

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

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



Citation: Kelly Da Costa v. Registrar, *Real Estate and Business Brokers Act, 2002*

Date: 2018-02-16
File Number: 10582 REBBA

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

Between:

Kelly Da Costa

Appellant

-and-

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

Respondent

DECISION AND ORDER

ADJUDICATOR: Patricia McQuaid, Vice Chair

APPEARANCES:

For the Appellant: Andrew Camman, Counsel

For the Respondent: Jonathan Miller, Counsel

Heard in Toronto: November 16 and 17 and December 15, 2017

OVERVIEW

[1] Kelly Da Costa (the “appellant”) has appealed the Registrar’s Notice of Proposal, dated November 15, 2016, to refuse his registration as salesperson. The Registrar issued a Supplemental Notice of Proposal to refuse his registration as a salesperson on April 12, 2017 setting out additional grounds for the appellant’s disqualification to registration. The appellant was previously registered as a real estate salesperson; however, pursuant to a Licence Appeal Tribunal Order dated May 8, 2014, the Tribunal directed the Registrar to revoke his registration.

[2] The parties agree that the facts of this case invoke two sections of the *Real Estate and Business Brokers Act, 2002* (the “Act”). The first relates to s. 17 which states that a person whose registration is revoked may reapply for registration only if the time prescribed to re-apply (one year) has passed since the revocation, and if new or other evidence is available or if it is clear that material circumstances have changed. The application for registration was made in June 2015, meeting the first requirement of s. 17. The onus is on the appellant to demonstrate the change in material circumstances. The Registrar asserts that there is no new or other evidence available and it is not clear that circumstances have changed.

[3] The second relevant section of the Act, s. 10, comes into play if the appellant satisfies the Tribunal of a material change in circumstances. Should he pass that hurdle then the Registrar asserts that he is not entitled to registration because he does not meet the test for registration. Specifically, he bases his refusal on two grounds:

- The appellant’s past conduct affords reasonable grounds for belief that the appellant will not carry on business in accordance with the law and with integrity and honesty; and
- The appellant is alleged to have made a false statement in his application for registration.

[4] With respect to the first ground, the Registrar relies on the Tribunal decision of May 2014, as well as two disciplinary decisions of the Real Estate Council of Ontario (“RECO”) in 2001 and 2012. Regarding the second ground, the Registrar alleges that the appellant made false statements on his applications for renewal of registration in 2005, 2007, 2009 and 2011.

ISSUES

[5] Given the evidence heard, has the appellant established that material circumstances have changed since the revocation of his registration in May 2014?

[6] If the evidence shows that it is clear that material circumstances have changed, is the appellant disqualified to registration on the basis of any one of the following: that there are reasonable grounds to believe that the appellant will not act in accordance with

the law, or with integrity, honesty and in the public interest, having regard to his past conduct; and/or because of false statements on his application?

[7] Further, if the evidence, establishes that the appellant is entitled to registration, should that registration be subject to conditions?

[8] For the reasons that follow, I find that the steps the appellant has taken do not yet clearly demonstrate that material circumstances have changed so as to warrant registration. Therefore I need not address the issue of whether, the appellant is otherwise entitled to registration. Accordingly, I direct that the Registrar carry out the Notice of Proposal to refuse the appellant's registration.

EVIDENCE and ANALYSIS

The Disciplinary Background

[9] The decision of the Tribunal in May 2014 provides context for the issues before me. It is important to note that the appellant does not take issue with, or dispute, the findings or conclusions set out in the decision.

[10] The Notice of Proposal to revoke registration that gave rise to that hearing was issued in September 2012. A hearing before the Tribunal took place and a decision was released in August 2013. That decision was appealed to the Divisional Court and on consent of the parties the appeal was allowed. The matter was re-heard over a period of three days in February 2014, resulting in the decision by Vice-Chair Sproule in May 2014.

[11] Joanne Swain, the RECO investigator involved in the appellant's case gave evidence at the prior hearing and before me. I will not review the particular real estate transactions that led to the disciplinary action against the appellant in 2012 in any detail, but a brief summary is important background for each of the party's positions. Three different transactions occurred over a period of a year, in 2008. The dealings with each of the properties was complicated with, for example, the appellant acting as listing agent for properties, purchasing the property through a numbered company owned by him and selling it shortly thereafter for a higher price. Mortgage monies were received based on the higher, and inflated, prices. The appellant's numbered company profited in these transactions. The appellant gave false and misleading information to his clients. In the May 2014 decision, the Tribunal found that the appellant knew that what he was doing was clearly wrong at the time.

