LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: Ryan Hodge v. Registrar, *Real Estate and Business Brokers Act, 2002*, 2020 ONLAT 12027 REBBA

Date: 2020-01-14
File Number: 12027 REBBA

Appeal from a Notice of Proposal to Suspend Registration dated April 8, 2019 made by the Registrar, *Real Estate and Business Brokers Act, 2002* under s. 13 and s. 14 of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C and Regulations thereto, as amended.

Between:

Ryan Hodge

Appellant

and

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

Respondent

DECISION AND ORDER

ADJUDICATOR:	**Lindsay Lake**
APPEARANCES:	
For the Appellant:	Ryan Hodge Ondrej Sabo, Counsel
For the Respondent:	Angela Volpe, Manager of Registration Shane Smith, Counsel Ian Daley, Counsel
Hearing in Person on:	**November 18-20, 2019 (London, Ontario) with written submissions on costs**

OVERVIEW

[1] The appellant, Ryan Hodge ("Hodge"), was registered as a broker under the *Real Estate and Business Brokers Act, 2002*[1] (the "Act") since September 3, 2013.

[2] On April 8, 2019, the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar") issued a Notice of Proposal (the "Proposal") to suspend Hodge's registration as a broker on the following grounds:

(i) He provided false statements in his applications for registration or renewal and other materials provided to the Registrar; and

(ii) His past conduct provides reasonable grounds for belief that he will not carry on business in accordance with the law, and with integrity and honesty.

[3] While Hodge did not dispute the majority of the facts in this matter, he appealed the Proposal arguing that a suspension was not appropriate because:

(i) There is no evidence that he is not governable by the Real Estate Council of Ontario ("RECO");

(ii) The imposition of a suspension is not proportional in the circumstances; and

(iii) A suspension would amount to double jeopardy.

[4] The matter proceeded to an in-person hearing and written submissions on costs were ordered in accordance with Rule 19.3 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I* (October 2, 2017) (the "*Rules*").

ISSUES TO BE DECIDED

[5] The following issues are to be decided:

(i) Whether the registration of Hodge as a broker under the Act should be suspended by the Registrar and, in particular, whether:

(a) Hodge provided false statements in his applications for registration or renewal; and

(b) Hodge's past conduct provides reasonable grounds for belief that he will not carry on business in accordance with the law, and with integrity and honesty.

[1] S.O. 2002, c. 30, Sched. C.

(ii) Is Hodge entitled to recover the costs of this proceeding because the Registrar acted unreasonably, frivolously, vexatiously or in bad faith?

RESULT

[6] I find that:

(i) the Proposal should be carried out and, as a result, Hodge's registration as a broker under the Act shall be suspended for a period of three months; and

(ii) Hodge is not entitled to the costs of the proceedings because he failed to prove on a balance of probabilities that the Registrar acted unreasonably, vexatiously, frivolously or in bad faith.

PROCEDURAL ISSUES

Exclusion of Evidence: Response to Human Rights Tribunal of Ontario ("HRTO") matter

[7] At the commencement of the hearing, Hodge sought to exclude the Response to an Application under s. 34 of the *Human Rights Code* (Form 2) dated October 5, 2018 (the "Response") which was filed as evidence by the Registrar. The grounds for Hodge's request were that the Response was not relevant, as it pertained to another matter, and also that it violated the Implied Undertaking Rule.

[8] The Registrar contested Hodge's request arguing that the Implied Undertaking Rule did not apply to the document, that there was no order from the HRTO making the Response not public and that the Response was relevant as the attachment spoke to a number of issues in this matter and, as Hodge was not testifying, it was valuable evidence.

[9] Having heard the submissions of the parties, I denied Hodge's request. I found that the Response was a pleading in another proceeding and, as such, was not subject to the Implied Undertaking Rule. Furthermore, the Tribunal may admit as evidence at a hearing any document *relevant* to the subject-matter of the proceeding.[2] In this matter, I found that the Response was relevant as the parties to the HRTO matter were Hodge and another witness for the Registrar in this proceeding. Additionally, the Response was relevant as the HRTO was another legal proceeding and one of the grounds for which the Registrar sought to suspend Hodge's registration was based upon Hodge's past conduct providing reasonable grounds for belief that he will not carry on business in accordance with the law.

