

Citation: *Estabrooks v. New-Brunswick (Director of Consumer Affairs)*, 2017 NBFCST 2

PROVINCE OF NEW-BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *REAL ESTATE AGENTS ACT*, S.N.B. 2011, c. 215

Date: 2017-02-17
Docket: CA-001-2016

BETWEEN:

Larry Nicholas Estabrooks,

Applicant,

- and -

Director of Consumer Affairs,

Respondent.

DECISION

PANEL: John M. Hanson, Q.C., Tribunal Member and Panel Chair
Raoul Boudreau, Tribunal Member
Gerry Legere, Tribunal Member

DATE OF HEARING: December 1, 2016
Additional submissions on December 9, 2016

WRITTEN REASONS: February 17, 2017

APPEARANCES: Brian Maude for the Director of Consumer Affairs;
Larry Estabrooks, in his own capacity.

I. OVERVIEW

- [1] In May 2016, Mr. Estabrooks submitted his annual renewal application for his real estate agent's licence. His licence was to expire on May 31, 2016.
- [2] On July 12, 2016, the Director of Consumer Affairs [the Director] refused Mr. Estabrooks' renewal application due to material misstatements on his application and concerns with respect to his financial suitability.
- [3] On July 29, 2016, Mr. Estabrooks filed a Request for Hearing with our Tribunal commencing an appeal of the Director's decision.
- [4] The Director filed a motion on September 16, 2016 seeking to have the appeal proceed as a true appeal rather than a hearing *de novo*. The motion was heard on September 30, 2016 and we issued an Order on October 5, 2016 ruling that the appeal would proceed as a hybrid appeal. Our Decision with reasons followed on November 1, 2016.
- [5] On October 25, 2016, the Registrar issued a Notice of Hearing scheduling the hearing of this appeal for November 30, 2016.
- [6] On November 25, 2016, we requested that the parties present evidence at the appeal addressing:
 - a) When and how the Director shared with Mr. Estabrooks the information she had on file regarding his application before the July 7, 2016 meeting;
 - b) When and how Mr. Estabrooks was advised that the July 7, 2016 meeting was his opportunity to be heard; and
 - c) When and how Mr. Estabrooks was advised that he could present additional evidence at the July 7, 2016 meeting.
- [7] At the end of the November 30, 2016 hearing, we indicated to the parties that we had concerns about procedural fairness in the proceedings before the Director. We requested that the parties provide post-hearing submissions addressing the following three questions:
 - a) Was there a breach of the duty of procedural fairness surrounding the July 7, 2016 meeting?
 - b) If there was a breach, does this invalidate the Director's decision?
 - c) If there was a breach, can the Tribunal issue a decision on the merits of this appeal?
- [8] For the reasons that follow, we conclude that Mr. Estabrooks should be granted a real estate agent's licence with terms and conditions. We are remitting this matter back to the Director for the determination of those terms and conditions.

II. PRELIMINARY COMMENTS

[9] We feel it is warranted to address certain issues that arose during this proceeding which unnecessarily delayed or complicated this appeal. We elaborate on these matters in the hope that they can be avoided in future appeals.

A. The Content of the Record

[10] The first matter is the deficiencies in the Record of the decision-making process compiled by the Director.

[11] The Record serves an important purpose in an appeal before the Tribunal as it indicates to the Tribunal what evidence was before the decision-maker in its decision-making process. The Record also serves as an evidentiary basis for an appeal. In appeals where the parties do not adduce additional evidence or call witnesses to testify, the Record is the only evidence before the Tribunal. For these reasons, it is crucial that the Record present a complete and faithful portrait of the proceedings before the regulator or other decision-maker.

[12] Part 11 of Local Rule 15-501 *Proceedings before the Tribunal* [Tribunal's procedural rules] and Practice Direction No. 7 *Procedure for an Appeal* require that the Director compile the Record of her decision-making process. Once compiled, the Director provides the Record to the Applicant, who then files it with the Tribunal.

[13] Paragraph 11(4)(d) of the Tribunal's procedural rules, which is applicable to an appeal by virtue of Practice Direction No. 7, sets out the content of the Record. That paragraph provides that the Record must contain "any documentary or other evidence considered in the decision-making process, subject to any limitation expressly imposed by any statute, regulations or guidelines on the extent to which or the purpose for which any such documents may be used".

[14] Practice Direction No. 8 *Content of the Record of the decision-making process* provides clarification on the content of the Record and states:

Paragraph 11(4)(d) of Local Rule 15-501 should be read to include **all documentary or other evidence** before the decision-maker during its decision-making process, subject to any limitation expressly imposed by any statute, regulations or guidelines on the extent to which or the purpose for which any such documents may be used. [our emphasis]

[15] Our first issue with the Record is that it contained a surplus of personal information that was not necessary to the Tribunal's adjudication of the appeal, such as Mr. Estabrooks' residential address, home telephone number and signatures. Pursuant to Part 16 of the Tribunal's procedural rules, the Record becomes part of the public record after the start of the hearing and, as such, is available to the public and the media.

[16] Given that the Tribunal is subject to the *Right to Information and Protection of Privacy Act*, it must limit its collection, use and disclosure of personal information to that which is necessary for the adjudication

of Mr. Estabrooks' appeal. The Tribunal expects the regulator or its legal counsel to redact the Record to ensure that only the personal information required for the appeal is contained in the Record. If a Record is provided containing unnecessary personal information, the Tribunal Registrar will redact the Record to ensure the Tribunal respects its obligations under the *Right to Information and Protection of Privacy Act*. We expect the parties and their legal counsel to cooperate with Tribunal staff when redactions are required.

[17] Second, it quickly became apparent at the hearing of this appeal that certain documents were missing from the Record. The following documents were omitted from the Record:

- Mr. Estabrooks' trust account statements showing a \$0 balance for the past two years;
- The front pages of insurance reports (the back pages were in the Record);
- A March 16, 2016 article entitled "Real estate agent will stand trial on tax charges" that appeared in Infomart; and
- A series of e-mails between Mr. Estabrooks and Roxanne Gunning, a compliance officer in the Consumer Affairs Division, dated July 4 and 5, 2016.

[18] The Record compiled by the Director does not comply with the requirements of the Tribunal's procedural rules nor Practice Direction No. 8. We are particularly concerned with the omission of Mr. Estabrooks' trust account records and the chain of e-mails between Mr. Estabrooks and Ms. Gunning on July 4-5, 2016, as these documents were highly relevant to this appeal.

B. Inaccurate Statements

[19] We are also troubled by the attempt by counsel for the Director, during the hearing, to blame the deficiencies in the Record on Mr. Estabrooks as shown in the following excerpt of the transcript of the hearing:

CHAIRMAN: All right. We are going back on the record. What Mr. Estabrooks has provided to us is an exchange of three emails from himself to Roxanne Gunning, and from Roxanne Gunning to himself. Mr. Maude, is there any reason why -- I mean, this is clearly about this meeting that's taking place in a few days' time, is there any reason why this wasn't included in the record?

[...]

MR. MAUDE: Yes. And the record of the decision-making process contains all the information relevant to the making of the decision. This was not relevant to the making of the decision. With respect to the record that was provided in this matter, that was compiled by Mr. Estabrooks. And if Mr. Estabrooks didn't see fit to include it, I don't know why.

- [20] While counsel later corrected this statement by recognizing that the compilation of the Record was done by himself in consultation with the Director, the statement was nonetheless misleading.
- [21] On another note, counsel for the Director on two occasions required, in e-mails to the Registrar, that were copied to Mr. Estabrooks, that Mr. Estabrooks provide a witness summary for his own testimony at the appeal. We instructed the parties on November 17, 2016 that Mr. Estabrooks was not required to provide either a witness list or a witness summary for his own testimony as he was a party and not a witness and as such could not be prevented from testifying at the hearing, which is the consequence for failing to provide a witness list or witness summary under the Tribunal's procedural rules.
- [22] In the future, counsel should refrain from sending such requests as they create confusion for self-represented parties. If a party or legal counsel has questions about the Tribunal's procedural rules, these should be addressed to the Tribunal.

C. Failure to Address Requests of the Tribunal

- [23] At the end of the hearing, we requested that the parties provide post-hearing submissions on procedural fairness. In particular, we requested that the parties provide submissions on whether the Tribunal could issue a decision on the merits of this appeal if it concluded there was a breach of the duty of procedural fairness by the Director.
- [24] Counsel for the Director took the position that the Tribunal had addressed this question in its November 1, 2016 motion decision and did not provide any caselaw on the issue. That Decision dealt with a motion by the Director seeking to have this appeal conducted as a true appeal rather than a hearing *de novo*. The Decision did not address the issue of whether we could hear this appeal on the merits if we concluded there was a violation of the duty of procedural fairness by the Director.
- [25] Mr. Estabrooks took the position that we should seek assistance from the Tribunal's legal counsel.
- [26] The Tribunal expects parties to cooperate with its requests, including requests for post-hearing submissions. While self-represented parties may not have the required legal skill or access to the same legal research databases as legal counsel, we do expect them to provide their position on the questions. The Tribunal's expectations of legal counsel are more elevated as they have the specific training to answer the Tribunal's questions. Therefore, at a minimum, when the Tribunal requests post-hearing submissions, it expects legal counsel to provide caselaw setting out the law on the issue.
- [27] The failure of the parties in this matter to provide any caselaw on this issue resulted in the Tribunal having to conduct its own research, which delayed the issuance of this Decision.

