failing to remit HST, the appellant has treated monies belonging to third parties as his own. By failing to advise clients that he is an undischarged bankrupt, the appellant has failed to act in accordance with the *Bankruptcy Act* and with integrity and honesty. By entering into the loan agreement with Mr. Lee as described, the appellant has failed to act with integrity and honesty. These actions, individually and collectively, provide ample grounds for belief that the appellant will not carry on business in accordance with law and with integrity and honesty.

Breach of Condition

- [37] The Registrar argues that, by failing to have his conditions of registration signed by his broker, as required by conditions of registration entered into October 14, 2015, the appellant has breached a condition of his registration and is ineligible for renewal pursuant to s. 10(1)(f) of the *Act*.
- [38] The appellant says that he verbally told the branch manager of his current broker of record about the conditions attached to his registration and that he did not realize he had to have the conditions signed.

[39] The Registrar submitted into evidence an email dated December 10, 2021, from the appellant's broker stating that he has not been provided with the conditions for signature. However, the Registrar did not disclose the email, or its intention to rely upon it, until shortly before the hearing.

[40] As a result, I decline to rely upon the email. While the Tribunal may consider hearsay evidence, it must be cautious in doing so given that hearsay evidence is be inherently unreliable. In these circumstances, I believe it would be procedurally unfair to the appellant to rely on hearsay evidence that was disclosed so late in the proceeding, particularly when no explanation was given as to why the email's author was not called as a witness. Without the email, I am not satisfied that the Registrar has proven that the appellant breached a condition.

Appropriate Outcome

[41] Having found that appellant cannot reasonably be expected to be financially responsible in the conduct of business and that there are reasonable grounds to believe that the appellant will not carry on business in accordance with law and with integrity and honesty, I must now consider the appropriate remedy. The Registrar and the Tribunal have the statutory discretion to consider the appellant's circumstances and determine whether the public interest requires outright revocation of registration or whether the public interest can be adequately protected through granting registration with conditions.

[42] I do not find that this is an appropriate case for conditions. The appellant has no plan, and no real prospect to improve his financial position. He has demonstrated no intention or ability to deal with his bankruptcy or his debts to CRA and Mr. Lee. There is evidence of a continuing pattern of behaviour which reasonably raises concerns with respect to his future behaviour in a regulated industry. His conduct reflects a pattern of financial irresponsibility, dishonesty, and failure to take responsibility for his actions. He has presented little or no evidence of changes he has made or any character evidence which might support registration with conditions.

[43] The findings against the appellant are serious. There is insufficient evidence before the Tribunal that would suggest conditions would be appropriate. I decline to impose conditions on the ground that I am not satisfied conditions would sufficiently protect the public.

D. CONCLUSION

- [44] I find that the Registrar has satisfied the onus to establish that the appellant cannot reasonably be expected to be financially responsible in the conduct of business.
- [45] I find that the Registrar has satisfied the onus to show that there are reasonable grounds to believe that the appellant will not carry on business in accordance with law and with integrity and honesty.
- [46] I find that that there are no terms and conditions that would sufficiently protect the public.

E. ORDER

- [47] The Tribunal directs the Registrar to carry out its proposal to revoke the registration of R.W. Todd Eves (the “appellant”) as a real estate salesperson.

LICENCE APPEAL TRIBUNAL



Colin Osterberg, Member

Released: January 14, 2022