

IN THE MATTER OF
the *Real Estate Agents Act*
S.N.B. 2011, c.215, as amended

- and -

IN THE MATTER OF
Siew Lan Hong Mulligan
(Respondent)

REASONS FOR DECISION & ORDER OF THE DIRECTOR OF CONSUMER AFFAIRS

Date of Opportunity to be Heard: 16 November 2017

Date of Decision: 6 February 2018

Date of Reasons for Decision: 6 February 2018

Heard Before

Alaina M. Nicholson
As Acting Director of Consumer Affairs

Counsel

Joel Hansen For Siew Lan Hong Mulligan

BACKGROUND

[1] This matter involves a request by Staff ("Staff") of the Financial and Consumer Services Commission ("FCNB") to the acting Director of Consumer Affairs ("Director") to review Ms. Siew Lan Hong Mulligan's ("Ms. Mulligan") suitability to hold a real estate manager's licence pursuant to section 10(2) of the *Real Estate Agents Act* (the "Act"). Staff were concerned that a recent undisclosed criminal conviction affected her suitability to hold a real estate manager's licence.

[2] Staff requested that the Director either consider terms and conditions on the licence pursuant to subsection 10(1.1) or a suspension or cancellation of the licence pursuant to subsection 10(2) as appropriate.

10(1.1) The Director may at any time restrict a licence by imposing any terms and conditions that he or she considers appropriate on the licence.

10(2) The Director may suspend or cancel a licence if he or she is of the opinion it is in the public interest to do so.

[3] Ms. Mulligan has been licensed to work in real estate, with a few minor gaps since 1985. During the history of her licensed activity, Ms. Mulligan was not the subject of any complaints filed with FCNB and nor has she been the subject of discipline by the New Brunswick Real Estate Association (the "NBREA").

[4] Ms. Mulligan has held a real estate manager's licence since 1999. Prior to that, Ms. Mulligan was licensed as a salesperson under the *Act*.

[5] Ms. Mulligan has held a real estate managers licence working for the licensed Agent Hartford Realty Inc. since 6 September 2013.

[6] The Director issued Ms. Mulligan a licence without restriction on 30 November 2016.

[7] The NBREA renewed Ms. Mulligan's membership in their association effective 1 July 2017. This membership requirement is necessary for the Director to continue licensing Ms. Mulligan as a real estate manager, as it demonstrates she is a member in good standing and has completed the necessary continuing education provided by the NBREA.

[8] Staff received information from industry representatives on 1 September 2017 that Ms. Mulligan had been convicted on 31 August 2017 of a criminal offence. Staff was provided with a copy of the Form 35 Conviction on 25 September 2017 which indicated that Ms. Mulligan had been tried and convicted under Part XXVII of the *Criminal Code* relating to an incident on 22 October 2016 at Fredericton, NB where she did steal merchandise the property of Sobeys, contrary to Section 334(b)(ii) of the *Criminal Code*. Ms. Mulligan was fined \$500, surcharge of \$150 and given probation for 12 months.

[9] Ms. Mulligan did not disclose her conviction to the Director as required by paragraph 15(2)(a) of the *Act*:

15(2) A salesperson, manager or official of an agent and, in the case of a corporate manager or salesperson, its nominee, shall notify the Director without delay in writing of the following:

(a) a conviction against the salesperson, manager, official or nominee of an offence involving fraud, theft or misrepresentation or conspiracy to commit an offence involving fraud, theft or misrepresentation under the Criminal Code (Canada) or the Competition Act (Canada);

[10] Ms. Mulligan was advised about concerns of the undisclosed criminal conviction from Staff via a letter on 3 October 2017. The letter referenced the criminal conviction registered against her; provided reference to the court and police file numbers; and made reference to the requirement to notify the Director under paragraph 15(2)(a) of the Act without delay and the offence for failing to report under paragraph 43.6(1)(a).