III. ISSUES

- [28] On the duty of procedural fairness, the issues are:
- a) Was there a violation of the duty of procedural fairness surrounding the July 7, 2016

meeting?

- b) If there was a breach of procedural fairness, does this invalidate the Director's decision?
- c) If there was a breach of procedural fairness, can the Tribunal hear the appeal on the merits?

[29] We must also address Mr. Estabrooks' five grounds of appeal, which are the following:

- a) Did the Director exceed the proof of financial responsibility?
- b) Did Mr. Estabrooks have the obligation to disclose the judgments on his Application?
- c) Should the Director have found that individual consumers of real estate representation services have a right to single agency representation and undivided loyalty from their agent?
- d) Did the Director fail to consider the length of Mr. Estabrooks' career as a real estate licensee?
- e) Was the Director biased?

IV. ANALYSIS

A. THE DUTY OF PROCEDURAL FAIRNESS

[30] We find, for the reasons set out below, that the Director violated the duty of procedural fairness in her decision-making process, but that the Tribunal retains the jurisdiction to hear the merits of this appeal.

(1) Was there a violation of the duty of procedural fairness surrounding the July 7, 2016 meeting?

(a) Positions of the Parties

[31] The Director submits that she owed a high level of procedural fairness to Mr. Estabrooks in her decision-making process and that she respected the applicable duty of procedural fairness for the following reasons:

- Her June 8, 2016 letter expressly stated her concerns with respect to the misrepresentations on Mr. Estabrooks' application and disclosed that she had his credit report identifying an unsatisfied judgment;
- She twice requested additional information from Mr. Estabrooks by her June 8, 2016 and June 30, 2016 letters;

- She received additional information from Mr. Estabrooks;
- She provided Mr. Estabrooks an opportunity to be heard in the form of an “oral hearing” before rendering her decision;
- By her June 30, 2016 letter, the Director provided Mr. Estabrooks the opportunity to make submissions in person regarding his application. In that letter, the Director also (1) indicated that the purpose of the July 7, 2016 meeting was to seek additional information with respect to Mr. Estabrooks’ application and to discuss his general suitability to be licensed as an agent under the *Real Estate Agents Act*; and (2) indicated to Mr. Estabrooks that he had the right to be represented by counsel at the July 7, 2016 meeting;
- Mr. Estabrooks was intimately familiar with the details of the Judgment in favour of Consumer Credit Services Ltd. as he had provided her with the entirety of the documentation in relation to that Judgment;
- The Director was never in possession of the Judgment in favour of Delehanty Rinzler Druckman; and
- Mr. Estabrooks was intimately familiar with his own credit utilization and the fact that no credit was currently available to him.

[32] Mr. Estabrooks submits there was a breach of procedural fairness although he did not provide a position on the level of procedural fairness required in the proceedings before the Director.

(b) Findings of Fact

[33] Mr. Estabrooks’ renewal application for his agent’s licence was dated May 17, 2016. It was stamped received by the Financial and Consumer Services Commission on May 26, 2016.

[34] On May 26, 2016, the Consumer Affairs Division obtained a Consumer Report from Equifax for Mr. Estabrooks.

[35] The Consumer Report indicated that Mr. Estabrooks’ credit utilization was at 100%.

[36] It also revealed the existence of two judgments: a Judgment in favour of Consumer Credit Services Ltd. in the amount of \$23,443 [Consumer Credit Judgment], and a Judgment obtained under the *Income Tax Act* in the amount of \$54,024.

[37] On June 8, 2016, the Director sent a letter to Mr. Estabrooks. In that letter, she indicated that Mr. Estabrooks had denied failing to satisfy a judgment of a court on his application. In her assessment of his suitability she performed a check with a credit reporting agency which revealed a Judgment in favour of Consumer Credit Services Ltd. The Director requested that Mr. Estabrooks provide additional information regarding the Consumer Credit Judgment and amounts outstanding by June 17, 2016.

[38] Mr. Estabrooks cooperated with the Director's request for further information. On June 10, 2016, he sent an e-mail to the Director providing the following documentation:

- a) A May 14, 2015 letter from Forbes Roth Basque regarding a notice of assignment of Forbes Roth Basque's debt in the amount of \$23,443.67 to Consumer Credit Services Ltd. and the Notice of Assignment of Account;
- b) The Notation in Default of Larry Estabrooks in Court File MC-457-15 on September 22, 2015 in relation to the action commenced by Consumer Credit Services Ltd.;
- c) A notice of Sheriff's Sales for a 1962 Chevrolet Corvette convertible owned by Larry Estabrooks posted in the March 30, 2016 Royal Gazette; and
- d) Documents relating to disciplinary proceedings before the New Brunswick Real Estate Association and subsequent applications for judicial review and appeals.

[39] It is unclear if any additional documents were attached to Mr. Estabrooks' e-mail as the Director separated these documents from Mr. Estabrooks' e-mail in compiling the Record.

[40] On June 30, 2016, the Director sent another letter to Mr. Estabrooks advising that she had completed her review of the documentation he had submitted and requesting his attendance at a meeting on July 7, 2016. The purpose of the meeting was stated as seeking "additional information with respect to our assessment of your application and to discuss your general suitability to be licensed as an individual agent under the Act". The Director advised Mr. Estabrooks that he had the right to be represented by counsel at the meeting. Finally, the letter indicates that failure to attend the meeting would result in a decision being rendered on the basis of the information currently on file.

[41] On July 4, 2016, Roxanne Gunning, a compliance officer in the Consumer Affairs Division, sent an e-mail to Mr. Estabrooks confirming his attendance at the July 7, 2016 meeting and indicating that he could contact her if he had any questions or required additional information.

[42] That same day, Mr. Estabrooks sent Ms. Gunning an e-mail with the following question: "Under the *Right to Information and Protection of Privacy Act*, do I have access to the FCNB records containing personal information about myself prior to the meeting?"

[43] On July 5, 2016, Ms. Gunning responded to Mr. Estabrooks' enquiry. She wrote: "Were there any documents in particular that you were seeking? If you wish to make a complete access to information request under the *Right to Information and Protection of Privacy Act* we will have to contact our legal division and may not be able to provide you with the information you are requesting prior to the meeting scheduled for this Thursday."

[44] The Director relied on the following documents at the July 7, 2016 meeting:

- a) The Consumer Report from Equifax dated May 26, 2016;

- b) The Memorial of Judgment registered in the Federal Court on March 24, 2011 for a debt under the *Income Tax Act* in the amount of \$54,024.97;
- c) The Satisfaction of Certificate from the Federal Court dated March 5, 2016; and
- d) A print-out from the New Brunswick Court Index identifying a Default Judgment obtained by Delehanty Rinzler Druckman against Larry Estabrooks on January 20, 2014.

[45] These four documents were not provided to Mr. Estabrooks before the meeting.

[46] During the meeting, the Director presented Mr. Estabrooks with the Court Index for the Delehanty Judgment and asked Mr. Estabrooks questions regarding this Judgment. At this point, Mr. Estabrooks indicated that he wanted to consult legal counsel.

[47] The Director did not adjourn the meeting to allow Mr. Estabrooks the opportunity to obtain legal advice and provide his answers.

[48] The Director did not inform Mr. Estabrooks, prior to the meeting, that he could provide any evidence or arguments in support of his application at the July 7, 2016 meeting.

[49] We find as a fact that Mr. Estabrooks did not fully understand the purpose of the July 7, 2016 meeting.

[50] The Director rendered her decision on July 12, 2016 without obtaining Mr. Estabrooks' answers to her questions on the Delehanty Judgment.

c) Analysis

[51] The duty of procedural fairness exists whenever a decision is administrative and affects the "rights, privileges or interests of an individual". [*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at par. 20. ("*Baker v. Canada*")] In *Baker v. Canada*, Justice L'Heureux-Dubé comments on the values underlying the duty of procedural fairness:

28. [...] The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[52] The content of the duty of procedural fairness is flexible and variable and is to be determined in the specific context of each case. [*Baker v. Canada*, par. 21] Determining the content of the duty of procedural fairness requires applying the factors set out in *Baker v. Canada*. These factors, which are not an exhaustive list, include:

- a) The nature of the decision and the decision-making process employed;
- b) The nature of the statutory scheme and statutory provisions pursuant to which the decision-maker operates;
- c) The importance of the decision to the individual affected;
- d) The legitimate expectations of the party challenging the decision; and
- e) The choice of procedure made by the decision-maker.