[2] *Statutory Powers and Procedure Act*, R.S.O. 1990, c. S. 22, s. 15(1)(b) ("*SPPA*").

[10] Having allowed the Response into evidence, however, I afford it little weight. Although the attachment is entitled, "Statement of Ryan Hodge on behalf of Respondents" and it was written in the first person, it was not a sworn statement or an affidavit and the allegations of the HRTO matter had not been proven or otherwise dealt with at the time of this hearing.

Costs

[11] In his closing submissions, Hodge requested to add the issue of whether he could recover his costs of this proceeding pursuant to Rule 19.1 of the *Rule*s because the Registrar acted unreasonably, frivolously, vexatiously, or in bad faith.

[12] I ordered that the issues of costs be added to the issues in dispute in this matter because the Registrar failed to show that it would be prejudiced by the addition of this issue. Further, Hodge was not out of time to request to add the issue of costs, as this request may be made at any time before a decision is released pursuant to Rule 19.2 of the *Rules*.

ANALYSIS

[13] Section 10(1) of the Act entitles applicants to renewal of registration if they meet the prescribed requirements unless they are disentitled for certain reasons, including:

(i) The applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;[3] or

(ii) The past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty.[4]

[14] For the reasons that follow, I find that the Proposal should be carried out because the Registrar has proven on a balance of probabilities that Hodge made false statements in two renewal applications and also that Hodge's past conduct affords reasonable grounds for belief that Hodge will not carry on business in accordance with the law, integrity and honesty.

[3] S. 10(1)(a)(iii) of the Act.
[4] S. 10(1)(a)(ii) of the Act.

False Statements

[15] The facts in this matter are largely not in dispute. Hodge, through his counsel in closing submissions and in his written submissions on the issue of costs, confirms that Hodge does not dispute the following facts:

(i) From September 3, 2013 to the hearing, Hodge was a broker with The Realty Firm Inc. ("Realty Firm"). Hodge was also a co-owner of the Realty Firm from its inception on September 3, 2013 until March 16, 2018;

(ii) As Hodge was registered as a broker under the Act, he was required to successfully complete continuing education courses for each two-year registration renewal period;[5]

(iii) Hodge did not complete the courses for two renewal periods. Ms. Ruth Illios, a former administrator at the Realty Firm from the firm's opening until October 2015, completed Hodge's continuing education courses as part of Hodge's 2015 renewal application at Hodge's direction. Hodge provided Ms. Illios with his personalized log-in credentials to complete the courses;

(iv) In Hodge's Application for Renewal of Registration dated August 31, 2015 (the "2015 Renewal Application"), Hodge confirmed that he completed three continuing education courses that Ms. Illios completed on his behalf;[6]

(v) On October 27, 2015, Ryan Hodge Coaching and Consulting Inc. was incorporated and listed Hodge as the sole Officer and Director of the corporation.[7] The status of the corporation was listed as "active" as of July 11, 2018;[8]

(vi) Ms. Jodi McKnight, an office administrator at the Realty Firm from July 2016 until March 2018, completed three more continuing education courses in July 2017 at Hodge's direction;

(vii) After completing the continuing education courses, Ms. McKnight completed Hodge's Renewal Application dated July 24, 2017 (the "2017 Renewal Application") on his behalf. The 2017 Renewal Application confirmed that Hodge completed the three continuing education courses that Ms. McKnight took on his behalf;

[5] O. Reg. 579/05, s. 5.
[6] Joint Document Brief, Exhibit 4, tab 5.
[7] Corporation Profile Report, Ontario Corp Number 2488756 dated July 11, 2018, Registrar's Book of Documents dated May 6, 2019, tab 6D.
[8] *Ibid*.