[11] Ms. Mulligan was also advised in the letter that, due to the undisclosed conviction, Staff had concerns about her continued suitability to hold a real estate manager's licence. The letter advised that she would be offered an Opportunity to be Heard in front of the Director with respect to Staff's concerns. She was notified that the purpose for the Opportunity to be Heard was to review her suitability, and she was provided the specific information that formed the basis of Staff's concerns. Ms. Mulligan was also advised that this was an opportunity for her to provide any additional information or rationale to aid the Director in reviewing her suitability; of her right to counsel; and of her right to disclosure of information.

[12] The right to have an Opportunity to be Heard is in accordance with subsections 10(1.3) and (2.1) of the Act. These sections are as follows:

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.

10(2.1) The Director shall not suspend or cancel a licence without giving the licensee an opportunity to be heard.

[13] 4 October 2017 Ms. Mulligan contacted Staff regarding the 3 October 2017 letter and advised she was unaware of her obligation to notify the Director of the conviction, pursuant to paragraph 15(2)(a) of the Act. Ms. Mulligan was aggressive with Staff and demanded to know who had provided FCNB with the information regarding her conviction. She described the conviction as both a misdemeanor and a summary conviction and reiterated that she did not believe she had to disclose. She advised she would be attending in person at an Opportunity to be Heard but that she needed to first speak with her legal counsel.

[14] On 6 October 2017 Staff received correspondence from a licensee of the real estate industry (Letter #1) regarding Ms. Mulligan's conviction and advising of their concerns with Ms. Mulligan having access to client homes in light of conviction. This letter expressed concerns regarding industry reputation and professionalism. The letter urged the suspension of Ms. Mulligan's licence.

[15] Staff contacted Ms. Mulligan via email on 11 October 2017 advising that an Opportunity to be Heard was scheduled for 2:30 pm on 23 October 2017 at FCNB's office in Fredericton.

[16] On 11 October 2017 Ms. Mulligan contacted Staff to advise that Joel Hansen, Ms. Mulligan's legal counsel ("Lawyer") was unable to be present at the Opportunity to be Heard scheduled for 23 October 2017, and she requested a postponement until he could be in attendance.

[17] An alternate Opportunity to be Heard date was provided to Ms. Mulligan via email by Staff on 16 October 2017, where an Opportunity to be Heard was scheduled for 10:30 am on 16 November 2017.

[18] 24 October 2017 Staff received a second letter from a licensee in real estate (Letter #2) regarding Ms. Mulligan's continued licensure. The letter expressed concern with public interest and client risk. The letter advised of the conviction and raised serious concern that Ms. Mulligan had previously entered into a property without permission of the vendor or vendor's agent. The letter advised that client protection and best interest were a concern, including concerns with Ms. Mulligan's access to client homes and private possessions unsupervised. The letter urged the suspension of Ms. Mulligan's licence.

[19] On 6 November 2017 Ms. Mulligan advised via email that her Lawyer would be available to attend the Opportunity to be Heard via teleconference, and she provided his contact details.

[20] 7 November 2017 Staff received an email from the Fredericton Real Estate Board (Letter #3) wherein a board representative advised that they have been receiving calls on a daily basis from concerned industry participants asking why the issue of Ms. Mulligan's licence had not yet been addressed. The email requested that the issue be dealt with as soon as possible.

[21] 10 November 2017 Staff obtained a copy of Court Transcript for Case No. 10430905 (Her Majesty the Queen and Siew Lan Hong Mulligan), for Ms. Mulligan's Trial, which was held 31 August 2017.

[22] Disclosure of anonymized copies of Letters #1 and #2 were provided to Ms. Mulligan via email from Staff on 14 November 2017. Correspondence attached to this email also disclosed that Staff had in their possession a copy of the Provincial Court transcript regarding Case Number 10430905. Ms. Mulligan was advised that a copy could be provided if requested.