[53] We turn to our analysis of these factors.

Nature of the decision and the decision-making process employed

[54] The determination of whether Mr. Estabrooks' licence should be renewed is an administrative decision, which directly affects his right to continue in his employment. [*Sherwood v. New Brunswick (Minister of Justice)*, [1985] N.B.J. No. 268]

[55] Numerous courts have recognized that a high degree of procedural fairness is required when the right to continue in one's profession or employment is at stake in the context of disciplinary proceedings as a disciplinary suspension can have grave and permanent consequences upon a professional career. [*Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105; *Sherwood v. New Brunswick (Minister of Justice)*, [1985] N.B.J. No. 268; *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653]

[56] While these are not disciplinary proceedings, there are important similarities with a disciplinary proceeding. The denial of a licence has the same effect as the imposition of a market ban in a disciplinary proceeding; both preclude the individual from working in their chosen field. In addition, both can negatively impact the individual's professional reputation. However, in disciplinary proceedings, the respondent can face additional sanctions such as the imposition of an administrative penalty or other sanctions, which may attract a higher content of procedural fairness.

[57] As to the decision-making process employed, the Director received Mr. Estabrooks' renewal application, conducted an investigation into Mr. Estabrooks' suitability pursuant to subsection 10(1) of the *Real Estate Agents Act*, and provided Mr. Estabrooks with an opportunity to be heard meeting on July 7, 2016.

[58] In our view, the nature of the decision and the decision-making process employed suggest that a duty of procedural fairness between the mid to high point is required.

Statutory Scheme

[59] The *Real Estate Agents Act* grants considerable discretion to the Director in deciding whether to grant or refuse an application for a licence. As set out in subsection 10(1), the Director must be satisfied that the applicant is suitable to be licensed and that the issuing of the licence is not objectionable for any

reason. That subsection also requires that the Director conduct a due investigation before refusing an application for a licence. Pursuant to subsection 11(2), the Director may make inquiries and require information before issuing a licence. Those subsections are reproduced below:

10(1) On receipt of an application for a licence and on payment of the prescribed fee, if the Director is satisfied that the applicant is suitable to be licensed and that the issuing of the proposed licence is not objectionable for any reason, the Director may issue to the applicant a licence authorizing the holder during the term of the licence to carry on the business of an agent or act as a manager or salesperson within the Province, but if, after due investigation made by the Director, the Director is, for any reason, of the opinion that the applicant should not be granted a licence, the Director may refuse a licence to the applicant.

[...]

11 (2) Before issuing a licence, the Director may make the inquiries and require the information that the Director considers desirable and shall require the furnishing of the security or proof of financial responsibility that is prescribed by regulation.

[60] The *Real Estate Agents Act* was amended four days before the Director rendered her decision to require that the Director provide an opportunity to be heard to an applicant before refusing an application for a licence. Subsection 10(1.3), which came into effect on July 8, 2016, reads:

10(1.3) The Director shall not refuse an application for a licence or impose terms and conditions on the licence without giving the applicant or licensee an opportunity to be heard.

[61] The Director does not have the authority in the *Real Estate Agents Act* to establish her own process, such as the authority to establish by-laws and procedures. To abrogate the duty of procedural fairness, “express language or necessary implication must be found in the statutory instrument”. [*Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 at pages. 1113-1114] No such express language is found in the *Real Estate Agents Act*, nor is necessary implication applicable.

[62] Finally, subsection 10(6) of the *Real Estate Agents Act* provides the right to appeal a licensing decision of the Director to the Tribunal. A right of appeal suggests a tempering of the content of the duty of procedural fairness. [*Baker v. Canada*, par. 24]

Importance of the decision to Mr. Estabrooks

[63] The Director’s decision is of great importance to Mr. Estabrooks. He has worked as a real estate agent since the 1970s. He was 68 years old at the time of the hearing and had a career in the real estate sector that has spanned four decades.

[64] In *Henderson v. Ontario (Superintendent of Financial Services)*, 2008 ONFST 7, the Financial Services Tribunal recognized that the denial of a licence “can have severe consequences for the applicant as it

will preclude or limit the applicant or licensee's ability to earn, or continue to earn, a living in his or her chosen line of work".

[65] We would add to this that the denial of a licence to a long-time licensee such as Mr. Estabrooks can have a significant negative impact on the individual's reputation.

[66] This factor weighs in favour of a high level of procedural fairness. In our view, this factor deserves substantial weight given the length of Mr. Estabrooks' real estate career.

Legitimate expectations of Mr. Estabrooks

[67] The Director's usual process for refusing to grant an application for a licence appears to have been followed in the consideration of Mr. Estabrooks' application. As such, this factor is not applicable.

Choice of procedure made by the Director

[68] In *Baker v. Canada*, Justice L'Heureux-Dubé states regarding this factor:

27 [...] the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans, supra*, at pp. 7-66 to 7-70.

[69] The *Real Estate Agents Act* requires the Director to conduct a due investigation before refusing an application for a licence.

[70] As of July 8, 2016, the *Act* also requires that the Director provide an applicant an opportunity to be heard before refusing a licence.

[71] The *Act* is otherwise silent on the procedure. It does not confer upon the Director the authority to establish by-laws or other procedures. This lack of authority suggests a higher level of procedural fairness as more detail is required than is stated in the *Act*.

Conclusion on Duty of Procedural Fairness

[72] Overall, we find the duty of procedural fairness applicable to the denial of a licence by the Director under the *Real Estate Agents Act* is at the mid to high point. This mid-point duty of procedural fairness requires that Mr. Estabrooks be provided the right to know the case and reply before an unbiased decision-maker. [*Baker v. Canada*, par. 32]

[73] In *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 at paragraphs 146 and 148, Justice L'Heureux-Dubé recognizes that the right to know the case and reply "is so very fundamental in our law" and "goes back to the origins of our democratic institutions and is part of our most cherished legal heritage".

[74] As to level of disclosure and sharing of documents required for a mid-point duty of procedural fairness, we could find no caselaw directly on point.

[75] In *Young v. Central Health*, 2016 NLTD(G) 145, a mid-point level of procedural fairness was found to apply to a non-disciplinary matter dealing with the denial of medical privileges to a doctor. At paragraph 48, Justice Goodridge states that this level of procedural fairness includes an obligation on the decision-maker to share all relevant information with the affected person and to afford that person a reasonable opportunity to respond before a decision is made. Justice Goodridge went on to cite the following excerpt from *Cameron v. East Prince Health Authority* (1999), 176 Nfld. & P.E.I.R. 296, 88 A.C.W.S. (3d) 937 (P.E.I. T.D.) at par. 125:

As a general proposition, fairness requires that there should be full disclosure by a tribunal to a party affected by a decision so that there will be a meaningful opportunity to correct or contradict prejudicial information. There may be no such opportunity unless the information is disclosed. Knowledge of the case to be met is necessary to exercise one's right to be heard. See Blake, *Administrative Law in Canada* (2nd ed.), pp. 29-30.

[76] We conclude that the Director must make full disclosure and share all relevant documents with an applicant sufficiently in advance of the opportunity to be heard meeting to allow the applicant to prepare a reply. This would, at a minimum, include all documents placed before the Director in making her decision. [*1185740 Ontario Ltd. v. Minister of National Revenue* (1999), 247 N.R. 287 (Fed. C.A.); *Canada (Human Rights Commission) v. Pathak*, [1995] 2 FCR 455; *Calgary (City) v. Nortel Networks Corp.*, 2008 ABCA 370]

[77] We find the Director violated Mr. Estabrooks' right to know the case and reply by:

- a) Failing to produce all relevant documents to Mr. Estabrooks before the July 7, 2016 meeting;
- b) Inadequately informing Mr. Estabrooks of his right to present any evidence and arguments he wished in support of his application; and
- c) Inadequately informing Mr. Estabrooks of the case against him.

[78] First, we find the Director failed to produce all relevant documents to Mr. Estabrooks in advance of the July 7, 2016 meeting. In particular, the Director did not provide to Mr. Estabrooks the Equifax Consumer Report, the Memorial of Judgment registered in the Federal Court on March 24, 2011, the Satisfaction of Certificate from the Federal Court dated March 5, 2016, and the print-out from the New Brunswick Court Index relating to a Default Judgment obtained by Delehanty Rinzler Druckman against Larry Estabrooks on January 20, 2014.

[79] We reject the Director's argument that it was not necessary to produce these documents because Mr. Estabrooks should have been aware of their contents. The Director surprised Mr. Estabrooks with

these documents during the meeting. That was not fair. The failure to produce these documents is particularly egregious because they are precisely the documents which formed the basis of the Director's refusal to renew Mr. Estabrooks' licence.