(viii) On July 24, 2017, Hodge instructed Ms. McKnight via email to respond "no" to the following questions on the 2017 Renewal Application:

(a) Are you, or will you be, registered/licensed, engaged or employed in any other business, occupation?

(b) Are you a Partner, Officer, Director or shareholder in any other business?

(ix) On March 16, 2018, Hodge became the sole owner and also the broker of record of the Realty Firm. On this same date, Hodge filed a Notice of Brokerage/Sole Proprietor Change form with the RECO.[9] In this document, Hodge checked "no" in response to the question, "are you a Partner, Officer, Director or shareholder in any other business?";[10] and

(x) On November 5, 2018, Hodge was charged with four provincial offences in relation to the 2017 Renewal Application and the 2018 Notice of Brokerage/Sole Proprietor Change form as set out above for contravention of O. Reg. 579/05 and s. 40(1) of the Act. Hodge pleaded guilty to all four offences on July 30, 2019 and fines totaling $8,400.00 were imposed.[11]

[16] Based on the undisputed facts set out above, I find that the Registrar has proven on a balance of probabilities that Hodge made the following false statements:

(i) In the 2015 Renewal Application by confirming that he completed his continuing education courses when, in fact, Ms. Illios completed them on Hodge's behalf; and

(ii) In the 2017 Renewal Application via Ms. McKnight as an agent of Hodge:

(a) That he completed three continuing education courses when Ms. McKnight completed them on Hodge's behalf;

(b) That he was not engaged in any other business, as I find that he was engaged in Ryan Hodge Coaching and Consulting Inc. at the time the 2017 Renewal Application was completed; and

(c) That he was not an Officer or Director in any other business, as I find that he was the sole Officer and Director of Ryan Hodge Coaching and Consulting Inc. at the time the 2017 Renewal Application was completed.

[9] Registrar's Book of Documents dated May 6, 2019, tab 6B.
[10] *Ibid*. at page 4.
[11] Certified Copy of Information 18-869P dated September 11, 2019, Joint Document Brief, Exhibit 4, tab 2.

Not Carry on Business in Accordance with the Law, Integrity and Honesty

[17] The following additional facts were not disputed at the hearing:

(i) On July 5, 2017, Hodge also requested Marnie Rijnen, the current head administrator with the Realty Firm, to complete his continuing education courses. Ms. Rijnen, however, did not comply with Hodge's request;

(ii) Hodge admitted in a September 27, 2018 recorded interview with Jo Ann Swain, investigator for RECO, to using profanities, insults and language that I find appalling, but which will not be reproduced in this decision, towards Ms. McKnight and another employee of the Realty Firm at a February 10, 2018 workplace event;[12] and

(iii) Hodge confirmed in the September 27, 2018 interview that an investigation arising from an internal complaint filed by Ms. McKnight regarding the February 10, 2018 workplace event was cancelled immediately upon Hodge becoming the sole owner and broker of record of the Realty Firm.[13] Hodge confirmed to Ms. Swain that there was no disposition of Ms. McKnight's internal complaint.[14]

[18] Angela Volpe, Manager of Registration with RECO, testified that RECO relies upon self-reporting from applicants and registrants. Ms. Volpe expressed RECO's concern over Hodge's lack of disclosure of his coaching business along with his failure to comply with the nominal requirement over a two-year period of completing education courses which, she stated, speaks to someone's honesty and integrity at its very core. I agree. As I have found that Hodge has in four instances provided a false statement to RECO and has requested three persons to complete his continuing education courses for him, I find that the Registrar has proven that Hodge's past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. In addition, the use of extremely inappropriate language by Hodge towards employees of the Realty Firm and the cancellation of an internal workplace investigation with no determination affords even more weight to my conclusion that the Registrar had reasonable grounds for belief that Hodge will not carry on business in accordance with law and with integrity and honesty.

[19] I am also not persuaded by the good character testimony advanced by Hodge to support a contrary finding on this issue.

