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Citation: *Financial and Consumer Services Commission v. McKellar et al.*, 2022 NBFCST 8

PROVINCE OF NEW BRUNSWICK  
FINANCIAL AND CONSUMER SERVICES TRIBUNAL  
IN THE MATTER OF THE *REAL ESTATE AGENTS ACT*, S.N.B. 2011, c 215, THE *MORTGAGE BROKERS ACT*, S.N.B. 2014, c 41, AND THE *SECURITIES ACT*, S.N.B. 2004, c S-5.5

Docket: MS-001-2021

BETWEEN:

**Financial and Consumer Services Commission,**

Applicant,

-and-

**John Albert McKellar and 668054 N.B. LTD,**

Respondents.

**DECISION**

PANEL: Mélanie McGrath, Chair  
Raoul Boudreau, Vice-Chair  
Sonia St-Pierre, Member

DATE OF HEARING: October 18-19, 2022

WRITTEN REASONS: April 1, 2025

APPEARANCES : Mark McElman, Financial and Consumer Services Commission  
John Albert McKellar did not appear  
No appearances on behalf of 668054 N.B. LTD.

## I. DECISION

1. The Tribunal concludes that Mr. McKellar held himself out as trading in real estate as an agent without holding a valid and subsisting licence, contrary to section 2 of the *Real Estate Agents Act*.
2. The Tribunal concludes that Mr. McKellar collected or attempted to collect a commission or remuneration for services rendered in connection with a trade in real estate without being licenced as an agent at the time of rendering the services contrary to subsection 35(a) of the *Real Estate Agents Act* and that Mr. McKellar collected remuneration for, inter alia, these activities, contrary to section 35 of the *Real Estate Agents Act*.
3. The Tribunal concludes that Mr. McKellar did not carry on the business of brokering mortgages, or hold himself out as doing so, without holding a mortgage brokerage licence, contrary to subsection 5(1) of the *Mortgage Brokers Act*.
4. The Tribunal concludes that Mr. McKellar did trade in a security on his own account or on behalf of another person where the trade would be a distribution of a security without a prospectus or exemption therefrom contrary to subsection 71(1) of the *Securities Act*.
5. The Tribunal concludes that 668054 N.B. Ltd. did trade in a security on their own account or on behalf of another person where the trade would be a distribution of a security without a prospectus or exemption therefrom contrary to subsection 71(1) of the *Securities Act*.

## II. OVERVIEW

6. The Financial and Consumer Services Commission (the "Commission") is alleging that the Respondents, John Albert McKellar ("Mr. McKellar") and 668054 N.B. Ltd. committed various breaches of the *Real Estate Agents Act*, the *Mortgage Brokers Act* and the *Securities Act*. The Commission commenced these proceeding after receiving two separate but interconnected complaints from senior citizens residing in Saint John, Helen Rae Patterson ("Ms. Patterson") and Robert Burke ("Mr. Burke").
7. Ms. Patterson's complaint originates from the sale of two properties in Saint John in 2016. Mr. McKellar is accused of having traded in real estate without a licence and carrying on the business of brokering mortgages equally without a licence. Much of the evidence presented by the Commission in relation to Mr. McKellar's unlicensed regulated conduct concerned documents which were said to be fraudulent. The Commission contends that Mr. McKellar prepared and submitted these documents in the course of his involvement in the real estate transactions. However, the Commission did not make specific allegations of fraud in the Statement of Allegations nor did it allege that the Respondents violated either s. 43.61 of the *Real Estate Agents Act* or s. 73 of the *Mortgage Brokers Act*. Both sections of these acts concern the making of untrue or misleading statements in the course of conducting the

regulated activity. In light of this, that evidence has not been considered in determining whether Mr. McKellar violated the *Real Estate Agents Act* or the *Mortgage Brokers Act*. The evidence may, however, be relevant when determining the sanctions.

8. During the course of his involvement in the real estate transactions, Mr. McKellar was introduced to Mr. Burke by Ms. Patterson. Mr. Burke had lent some money to Ms. Patterson to help with the sale of the properties. Shortly after meeting Mr. McKellar, Mr. Burke made multiple loans to Mr. McKellar. Mr. Burke, Mr. McKellar and the company 668054 N.B. LTD entered into various loan agreements which the Commission maintained were securities within the meaning of the *Securities Act* issued in contravention of the prospectus requirement under section 71 of the *Securities Act*.

