

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”), in particular sections 9, 14 and 21, and the Mortgage Brokers and Agents Licensing Regulation, SOR 409/07 (the “Regulation”), in particular, section 10;

AND IN THE MATTER OF Mr. Justin Edwards:

AND IN THE MATTER OF a request for hearing pursuant to subsection 21(3) of the Act.

BETWEEN:

JUSTIN EDWARDS

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin McNairn
Member of the Tribunal and Chair of the Panel

Ms. Anne Corbett
Vice Chair of the Tribunal and Member of the Panel

Ms. Heather Gavin
Member of the Tribunal and of the Panel

APPEARANCES:

Mr. Justin Edwards, the Applicant, in person

Mr. Robert Conway for the
Superintendent of Financial Services

HEARD:

February 12, 2009

REASONS FOR DECISION

A. Background

On June 20, 2008, the applicant, Mr. Justin Edwards (“Edwards”) submitted an electronic application to the Superintendent of Financial Services (the “Superintendent”) for a mortgage agent’s licence. Such licences can be issued by the Superintendent under the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the “Act”). The licence application completed by Edwards specified that he intended to work for Mortgage Alliance Company of Canada Inc. (“MACC”). In fact, he was already working for MACC as a mortgage agent. His employment with MACC in that capacity had commenced sometime in 2005. No licence was required in order to engage in the activity of a mortgage agent in Ontario until July 1, 2008, when the Act came into force. MACC has agreed to continue Edwards in its employment, should he receive a mortgage agent’s licence, notwithstanding the circumstances that gave rise to the Superintendent’s proposal to refuse such a licence.

By notice of proposal dated August 25, 2008, the Superintendent indicated to Edwards that he proposed to refuse his licence application. The stated basis for the refusal was that:

- (a) Edwards’ past conduct afforded reasonable grounds for the belief that he would not deal or trade in mortgages in accordance with the law and with integrity and honesty; and
- (b) Edwards had provided false information to the Superintendent with respect to his application for a licence.

The reasons for proposal that accompanied the notice of proposal set out some of the particulars of the past conduct and the false information on which the Superintendent relied.

The documents in the Agreed Book of Documents, including those reasons for proposal, which were filed by the parties with the Tribunal, reveal that the relevant past conduct was that involved in an incident that took place on December 12, 2004. This incident led to Edwards' conviction on December 6, 2005 of the offence of possession of a controlled substance, in this case marijuana, for the purposes of trafficking. That is an indictable offence under subsection 5(2) of the *Controlled Drugs and Substances Act*. Conviction for this offence can result in a maximum penalty of five years imprisonment if no more than three kilograms of marijuana is involved (otherwise the potential penalty is life imprisonment). Edwards was given a conditional sentence, commonly known as "house arrest", of five months upon pleading guilty. The guilty plea and the penalty reflected the terms of a plea bargain between Edwards, through his counsel, and the prosecutor.

The documents in the Agreed Book of Documents reveal that the false information provided by Edwards in connection with his licence application was his negative response to the question of whether he has ever pleaded guilty to, or been found guilty of, an offence under any law.

On September 26, 2008, Edwards made a request to the Tribunal, pursuant to the Act, for a hearing in respect of the Superintendent's proposal. In that request, he asked the Tribunal to make an order requiring that a mortgage agent's licence be issued to him. The request for a hearing was made beyond the 15 day time period for making such a request. However, at a pre-hearing conference held on October 17, 2008, that time period was extended, for the purposes of this case, until September 26, 2008, by order of the Tribunal. That order, which was made on consent of the parties, is set out in a Pre-Hearing Conference Memorandum dated October 20, 2008.

B. Relevant Legislation and Regulations

Subsection 2(3) of the Act prohibits an individual from dealing in mortgages in Ontario without a mortgage broker's licence or a mortgage agent's licence. The Act provides for mortgage agent's licences in the following terms:

9. (1) An individual may apply for a mortgage agent's licence.
 - (2) A mortgage agent's licence authorizes the licensee to deal in mortgages in Ontario or trade in mortgages in Ontario on behalf of one specified brokerage by engaging in the activities permitted under the licence issued to the licensee.
 - (3) A mortgage agent's licence is subject to such conditions as may be imposed by the Superintendent or the Tribunal.
 - (4) The licensee shall comply with such standards of practice as may be prescribed for the licence issued to the licensee.