[23] Ms. Mulligan contacted Staff by phone on 15 November 2017 and requested the identity of those who had written Letters #1 and #2. Staff advised that the identity of authors was to remain anonymous unless consent is given by the authors.

[24] A copy of Letter #3 was provided via email to Ms. Mulligan by Staff on 15 November 2017.

[25] Ms. Mulligan met with the Director on 16 November 2017. Also in attendance were Robyn Gallant, Compliance Officer for Consumer Affairs, and Rick Hancox, Chief Executive Officer. Ms. Mulligan's Lawyer joined the meeting via conference call.

[26] There, Ms. Mulligan was provided a summary of the Directors' concerns and the basis for them. Ms. Mulligan spoke and provided an explanation and rationale for her actions. Ms. Mulligan's Lawyer also spoke on behalf of his client. In addition, she responded to the Director's questions. Ms. Mulligan provided a photocopy of a 25 year Certificate of Recognition from the Canadian Real Estate Association, as well as a reference letter from a former manager whom she worked under for six years.

THE FACTS

[27] After reviewing the information submitted by Staff and the Respondents, I find the following as facts:

- a. Ms. Mulligan confirmed at the Opportunity to be Heard that she had all the documents relied upon by staff as listed in the FCNB letter of 3 October 2017 and the disclosures of 14 and 15 November 2017.
- b. Since the issuance of her licence on 30 November 2016 Ms. Mulligan was convicted of a criminal offence under section 334(b)(ii) of the *Criminal Code of Canada*:
 - Conviction Form 35 - Tabu-File #10430905; Police File # 16-23480 Form 35
- c. Paragraph 15(2)(a) of the *Act* requires that a manager shall notify the Director without delay in writing of a conviction involving theft under the *Criminal Code* (Canada).

[28] In her explanation at the Opportunity to be Heard, the following information was provided:

- a. Ms. Mulligan's Lawyer spoke on behalf of his client to say that he had advised Ms. Mulligan that she should hold off notifying FCNB until renewal of her licence, as he thought she was only required to notify FCNB at that time;
- b. Ms. Mulligan reiterated that she acted under the advice of her Lawyer and that she was not aware of the requirement to notify and that she is not familiar with the *Act*;
- c. Ms. Mulligan's Lawyer indicated that shoplifting was a summary conviction under the *Criminal Code* and not indictable, and that he thought only serious offences needed to be reported. He explained that he had instructed Ms. Mulligan that she was not required to notify the Director, as the offence was small in nature. He stated that shoplifting in itself may not even be considered a criminal offence at a higher court, and that Ms. Mulligan may only technically need to admit bigger, more egregious professional conduct offences;
- d. Ms. Mulligan stated that she has been in real estate her whole life, and that she has 30 years' experience and has not had any complaints; Ms. Mulligan indicated that she had not taken on any new listings since receiving her letter regarding the Opportunity to be Heard;
- e. Ms. Mulligan described the incident as an unfortunate situation;
- f. Ms. Mulligan advised that Letters 1, 2 & 3 are examples of individuals who want to push her out of the industry. She questioned why copies of the letters were not provided sooner. The Director indicated that the information disclosed in the letters related to the same reason she was being presented with an Opportunity to be Heard and did not raise any new information or issues. Ms. Mulligan indicated that the authors of the letters were making a "mountain out of a molehill", and that they were trying to "make something out of nothing". Ms. Mulligan demanded to be provided with the identities of the authors. The Director explained that the identities were to remain confidential;
- g. Ms. Mulligan stated that details in Letter 2 involve an issue wherein she showed an empty house without notifying the listing agent. The listing agent registered a complaint with the NBREA and it was dismissed;
- h. Ms. Mulligan advised that the NBREA has not upheld any complaints made against her. She stated that she has never done anything wrong in her professional business;
- i. Ms. Mulligan indicated that she has done a lot of work for Chinese clients, and has even helped them with their mortgages, insurance, Service New Brunswick, with translation, etc.;
- j. Ms. Mulligan stated that she has handled trust accounts and open houses and is not a threat to the public;

