



Citation: *New Brunswick (Financial and Consumer Services Commission) v. Atlantic Real Estate Services Ltd. doing business as Royal LePage Atlantic, Ian Wilkie, and Ralph Stephen, 2022 NBFCST 7*

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

Docket: CA-001-2022

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

**Atlantic Real Estate Services Ltd., doing business as Royal
LePage Atlantic, Ian Wilkie, and Ralph Stephen,**

Respondents.

DECISION AND ORDER

PANEL: Mélanie McGrath, Tribunal Chair

DATE OF HEARING: October 26, 2022

WRITTEN REASONS: June 15, 2023

APPEARANCES: Mark McElman for the Financial and Consumer Services Commission
George L. Cooper, K.C. for the respondents

I. DECISION

1. I approve the *Settlement Agreement* signed by the parties.

II. OVERVIEW

2. Atlantic Real Estate Services Ltd., which operates under the business name Royal LePage Atlantic, is a licensed real estate agency with four offices located in New Brunswick. It maintains trust accounts at its Saint John and Moncton offices (the “trust accounts”). The primary purpose of the trust accounts is to hold deposits on behalf of New Brunswick consumers which are occasioned during real estate transactions. In these reasons, I will refer to Atlantic Real Estate Services Ltd. as Royal LePage Atlantic.
3. Ian Wilkie was employed as the Chief Financial Officer of Royal LePage Atlantic until March 1, 2019. Mr. Wilkie never held a licence issued under the *Real Estate Agents Act*, R.S.N.B. 2011 c. 215 (the “Act”). Mr. Wilkie reported to Ralph Stephen, the Chief Executive Officer of Royal LePage Atlantic. Mr. Stephen has been licensed under the Act since November 21, 1991 and has held a manager’s licence with Royal LePage Atlantic since March 11, 2014.
4. On June 15, 2022, The Financial and Consumer Services Commission (the “Commission”) filed a *Statement of Allegations* commencing enforcement proceedings against Royal LePage Atlantic, Mr. Wilkie and Mr. Stephen. The allegations concern improper withdrawals from the trust accounts between April of 2016 and November of 2017. On June 15, 2022, the Commission also filed a *Notice of Application for Approval of a Settlement* which was accompanied by a *Settlement Agreement* signed by the parties and a draft order.
5. In the *Settlement Agreement*, the respondents admit that there was a total of 73 wrongful transactions from the trust accounts involving over \$3 million. Each of these transactions were in violation of the requirements imposed by subsection 20(1) of the Act. Subsection 20(1) of the Act prohibits the withdrawal of funds from an agency’s trust account, except in accordance with the terms on which it was received.
6. All 73 improper transactions were made by Mr. Wilkie. He transferred funds from the trust accounts to Royal LePage Atlantic’s general operating account and used them to cover the agency’s operational expenses. As Royal LePage Atlantic’s CEO, Mr. Stephen was responsible for ensuring that systems were in place to ensure trust funds were withdrawn in accordance with the terms of the Act and that Royal LePage Atlantic’s employees respected these systems. Mr. Stephen admits that he failed to detect the non-compliant transactions and remedy the situation in a timely manner.
7. The parties ask the Tribunal to approve the following agreed upon sanctions:
 - a) Royal LePage Atlantic pay an administrative penalty of \$60,000;

- b) Mr. Wilkie pay an administrative penalty of \$25,000 and be permanently prohibited from conducting all regulated activities under the Act;
- c) Mr. Stephen pay an administrative penalty of \$10,000; and
- d) The Respondents pay the Commission's investigative and hearings costs of \$15,000 on a joint-and-several basis.

III. ISSUES

- 8. To determine whether I should approve the *Settlement Agreement*, I must answer the following questions:
 - a) Are the sanctions proposed by the settlement within the parameters of what is reasonable?
 - b) Is the proposed settlement in the public interest?