[80] We also find that the Consumer Affairs Division's handling of Mr. Estabrooks' request for disclosure on July 4, 2016 did not respect his right to know the case and reply. On that date, Mr. Estabrooks sent Roxanne Gunning an e-mail asking whether he had access to the FCNB records containing personal information about himself before the meeting. While he framed his request under the *Right to Information and Protection of Privacy Act*, it is clear that Mr. Estabrooks' intent was to obtain documents from the Director in order to prepare for the July 7, 2016 meeting.

[81] Ms. Gunning should have known, as the compliance officer assigned to Mr. Estabrooks' renewal application, that he was seeking documents in relation to his application. Ms. Gunning is a lawyer. Mr. Estabrooks was self-represented. Ms. Gunning should have informed Mr. Estabrooks that he was entitled to production of the documents relating to his application without proceeding under the *Right to Information and Protection of Privacy Act*.

[82] Second, the Director inadequately informed Mr. Estabrooks of his right to reply. As we previously found, Mr. Estabrooks did not fully understand the purpose of the July 7, 2016 meeting. We accept Mr. Estabrooks' testimony that he thought the July 7, 2016 meeting was going to be a meeting to sit down and talk. We highlight the following excerpt of his testimony from the December 1, 2016 hearing:

A. There was -- the so-called meeting was like going down a path -- like when I arrived there, there was documents that I wasn't given ahead of time, or whatever and stuff like that.

[...]

A. Yeah, I -- yes -- yes, I did, because it was -- I thought it was going to be a meeting, sit down and talk. It got to be -- you could tell, you know, that -- that this was a -- the hunt was on, you know. I was on the defence here. This -- you know, I wasn't prepared for that. I thought we were just going to sit down and have a talk.

[83] We also reject the Director's argument that her letters of June 8 and June 30, 2016 discharged her duty of procedural fairness. The Director did not advise Mr. Estabrooks in her June 30, 2016 letter that he could present any evidence he wanted at the July 7, 2016 meeting in support of his application. Rather, the Director indicated in that letter that: "the purpose of this meeting is to seek additional information with respect to our assessment of your application and to discuss your general suitability to be licensed as an individual under the Act."

[84] In our opinion, these words are not sufficient to satisfy the obligation to inform Mr. Estabrooks of his right to reply. There is an important distinction between the Director requesting additional documents from Mr. Estabrooks to further her investigation (as was done in her June 8, 2016 and June 30, 2016 letters) and informing Mr. Estabrooks of his right to present any evidence he wants in support of his application, which was not done.

[85] Third, the Director inadequately informed Mr. Estabrooks of the case against him. The Director submits that Mr. Estabrooks was informed of the case against him - in writing - one month before the meeting. The Director relies on *Broers v. Real Estate Council (Alberta)*, 2010 ABQB 497 in support of her position. The Director indicates that, as in *Broer*, Mr. Estabrooks was provided a letter outlining her concerns, he was given the opportunity to respond to those concerns and he provided voluminous material to the regulator.

[86] A careful reading of *Broer* sets out important distinctions with this matter. We highlight paragraph 7 of that decision:

[7] On June 4, 2009 the Executive Director of RECA notified Broers by letter that the ASC decision had been brought to his attention and that the decision raised concerns regarding the type and nature of the conduct described in the decision. The Executive Director advised Broers that he would be conducting an Information Review pursuant to Rule 38 relating to the actions described in the ASC decision, in order to determine if it was in the public interest that Broers keep his mortgage brokers licence. In a separate letter of the same date, the Executive Director advised Broers that he was initiating a conduct investigation under Part 3 of the *Act*. The letter outlining the nature of the Information Review invited Broers to provide all information relevant to his activities with MIC as well as any additional information and any supporting documents that he wished the Executive Director to review. Broers, through his then counsel, provided a written response and documentation.

[87] Mr. Broer was informed that he could provide any additional information and any supporting documents that he wished the Executive Director to review. The Director did not inform Mr. Estabrooks that he could provide any additional information and documents that he wished her to review.

[88] In addition, Mr. Broer was informed of the specific allegations against him. The Director did not do this. The Director's June 30, 2016 letter did not convey that she intended to discuss Mr. Estabrooks' material misstatements on his application and her concerns regarding his financial suitability. These were the Director's two reasons for denying Mr. Estabrooks' licence in her July 12, 2016 decision. In order to be afforded a meaningful opportunity to reply, Mr. Estabrooks should have been made aware of these allegations.

Obiter Comments on Right to Legal Counsel and Adjournments

[89] We did not ask the parties for submissions on Mr. Estabrooks' right to legal counsel under the duty of procedural fairness. We did have a discussion at the hearing with counsel for the Director as to why the July 7, 2016 meeting was not adjourned after Mr. Estabrooks requested to consult counsel with regard to the Delehanty judgment. As such, we will not make a decision on this issue. We provide the following comments purely *in obiter*.

[90] We are particularly troubled by the position taken by the Director at the hearing that Mr. Estabrooks' refusal to answer questions regarding the Delehanty judgment amounted to a refusal to be regulated.

The facts are that after being surprised with this Judgment during the meeting, Mr. Estabrooks requested to consult with legal counsel.

[91] The comments made by counsel for the Director during the hearing also cause us concern:

Now I can see why he did not bring a lawyer with him. I don't want to be facetious, but it's difficult to bring a lawyer with you when you are not paying them, and there is no duty counsel provision under the Real Estate Agents Act either. But if the opportunity to bring counsel with him is denied, and then he is relying upon that in order to refuse to answer a question --

MR. BOUDREAU: But I don't see on the record where he was provided another opportunity to have like another meeting after the July 7th, if he refused to answer certain questions, because at that time he wanted to be represented. Was he offered that opportunity?

MR. MAUDE: He was not offered the opportunity to have a subsequent meeting for the simple reason that he was asked for the additional information on two earlier occasions and provided with the opportunity to secure counsel to provide that information and he chose not to do that. This isn't a criminal circumstance. He doesn't have a right to have a lawyer. He has an opportunity to have a lawyer with him. He is afforded that opportunity and he chose to ignore that opportunity. And then when he arrives and he is presented with information that was requested of him, and he declines to answer a question, a fairly forthright question with regard to an amount owing on a judgment or the circumstances surrounding it, it's a fairly anodyne question. And again, the answer is predicated upon our ability to trust the answer.

[...] And no information was forthcoming after the meeting either. There was a brief period of time, albeit brief, between the July 7th meeting and the decision of the Director of Consumer Affairs, but there was no subsequent communication by Mr. Estabrooks to the Director indicating that here is the information you were looking for. I have had an opportunity to consult counsel, or I have not had an opportunity consult counsel, and I can provide you the information at a later date. There was none of that. So there was simply the refusal to answer the question.

[92] First, contrary to what was indicated by counsel for the Director, there is no record that the Director requested information from Mr. Estabrooks regarding the Delehanty Judgment before the July 7, 2016 meeting. Counsel's comments to that effect are misleading.

[93] Second, while there is no absolute right to counsel in administrative proceedings, there are instances in administrative proceedings where that right exists. The determination of whether the right to counsel exists is made by applying the five *Baker factors*.

[94] Third, the position taken by the Director that Mr. Estabrooks could have provided the information in relation to the judgment after the July 7, 2016 meeting is unreasonable. The meeting was not

adjourned to allow him to seek advice from legal counsel. There is no evidence that the Director advised Mr. Estabrooks that he could submit additional evidence after the meeting or that he could consult counsel and provide his answers after the meeting. Mr. Estabrooks was self-represented. The Director was the master of her procedure. If Mr. Estabrooks had the opportunity to submit additional information after the July 7, 2016, the Director should have indicated this to Mr. Estabrooks and provided him with a timeline for submitting additional evidence.

- [95] Again, completely in *obiter*, it is possible that Mr. Estabrooks had a legitimate expectation that the meeting would be adjourned to allow him to consult legal counsel. The Director's June 30, 2016 letter advised Mr. Estabrooks of his right to have counsel at the meeting. Perhaps a reasonable approach would have been to adjourn the meeting, with a strict timeline, to allow Mr. Estabrooks to consult a lawyer and provide his answers.

(2) What is the Effect of a Violation of the Duty of Procedural Fairness on the Director's Decision?

- [96] In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Supreme Court of Canada stated that a breach of procedural fairness renders a decision invalid. The following excerpt of the decision is highlighted:

[23]...I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

- [97] Having concluded there was a violation of the duty of procedural fairness, the Director's decision is invalid.

(3) Can the Tribunal Hear the Appeal on the Merits?

- [98] We conclude that we can hear the appeal for the reasons set out below.
- [99] Unfortunately, as previously discussed, neither party addressed this question in their post-hearing submissions.
- [100] While the *Cardinal* decision states that a denial of procedural fairness renders a decision invalid, that decision did not deal with an appellate administrative tribunal conducting an appeal from a decision of a subordinate administrative decision-maker.
- [101] The decision of *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 deals precisely with the issue with which we are faced. In that matter, the British Columbia Court of Appeal concluded that an appellate administrative tribunal retains jurisdiction to hear the appeal where it has the ability to cure breaches of procedural fairness on

appeal. The Court cited from *International Union of Operating Engineers, Local 882 v. Burnaby Hospital Society* (1997), 100 B.C.A.C. 147 as follows:

[10] Thus, when justice requires a fair trial and a fair appeal it may be said that a failure of natural justice at the original hearing cannot be cured at the appellate level. It may also be said that where the appeal stage is akin to a trial de novo the subsequent hearing may cure the defect in the first hearing. Such was the case in *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561. [...]