[20] The Tribunal first heard from Sandra Tavares, Chief Operating Officer and Alternate Broker of Record at the Realty Firm. Ms. Tavares testified that she, Hodge and one other realtor form the Hodge Group Sales team at the Realty

[12] Registrar's Book of Documents dated May 6, 2019, tab 7, pages 62-63.
[13] *Ibid*. at pages 64-65.
[14] *Ibid*. at page 65.

Firm. As part of this team, Ms. Tavares testified that 90 per cent of her income comes from Hodge as a result of the compensation structure within the Hodge Group Sales team. Ms. Tavares testified that Hodge "is the brokerage" and that people come to the Realty Firm because of Hodge's experience and the training that he provides other realtors. I place little weight on Ms. Tavares' testimony regarding Hodge's character, however, because she primarily spoke to Hodge's importance to the brokerage and gave little, if any, evidence regarding Hodge's character. Furthermore, it is clear that Ms. Tavares has a financial interest regarding whether or not Hodge is suspended, which she described would be "devastating" on her income, and there was evidence that she was, at one point, in a relationship with Hodge.

[21] The Tribunal also heard testimony from the following persons as character witnesses for Hodge:

(i) Carole-Anne Schneider, Broker with Realty Executives Investment Group Ltd.;

(ii) Scott Gilmour, Broker of Record with Realty Executives Plus Ltd.;

(iii) Paul Etherington, Broker of Record with Royal Heritage Realty Ltd.; and

(iv) Gary Plummer, Broker/Manager with Century 21 Leading Edge.

[22] While all of these witnesses spoke of Hodge's high-quality and professional reputation as a leader within the real estate industry, none of these witnesses ever worked with Hodge or were employees of Hodge. There was also no evidence that any of these persons ever dealt with Hodge in a real estate transaction. As a result, the testimony of these witnesses gives little assistance to the Tribunal in determining if Hodge would carry on business in accordance with law, integrity and honesty.

[23] Moreover, I am not persuaded by the argument advanced by Hodge that because there is no actual or perceived consumer harm resulting from his actions that the Tribunal should conclude that he would carry on business in accordance with law, integrity and honesty. Hodge provided no authority for this argument and there is no language in the Act that a conclusion that one would not carry on business in accordance with law, integrity and honesty requires a finding of consumer harm.

[24] For all of the above-reasons, I find that the Registrar has proven on a balance of probabilities that Hodge made false statements in two renewal applications. I further find that the Registrar has established that Hodge's past conduct affords reasonable grounds for belief that Hodge will not carry on business in accordance with the law, integrity and honesty.

The Suspension

[25] The parties' main dispute in this matter was over the Registrar's request for a six-month suspension. For the reasons that follow, I order that Hodge's registration as a broker under the Act be suspended for a period of three months, as opposed to the six months requested by the Registrar.

[26] The Registrar's position was that once the Tribunal found that Hodge provided false information on his renewal applications, the Tribunal has no discretion and must order a suspension. In support of its position, the Registrar relied upon the Ontario Division Court decision in *Registrar of Alcohol and Gaming v. Hosseini-rad*.[15] In that case, the issue on appeal was whether the Tribunal erred by approving a registrant's application for a liquor delivery service licence (with conditions) despite finding that false information was provided in his application contrary to s. 6(2)(e) of the *Liquor Licence Act* (the "*LLA*").[16] The court held that the Tribunal erred, and that the combined language of s. 6(2)(e) and s. 10(2) of the *LLA* meant that the Tribunal did not have the discretion to approve a licence once it found that the applicant had provided false information on an application.

[27] I do not agree that the test in *Hosseini-rad* is applicable in this matter because the two statutory schemes are different. In any event, I do not need to decide this issue because I find that a suspension is warranted in the circumstances.

[28] Hodge's position was that there should be no suspension of his registration for the following reasons:

(i) There is no evidence that he is not governable by RECO;

(ii) The imposition of a suspension is not proportional in the circumstances; and

(iii) A suspension would amount to double jeopardy.