[12] The Tribunal summarized the appellant's testimony as follows:

The Applicant acknowledged that in hindsight he should have noticed some things. He testified that in 2008 he was "burnt out", working 7 days a week for months at a time. He described SSC, who was involved in all three deals, as a "pretty aggressive individual", and that his own personality didn't get along well with aggressive people, he (the Applicant) tends to back away. The Applicant testified he did not see the described transactions as unethical at the time, now he definitely does. He testified

he is doing things to change, and prevent any reoccurrence. He is working less hours, continues to see his counselor, and he doesn't deal with aggressive people. He knows what his weaknesses are. He confirmed that if it was a condition of his registration that he could not trade in real estate personally he would comply.

[13] In her conclusion, Vice-Chair Sproule stated as follows:

The Applicant was an active party who was personally enriched by his conduct, who has failed to demonstrate a willingness to disclose the true facts long after the events when it has not been in his interest to do so. For these reasons, the Tribunal concludes that the Applicant's past conduct, in its totality, affords reasonable grounds for belief that he will not carry on business in accordance with the law and with honesty and integrity.

[14] Ms Swain, in her evidence at this hearing, also referred to two other disciplinary proceedings against the appellant. The first was in 2001-2002 in which the RECO appeals committee upheld a finding that the appellant was negligent in the manner in which he retained and stored confidential client information, and that he failed to take steps to verify the accuracy of letters that he sent to a lender. An administrative penalty of \$3500 was imposed. The second disciplinary matter occurred in April 2012. A RECO discipline committee, based on an agreed statement of facts, found that the appellant acted unprofessionally with regard to circumstances involving a home inspection at a seller's home. On this occasion, the appellant was ordered to pay a \$5000 penalty.

[15] The other issue addressed by Ms Swain in her evidence at this hearing was the nondisclosure on the applications for renewal of registration in 2005, 2007, 2009 and 2011; specifically the failure to disclose corporations in which he was a director and/or officer. One of those corporations was implicated in the transactions before the Tribunal in 2014. The appellant conceded this failure to disclose at this hearing.

[16] The paragraphs above form the backdrop for the assessment of whether, as articulated by Mr. Camman, there is evidence of sufficient material change in circumstances to satisfy me that this conduct will not be repeated. Counsel described his client as having hit 'rock bottom' in 2014: he lost his registration; his ability to provide for his family which was integral to his sense of self; he lost his marriage and was alienated from his children. But flowing from this, counsel submits, is a tale of rehabilitation and redemption. He describes the appellant as having experienced a dramatic renaissance. He now has the ability to follow rules.

Change in Material Circumstances

[17] Both of the appellant's children, now adults, testified about their father's absentee role for many years. He was always working. He was supportive financially, but not emotionally. He did not take care of himself. He seldom ate at home, consumed junk food, would fall asleep in front of the T.V. where they would find him in the morning. They both described a man who seemed to feel the pressure to succeed but derived no enjoyment from his financial success. Now, they see a man who is leading a healthy lifestyle and seems to have the tools to keep his life in balance. They now have positive relationships

with their father; he is involved in their lives and the lives of his grandchildren. They see that family has become a priority for their father like it never was before.

[18] The appellant has never explained to his children why he lost his registration in 2014, nor have they asked.

[19] Cindy Da Costa, the appellant's former spouse also testified, as she did at the previous hearing. She is a registered real estate broker and they worked on the same sales team though she was not aware of the transactions in 2008 as they were happening. She described him as a driven man who lived life as a machine. He had tunnel vision, always focussed on the next deal. Now she sees a different man. This change, in her view, could not have happened but for the revocation of his licence in 2014 and believes that he will spend the rest of his life trying not to allow the past events to recur, because he now knows what he lost.

[20] Darryl Upfold, a registered psychologist, also testified on the appellant's behalf. Mr. Upfold did a psychological assessment of the appellant in 2013, using several diagnostic tools. He did not diagnose a clinical or personality disorder. Through that assessment, he determined that the appellant was a person who tended to be trusting of others, believing them to be honest and well intentioned. He also found that the appellant lacked internal deliberation meaning that unlike most people, the appellant tended not to slow down to pause and reflect on the impact of his actions and their consequences. His personal work ethic embodied a drive to avoid failure and a relentless need to just keep going.

[21] Mr. Upfold found the appellant to be a very private person, but he was willing to engage in psychotherapy. They had several sessions. Mr. Upfold opined in a 2013 report that the appellant had gained some insight into his personality and gave him a favourable prognosis. The appellant did not continue in treatment with him beyond 2014. Mr. Upfold was then contacted by the appellant in May 2017, in anticipation of this hearing. In the intervening period, the appellant had engaged in a process of self-improvement through reading and taking motivational workshops, some of which were online.

[22] Mr. Upfold saw the appellant twice in May 2017. He did not re-administer the psychological assessment. Mr. Upfold testified that he was extremely impressed by the appellant. He felt that when the appellant lost his registration in 2014, he had no choice but to stop and reflect on what had occurred. In 2017, he was able to understand that he had lost sight of his professional responsibilities as he was working seven days a week trying to stay ahead of what he perceived as failure. He saw a dramatic change in the appellant physically and mentally. He felt that the appellant, through his own efforts for self-improvement had gained tremendous insight about himself. After two sessions with the appellant, he told him that he did not believe he needed any further counselling from him.