### III. ISSUES

9. The allegations made by the Commission raise the following issues:
  - a) Did Mr. McKellar trade or hold himself out as trading in real estate as an agent or salesperson without holding a valid and subsisting licence, contrary to section 2 of the *Real Estate Agents Act*?
  - b) Did Mr. McKellar collect, or attempt or be entitled to collect any commission or other remuneration for services rendered in connection with a trade in real estate without being licensed as an agent at the time of rendering the services contrary to subsection 35(a) of the *Real Estate Agents Act*?
  - c) Did Mr. McKellar carry on the business of brokering mortgages, or hold himself out as doing so, without holding a mortgage brokerage licence, contrary to subsection 5(1) of the *Mortgage Brokers Act*?
  - d) Did Mr. McKellar and 668054 N.B. Ltd. trade in a security on their own account or on behalf of another person where the trade would be a distribution of a security without a prospectus or exemption therefrom contrary to subsection 71(1) of the *Securities Act*?

### IV. PRELIMINARY ISSUES

#### 1. Failure of the Respondents to Appear

10. Mr. McKellar did not appear at the hearing and no one appeared on behalf of 668054 N.B. Ltd. Mr. McKellar is a director of 668054 N.B. as shown on the Corporate Affairs Registry Database provided from Service New Brunswick which is contained in the Record. The merits hearing in this matter was adjourned on three occasions for various reasons. The first adjournment was due to the COVID-19 pandemic. The second and third adjournments were caused by the poor health of two of the Commission's witnesses.

11. A Fourth Amended Notice of Hearing was issued by the Registrar of the Tribunal on May 27, 2022, setting the new dates for the hearing and served on the Respondents by email on the same day. Mr. McKellar acknowledged receipt of the Fourth Amended Notice of Hearing on May 27, 2022. Notwithstanding the ample notice of the new hearing dates, Mr. McKellar informed the Registrar, on October 3, 2022, that he would not attend the hearing as a result of work commitments in Prince Edward Island.
12. Rule 11.9 of the Tribunal's *Rules of Procedure* deals with the ability of a hearing panel to continue with a hearing in the event of the non-appearance of a party. That rule reads as follows:

If a Notice of Hearing has been duly served on a party or any other person required to be served and the party or other person does not attend the hearing, the hearing may proceed in his or her absence. The party or person is entitled to notice of any subsequent step in the proceeding.
13. Rule 11.1 of the Tribunal's *Rules of Procedure* requires that the Registrar serve the Notice of Hearing on the parties to a proceeding, but does not set out how that service is to be effected. In this case, the Registrar elected to serve the documents via email which was an acceptable means of services according to Rule 3.4(3) and 3.4(7) of the *Rules of Procedure*.
14. Therefore, the Tribunal decided to proceed with the hearing in the absence of the Respondents having found that the Fourth Amended Notice of Hearing was duly served and considering the Tribunal had jurisdiction to continue with the hearing in the absence of the Respondents.

## **2. Admissibility of McKellar's Affidavit**

15. While Mr. McKellar chose not to attend the hearing, he did file a motion on October 11, 2022, requesting to have admitted into evidence an affidavit he swore on September 27, 2022. Mr. McKellar's motion was addressed as a preliminary matter at the outset of the hearing and was decided in his absence. After hearing from the Commission, Mr. McKellar's motion was denied and his September 27, 2022, affidavit was therefore not admitted into evidence.
16. The only grounds presented by Mr. McKellar in his Notice of Motion to support his request to present his evidence by affidavit is his claim that he was unavailable to attend the hearing caused by the "numerous rescheduling" of the hearing on the merits. As stated above, the Fourth Amended Notice of Hearing containing the dates of hearing on the merits was served on the parties on May 27, 2022, approximately four and a half months before the start of the hearing.

17. The Commission objected to Mr. McKellar’s motion on the grounds of procedural fairness. It argued that its right to a fair hearing would be substantially prejudiced by allowing into evidence Mr. McKellar’s September 27, 2022, affidavit. His failure to attend the hearing meant that the Commission could not cross-examine him on his evidence. The Commission further argued that Mr. McKellar had received ample notice of the new hearing dates and had more than enough time to arrange his schedule to be able to testify in person and subject himself to a cross-examination. By not attending the hearing and submitting his evidence by affidavit, Mr. McKellar was attempting to present his view of the case while avoiding cross-examination with respect to the full scope of the evidence.