Governability

[29] Hodge argues against a suspension by submitting that there was nothing in the evidence that demonstrated he was not governable by RECO. Hodge relied upon excerpts of his September 27, 2018 interview with Ms. Swain as evidence that he was forthcoming and made several admissions about his conduct. The Registrar made no reply submissions on this argument.

[15] 2004 CanLII 34450 (Div. Ct.) ("*Hosseini-rad*").
[16] R.S.O. 1990, c. L. 19 ("*LLA*").

[30] There appears to be some uncertainty as to the role governability plays when the Tribunal is considering "past conduct" appeals.[17] I agree that whether or not an applicant's conduct raises concerns about governability can be a relevant consideration in these types of appeals. I disagree, however, that where the Registrar has proven that an applicant's past conduct affords reason for belief that they will not act in accordance with the law and with honesty and integrity, that it must *also* prove that the applicant is ungovernable before it can impose a sanction under the Act. In any event, I find that a suspension is warranted in this matter to ensure Hodge's future governability.

Proportionality

[31] Hodge argued that a six-month suspension of his registration was absurd and not proportional in the circumstances. To support his position, the Tribunal heard evidence from Ms. Rijnen that a six-month suspension would result in a financial loss to Hodge of over $100,000.00.

[32] Hodge also relied upon several decisions in support of his position that a six-month suspension is not appropriate. For example, Hodge submitted *Akbar Zarehhossainabadi, Kingsway Real Estate Inc. and Rouhollah Houshmand v. Registrar, Real Estate and Business Brokers Act, 2002*,[18] in which the Tribunal did not direct the Registrar to carry out a proposal for revocation of registration and, instead, allowed registration with conditions. One of the grounds for the Registrar's request for revocation in *Zarehhossainabadi* was false statements provided in renewal applications that included the failure to disclose a business. In the end, the Tribunal did not find that false statements were made on the renewal applications and, rather, that the non-disclosure was in the nature of an "honest mistake."[19] The Tribunal also found that one of the brokers made a "concerted effort to answer questions to the best of his ability" on the renewal applications.[20] I find that *Zarehhossainabadi* is distinguishable on the issue of false statements from Hodge's matter, as there was no evidence before me that the false statements on Hodge's renewal applications were "honest mistakes" or that Hodge made any concerted effort to answer the questions in the renewal forms to the best of his ability.

[33] Hodge submitted three other Tribunal decisions[21] that were of little assistance to support his argument that a six-month suspension was not proportional in the

[17] See for example, *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's)*, 2013 ONCA 157 (ONCA) at para. 32, but also *Registrar of Alcohol, Gaming and Racing v. MacLaren*, 2018 ONSC 6576 (CanLII) at paras. 36-39.

[18] 2019 ONLAT REBBA 9820 (ON LAT), unreported ("*Zarehhossainabadi").*

[19] *Ibid*. at para. 58.

[20] *Ibid*. at para. 82.

[21] *11603 v. Registrar, Real Estate and Business Brokers Act 2002*, 2019 CanLII 32288 (ON LAT) ("*11603*"), *Paolo (Paul) Fasciani v. Registrar, Real Estate and Business Brokers Act, 2002*, 2018 CanLII 52306 (ON LAT) ("*Fasciani*") and *Paul Panton v. Registrar, Real Estate and Business Brokers Act, 2002*, 2018 CanLII 50252 (ON LAT) ("*Panton*").

circumstances. For example, in *11603*, the Tribunal found that the appellant did not knowingly make a false statement on his application for registration and that the other business he failed to disclose was not carried on for gain or profit.[22] Also in *Fasciani*, the appellant testified that he was not trying to mislead RECO or lie and offered several explanations for the information on his applications. The Tribunal found that the appellant did not knowingly make false statements in his applications and that the appellant was governable based on the appellant's "insight and volunteering to abide by conditions."[23] These decisions are distinguishable as there was no evidence led by Hodge that he unknowingly made any of the false statements to RECO, Hodge's coaching business was carried on for gain or profit,[24] and no explanation or "insight" was provided by Hodge regarding the false statements on his RECO documents. *Panton* is also distinguishable as that decision dealt with a refusal of registration, which is not at issue in this matter. Finally, I find the disciplinary hearing decisions relied upon by Hodge in support of his position[25] to be of little assistance as well, as there was no information if any steps were taken by the Registrar regarding registration as these decisions only spoke to fines.