- k. In regards to the shoplifting incident Ms. Mulligan states that both the store that charged her with shoplifting and the Judge who heard her case did not believe her version of the events;
- l. When the Director questioned Ms. Mulligan about a previous incident raised on page 3 of the court transcript, wherein the security guard testifying indicates a previous incident involving concealing items, Ms. Mulligan's Lawyer advised that the previous incident should not have been raised during the trial, as no record had been introduced. When questioned by the Director if Ms. Mulligan had a previous conviction, both Ms. Mulligan and her Lawyer did not answer the question;
- m. When the Director asked Ms. Mulligan about a reference to a prior conviction by the Judge on page 52 of the court transcript, Ms. Mulligan referred to her Lawyer, who indicated that that point had been raised during trial when he had requested a conditional discharge on behalf of his client. No direct response to the question of whether or not there was a previous conviction was provided;
- n. Ms. Mulligan stated that the security guard who acted as a witness during the trial lied. Ms. Mulligan's Lawyer stated that he was surprised the judge accepted his testimony, and reminded the Director that Ms. Mulligan had also been charged with assault, and that video was presented during the trial demonstrated the assault was the other way around and that the charge was dropped. Ms. Mulligan's Lawyer indicated that the Crown Prosecutor was new and inexperienced and that the video evidence was contrary to the security guards version of events;
- o. When Ms. Mulligan was asked a second time if she had any other convictions she replied that she had no convictions in the real estate business in the last 30 years; and
- p. Ms. Mulligan asked that her experience in industry be considered and suggested that the Director should not consider a summary conviction which was a personal matter. Ms. Mulligan's Lawyer further iterated that Ms. Mulligan's age and past history should be considered and suggested that conditions on her licence would satisfy the public interest.

[29] Ms. Mulligan provided a copy of a 25 years Certificate of Recognition from the Canadian Real Estate Association.

[30] Ms. Mulligan provided a reference letter from a former manager, wherein she was described as thoughtful, energetic and passionate, and someone who had her client's best interests, acted with integrity, was trustworthy and professional. The letter advises that one would be fortunate to have her as a part of their team.

[31] At the close of the Opportunity to be Heard, the Director requested that Ms. Mulligan undertake to provide Criminal Record Check ("CRC") without delay. Ms. Mulligan replied that her current company (agent) had provided a reference and asked why the Director needed a CRC and why FCNB could not order a copy themselves. Ms. Mulligan was advised that she would need to provide the CRC without delay and where she would need to go to order a copy.

[32] Subsequent to the Opportunity to be Heard, Staff followed up with Ms. Mulligan on 17 November 2017 reiterating in writing the requirement for her to submit a CRC as part of rendering a decision regarding her licence.

[33] 26 November 2017 Ms. Mulligan contacted Staff by email to advise that unless FCNB is planning to renew her licence under the *Act*, then she sees it redundant to submit the CRC. Her email also stated that we should receive the CRC by 28 November 2017 at the latest.

[34] 29 November 2017 Ms. Mulligan provided a copy of her CRC which indicated two convictions (one that had been disclosed by Ms. Mulligan prior to this matter and the other the subject matter of this Decision). The CRC also included a statement that there was a third criminal conviction that had been registered on JISNB where a Record Suspension (Pardon) was granted.

[35] 1 December 2017 Ms. Mulligan emailed Staff to advise that she had resigned her employment from Re/Max Hartford and that she wished to know whether a future application would be accepted or rejected.

THE COMMISSION'S MANDATE

[36] The *Financial and Consumer Services Act*, in Section 2(a) provides that the purpose of the Act is to 'enable the Commission to provide regulatory services that protect public interest and enhance public confidence in the regulated sectors...'.

[37] The *Financial and Consumer Services Act*, in Section 12(2)(b) provides that *the Commission shall administer the financial and consumer services legislation*, which as per subsection 1(q) includes the *Real Estate Agents Act*.