IV. ANALYSIS

A. TEST

- 12. The test for the endorsement of a settlement under the Act was established by the Tribunal in *New Brunswick (Financial and Consumer Services Commission) v. Rhino Ventures Inc. et al.*, 2021 NBFCST 7 ("*Rhino Ventures*"). In that decision, the Tribunal stated the following:

12. This is the first time the Tribunal has been asked to approve a *Settlement Agreement* under the *Mortgage Brokers Act*, the *Cost of Credit Disclosure and Payday Loans Act* and the *Real Estate Agents Act*.

13. Paragraph 79(1)(a) of the *Mortgage Brokers Act* provides that the Tribunal may terminate an enforcement proceeding (or administrative proceeding) by approving a *Settlement Agreement*:

[...]

14. The *Real Estate Agents Act* and the *Cost of Credit Disclosure and Payday Loans Act* have identical provisions: sections 43.81 and 51.81 respectively. All three statutes are silent as to the test to be applied by the Tribunal in deciding whether to approve a *Settlement Agreement*.

15. In *New Brunswick (Financial and Consumer Services Commission) v. Howse*, 2018 NBFCST 2 [Howse] and *New Brunswick (Financial and Consumer Services Commission) v J.B. Côté et Fils Ltée et al.*, 2021 NBFCST 6 [J.B. Côté], this Tribunal considered the approval of settlements under equivalent provisions of

the *Securities Act* and the *Pre-arranged Funeral Services Act*. The Tribunal formulated the test to be met for approval of a settlement agreement as follows:

(a) Are the sanctions proposed by the settlement within the parameters of what is reasonable?

(b) Is the proposed settlement in the public interest?

16. The Tribunal also stated in *J.B. Côté*, at paragraph 14, that it would be desirable that this test be applied across “financial and consumer services legislation”, as this term is defined in section 1 of the *Financial and Consumer Services Commission Act*. I agree. Given that the *Mortgage Brokers Act*, the *Real Estate Agents Act* and the *Cost of Credit Disclosure and Payday Loans Act* come within the definition of “financial and consumer services legislation” and that the provisions in these statutes are virtually identical to those in the *Securities Act* and the *Pre-arranged Funeral Services Act*, I find the test set out in *Howse*, and adopted in *J.B. Côté*, should be applied in this matter.

17. As recognized in *Howse* and in *J.B. Côté et Fils Ltée*, the purpose of the legislation is also relevant in determining whether a proposed settlement is in the public interest. Neither the *Mortgage Brokers Act*, the *Real Estate Agents Act* nor the *Cost of Credit Disclosure and Payday Loans Act* enunciate a purpose. However, these statutes should be interpreted in the broader context of financial and consumer services legislation. Section 2 of the *Financial and Consumer Services Commission Act* sets out its dual purpose:

Purposes of Act

2 The purposes of this Act are to

(a) enable the Commission to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors, and

(b) enable the Commission to disseminate knowledge and promote understanding of the regulated sectors and develop and conduct educational programs.

18. In *J.B. Côté*, the Tribunal further stated that a hearing panel should also consider the following in analyzing whether to approve a *Settlement Agreement*:

- whether the allegations in the *Settlement Agreement* fall within the Tribunal’s jurisdiction;
- that the only evidence that can be considered by the Tribunal is that contained in the *Settlement Agreement*;
- whether sufficient evidence has been provided in the *Settlement Agreement* to allow the Tribunal to determine whether the proposed sanctions come within reasonable parameters;

- whether the sanctions contemplated in the *Settlement Agreement* fall within the Tribunal's jurisdiction;
- whether the proposed sanctions are preventive and prospective in nature and not remedial or punitive;
- that a *Settlement Agreement* arises out of negotiations between Commission staff and the respondents and therefore significant weight should be given to the agreement reached between parties, given that a balancing of factors and interests has already taken place in reaching that agreement; and
- that settlements serve the public interest by resolving enforcement proceedings quickly, efficiently and with certainty and by avoiding the significant resources that would be committed to a contested proceeding.

B. PROPOSED SANCTIONS

13. I find that the sanctions proposed in the *Settlement Agreement* fall within the parameters of what is reasonable.
14. I now turn to the analysis of the factors identified by the Tribunal to assess the reasonableness of the sanctions.