18. In two previous decisions arising from this matter (*Financial and Consumer Services Commission v. McKellar et al.*, 2021 NBFCSST 3 and *Financial and Consumer Services Commission v. McKellar et al.*, 2022 NBFCSST 2), the Tribunal denied the Commission’s requests to change the hearing format from an oral hearing with the testimony of witnesses to a written hearing with evidence provided by way of affidavits. In *Financial and Consumer Services Commission v. McKellar et al.*, 2021 NBFCSST 3, the hearing panel wrote the following at paragraph 12:

12. The hearing in an enforcement proceeding is usually conducted as an oral hearing with the evidence presented through the testimony of witnesses and the introduction into evidence of documentary and material evidence. There is a direct examination, cross-examination and re-examination of witnesses. The parties can also present oral arguments. In short, the hearing resembles a trial before a court.

19. In that decision, the hearing panel was interpreting the previous version of our *Rules of Procedure*. The Tribunal’s new rules have maintained the same usual hearing format for enforcement proceedings. Rule 5.13 provides that Part 11 of the *Rules of Procedure* applies to an enforcement proceeding. Rules 11.2(2) and 11.4(1) read as follows:

11.2 Hearing format  
[...]

Usual hearing format

(2) Unless otherwise directed or ordered by the Tribunal, the usual form of a hearing is an oral hearing.

11.4 How to present evidence

Evidence in oral hearings

(1) The evidence in an oral hearing is given by the testimony of witnesses and expert witnesses and the introduction into evidence of documents and objects, or in such other form as the Tribunal may direct.

20. The Tribunal has the discretion to modify the hearing format in an enforcement proceeding in accordance with the requirements of Rule 11.3. However, Mr. McKellar did not request a change in the hearing format, he did not request an adjournment and he did not provide a compelling reason for his failure to attend the hearing. We agree with the Commission that Mr. McKellar received ample notice of the hearing dates and he had more than enough time to arrange his schedule accordingly. We also agree with the Commission that allowing Mr. McKellar's affidavit without it having the opportunity to cross-examine him is highly prejudicial.
21. Furthermore, the Tribunal has twice decided that the evidence in this case would be given by the testimony of witnesses and the introduction of documents and objects. The Tribunal denied the Commission's requests to present the case by affidavit evidence. Mr. McKellar has not provided us with any reason to deviate from that approach and therefore his motion is denied.

## V. ANALYSIS

22. This matter touches on three different sectors under the Financial and Consumer Services Legislation. Section 2 of the *Financial and Consumer Services Commission Act*, SNB 2013, c 30, sets out its dual purpose and states as follows:

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.

23. Therefore, in accordance with Section 2(a) of the Act, the Commission commenced these proceedings against Mr. McKellar and 668054 N.B. Ltd.

**A. Did Mr. McKellar trade or hold himself out as trading in real estate as an agent or salesperson without holding a valid and subsisting licence, contrary to section 2 of the *Real Estate Agents Act*?**

24. For the reasons set out below, we conclude that Mr. McKellar held himself out as trading in real estate as an agent or salesperson without holding a valid and subsisting licence, contrary to section 2 of the Real Estate Agents Act.

25. The Commission's position is that as a result of being contacted by Ms. Patterson, Mr. McKellar became intimately involved in the transactions involving 12 Myles Drive, in Saint-John ("12 Myles Drive") and 710 Highmeadow Drive, in Saint John ("710 Highmeadow Drive"). The Commission submits that Mr. McKellar charged each homeowner a broker's fee of \$3,000 in respect of his involvement in advancing the sale of each property, including locating a buyer for 710 Highmeadow Drive despite not being licensed under the *Real Estate Agents Act*, R.S.N.B. 2011, c. 215.
26. The Commission advances that the involvement of Mr. McKellar in relation to the real estate transactions relating the two properties included the following:
- (a) preparing, explaining, and witnessing the execution of agreements of purchase and sale and an amendment thereto;
  - (b) locating the purchaser for 710 Highmeadow Drive, named Jessica Eatman, without listing the property for sale;
  - (c) coordinating the closing of both real estate transactions with the lawyers for Ms. Patterson and Ms. Rebecca Parks;
  - (d) negotiating with the City of Saint John for the reduction of an outstanding water bill on 710 Highmeadow Drive.
27. The Commission contends that the actions and activities of Mr. McKellar in respect of the sale of 12 Myles Drive and 710 Highmeadow Drive constitute trading in real estate without a licence, contrary to section 2 of the *Real Estate Agents Act*.
28. As previously mentioned, Mr. McKellar did not appear at the hearing and he did not provide the Tribunal with a Statement of Position.
29. The *Real Estate Agents Act* states the following at paragraph 2;
- 2 No person shall trade or hold himself, herself or itself out as trading in real estate
- (a) as an agent unless that person holds a valid and subsisting licence as an agent,
  - (b) as a manager of an agent unless that person holds a valid and subsisting licence as a manager, or
  - (c) as a salesperson of an agent unless that person holds a valid and subsisting licence as a salesperson or manager.