[38] Prior to suspending, cancelling or imposing terms and conditions on a licensee, the Director must consider the appropriateness of any action taken. In making this determination it is necessary to consider the mandate of the Commission and whether or not the Respondent is suitable to hold a licence and that the issuance of a licence is not objectionable for *any* reason.

[39] Consumer protection is a fundamental consideration and a key purpose of the Commission's mandate. It is a key responsibility of the Director, as the gatekeeper to the industry to determine suitability of an applicant or a licensee and allow that person to operate in the sector.

THE PROCESS OF DETERMINING SUITABILITY

[40] Section 10(1) of the Act requires that 'the Director is satisfied that the applicant is suitable to be licensed'. The review of suitability covers a number of aspects including education, qualifications, financial stability and integrity. These all have a significant bearing on a candidate's suitability to hold a manager's licence and operate in the real estate sector.

[41] Integrity is an essential character for a manager in order for consumers to have confidence in the industry. Consumers need to know that their real estate agent will be honest and act with integrity when acting on their behalf in what may be one of the largest financial transactions in their life. An applicant's ability to notify the Director when matters involve termination of employment because of misconduct, criminal convictions of fraud, theft or misrepresentation, judgments, or bankruptcy proceedings are all significant factors in determining their integrity and therefore suitability to operate in the industry.

[42] Another determination that the Director must make under Section 10(1) is that the issuing of a proposed licence "is not objectionable for any reason". While this provides wide latitude, in this situation it is viewed from the perspective of consumer protection. If a licence is issued or continued does it leave consumers exposed to harm or exploitation?

ANALYSIS

[43] FCNB's primary purpose is to protect the public and enhance public confidence in the financial marketplaces which it regulates. This includes ensuring that individuals carrying on business in the industry are competent and trustworthy. It also includes ensuring that when a licence is granted and/or held, any potential risks to consumer are minimized.

[44] Although Ms. Mulligan has been licensed in the real estate industry for a long period of time, with no complaints received, she was convicted of a criminal offence involving theft, and she failed to notify the Director of the conviction.

[45] The category of licensed Manager that Ms. Mulligan's holds assumes a higher standard of behaviour than individuals licensed as salespeople. To qualify as a licensed manager, individuals are required to have a minimum number of years in industry and must complete specific training and continuing education related to their role as a supervisor over licensed salespeople working for the agent.

[46] It is clear that Ms. Mulligan's lack of disclosure is of concern and reflects on her suitability to hold a licence. The circumstances warrant a regulatory response. The Act provides that the Director can either place terms and conditions on the licence as appropriate, or suspend or cancel the licence if it is in the public interest to do so.

[47] Honesty and integrity are important attributes for a manager undertaking a financially significant transaction on behalf of a client. Clients are relying on the manager to see that details are looked after, agreements and contracts are properly completed and any necessary follow up is conducted in a timely and efficient manner. Consumers need to have confidence that the professionals they deal with and for whose services they are paying for will behave in a proper and ethical manner. When these attributes are in question in an individual's personal dealings it does not lend confidence to how she will conduct business on behalf of others.

[48] While there is no evidence that Ms. Mulligan's failure to notify the Direction was meant to intentionally mislead, Ms. Mulligan displayed an unwillingness to accept responsibility for her actions. Her failure to take responsibility for notifying the Director, citing lack of knowledge of the legislation, is not a valid excuse. As someone who has worked in the industry for as long as Ms. Mulligan, she should be familiar with the regulatory structure of her industry and recognize the suitability requirements of her licence. Of further concern is her initial response to the Opportunity to be Heard letter of 3 October 2017 was to question how FCNB was informed, which demonstrated a lack of remorse and a lack of ownership for both the conviction itself and the failure to notify. These issues raise concern in the areas of both integrity and competency.