(5) A person who has a mortgage agent's licence shall not deal in mortgages in Ontario or trade in mortgages in Ontario except under the supervision of a mortgage broker.

The Act directs the Superintendent as to when licences are to be issued and withheld, as follows:

14. (1) The Superintendent shall issue a licence to an applicant who satisfies the prescribed requirements for a licence unless the Superintendent believes, on reasonable grounds, that the applicant is not suitable to be licensed having regard to such circumstances as may be prescribed and such other matters as the Superintendent considers appropriate.

The circumstances to which the Superintendent may have regard, in coming to the view that an applicant is unsuitable to receive a mortgage agent's licence, are prescribed in the following terms by the Mortgage Brokers and Agents Licensing Regulation, SOR 409/07 (the "Regulation"):

10. In determining whether an individual is not suitable to be licensed as a mortgage ... agent, the Superintendent is required by subsection 14(1) ... of the Act to have regard to the following prescribed circumstances:

1. Whether the individual's past conduct affords reasonable grounds for belief that he or she will not deal or trade in mortgages in accordance with the law and with integrity and honesty.
2. Whether the individual is carrying on activities that contravene or will contravene the Act or the regulation if he or she is licensed.
3. Whether the individual has made a false statement or has provided false information to the Superintendent with respect to the application for the licence.

C. Issue

The issue to be determined in this case is as follows:

Are there reasonable grounds to believe that Edwards is not suitable to be licensed as a mortgage agent having regard to:

- (a) his past conduct, in particular the conduct that led to his conviction under the *Controlled Drugs and Substances Act*, on December 6, 2005, of the offence of possession of marijuana for the purposes of trafficking; and
- (b) the false information he provided to the Superintendent in his application for a mortgage agent's licence, in particular the response of "no" that he gave to

the question of whether he had ever pleaded guilty to, or been convicted of, an offence.

D. Evidence of Edwards

Edwards testified as to the circumstances that gave rise to his conviction and as to his reasons for indicating, when applying for a mortgage agent's licence, that he had not pleaded guilty to, or been convicted of, any offence.

Edwards described the events of December 12, 2004 that led to his conviction as follows:

D, a friend, asked Edwards, as a favour, to give him a lift in his van. The van actually belonged to Edwards' mother. He agreed to drive D to his destination. He was led to believe that he would get gas money for his trouble. At the time D was 23 or 24 years of age and Edwards was 19. The two had been acquainted for about a month and a half. They came to know each other through D's brother who worked with Edwards at Bell Mobility. Edwards considered the brother to be a "straight-up guy". He knew that D didn't do anything for a living. He had no reason, however, to suspect that D was dealing drugs.

Edwards picked up both D and a friend of D who was unknown to him. The friend's presence was not explained to Edwards. He drove them to their destination. D had a gym bag with him but Edwards didn't know or suspect what was in it. When they arrived at the destination, D called some "buddies" over to the van. They got into the van at D's invitation and asked if D had the marijuana, at which time Edwards realized what was in the bag. At some point, the bag was opened and Edwards saw that it was partly full of marijuana.

One of the buddies pulled a gun, attempting to steal the marijuana. This individual pointed the gun at Edwards (who was sitting in the driver's seat). Edwards grabbed the gunman's arm, a scuffle ensued outside the van, the gun fell and he was able to kick it under a vehicle. When another of the buddies approached, Edwards ran for safety. He then heard gunshots, which apparently prompted someone in the neighborhood to call the police. Edwards also called the police from his hiding place. They arrived within 15 minutes. When the police showed up, Edwards returned to the scene.

The police asked if they could search the van and Edwards said yes, not realizing that the gym bag, which he now knew contained marijuana, was still in the van. The police also asked for the names of the buddies, which he couldn't provide. Edwards did give the police D's name and phone number but still doesn't know if charges were ever laid against D, who is no longer a friend. Edwards was arrested by the police at the scene and was subsequently charged with possession of marijuana for the purpose of trafficking.