30. First off, it is important to say that at the time of sale of 12 Myles Drive and 710 Highmeadow Drive, and/or during the negotiations of the transactions, Mr. McKellar did not hold a valid and subsisting licence as a real estate agent.
31. Mr. McKellar had a valid licence as a real estate agent between July 14, 2009 to June 30, 2010, but according to a certificate of the Commission of Financial Services dated October 22, 2021, Mr. McKellar no longer had a valid and subsisting licence after June 30, 2010.
32. Section 1 of the *Real Estate Agents Act* states the definition of "trade" or "trading" is as follows:
  - s. 1 – definition of "trade"  
"trade" or "trading" includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise and an offer or attempt to list real estate for the purpose of such a disposition or transaction, and an act, advertisement, conduct or negotiation, directly or in- directly, in furtherance of any disposition, acquisition, transaction, offer or attempt, but does not include a listing service operated by or for an organized real estate board in a community, and the verb "trade" has a corresponding meaning.
33. The tribunal heard the testimony of Rebecca Parks ("Ms Parks"), who was the owner of 710 Highmeadow Drive and she purchased the home of Ms Patterson at 12 Myles Drive. Ms Parks testified at length of the dealings the parties had with Mr. McKellar.
34. Ms Parks testified that she and Ms Patterson agreed on the purchase price but that all other terms were negotiated and prepared by Mr. McKellar. No evidence was presented to determine exactly who drafted the Agreement of Purchase and Sale, however Ms Parks stated that Mr. McKellar presented to her an Agreement of Purchase and Sale regarding the property at 12 Myles Drive which was dated September 12, 2014, with Mr. McKellar signing as a witness for both parties.
35. Ms Parks stated that following the execution of the Purchase and Sale Agreement, Mr. McKellar negotiated with Ms Patterson an amendment for the financing condition which amendment was dated February 1, 2016, signed by the parties and witnessed by Mr. McKellar. At that time, Ms Parks intended to purchase 12 Myles Drive while keeping the property at 710 Highmeadow Drive as a rental property.
36. Ms Parks stated that she was having difficulties obtaining financing for the purchase of 12 Myles and therefore she had to sell her property at 710 Highmeadow Drive. Ms Parks testified that it was Mr. McKellar who found Jessica Eatman as a buyer for 710 Highmeadow Drive and Mr. McKellar also showed her the house. Ms Parks was not present during the house viewing and she never met Jessica Eatman. It is important to note that throughout the record, Jessica Eatman's name was sometimes spelled Jessica Eatmon. We accept that Jessica Eatman and Jessica Eatmon is one and the same person. We will refer to her as "Ms Eatman".