[11] The learned authors of de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) summarize the case law this way (at 489-90):

Whilst it is difficult to reconcile all the relevant cases, recent case law indicates that the courts are increasingly favouring an approach based in large part upon an assessment of whether, in all the circumstances of the hearing and appeal, the procedure as a whole satisfied the requirements of fairness. At one end of the spectrum, when provision is made by statute or by the rules of a voluntary association for a full rehearing of the case by the original body (constituted differently where possible) or some other body vested with and exercising original jurisdiction, a court may readily conclude that a full and fair rehearing will cure any defect in the original decision. However, where the rehearing is appellate in nature, it becomes difficult to do more than to indicate the factors that are likely to be taken into consideration by a court in deciding whether the curative capacity of the appeal has ensured that the proceedings as a whole have reached an acceptable minimum level of fairness. Of particular importance are (i) the gravity of the error committed at first instance, (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (iii) the seriousness of the consequences for the individual, (iv) the width of the powers of the appellate body and (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing de novo.

[102] The *Taiga* decision has been followed numerous times. In *Schmidt v. Canada (Attorney General)*, 2011 FC 356, at paragraph 17, the Federal Court comments on the five factors set out in *Taiga* and states that: “[i]t seems to me that, with the exception of item (c) above, the underlying concern is whether the subsequent process for review affords to the affected party a full and independent consideration of the case without being contaminated by the unfairness of what occurred below.”

[103] We turn now to our analysis of the five factors.

Gravity of the Error Committed at First Instance

[104] The violation of procedural fairness was severe. Mr. Estabrooks was deprived of his right to know the case and reply, which is a fundamental principle of procedural fairness. The documents relied upon by

the Director were not provided to him in advance of the July 7, 2016 opportunity to be heard meeting. The purpose of that meeting was not adequately explained to Mr. Estabrooks such that he did not understand its purpose. Finally, he was not advised of his right to present whatever evidence and arguments he wished in support of his application.

The Seriousness of the Consequence for the Individual

- [105] The Director's decision has important consequences for Mr. Estabrooks in his particular circumstances. He is 68 years of age and his career in real estate has spanned four decades. He has been an agent since the mid-1970s and is likely nearing the end of his career.
- [106] While Mr. Estabrooks was offered the opportunity to apply for a salesperson's licence in the Director's decision, he is opposed to this option as he might have to work in a dual agency situation. Mr. Estabrooks testified that he is opposed to dual agency as he believes consumers of real estate representation should be entitled to single agency representation and undivided loyalty from their agent.
- [107] For these reasons, we find the decision hinders Mr. Estabrooks' ability to earn a livelihood and work at his chosen profession.

Likelihood that the Prejudicial Effects of the Error may have Permeated the Rehearing; Width of the Powers of the Appellate Body; Evidence on an Appeal

- [108] We are of the view that the prejudicial effects of the violation of the duty of procedural fairness which occurred before the Director did not permeate the appeal proceedings before the Tribunal. We also conclude that the Tribunal's powers in an appeal proceeding are broad enough to cure the procedural defects.
- [109] In the previous motion in this matter, the panel determined that it must conduct a hybrid appeal under the *Real Estate Agents Act*. The characteristics of this hybrid appeal as stated in our November 1, 2016 decision are the following:
- There is an oral hearing;
 - The Record of the decision-making process compiled by the Director constitutes evidence on the appeal;
 - The parties can present additional evidence and witnesses can testify at the hearing;
 - Leave of the Tribunal is not required to call witnesses or present additional evidence;
 - No deference is afforded to the decision of the Director;
 - The decision of the Director is reviewed for correctness; and

- The appeal is not limited to the grounds set out in the Request for Hearing. The Tribunal considers the entirety of the evidence and the arguments of the parties.

[110] The Tribunal's powers in an appeal under the *Real Estate Agents Act* are the following:

- It can decide all questions of fact or law arising in the course of the hearing pursuant to subsection 38(5) of the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30 [FCSC Act];
- It can summons and enforce the attendance of witnesses pursuant to paragraph 38(1)(a) of the *FCSC Act*;
- It can compel witnesses to give evidence under oath or any other manner pursuant to paragraph 38(1)(b) of the *FCSC Act*;
- It can compel witnesses to produce books, records, documents and things pursuant to paragraph 38(1)(c) of the *FCSC Act*; and
- It can receive in evidence any statement, document, record, information or thing that is relevant to the matter regardless of whether it would be admissible as evidence in a court of law pursuant to subsection 38(6) of the *FCSC Act*.

[111] The Tribunal's procedural rules and Practice Direction No. 7 *Procedure for an Appeal* provide additional information on how an appeal before the Tribunal is conducted. The relevant provisions are as follows:

- An appeal is started by the filing of a Request for Hearing pursuant to paragraph 11(1);
- The Applicant must set out the alleged errors in the decision and the reasons for requesting the appeal pursuant to paragraph 11(2);
- The Director must provide a Record of the decision-making process pursuant to paragraph 11(4);
- The Record must include, amongst other things, "any documentary or other evidence considered in the decision-making process, subject to any limitation expressly imposed by any statute, regulations or guidelines on the extent to which or the purpose for which any such documents may be used";
- If the parties intend to rely on documents at the hearing, they must deliver to all other parties copies of these documents as soon as reasonably practicable after the Notice of Hearing is issued pursuant to paragraphs 7(1) and (2);
- Failure to make disclosure in accordance with Part 7 results in the party not being able to refer or introduce the document into evidence at the hearing without leave of the panel pursuant to paragraph 7(5);

- A party who intends to call witnesses to testify must provide to every other party, at least 10 days before the hearing, a list of these witnesses and a summary of the evidence that the witnesses are expected to give pursuant to paragraph 8(4);
- Failure to include a witness on the witness list or to provide a summary of the evidence results in the party not being able to call that person as a witness without leave of the panel pursuant to paragraph 8(6); and
- The parties may provide pre-hearing submissions containing the relevant facts and applicable law in support of a party's position pursuant to paragraph 14(1).

[112] Practice Direction No. 8 *Content of the Record of the decision-making process* adds that the Record should contain all documentary or other evidence before the decision-maker during the decision-making process, subject to any limitation expressly imposed by any statute, regulations or guidelines on the extent to which or the purpose for which any such documents may be used.

[113] In our view, the requirement for the Director to provide a Record containing all documentary or other evidence before her during her decision-making process should eliminate the possibility that the disclosure errors permeate the appeal.

[114] In terms of evidence, Mr. Estabrooks testified at the hearing of the appeal. He also introduced 13 documents into evidence. The Director also introduced 10 additional documents into evidence at the hearing.

[115] The Tribunal has very broad powers on an appeal under the *Real Estate Agents Act* which resemble first instance trial powers. In particular, the ability of the parties to introduce additional evidence and to call witnesses combined with the Tribunal's authority to decide all questions of fact or law arising in the hearing ensure that the Tribunal can cure the procedural defects which occurred in the proceedings before the Director.

[116] We conclude that the requirement for the Director to provide a Record of her decision-making process combined with the breadth of the Tribunal's powers on an appeal ensure that the prejudicial effects of the violation of procedural fairness that occurred in the proceedings before the Director have not permeated the appeal.

Conclusion

[117] We conclude that we have the authority to hear Mr. Estabrooks' appeal as he was provided a full and independent consideration of his matter by the Tribunal, free of any contamination by the procedural fairness issues that arose in the Director's decision-making process. In other words, the procedural fairness deficiencies were cured on the hearing of the appeal.

B. GROUNDS OF APPEAL

[118] Having concluded that we can hear this appeal, we turn to the grounds of appeal raised by Mr. Estabrooks.

(1) Did the Director exceed the proof of financial responsibility?

[119] For the reasons set out below, we find that this ground of appeal has merit. In our view, there is insufficient evidence to establish a reasonable apprehension that Mr. Estabrooks will not respect his obligations vis-à-vis his trust account and the handling of deposits.

[120] Subsection 11(2) of the *Real Estate Agents Act* sets out certain requirements regarding proof of financial responsibility. That subsection states:

11(2) Before issuing a licence, the Director may make the inquiries and require the information that the Director considers desirable and shall require the furnishing of the security or proof of financial responsibility that is prescribed by regulation.

[121] The proof of financial responsibility prescribed by regulation for an agent not employing salespersons or managers is set out in subsection 10(1) of the *General Regulation - Real Estate Agents Act* as follows:

10(1) The amount of a bond that an agent shall furnish is:

(a) \$10,000 if the agent does not employ a salesperson or manager or employs no more than one salesperson or manager;

[122] There is no other proof of financial responsibility prescribed by regulation.