Edwards explained his failure to disclose his conviction, in his application for a mortgage agent's licence, as follows:

He had applied, without legal assistance, to the National Parole Board for a pardon for his possession for trafficking conviction. In applying for a pardon, he referred to a booklet he had been sent outlining the different types of pardon "packages" and what was involved with each one. He "purchased" the one that suited his circumstances. He didn't re-call receiving a guide for the completion of an application. He didn't hear back with respect to the application and was under the impression that he might not hear anything for two or three years. He didn't realize that since insufficient time had passed since his conviction, he was ineligible for a pardon [he remains ineligible to this day].

Edwards said that in completing the background information part of the application for a licence, which included the question about criminal convictions, he just read the questions and responded to them. He simply skimmed over the related instructions. He thought that because he had put in a pardon application, he could mark "no" as the answer to the question about criminal convictions in the licence application form.

In evaluating this testimony, we considered certain statements that are included in two of the documents contained in the Agreed Book of Documents filed with the Tribunal. First, the National Parole Board's "Pardon Application Guide" states, in a couple of highlighted blocks, that an application for a pardon cannot be processed if the court has indicated that a conviction was tried as an indictable offence and it hasn't been five years since the sentence was completed. That was, in fact, the situation with respect to Edwards' conviction. Second, the background information part of the application material for a mortgage agent's licence includes a statement to the effect that offences under the *Criminal Code*, the *Narcotic Control Act*, the *Controlled Drugs and Substances Act* and certain other named Acts are criminal offences that must be disclosed. There is a further statement to the effect that an applicant does not have to disclose any offence for which a pardon has been granted under the *Criminal Records Act* and has not been revoked. This is accompanied by a parenthetical note to the effect that pardons are not automatically granted merely because of the passage of time.

We found the testimony of Edwards - as to the conduct that led to his conviction and as to his failure to disclose that conviction - to be credible. He was thoroughly cross-examined by counsel for the Superintendent and no material inconsistencies were revealed in his evidence.

E. Analysis

In our analysis of this case, we have been guided by three principles that have been recognized in prior decisions of this Tribunal following hearing requests, under the Act, in respect of licence refusal proposals.

- (1) The Tribunal must make its own determination, in cases such as this one, about the suitability of an applicant to hold a mortgage agent's licence having regard to the criteria for the granting or withholding of a licence set out in the Act and Regulation. The Tribunal need not show any deference to the Superintendent's opinion, about the suitability of the applicant, as reflected in his proposal to refuse the licence application or in the reasons supporting that proposal. In other words, the Tribunal must look at the matter afresh, as one of first impression, and come to its own conclusion, based on the evidence before it, as to the applicant's suitability in light of his or her past conduct and any false information he or she has provided in making the application.
- (2) In applying the licensing provisions of the Act and Regulation, in a case such as this, the Tribunal must be mindful of two important considerations, namely:
 - (a) the underlying rationale of the Act in that it is designed to protect the public interest and enhance public confidence in the mortgage industry; and
 - (b) the fact that a decision to refuse a licence can have severe financial implications for the applicant in that it will preclude him or her from earning a livelihood in a chosen line of work.
- (3) A number of considerations should be taken into account in determining whether the past conduct of an applicant or any false information provided by an applicant justifies the refusal of a licence. Some of the considerations that may be relevant in assessing past conduct are set out in the Tribunal's decision in *Henderson v. Superintendent of Financial Services* (FST Decision No. M0319-2008-1), while some of the considerations that may be relevant in assessing information provided are set out in the Tribunal's decision in *Alves v. Superintendent of Financial Services* (FST Decision No. M0315-2008-1).

We now consider the facts of this case in light of the considerations listed in the *Henderson* and *Alves* decisions (in neither decision was the list meant to be exhaustive).

1. Past Conduct

We set out below our analysis of Edwards' past conduct in light of the *Henderson* considerations.

(a) The time that has elapsed since the conduct.

The time between the conduct, on December 12, 2004, that gave rise to Edwards' conviction and the Superintendent's notice of proposal to refuse his licence application, dated August 25, 2008, was just over three and two-thirds years, which is neither a particularly short nor a particularly long period.