37. Ms Parks stated that Mr. McKellar again presented her an Agreement of Purchase and Sale which was already prepared and dated May 9, 2016. Ms Parks signed the Agreement of Purchase and Sale in the presence of Mr. McKellar and he then signed as a witness. Similar to the transaction in 12 Myles Drive, there was a document signed by Ms Parks on September 27, 2016 regarding the sale of 710 Highmeadow Drive and Mr. McKellar signed as a witness. The document indicated the following:
- a. an acknowledgment as to Ms Parks receiving \$14,200.00 as a deposit from the buyer Ms Eatman;
  - b. that Ms Parks was giving authorization to pay all closing costs associated between her and Ms Eatman;
  - c. that there was no water or tax adjustments; and
  - d. that Ms Parks agreed to pay to Mr. McKellar the sum of \$3,000.00 for his services in facilitating the sale of 710 Highmeadow Drive.
38. Ms Parks testified that she did not give specific instructions to Mr. McKellar regarding the content of the document and she believes that Mr. McKellar prepared it.
39. On September 23, 2016, Mr. McKellar sent an email to Gandy Law regarding the transaction of 710 Highmeadow Drive stating that he negotiated the reduction and payment method of Ms Parks' water bill and he also gave instructions to the lawyer on how to disburse the funds following the sale.
40. On November 24, 2016, November 28, 2016, and November 29, 2016 (even though the documents erroneously state the year 2017) amendments regarding the sale of 12 Myles Drive were executed by Ms Parks and Ms. Patterson. All amendments were also witnessed by Mr. McKellar.
41. Ms Parks testified that to her knowledge, all documents were prepared by Mr. McKellar and they were part of the legwork that he did. Ms Parks stated she had no direct discussions with Ms Patterson regarding those amendments.
42. There are emails in the Record dated between November 18, 2016 and November 22, 2016 where Mr. McKellar is communicating with Alicia Seaward of Donald Cullinans' office, solicitor for Ms Patterson, in which Mr. McKellar is giving Alicia Seaward instructions regarding the transaction.
43. In light of all this evidence, we conclude that throughout both transaction of 710 Highmeadow Drive and 12 Myles Drive, Mr. McKellar conducted and negotiated directly the transactions between the parties which consists of trading as per section 1 of the *Real Estate Agents Act*.

44. Section 1 of the *Real Estate Agents Act* states the definition of "real estate" is as follows:

s. 1 – definition of "real estate"

"real estate" includes real property and leasehold property, and a business whether with or without premises and the fixtures, stock-in-trade, goods or chattels in connection with the operation of the business.

45. As evidenced by the Agreements of Purchase and Sale and through the various communications between Mr. McKellar and the various solicitors, both transactions in this matter pertain to properties which are both real estate properties as defined by section 1 of the *Real Estate Agents Act*.

46. Section 1 of the *Real Estate Agents Act* states the definition of "agent" is as follows:

s. 1 – definition of "agent"

"agent" means a person who, for compensation, gain or reward or hope or promise of compensation, gain or reward, either alone or through one or more officials or salespersons, trades in real estate for another person, and a person who holds, himself, herself or itself out as such.

47. On December 7, 2016, Mr. McKellar sent an email to Alicia Seaward of Donald Cullinans' office, solicitor for Ms Patterson, in which he states he is to receive a \$3,000.00 broker fee, which fee was to facilitate the sale of 12 Myles Drive, between the Seller and Buyer. Mr McKellar further indicated that this included the negotiations of the second mortgage and the staging value of the property that was to be sold.

48. We accept the position of the Commission that in the present case, Mr. McKellar facilitated real estate transactions involving the properties located at 710 Highmeadow Drive and 12 Myles Drive, and no other real estate agent was involved in either transaction. Mr. McKellar undertook all of the usual tasks of a real estate agent including:

- (a) preparing, explaining, and/or witnessing the execution of agreements of purchase and sale and amendments thereto;
- (b) locating the purchaser for 710 Highmeadow Drive, namely Ms Eatman, without listing the property for sale;
- (c) coordinating the closing of both real estate transactions with the lawyers for Ms. Patterson and for Ms. Parks; and
- (d) negotiating with the City of Saint John for the reduction of an outstanding water bill on 710 Highmeadow Drive.

49. As previously mentioned, during the time of the transactions of 710 Highmeadow Drive and 12 Myles Drive, Mr. McKellar no longer had a valid and subsisting licence and therefore was not permitted to act as a real estate agent according to the *Real Estate Agents Act*.
50. We therefore conclude that Mr. McKellar acted as an agent as defined by the *Real Estate Agents Act* as he, for compensation, gain or reward, traded in real estate for another person, being Ms. Patterson, Ms Parks and Ms Eatman, without having a valid licence.