[123] In our view, subsection 10(1) of the *Real Estate Agents Act* grants the Director the authority to consider evidence in addition to the bond in assessing an applicant's financial suitability. That subsection requires that before issuing a licence, the Director be satisfied that the applicant is suitable and that issuing a licence is not objectionable for any reason. Therefore, a comprehensive assessment of financial suitability is appropriate given that a real estate agent is required under section 18 of the *Act* to maintain a trust account for deposits.

(a) Positions of the Parties

[124] Mr. Estabrooks contends that the Director exceeded the proof of financial responsibility as set out in section 48 of the *Real Estate Agents Act*. That section sets out the Lieutenant-Governor in Council's authority to make regulations:

(a) in order to ensure compliance with this Act and the regulations and the payment of money held for the account of a person by an agent, providing for the furnishing of security or proof of financial responsibility by agents in the amounts

and in the form and on the conditions that may be considered necessary to obtain those objects, which regulations may discriminate between persons required to furnish security or proof of financial responsibility in accordance with the number of salespersons employed by them and the volume of business done by them;

[125] The Director submits that this ground of appeal is without merit. The Director states that she assesses financial suitability of an applicant due to the statutory requirement under the *Real Estate Agents Act* for an agent to maintain a trust account. The Director concluded that Mr. Estabrooks' credit utilization rate of 100% coupled with the unsatisfied judgments against him raised considerable concern with respect to his financial suitability to hold an agent's licence.

(b) Findings of Fact

[126] Mr. Estabrooks furnished a bond of \$10,000 as required by subsection 10(1) of the *General Regulation - Real Estate Agents Act*. A Continuation Certificate and Premium Due Notice issued by Intact Insurance shows that the bond is in effect from May 7, 2016 until May 7, 2017.

[127] Pursuant to paragraph 48(a) of the *Real Estate Agents Act*, the agent is required to furnish a bond because he or she may hold clients' deposits in its trust account.

[128] We accept Mr. Estabrooks' testimony that he does not use his trust account and does not accept deposits from his clients; he leaves this to the lawyer. He provided the Director with his trust account statements for the last two years showing a zero balance on January 1 and December 31.

[129] On December 10, 2010, a Trust Inspector with the New Brunswick Real Estate Association conducted an audit of Mr. Estabrooks' agency and trust account and found no major discrepancies. Another audit was conducted on December 10, 2014, which again revealed no major discrepancies.

[130] A Consumer Report prepared by Equifax dated May 26, 2016 for Mr. Estabrooks' indicates a credit utilization of 100%.

[131] At the time of completing his application on May 17, 2016, Mr. Estabrooks had two outstanding judgments against him:

- A default judgment obtained by Consumer Credit Services Ltd./Service de Crédit aux Consommateurs Ltée on September 22, 2015; and
- A default judgment obtained by Delehanty Rinzler Druckman on January 20, 2014.

Consumer Credit Judgment

[132] The original amount of the Consumer Credit Judgment was \$23,443.67. That Judgment is in relation to unpaid legal fees.

- [133] The Director requested information from Mr. Estabrooks in relation to the Consumer Credit Judgment before the July 7, 2016 meeting. Mr. Estabrooks provided the Notice of Action with Statement of Claim Attached, the Default Judgment, and the Notice of Sheriff's Sale in relation to his 1962 Chevrolet Corvette convertible.
- [134] The Consumer Credit Judgment has been at least partially satisfied by the Sheriff's sale of the Corvette.
- [135] The amount outstanding on the Judgment, if any, was not provided to the Tribunal.

Delehanty Judgment

- [136] The original amount of the Delehanty Judgment was \$5,252.81. That Judgment is also in relation to unpaid legal fees.
- [137] Aside from the question on the application, the Director did not request information from Mr. Estabrooks about the Delehanty judgment in advance of the July 7, 2016 meeting.
- [138] Mr. Estabrooks is paying the Delehanty Judgment in monthly instalments. Although no documentation was provided indicating the outstanding balance of the Judgment, we accept Mr. Estabrooks' evidence that he believes the outstanding balance to be approximately \$1,000.

Memorials of Judgment under the Income Tax Act and Excise Tax Act

- [139] On March 24, 2011, the Minister of National Revenue registered a Certificate under the *Income Tax Act* in the Federal Court against Larry Estabrooks in the amount of \$54,024.97 plus interest. A Memorial of Judgment was filed that same day in the Federal Court.
- [140] A Satisfaction of Certificate was filed in the Federal Court on March 5, 2016 confirming that the Certificate and Memorial of Judgment under the *Income Tax Act* had been satisfied by Mr. Estabrooks.
- [141] On April 5, 2011, the Minister of National Revenue registered a Certificate under the *Excise Tax Act* in the Federal Court against Larry Estabrooks doing business as Nova Homes. A Memorial of Judgment was filed that same day in the Federal Court. The amount claimed under the Certificate and Memorial of Judgment is unknown.

Provincial Court Certificates of Conviction

- [142] Additional evidence regarding Mr. Estabrooks' financial responsibility was provided at the hearing of this appeal. While this evidence pertains to Certificates of Conviction issued after Mr. Estabrooks submitted his application, they are nonetheless relevant to an assessment of his financial responsibility.
- [143] On November 16, 2016, Mr. Estabrooks was convicted in Provincial Court of three counts of failing to provide complete Income Tax and Benefit Returns for the years 2011, 2012, and 2013. He was fined \$1,000 per count and ordered to pay a victim surcharge of \$100 per count.

- [144] Mr. Estabrooks was also convicted, on that same date, of five counts of failing to provide a completed Corporation Income Tax Return for the years 2009, 2010, 2011, 2012 and 2013. He was fined \$1,000 for each count and ordered to pay a victim surcharge of \$100 per count. These corporate tax returns were in relation to the company called Escorp. Ltd., which does not involve Mr. Estabrooks' real estate activities.
- [145] There was no evidence regarding the outstanding amounts, if any, on these Certificates of Conviction.
- [146] None of the Judgments relate to Mr. Estabrooks' dealings as a real estate agent.
- [147] None of the judgments relate to misrepresentation, negligence or fraud.
- [148] There is no evidence that Mr. Estabrooks has mishandled trust monies since the Judgments were issued against him.

(c) Analysis

- [149] We are not aware of any New Brunswick caselaw dealing with this issue. We therefore examined caselaw from other provinces, recognizing that it is not binding on the Tribunal.
- [150] In *Henderson v. Ontario (Superintendent Financial Services)*, 2008 ONFST 7, the Financial Services Tribunal recognized that assessing suitability of an applicant for a mortgage brokers licence involves the balancing of two competing interests: (1) the public interest purpose of the *Act*; and (2) the recognition that the denial, revocation or suspension of a licence can have severe consequences for an applicant or licensee. The Tribunal stated:

In applying the licensing provisions of the *Act*, as supplemented by the Regulation, we must be mindful of the fact that the *Act* is designed to protect the public interest. This public interest purpose is implicit in the terms of the *Act*, including the fact that a public official, the Superintendent, is given responsibility for supervising the mortgage brokering industry. [...]

At the same time, we must keep in mind that the denial of a licence or the revocation or suspension of a licence under the *Act* can have severe consequences for the applicant or licensee as it will preclude or limit an individual's ability to earn, or to continue to earn, a living in his or her chosen line of work. Given those serious consequences, the quality of evidence required to support disciplinary action against a licensee is enhanced; the evidence should be "clear, convincing and cogent" (see *Law Society of Upper Canada v. Neinstein*, 2007 CanLII 8001 (ON SCDC), [2007] O.J. No. 958, at pp. 9-10 (Ont. Div. Ct.)). The serious consequences of the denial of a licence to carry on the business of a mortgage agent would seem to suggest that the same quality of evidence should be required in the context of a licence denial as in the context of a licence suspension or revocation.

- [151] The *Henderson* decision has been cited with approval several times.