[49] Though Ms. Mulligan advised that she was acting on her Lawyer's advice not to notify the Director of the conviction since the offence was a conditional discharge and personal not professional in nature, this does not negate the fact that notification was required. Even though it appeared that Ms. Mulligan was attempting to minimize her theft conviction, shoplifting on the part of a real estate licensee is extremely relevant to the industry in which they operate. Shoplifting/theft on the part of a licensee points directly to questionable character in the realm of honesty, integrity and trust. Ms. Mulligan has direct, unsupervised access to individual's personal properties, as well as commercial buildings. A licence to trade in real estate permits access to properties, and a theft conviction brings a question of confidence to the issuance of the licence.

[50] During the Opportunity to be Heard Ms. Mulligan indicated that the judge was mistaken in his decision and that the security guard had been untruthful in his testimony. Regardless of her position on these matters, she has been tried and convicted of a criminal offence involving shoplifting. The

Opportunity to be Heard was provided to Ms. Mulligan as her opportunity to account for her actions, and was not intended to retry the conviction. The fact of the matter is that she was found guilty by a court, which a higher burden of proof than that required by the regulator. The conviction itself is the overarching and initial concern of Staff, however, her conduct surrounding notification and communication with the regulator, and her attitude toward the conviction itself, furthered the position that suitability for licence should be questioned.

[51] When asked directly about any prior convictions, Ms. Mulligan did not answer the question. When asked a second time she indicated that she had no prior convictions in her professional capacity [in the real estate industry]. Her failure to respond to direct questioning speaks to suitability. It was clear that Ms. Mulligan did not want to answer the question and was avoiding disclosure of information. The avoidance demonstrates a lack of integrity on the part of Ms. Mulligan. Her refusal to provide information in this situation, would suggest that she may be less than honest in other areas, which raises further concerns in the realm of consumer protection.

[52] A determining consideration is whether Ms. Mulligan's criminal conviction is so objectionable that she should not be allowed to operate in the real estate sector at all, or whether she, with the appropriate supervision can conduct herself in a suitable manner.

[53] After careful consideration, with the particular facts of this matter and the nature of the convictions at issue, it is felt that not only is Ms. Mulligan not suitable to hold a manager's licence, which implies she is responsible for supervising others, but supervision by another licensee is not an option available as a term and condition of Ms. Mulligan's licence. Effective supervision would place unacceptable limitations on Ms. Mulligan's conduct in real estate. It would also put other licensees responsible for her actions through an uncharacteristic supervisory role, wherein they would be required to accompany Ms. Mulligan to every property, and account for her actions. Requiring that Ms. Mulligan be escorted into listings would place other licensed in real estate in the position of acting as security personnel. Another individual should not and could not be held accountable for Ms. Mulligan's actions. Consumer protection cannot be assured even with an additional real estate licensee overseeing a showing.

[54] Providing a licence that prohibits access to listings is beyond the scope of limitations available under the legislation, as a trade in real estate is not limited to simply listing properties, in and of itself, trading in real estate permits licensed individuals access to vendor properties. Access to the Multiple Listing Service (MLS) provides licensees with access to all listings. Ms. Mulligan herself admits during the Opportunity to be Heard that she has previously entered into a property without vendor consent.

DECISION

[55] With respect to placing suitable terms and conditions on Ms. Mulligan's licence, as noted above, I have considered terms and conditions, and find that supervision is not a term and condition that is appropriate in this situation; Therefore I have concluded that:

- a. Ms. Mulligan is not suitable for licence under the *Act*, and in that regard I am denying any licensure in this industry in the public interest for the reasons detailed above and in accordance with subsection 10(1) of the *Act*.

- b. Pursuant to subsection 10(5) of the *Act*, Ms. Mulligan is not entitled to apply for a new licence under the *Act* for a period of one year from the date of this decision.

DATED at Fredericton, New Brunswick this 6th day of February 2018.



Alaina M. Nicholson
Acting Director, Consumer Affairs
Financial and Consumer Services Commission