(b) The prolonged or repetitive nature of the conduct.

The conduct in question was not prolonged or repetitive nor had Edwards engaged in any other conduct earlier than, or subsequent to, that conduct which was alleged to raise questions about his honesty, integrity or law-abiding character (other than his inaccurate response to the question about convictions on the licence application, which we deal with below, under subsection 2).

(c) The advertent or inadvertent nature of the conduct.

Counsel for the Superintendent urged us to conclude that Edwards' testimony to the effect that he was not knowingly in possession of marijuana, and was an innocent participant in the aborted drug deal of December 12, 2004, was not plausible. We find that Edwards' evidence in this regard was, indeed, plausible and that he was inadvertently caught up in the criminal activities that took place on December 12. Moreover, we do not think that Edwards was wilfully blind to the prospect that his friend, D, was in possession of a significant quantity of drugs and was intending to complete a drug deal when he agreed to drive him to his destination on December 12. Wilful blindness occurs where a person is aware of the need for inquiry, but declines to inquire as he or she does not wish to know.

(d) The extent to which the conduct can be taken to call into question the integrity, honesty and law abiding nature of the individual.

Edwards conduct on December 12, 2004 does not, in our view, call into question his integrity, honesty or law abiding nature since we accept his testimony as to the innocent role that he played in the events of that day. We note, in particular, that Edwards' evidence was that during the events of December 12, he called the police, stayed in the area, returned to the van and consented to having the van searched by the police.

(e) The closeness of the context of the conduct to the context of activities in which the individual would be engaged as a mortgage agent.

The context of the conduct, namely drug dealing, is not at all close to the context in which the activities of a mortgage agent are carried out.

- (f) *The fairness of the process followed in any legal proceeding to which the individual was subject as a result of the conduct.*

There was no suggestion before us that the legal process that led to Edwards' conviction was unfair in any way. He was apparently represented by counsel throughout and agreed ultimately to entering a guilty plea.

- (g) *The seriousness with which the conduct of the individual was treated as reflected by the severity of any sanction imposed on him or her as a result of the conduct.*

The offence of which Edwards was convicted carried a much more serious penalty than was imposed on him. He could, for example, have been imprisoned for a term of up to five years. The penalty he received was five months house arrest with no actual detention in a custodial facility (except for a few days while awaiting release pending trial). Moreover, no fine was levied and no specific restrictions were imposed upon his activities. In other words, the sanction was not severe, which must be taken to reflect the fact that the court did not treat Edwards' conduct on December 12, 2004 as very serious.

- (h) *Any unusual and severe pressure the individual was under at the time of the conduct that would explain the conduct but is unlikely to reoccur.*

There was no evidence that pressure was a factor in this case and, in any event, it is only likely to be particularly relevant, as a possible explanation of past conduct, in a case where the individual has acted advertently.

- (i) *Any consistent and prolonged pattern of reformed or redeeming behaviour on the part of the individual since the conduct occurred.*

Edwards was not in a position to demonstrate such a prolonged pattern of behaviour because, at the time of the Superintendent's proposed licence refusal, it had only been three and two-thirds years since the conduct occurred. It should be noted, however, that for most of that period, Edwards was engaged in the mortgage business without, so far as the Tribunal was made aware, any complaints about his conduct and any involvement in any other offences. In any event, the absence of a consistent and prolonged pattern of reformed or redeeming behaviour should not normally count against an applicant when, as in this case, his conduct did not amount to advertent participation in a crime.

After weighing all of these considerations, we have concluded that Edwards' past conduct does not afford reasonable grounds for a belief that he will not deal or trade in mortgages in accordance with the law and with integrity and honesty. Therefore, he should not be disqualified on this basis from receiving a mortgage agent's licence.

2. False Statement

The fact that an applicant has made a false statement in connection with a licence application does not necessarily mean that he or she is not suitable to hold a licence. For example, an innocent misstatement of the applicant's phone number in the application form ought not to have this effect.

We set out below our analysis of the false statement made by Edwards in his licence application in light of the *Alves* considerations.