- [152] We are of the view that the balancing act discussed in *Henderson* is equally applicable to the assessment of an applicant's suitability under the New Brunswick *Real Estate Agents Act* as the Director also has the mandate to protect the public interest.
- [153] We also agree that clear, convincing and cogent evidence is required to support a denial of a licence on a renewal application as the denial has the effect of precluding or limiting the applicant or licensee's ability to earn or continue to earn a living.
- [154] As will be discussed in further detail below, an important consideration in this appeal is the Director's admission that the denial of Mr. Estabrooks' application is not related to his conduct as an agent.
- [155] *Thomson v. British Columbia (Superintendent of Real Estate)*, 2005 CarswellBC 3209 is of assistance in assessing suitability where the conduct as a real estate agent is not in issue. Mr. Thompson was licensed under the *Real Estate Act* as an agent nominee. In 1998, he was arrested in a drug bust. After his arrest, he continued to work as an agent until 2004. During that period of time, he submitted his licence renewal applications and disclosed that he was the subject of a charge or indictment. His licence was renewed until his conviction in 2004. Following his conviction, his licence was suspended for an indefinite period of time by the Superintendent of Real Estate.
- [156] Mr. Thompson appealed the indefinite suspension of his licence to the Financial Services Tribunal. He argued that over the five years following the laying of the charges, he did not abscond with trust account funds or behave in any fashion contrary to the public interest. The Tribunal found the interest at stake was not Mr. Thompson's conduct as a real estate agent, but rather the secondary public interest of the reputation and status of licensees in the real estate business generally. The Tribunal cited the following excerpt of *Clough, Re*, [1984] B.C.C.O. No. 3:

The whole licensing scheme under the *Real Estate Act* is designed for the protection of the public. The legislature obviously feels that no one should be allowed to engage in real estate brokerage without being qualified for and obtaining a licence so that the public will be protected from unqualified, incompetent or dishonest brokers. A real estate broker is a person on whom a reasonable man is inclined to rely, expecting good advice and, certainly, integrity.

Looked upon in that light, it seems clear that what we have to do is make a judgmental choice between inflicting hardship on the appellant and the protection of the public of the Province generally.

A further consideration, although not of quite such importance, [is] support of the reputation and status of licensees in the real estate business generally. This last is also in the public interest.

- [157] We agree that the relevant public interest here is as in *Clough* and *Thompson*, namely the support of the reputation and status of licensees in the real estate business generally.

- [158] The simple fact that Mr. Estabrooks has judgments against him does not automatically render him unsuitable to be licensed. In our view, it is necessary to look at the number of judgments and the nature of the judgments in order to assess suitability or to determine whether it would be objectionable to issue a licence to Mr. Estabrooks. We are bolstered in this position by the Financial Services Tribunal’s decision in *Henderson v. Ontario (Superintendent Financial Services)*, 2008 ONFST 7, where it stated that “the fact that a serious disciplinary sanction had previously been imposed on an individual...does not mean, automatically, that there are reasonable grounds for believing that the individual, if licensed, under the *Act*, could not be expected to deal or trade in mortgages in accordance with the law and with integrity and honesty.”
- [159] The Judgments obtained against Mr. Estabrooks do not relate to reprehensible conduct such as theft, fraud, misrepresentation or negligence. Judgments relating to such conduct have been found to bring into question an applicant’s suitability: *Alves v. Ontario (Superintendent Financial Services)*, 2008 ONFST 10; *Todorovic v. Ontario (Superintendent Financial Services)*, 2009 ONFST 3; and *Joshi v. Ontario (Superintendent Financial Services)*, 2016 ONSC 4477.
- [160] The Director’s contention that a denial of Mr. Estabrooks’ licence is needed for the protection of the public is refuted by the following facts:
- At the time of his last audit on December 10, 2014, Mr. Estabrooks’ trust account was in order;
 - Mr. Estabrooks is paying the Delehanty judgment in monthly installments and the outstanding balance is approximately \$1,000;
 - The amount outstanding on the Consumer Credit Judgment is unknown, however it has been at least partially satisfied by the seizure and sale of Mr. Estabrooks’ 1962 Chevrolet Corvette;
 - Mr. Estabrooks has satisfied the Memorial of Judgment filed under the *Income Tax Act*;
 - There was no evidence regarding the outstanding amounts, if any, on the Provincial Court Certificates of Conviction;
 - There is no evidence regarding the outstanding amount, if any, on the Memorial of Judgment under the *Excise Tax Act*;
 - There is no evidence that Mr. Estabrooks has mishandled trust monies since the Judgments were issued against him; and
 - The Director admits that the denial of Mr. Estabrooks’ application is not related to his conduct as an agent.

[161] In our view, there is no clear, convincing and cogent evidence creating a reasonable apprehension that Mr. Estabrooks will not respect his obligations under the *Real Estate Agents Act* in respect of his trust account and the handling of deposits. That being said, given the number of outstanding judgments against Mr. Estabrooks, increased supervision may be warranted. This will be discussed in further detail below.

(2) Did Mr. Estabrooks have the Obligation to Disclose the Judgments on his Application?

[162] We conclude that Mr. Estabrooks had the obligation to disclose the Consumer Credit and the Delehanty judgments on his application.

[163] The parties did not refer us to any caselaw dealing with the effect of misrepresentations on an applicant's suitability for licensure in a regulated sector. Once again, we could not find any New Brunswick caselaw on this topic.

[164] *Alves v. Ontario (Superintendent Financial Services)*, 2008 ONFST 10 is a leading decision of the Ontario Financial Services Tribunal which is directly on point. That matter dealt with false statements on an application for a mortgage brokers licence. The Financial Services Tribunal set out a contextual approach for determining whether a false statement constituted reasonable grounds that the applicant was not suitable for licensure as follows:

Echoing the contextual approach adopted by the Tribunal in Henderson with respect to past conduct, there are a number of considerations that should be taken into account in determining whether a false statement or false information meets the reasonableness threshold established by subsection 14(1) of the Act, including the following:

- 1) the nature of the false statement or false information;
- 2) the advertent or inadvertent nature of the falsehood;
- 3) the explanations provided by the individual for the falsehood; and
- 4) the circumstances in which the false statement is made, including any unusual and severe pressure the individual was under at the time the false statement was made or false information provided.

(a) Positions of the Parties

[165] Mr. Estabrooks argues that he is only required to disclose on his application judgments involving misrepresentation, negligence or fraud. He bases his argument on the fact that sections 15 and 31 of the *Real Estate Agents Act* require an agent to report these types of judgments to the Director. Mr. Estabrooks has always read the question on the application to require only the disclosure of judgments identified in sections 15 and 31 of the Act.

[166] The Director on the other hand contends that the question on the Application was clear and not subject to Mr. Estabrooks' interpretation. The Director submits that Mr. Estabrooks is conflating the question pertaining to an unsatisfied judgment of a court with the duty under the *Act* to report a judgment pertaining to misrepresentation, fraud or negligence.

(b) Facts

[167] Question 11 of the application reads in part:

Have you, or any of the partners, directors or officers of the firm, partnership of corporation, as the case may be, ever:

[...]

c. Failed to satisfy a judgment of court? Yes No

[168] We find as a fact that the language in question 11(c) is clear and unambiguous. It imparts on the applicant the obligation to disclose any unsatisfied judgment.

[169] Mr. Estabrooks responded "no" to question 11(c).

[170] In completing his application, Mr. Estabrooks swore a Statutory Declaration before a Commissioner of Oaths swearing that "[t]he information given on this application is true."

[171] At the time of completing his application, the Delehanty and Consumer Credit Judgments were unsatisfied.

[172] As for the Memorials of Judgment under the *Excise Tax Act* and the *Income Tax Act*, they are not judgments of a court. While a Memorial has the same effect as a judgment; it is not a judgment.

[173] Section 223 of the *Income Tax Act* and section 316 of the *Excise Tax Act* provide a mechanism of securing Crown claims for unpaid tax against real estate by the registration in the Land Registration Office of a Memorial of Judgment. The Minister of National Revenue certifies, by the means of a Certificate, an amount assessed and owing by a tax debtor. The Certificate is then registered in the Federal Court. The Canada Revenue Agency can then file a Memorial of Judgment, which can be registered in the Land Registration Office.

[174] Both section 223 and section 316 state that once a certificate is registered it "has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court".

[175] We find as a fact that Mr. Estabrooks did not have the obligation to disclose the Memorials of Judgment on his application.

(c) Analysis

- [176] While we are not bound by the *Alves* decision, we find that the four criteria set out in that decision can provide guidance in this matter. We turn now to our analysis of the factors set out in *Alves*.
- [177] As to the nature of the false statement or false information, Mr. Estabrooks failed to disclose two judgments relating to unpaid legal fees. The false statements were not an attempt to cover up criminal conduct or conduct bordering on criminal conduct, such as fraud.
- [178] Given our finding that the question on the application was clear and unambiguous, we find the false statement by Mr. Estabrooks was advertent or deliberate. Mr. Estabrooks had knowledge of the Consumer Credit and Delehanty judgments, but chose not to disclose them.
- [179] Mr. Estabrooks explained his false statement by testifying that he could answer no to question 11(c) because that question should be interpreted to include only judgments relating to misrepresentation, fraud or negligence as the *Real Estate Agents Act* only requires agents to report only these types of judgments. Mr. Estabrooks felt justified in responding no to question 11(c) as he had not failed to satisfy a judgment of this type.
- [180] There is no evidence that Mr. Estabrooks was under any unusual or severe pressure when he completed his application and made the false statements.
- [181] Based on our analysis of the *Alves* factors, we find the false statement by Mr. Estabrooks does impact his suitability such that increased supervision is warranted. This will be discussed in further detail below.

(3) Should the Director have Found that Individual Consumers of Real Estate Representation Services Have a Right to Single Agency Representation and Undivided Loyalty from their Agent?