(i) Seriousness of the Allegations

15. The allegations against the respondents are extremely serious. Subsection 20(1) of the Act exists to ensure that trust funds received by real estate agents are only used for their proper purpose. It is against the law for a real estate agency to use trust funds for any other purpose other than the one for which it was received.
16. Mr. Wilkie misappropriated over \$3 million in trust funds over the course of approximately 18 months by transferring funds from the trust account to the general account to pay for Royal LePage Atlantic's operating expenses. He did so on 73 separate occasions, therefore repeatedly violating subsection 20(1) of the Act. These transactions created considerable deficiencies in the trust accounts that often persisted over long periods of time. At one point, the trust accounts had a shortfall of almost \$680,000. To make matters worse, Royal LePage Atlantic's general operating account was also often in a deficit position.
17. I cannot overstate the risk that this created for New Brunswick consumers.

18. As the agent, Royal LePage Atlantic holds fiduciary obligations towards the funds it keeps in its trust accounts. Subsection 21(1) of the Act provides that:

21(1) Subject to subsection (3), an agent who receives a deposit on a trade in real estate shall hold it as trustee on behalf of all the parties to the trade in accordance with their respective rights under the offer or contract and not as agent for any one of them, and the agent shall have the responsibility to pay or account for it to the proper party.

19. Considering the repeated improper uses of trust funds by Mr. Wilkie over the period in question, it is self-evident that Royal Atlantic LePage did not have adequate internal controls for safeguarding the proper use of trust funds. Similarly, Mr. Stephen also failed to ensure trust monies were properly protected by not adequately supervising Mr. Wilkie or taking sufficient measures to apprise himself of the situation. He therefore acquiesced to the improper transactions within the meaning of section 43.8 of the Act.

(ii) Past Conduct

20. There are no past violations of financial and consumer services legislation by the respondents.

(iii) Experience and Level of Activity in the Sectors

21. Royal LePage Atlantic is a large real estate agency with multiple offices located in New Brunswick. Mr. Stephen has been licensed under the Act since November 21, 1991, holding a manager's licence since March of 2014. I have no doubt that they fully appreciated the requirements imposed by the Act regarding trust funds.

(iv) Recognition of the Seriousness of the Improper Activity

22. The Respondents have admitted to serious breaches of the Act. They have accepted responsibility for their conduct by signing the *Settlement Agreement* and agreed to the proposed sanctions against them.

23. I note that Mr. Wilkie maintains that his conduct was inadvertent rather than willful. That is a position that I have great difficulty accepting given the sheer number of times he misused funds from the trust accounts. My concerns regarding Mr. Wilkie's failure to recognize his full role in this matter is mitigated by the fact that he has agreed to the highest administrative penalty allowed under the Act and a permanent ban from all regulated activities under the Act.

(v) Benefit Received as a Result of the Improper Activity

24. Mr. Wilkie did not personally benefit from the improper transactions. The improper conduct also did not result in any direct benefit to the other respondents. However, it can be viewed that Royal LePage Atlantic did gain some indirect benefits from the breaches. Had they not occurred, Royal LePage Atlantic would likely have required additional financing from its shareholders to fund its operations.

(vi) Risk to Customers in the Regulated Sectors

25. As I have stated, the respondents' conduct in this matter created substantial risk of harm to New Brunswick consumers. Fortunately, the risk to consumers did not materialize but the situation could have been much worse. Frankly, it is a miracle that no one was affected by these breaches.

(vii) Damage Caused to the Integrity of the Regulated Sectors

26. There can be no doubt that the improper use of trust funds by a real estate agency causes a lessening of confidence of the real estate market in New Brunswick. The impact that this misconduct creates was aptly described in *Schoen (Re)*, 2017 CanLII 51540, at paragraph 110 of that decision:

110. Without demeaning the importance of those at all, the Committee notes that there is a more fundamental issue of public trust and confidence that is at stake. Members of the public who invest in real estate and desire the services of a licensed real estate professional to manage their rental properties do so in the clear expectation that the advice and service will be reliable, and that the collection and disbursement of funds will be done in a regular and trustworthy manner. That is the essence of the fiduciary obligation that the law recognizes and exacts of those who choose to serve as members of the real estate profession.