[34] Nevertheless, the Proposal in this matter did not set out a term for the suspension of Hodge's registration. The Registrar initially requested a suspension for a six-month period at the hearing. However, the Registrar also submitted in its closing submissions that the Tribunal is not restricted to the requested six months and may order a suspension for a period *greater than* six months up to the maximum of two years. Likewise, I also find that it is open for the Tribunal to impose a suspension of *less* than six months.

[35] Hodge made no submissions on the proposed length of the suspension, only that he did not want a suspension imposed. However, he argued that his actions caused no consumer or public harm. While providing false statements to the Registrar could be considered public harm, I do acknowledge that the Registrar provided no evidence of any individual consumer complaint arising from Hodge's conduct. This is an important consideration in considering the proportionality of the imposition of a six-month suspension given the public protection function of the Act and of RECO.

[36] Hodge did not testify at the hearing and, while he is not obliged to do so, the only evidence from Hodge before me is contained in the September 27, 2018 recorded interview with Ms. Swain and in his brief statement to His Worship Chahbar at his July 30, 2019 provincial offences sentencing hearing. Hodge conceded that he should have completed his continuing education courses at his

[22] *11603* at paras. 40 and 42.
[23] *Fasciani* at para. 53.
[24] *Supra* note 12 at page 7.
[25] *Real Estate Council of Ontario and Fozia Qamar*, 2019 (unreported) and *Real Estate Council of Ontario and Chaim Smilovici*, 2019 (unreported), Appellant's Brief of Authorities tabs 7 and 8, respectively.

sentencing hearing[26] and informed Ms. Swain that he had "just done the courses again."[27] However, it is not clear if Hodge was only referring to the 2017 courses or both the 2015 and 2017 courses. Furthermore, Hodge did not speak to the false statements at his provincial offences sentencing hearing. While Hodge stated to Ms. Swain that he was trying to take responsibility for his actions, no evidence was presented to the Tribunal of any steps taken to ensure that Hodge's past conduct that gave rise to the Proposal will not be repeated. Hodge's counsel also continued to characterize Hodge's conduct as "not serious" in his closing submissions, repeatedly stating that a hearing was not called for in this matter, let alone the Proposal, and that the Registrar was making a "mountain out of a molehill." For all of these reasons, I find that the absence of evidence in this matter that Hodge has taken remedial action underscores the need for a sanction by way of a suspension to ensure future compliance which is in the public interest.

[37] I also inquired into the parties' positions on the imposition of conditions on Hodge's registration as opposed to a suspension at the hearing. Nonetheless, I find that imposing conditions as an alternative to a suspension is not appropriate in this matter. Hodge's conduct shows patterns of behaviour such that on four occasions he provided false statements to RECO and had other persons complete his required continuing education courses on two occasions. Moreover, I agree with the Registrar that honesty and integrity is not something that can be easily remedied with a condition in this matter.

[38] For all of the reasons set out above, I find that a suspension of Hodge's registration is the appropriate outcome in this matter despite the potential financial impact to him. However, I am ordering a period of suspension of three months as opposed to six months as requested by the Registrar as three months is more proportional given the facts in this matter, including there being no evidence of any consumer complaint arising from Hodge's conduct.

Double Jeopardy

[39] I find that that the imposition of a suspension of Hodge's registration does not amount to double jeopardy for the following reasons.

[40] It is undisputed that Hodge has already pled guilty to four provincial offences charges under the Act and was imposed a fine of $8,400.00. No evidence, however, was tendered at the hearing that this amount had been paid.