- [182] This ground of appeal is without merit.
- [183] Mr. Estabrooks argues that the Director's decision is incorrect because individual consumers of real estate representation services have a right to single agency representation and undivided loyalty from their agent. Mr. Estabrooks discussed at length his opposition to the dual agency regime which currently exists in New Brunswick. He also argued that the Director's decision has a negative impact on consumer rights in New Brunswick
- [184] The Director submits this ground of appeal is without merit as it is a political argument outside the scope of the appeal before the Tribunal.
- [185] We agree with the Director's contention that this ground of appeal is a political argument. At the current time, dual agency is permitted in New Brunswick. This ground of appeal exceeds the jurisdiction of the Tribunal and would be best advanced in the political arena.

(4) Did the Director Fail to Consider the Length of Mr. Estabrooks' Career as a Real Estate Licensee?

[186] In our view, the Director did not attribute sufficient importance to the length of Mr. Estabrooks' career as a real estate licensee in light of the absence of conduct issues. In short, he has an exemplary record as an agent which she should have considered.

(a) Positions of the Parties

[187] Mr. Estabrooks submits that the Director did not consider the length of his career as a real estate licensee in refusing his application.

[188] The Director submits that she took the length of Mr. Estabrooks' career into consideration and this is why, in refusing his application for an agent's licence, she offered him the opportunity to apply for a salesperson's licence.

(b) Facts

[189] Mr. Estabrooks has been licensed in the real estate sector in one capacity or another for four decades and as a real estate agent since the mid-1970s.

[190] He is 68 years of age.

[191] The denial of Mr. Estabrooks' application was not attributable to his conduct as an agent.

(c) Analysis

[192] The denial of a licence can have severe consequences for an applicant as it will preclude the individual's ability to earn or continue to earn a living in his or her chosen line of work. In many ways, the denial of a licence has the same effect as a suspension or revocation of a licence. [*Henderson v. Ontario*]

[193] In our view, the length of licensure of an applicant is an important consideration in assessing suitability, which should be given considerable weight in the balancing between the public interest and the right of an individual to continue in his chosen profession. That is especially so when the applicant's conduct is not a factor, such as in the within matter.

[194] The consequences of a denial of a licence become more important when the applicant has been licensed for a lengthy period of time and is nearing the end of his career. Mr. Estabrooks has been his own boss since the mid-1970s when he became an agent. At 68 years of age, losing his licence and this autonomy has important consequences for Mr. Estabrooks.

[195] We also wish to highlight that the Director did not grant Mr. Estabrooks a salesperson's licence in her July 12, 2016 decision. She simply offered him the opportunity to apply for such a licence. She was not guaranteeing that, if submitted, she would approve such an application.

[196] In the circumstances of this case and given Mr. Estabrooks' track record as an agent, we are of the

view that the Director did not attribute sufficient weight to the length of his career as an agent.

(5) Was the Director Biased?

[197] We conclude that this ground of appeal has not been proven.

[198] Mr. Estabrooks submits that the Director was biased for two reasons. First, Mr. Estabrooks had advised the Director of his concern that certain salespersons were indicating they were agents in their advertising. Mr. Estabrooks eventually took his concern to the Ombudsman, which resulted in the issuance of a notice indicating that the salesperson is not an agent and cannot hold itself out to be an agent. Second, he feels the Director is biased due to his disagreement with her about mandatory continuing education and in particular her insistence that he take an online course pertaining to FINTRAC. Mr. Estabrooks feels the Director's comment that he was the only agent in the province who complained about taking this online course demonstrates bias.

[199] The Director submits there is no evidence supporting an allegation of bias.

[200] Once again, the parties have not provided any caselaw on bias.

[201] The test for concluding at a reasonable apprehension of bias was set out by Justice Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at page 394:

[...] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[202] We are of the view that the test for bias is not met in relation to the advertising issue pertaining to salespersons. Mr. Estabrooks has not provided sufficient evidence to demonstrate that an informed person, viewing the matter realistically and practically and having thought the matter through would conclude that the Director would not decide his application fairly.

[203] As to his disagreement with the Director about mandatory continuing education, we are again of the view that Mr. Estabrooks has not provided sufficient evidence to demonstrate bias. While the evidence indicates that the Director would have been familiar with Mr. Estabrooks, this evidence does not show any animosity or unfair treatment. Again, we conclude that an informed person, viewing the matter realistically and practically and having thought the matter through would conclude that it is more likely than not that the Director would decide Mr. Estabrooks' application fairly.

(6) Conclusion on Suitability

[204] We agree with the Director that Mr. Estabrooks requires supervision. However, in our view, the evidence to support a denial of licence should be clear, convincing and cogent. [*Henderson v. Ontario*]

That threshold is not met here. There is insufficient evidence to conclude that Mr. Estabrooks is not suitable for an agent's licence or that issuing him a licence would be objectionable.

- [205] In *Alves v. Ontario (Superintendent Financial Services)*, 2008 ONFST 10, the Financial Services Tribunal concluded that the applicant's past conduct and false statement on his application, when viewed together, provided reasonable grounds to conclude he was not suitable for a mortgage broker's licence. Mr. Alves did not disclose on his application form that he had been charged with seven offences under the *Criminal Code*, including assault causing bodily harm, forcible confinement, theft under \$5,000, two counts of mischief in relation to property under \$5,000 and criminal harassment.
- [206] In *Todorovic v. Ontario (Superintendent of Financial Services)*, 2009 ONFST 3, Ms. Todorovic submitted an application for a mortgage agent's licence. She did not disclose that she had been found guilty of two counts of fraud over \$5,000. Her application was approved and she was issued a licence. During a criminal record check after the licence was issued, staff of the Financial Services Commission of Ontario discovered the convictions for fraud. The Financial Services Tribunal concluded that Ms. Todorovic was not suitable to be licensed as a mortgage agent in view of her past conduct and of the false information she willfully provided on her application form.
- [207] Mr. Estabrooks' situation is clearly distinguishable from these decisions. His is a unique situation in that his conduct is not a factor in assessing his suitability. Counsel for the Director admitted at the hearing that the denial of Mr. Estabrooks' application "has nothing to do with his conduct as an agent".
- [208] In our view, the Director did not properly balance the competing interests of protecting the public interest against the serious consequences of a denial of licence in Mr. Estabrooks' particular circumstances. We conclude insufficient importance was afforded to the length of Mr. Estabrooks' licensure as a real estate agent.
- [209] In *Joshi v. Ontario (Superintendent of Financial Services)*, 2016 ONSC 4477, the Ontario Superior Court commented on the obligation of the decision-maker to consider lesser penalties. While that matter did not deal with the denial of a licence, the comments are nonetheless relevant to this matter. The Court concluded that the Financial Services Tribunal erred in not giving sufficient consideration to lesser penalties and remitted the matter back to the Tribunal to consider the issue of penalty. We highlight the following excerpt of the decision:
- [13] ...Consistent with the decision of this court in *Strazzeri v. Superintendent of Financial Institutions*, [2015] ONSC 255, the Tribunal should have been more explicit in its reasons with respect to consideration of a lesser penalty than the most serious disposition of licence revocation. This is especially so given that Mr. Joshi had no previous discipline record and was not found to have contravened any applicable laws.
- [210] The Director did not consider all options other than the denial of Mr. Estabrooks' application. She failed to consider all options which could balance the protection of the public interest with Mr. Estabrooks' right to earn a livelihood in his chosen profession. In particular, she failed to consider the issuance of an agent's licence with terms and conditions.

- [211] In our view, given the length of Mr. Estabrooks' career as an agent and the lack of conduct issues, the appropriate balance between the protection of the public interest and Mr. Estabrooks' right to continue working in his chosen profession, is the issuance of an agent's licence with terms and conditions.
- [212] According to the Director, the denial of Mr. Estabrooks' application was appropriate given that he is an individual agent working alone with no oversight or supervision and there are no checks and balances with regard to his trust account. In our view, the Director can provide oversight or supervision that will ensure the protection of the public interest by the imposition of terms and conditions on an agent's licence.
- [213] We do not feel it is our role to determine the appropriate terms and conditions that will ensure Mr. Estabrooks is respecting his obligations with respect to his trust account. [*Thomson v. British Columbia (Superintendent of Real Estate)*, 2005 CarswellBC 3209] We are therefore remitting this matter back to the Director for the determination of these terms and conditions in accordance with subsections 10(1.1) and 10(1.3) of the *Real Estate Agents Act*.

V. DECISION

- [214] For the reasons set out above, we conclude that Mr. Estabrooks should be granted a real estate agent's licence with terms and conditions relating to his trust account. This matter is remitted back to the Director for the determination of those terms and conditions.

DATED this 17th day of February, 2017.

John M. Hanson, Q.C.

John M. Hanson, Q.C. Tribunal
Member and Panel Chair

Gerry Legere

Gerry Legere, Tribunal Member

Raoul Boudreau

Raoul Boudreau, Tribunal Member