[23] At the hearing, I heard evidence from the appellant's children, Ms. Da Costa and the appellant himself about his unhealthy lifestyle prior to 2014. Mr. Upfold described the poorly balanced lifestyle as a symptom of his personality issues. As a result of his fear of

failure, he felt the constant need to work, and his lack of deliberation led to the unhealthy choices that he made.

[24] Mr. Upfold acknowledged that he did not know any details of what the appellant had done which resulted in the hearing in 2014. He stated that it was sufficient to know that he violated certain legal and ethical standards required of a real estate salesperson. For him, what he had done was less important than why he had done it.

[25] The appellant had been in the real estate business for about 25 years when he lost his registration in 2014; it was all he had done since the age of 21. And despite the fact that he describes the business as competitive and cut-throat, he does want to return to it. It is all he knows. Indeed, he filed the application to be registered only 13 months after the May 2014 Tribunal decision. In his testimony, he stated that he was very successful, but had no joy. He had no financial pressures, but it was at a cost; he smoked, ate poorly and slept on the floor of his family room in front of the T.V. He was a workaholic. He burnt himself out and made poor decisions with significant consequences. He failed to see 'red flags' in terms of his dealings that others would have. After he lost his registration, he saw that what he had done was wrong and embarked on a path to restore himself and his relationships with his children.

[26] After seeing the appellant react to his family's testimony and hearing his testimony, which was often emotional, I can conclude that he seems more self-aware. As he stated, he understands why RECO believes him to be a dishonest person. The fact that he has rehabilitated his family relationships is laudable

[27] When asked why, with all the pressures of the real estate business, he would want to put his recent personal achievements at risk, the appellant stated that he is not interested in going back to a world of sales, but rather, he would like to manage an office and to mentor new members to the profession by telling his cautionary tale so that they do not make the same mistakes. He knows the red flags that he personally has to look out for; it is about him- sleeping on the floor, going to work in the clothes he slept in and eating unhealthily.

[28] The appellant, it should be noted, did make restitution totalling about \$200,000 in respect of the parties impacted by the 2008 real estate transactions. The fact that restitution has been made can be of positive effect in cases such as this. However, as Mr. Miller, the respondent's counsel, pointed out, restitution had been made at the time of the 2014 hearing; it does not reflect a material change from that time and appears not to have been a significant factor considered by the Tribunal at that time.

[29] The appellant has been involved as a volunteer, providing financial support, with a sports club in Kitchener for many years and provided a letter from one of the directors outlining the various charitable initiatives the club has undertaken for the community. This too is not a recent development since 2014 and while commendable, does not, based on the evidence before me, reflect a material change in circumstances.

[30] What is in evidence before me is that the appellant has made positive changes in his life since 2014. His family's evidence was a testament to that. This is not disputed by the Registrar. What is in dispute is whether the evidence of change is material as contemplated by the Act. The changes outlined are very personal ones; it is unclear whether those changes will translate into the context of work. The appellant states that he does not want to be involved in sales, but wants his registration as a salesperson as a necessary first step to being a manager and mentor to others. While it is logical that in the role as office manager, sales documents would cross his desk, Ms Da Costa's evidence was that it may not require registration, if it is an administrative position only. She also stated that many people would hire him in the Kitchener area, even without a licence.

[31] So while the appellant's personal path since 2014 suggests a tale of redemption as described by Mr. Camman, the issue of whether material circumstances have changed is not sufficiently clear at this time. While the cases cited to me by counsel refer to 'forgiveness' and second chances, the context of the public interest mandate also figures into the equation. Here there is no evidence of the appellant's ability to transfer the positive lifestyle changes he has made into the working environment, especially into an environment where there is high pressure to close transactions, an environment which proved problematic for him in the past. There is no evidence of work in a position of responsibility, in a real estate context or otherwise, since 2014. He does have a sponsoring broker, but has had little to no contact with him since his application was made to RECO in 2015, and in fact, had to confirm during the course of the hearing that the broker would still employ him. There was no evidence of any kind from this prospective employer, nor any evidence that he has made any concrete effort to pursue the office manager role which he states he wants to pursue, versus a sales position.

[32] Having concluded that the evidence of change is not sufficient to convince me that the appellant should be registered at this time, it is not an opportunity that necessarily should be foreclosed to him in the future.

ORDER

[33] Pursuant to the authority vested in it under the Act, the Tribunal directs the Registrar to carry out the Proposal to refuse registration.

LICENCE APPEAL TRIBUNAL

A handwritten signature in black ink, appearing to read "Patricia McQuaid". The signature is written in a cursive style with a large initial "P".

Patricia McQuaid, Vice Chair

Released: February 16, 2018