(a) The nature of the false statement.

Edwards made a false statement in a matter that was relevant to determining his suitability to hold a mortgage agent's licence, i.e. a false statement to the effect that he did not have a criminal record. That record would have revealed past conduct on his part that could have had a bearing on his suitability to hold a licence. Although we have concluded, after hearing Edwards' explanation, that his past conduct should not disqualify him from holding a licence, there is little doubt as to the materiality of the subject matter of his false statement to what the Superintendent had to decide in response to the application, specifically whether to issue a licence or to propose to refuse a licence.

(b) The advertent or inadvertent nature of the falsehood.

We found Edwards' evidence credible when he testified to the effect that he was unaware of his ineligibility for the pardon he had applied for and that he had responded to the question about convictions on the licence application form without reading the instructions but thinking that his conviction need not be disclosed given his application for a pardon. Certainly, Edwards acted foolishly and carelessly when he completed the pardon application and the licence application without making sure that he understood the requirements. We did not receive any evidence that would persuade us that the false statement in the licence application was other than an innocent misrepresentation.

(c) The explanation provided by the individual for the falsehood.

As noted above, we found Edwards' explanation for his false statement in the licence application form to be plausible.

(d) The circumstances in which the false statement was made, including any unusual and severe pressure the individual was under at the time the false statement was made.

It was not alleged that pressure on Edwards was a factor in the making of his false statement in the licence application form.

After weighing these considerations, we have concluded that Edwards' false statement about convictions in his licence application form does not afford reasonable grounds for a belief that he is not suitable to be licensed as a mortgage agent. Therefore, he should not be disqualified on this basis from receiving a mortgage agent's licence.

The conclusions that we have reached in this case are not inconsistent with the decision of the Tribunal in *Glaude v. Superintendent of Financial Services* (FST Decision No. M0325-2008-1), on which the Superintendent relied in argument in this case. *Glaude* was a case in which the Tribunal ordered the Superintendent to carry out a proposal to deny an application for a mortgage agent's licence by an applicant who, like Edwards, had been convicted of the offence of possession of marijuana for the purposes of trafficking and had provided false information to the Superintendent about that conviction. However, the *Glaude* case can be distinguished from the present case in a number of important respects, in particular:

- In *Glaude*, the time that had elapsed between the past conduct leading to the conviction and the Superintendent's proposal was a year and seven and a half months, while in the present case that period was just over three and two-thirds years. Indeed, in *Glaude* the applicant was still on probation at the time of the proposal (and at the time of the hearing before the Tribunal).
- The past conduct on the part of the applicant Glaude that led to his conviction was found by the Tribunal to have been advertent in that he admitted that there was a good likelihood that he was being sent to pick up drugs when he was asked by a friend, whom he knew to have participated in illegal activity, to collect a package for him. He acknowledged that he knew that he could end up in jail. This can be contrasted with the circumstances in which Edwards became caught up in an attempted drug transaction, which we have found to be largely accidental. That led us to conclude that his conduct was inadvertent.
- Glaude was sentenced on a guilty plea to a much more severe penalty than was Edwards, reflecting more serious criminal conduct. Glaude was fined \$20,000, put on probation for one year and was made subject to various limitations on his activities. By comparison, Edwards was sentenced to five months house arrest.
- Glaude was the source of false information, describing some of the circumstances surrounding the conduct leading to his conviction, that was provided in a letter written by his principal broker to the Superintendent. He took no steps to correct that information when he learned of the letter's contents. The false statement that Edwards made to the Superintendent, to the effect that he had no criminal record, was made under the naïve impression that it was not false given the fact that he had applied for a pardon.

F. Order

In light of the reasons set out above, we direct the Superintendent, by order, to issue a mortgage agent's licence to Edwards.

DATED at the City of Toronto, this 20 day of February, 2009.

"Colin McNairn"

Colin McNairn, Member of the Tribunal
and Chair of the Panel

"Anne Corbett"

Anne Corbett, Vice Chair of the Tribunal
and Member of the Panel

"Heather Gavin"

Heather Gavin, Member of the Tribunal
and of the Panel