[41] Hodge argued that a suspension of his registration would amount to a further monetary penalty and that the Tribunal has no authority to supplement or add to the $8,400.00 fine. Further, Hodge also argued that the Registrar relied upon all

[26] Transcript of Reasons for Sentence in the matter of *R. v. Hodge* dated July 30, 2019, Joint Document Brief, Exhibit 4, tab 21, pages 32-33.
[27] *Supra* note 12 at page 3.

of the same evidence in this matter as what was relied upon in the provincial offences matter and, therefore, a suspension would be a second punishment arising out of the same set of facts.

[42] Firstly, I disagree with Hodge that the Registrar relied upon "all of the same evidence" as it did in the provincial offences proceeding as that proceeding did not involve charges in relation to Hodge's false statements made in the 2015 Renewal Application or information regarding Hodge's conduct at the February 10, 2018 workplace event.

[43] Secondly, the decisions submitted by Hodge of *R. v. Wigglesworth*,[28] *R. v. Rodgers*[29] and *R. v. Denief*[30] have no application in this matter as these decisions speak to double jeopardy in reference to s. 11 of the *Canadian Charter of Rights and Freedoms*.[31] Here, Hodge conceded that he failed to comply with Rule 11 of the *Rules* as he did not serve the Attorney General of Canada or the Attorney General of Ontario with a Notice of Constitutional Question. As a result, I find that he is precluded from seeking any *Charter* relief regarding his argument of double jeopardy in this matter. Even if I was incorrect in this finding, s. 11 of the *Charter* applies to persons charged with "offences." While the provincial offences charges that Hodge pled guilty are "offences" for the purposes of s. 11, the administrative action taken by the Registrar in this matter is not. Therefore, even if Hodge had provided the requisite notice to the Attorney Generals, I find that s. 11 of the *Charter* does not apply in this matter.

[44] Thirdly, I find that the decision of *Babineau v. Canada (Treasury Board – Correction Services)*[32] submitted by Hodge is not relevant. In that decision, the issue was whether or not an employer can discipline an employee twice for the same misconduct. I find that the outcomes of the provincial offences matter and the Tribunal proceeding as against Hodge do not arise from the same issuing body. I also accept Ms. Volpe's testimony that there is no singular proceeding for the Registrar to seek both a fine and a suspension. As a result, the Registrar is entitled to seek its remedies in both the provincial offences court *and* before the Tribunal. Therefore, *Babineau*, which is also not binding on the Tribunal, is distinguishable for these reasons.

[45] Finally, Hodge's counsel could not direct me to any authority that *precluded* the Registrar from seeking both a fine in provincial offences court as well as an administrative suspension as against a registrant. I also note that the Tribunal has on at least one other occasion revoked a registration following fines being imposed.[33]

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[28] [1987] 2 S.C.R. 541, 1987 CarswellSask 385 (SCC).
[29] [2006] 1 S.C.R. 554, 2006 SCC 15 (SCC).
[30] [2013] N.J. No. 12, 2013 CasrwellNfld (Prov. Ct.).
[31] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*").
[32] 2004 PSSRB 145, 2004 CasrwellNat 3371 ("*Babineau*").
[33] See *11503 v. Registrar of Real Estate and Business Brokers Act*, 2019 CanLII 32259 (ON LAT).

Costs

[46] Rule 19.1 of the *Rules* provides that a party may make a request to the Tribunal for costs where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.

[47] Of note is the fact that the Registrar is successful in this matter. The usual course would be for a cost award to be made in favour of the successful party. The *Rules* and the *SPPA*, however, reflect a different policy. By incorporating the behaviour of a party in a proceeding as a trigger for an award of costs, the section makes behaviour the focus rather than success in the dispute. Thus, a successful but unreasonable party may be subject to a costs award.[34]

[48] I find that Hodge has failed to prove on a balance of probabilities that the Registrar acted unreasonably, frivolously, vexatiously or in bad faith in this proceeding for the following reasons:

(i) As discussed above, Hodge did not provide the required notice under Rule 11 of the *Rules* to advance any claim for relief under the *Charter* based on double jeopardy. Further, I found that the imposition of a suspension of Hodge's registration does not amount to double jeopardy. As such, any argument advanced by Hodge regarding double jeopardy cannot form the basis of a costs award against the Registrar;