The people of New Brunswick who retain real estate agents must have confidence the money they deposit into the real estate agency's trust account will not be misused or misappropriated.

(viii) Deterrence and Education

27. In considering the sanctions in the *Settlement Agreement*, I must determine whether they fulfill the goals of general and specific deterrence (see *Rhino Ventures*, para 33). In my opinion, the proposed sanctions will accomplish both goals of specific and general deterrence.
28. The maximum administrative penalties under the Act are \$25,000 for an individual and \$100,000 for a person other than an individual. Each of the respondents have agreed to pay significant administrative penalties commensurate with their obligations that they failed to discharge. For example, Mr. Wilkie has agreed to pay the maximum administrative penalty permitted under the Act and to a permanent ban of all regulated activities under the Act. These sanctions should deter the respondents from breaching financial and consumer services legislation in the future.
29. In *Rhino Ventures*, the Tribunal explained that the purpose of general deterrence is to deter other industry participants from breaching financial and consumer services legislation (para 38). I find that the proposed sanctions do send the message to industry participants that improper transactions with trust moneys will not be tolerated in New Brunswick. I therefore conclude that the general deterrence purpose is met.

(ix) **Mitigating Factors**

30. There are no mitigating factors in this case.

(x) **Previous Decisions Made in Similar Circumstances**

31. This is the first time that the Tribunal has considered a settlement agreement concerning wrongful trust transactions. I was referred to two decisions by the parties, *Re: John Helm*, an unreported decision of the Alberta Real Estate Council dated June 12, 2012, and *Re: Roger Bruce Schoen*, 2017 CanLII 51540, a decision of a panel of the British Columbia Real Estate Council's Discipline Committee.

32. These decisions deal with similar conduct with some differences. For example, in the *Re: John Helm* decision, there was evidence that certain of the wrongful trust transactions were used to fund Mr. Helm's lifestyle and personal expenses. That is an important aggravating factor which is absent from this case. The *Re: Roger Bruce Schoen* case concerns the failure of the manager of a real estate agency to adequately supervise the staff of the agency which resulted in \$80,000 in trust funds being misappropriated. It is helpful in assessing the sanctions against Mr. Stephen.

C. PUBLIC INTEREST

33. The proposed sanctions will have a significant deterrent effect on the respondents and will send the message that the misuse trust funds in the financial and consumer services sectors will not be tolerated in New Brunswick. The *Settlement Agreement* holds the respondents accountable for their actions and furthers the objectives of financial and consumer services legislation. The *Settlement Agreement* also serves to demonstrate that individual respondents will be held accountable in a manner that corresponds to the gravity of their conduct.

34. I therefore find that the sanctions proposed in the *Settlement Agreement* serve the public interest.

V. ORDER

35. I hereby order that:

- a) Pursuant to subsection 43.71(1) of the *Real Estate Agents Act*, Atlantic Real Estate Services Ltd. shall pay an administrative penalty of \$60,000 to the Financial and Consumer Services Commission;
- b) Pursuant to subsection 43.71(1) of the *Real Estate Agents Act*, Ian Wilkie shall pay an administrative penalty of \$25,000 to the Financial and Consumer Services Commission;
- c) Pursuant to paragraph 43.7(1)(c) of the *Real Estate Agents Act*, Ian Wilkie shall permanently

cease conducting all regulated activities under that statute;

- d) Pursuant to subsection 43.71(1) of the **Real Estate Agents Act**, Ralph Stephen shall pay an administrative penalty of \$10,000 to the Financial and Consumer Services Commission; and
- e) Pursuant to subsection 44(1) of the **Financial and Consumer Services Commission Act**, the respondents shall pay hearing and investigation costs of \$15,000 to the Financial and Consumer Services Commission, on a joint-and several basis.

DATED this 15th day of June, 2023

A handwritten signature in black ink, appearing to read 'Melanie McGrath', written over a horizontal line.

Mélanie McGrath
Tribunal Chair