(ii) I also do not agree with Hodge that he was not treated in good faith by the Registrar on the basis of Ms. McKnight's testimony. Hodge submits that it was inappropriate for Ms. McKnight to testify to matters outside of the Proposal, the Further Particulars document and her statement of anticipated evidence. Hodge alleges that this amounted to an ambush by the Registrar. I disagree. Ms. McKnight's testimony should have come as no surprise to Hodge, as his counsel brought a motion prior to the hearing to exclude the transcript of Hodge's September 27, 2018 interview with Ms. Swain which was denied by the Tribunal. The transcript clearly contained information regarding the February 10, 2018 workplace event that Ms. McKnight testified to even though this information was not included in the Proposal, the Further Particulars document or in Ms. McKnight's statement of anticipated evidence. The Tribunal's decision on Hodge's motion was made almost two months prior to the hearing which, in my opinion, gave Hodge ample time to respond to the likelihood that Ms. McKnight would testify about the February 10, 2018 workplace event. Furthermore, the other portions of Ms. McKnight's testimony that were outside of the Proposal, the Further Particulars document and her statement of anticipated evidence regarding spam emails and alleged plagiarism did not form part of my decision in this matter;

[34] See *17-005302 v Aviva Insurance Company of Canada*, 2018 CanLII 83535 (ON LAT) at para. 43.

(iii) Although Hodge asserts that the Registrar's calling Ms. McKnight as its first witness at the hearing was done to "prejudice the trier of fact against Mr. Hodge on issues which are plainly outside the scope of this hearing," he provided no supporting evidence of this alleged prejudice. Furthermore, I accept the Registrar's explanation that it is its practice to call the complainant first at a hearing and, in this matter, that was Ms. McKnight. Therefore, I find that there was nothing in the calling of Ms. McKnight as the Registrar's first witness that supports a finding that the Registrar acted unreasonably, frivolously, vexatiously or in bad faith; and

(iv) I also do not agree that the Registrar was not act in bad faith towards Hodge by relying upon the September 27, 2018 interview transcript in this matter. Hodge argues that even though the Tribunal denied his request to exclude the transcript as evidence at the hearing, "the question remains whether the use of such evidence by the Registrar is fair and appropriate and done in accordance with good faith, notwithstanding the technical ruling on its admissibility."[35] A determination on the admissibility of the transcript was previously made by the Tribunal and it was allowed into evidence at the hearing. Hodge argues that regardless of the Tribunal's decision on its admissibility, the Registrar acted in bad faith by relying upon the transcript at the hearing because Hodge voluntarily participated in the interview which was then "used against him despite an apparently express request that such evidence be not produced in a court proceeding."[36] It is clear that when the admissibility of the transcript was determined by the Tribunal, it held that Hodge's participation in the interview was *not* voluntary, contrary to Hodge's submissions, and, in any event, voluntariness did not have any bearing on its admissibility.[37] Furthermore, Hodge's request that the transcript of the interview not be used against him in a court proceeding was found to apply to the provincial offences charges *only* and that the proceeding before the Tribunal was not a "court proceeding."[38] Given the Tribunal's express disagreement with Hodge on these two arguments, I do not find that the Registrar was acting in bad faith by relying upon the transcript as evidence in this matter.

[49] Based on all of the reasons set out above, Hodge is not entitled to his costs of this proceeding.

[35] Submissions of the Appellant Regarding Costs dated November 27, 2019, para. 33.
[36] *Ibid*. at para. 38.
[37] Decisions and Reasons dated October 3, 2019 by Adjudicator Foot, paras. 9-11.
[38] *Ibid*. at paras. 12-14.

DECISION AND ORDER

[50] For all of the reasons set out above, I direct the Registrar to carry out the Proposal and suspend Hodge's registration as a broker under the Act for a period of three months. Hodge's request for costs is dismissed.

LICENCE APPEAL TRIBUNAL

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Lindsay Lake, Member

Released: January 13, 2020