**B. Did Mr. McKellar collect, or attempt or be entitled to collect any commission or other remuneration for services rendered in connection with a trade in real estate without being licensed as an agent at the time of rendering the services contrary to subsection 35(a) of the Real Estate Agents Act?**

51. For the reasons set out below, we also conclude that Mr. McKellar collected or attempted to collect a commission or remuneration for services rendered in connection with a trade in real estate without being licenced as an agent at the time of rendering the services contrary to subsection 35(a) of the *Real Estate Agents Act* and that Mr. McKellar collected remuneration for, inter alia, these activities, contrary to section 35 of the *Real Estate Agents Act*.
52. The Commission's position is that the actions and activities of Mr. McKellar in respect of the sale of 12 Myles Drive and 710 Highmeadow Drive constitute trading in real estate without a licence, contrary to section 2 of the *Real Estate Agents Act*. Further, Mr. McKellar collected remuneration, for, inter alia, these activities, contrary to section 35 of the *Real Estate Agents Act*.
53. Section 35 of the *Real Estate Agents Act* state as follows:
35. No agent shall collect, or attempt or be entitled to collect, any commission or other remuneration for services rendered in connection with a trade in real estate unless at the time of rendering the services
- (a) the agent was licenced as an agent, or
- (b) if the services were rendered by another person, both the agent and that person were licenced.
54. As previously stated, Mr. McKellar was not licensed as an agent and it was determined that his actions constituted trading in real estate as he conducted and negotiated directly with the parties relating to the sale of 710 Highmeadow Drive and the sale of 12 Myles Drive.
55. Ms Parks testified that she owed what she believed was a broker fee to Mr. McKellar in the amount of \$3,000.00 for the footwork that he did, running around going to the bank, finding the mortgage broker, communicating with lawyers, which Ms Parks then stated was sort of like a real estate fee.

56. Mr. McKellar received a cheque in the amount of \$3,000.00 from William B.C. Gandy Law on September 27, 2016. There is a note on the cheque indicating Parks – Broker Fee.
57. In the email of September 23, 2016, sent by Mr. McKellar to Gandy Law, Mr McKellar discussed some of the details of the negotiations of Ms Parks' water bill and he then gave instructions to Gandy Law regarding the breakdown of funds after closing the transaction at 710 Highmeadow Drive. Mr. McKellar states in the email: "In closing, the following will take place (...) \$3,000 broker fee."
58. Regarding the sale of 12 Myles Drive, Mr. McKellar sent an email to Alicia Seaward at Donald Cullinan's Law Office on November 18, 2016, in which he states Ms. Patterson agrees to pay John McKellar \$3,000.00 for his services in facilitating the resolution between Ms Parks and Ms. Patterson, concerning 12 Myles Drive.
59. In another email dated December 7, 2016, sent to Alicia Seaward, Mr. McKellar confirms that: "As requested, the breakdown of disbursements authorized by Rae Patterson are as follows: \$3,000.00 broker fee (John McKellar). This fee was to facilitate the sale of 12 Myles, between the Seller/ Buyer."
60. The Record also contains a Letter of Direction signed by Ms. Patterson on December 1, 2016, in which Ms. Patterson directs her solicitor, Donald F. Cullinan to pay from the proceeds of sale of 12 Myles Drive, John McKellar the amount of \$3,000.00.
61. In addition to the cheque of \$3,000.00 from Gandy Law, Mr. McKellar received another cheque in the amount of \$3,000.00 from Donald F. Cullinan Law Offices on December 7, 2016. There is also a note on the cheque indicating Broker Fee – 12 Myles Drive.
62. In light of all the evidence, we conclude that as per the definition of agent in Section 1 of the *Real Estate Agents Act*, Mr. McKellar received compensation, gain or reward while trading in real estate for Ms. Parks and Ms. Patterson when he received a payment of \$3,000.00 following the sale of 710 Highmeadow Drive and also when he received a payment of \$3,000.00 following the sale of 12 Myles Drive.
63. Therefore, the Tribunal concludes that Mr. McKellar collected or attempted to collect a commission or remuneration for services rendered in connection with a trade in real estate without being licenced as an agent at the time of rendering the services contrary to subsection 35(a) of the *Real Estate Agents Act* and that Mr. McKellar collected remuneration for, inter alia, these activities, contrary to section 35 of the *Real Estate Agents Act*.

**C. Did Mr. McKellar carry on the business of brokering mortgages, or hold himself out as doing so, without holding a mortgage brokerage licence, contrary to subsection 5(1) of the Mortgage Brokers Act?**

64. For the reasons set out below, we conclude that Mr. McKellar did not carry on the business of brokering mortgages, or hold himself out as doing so, without holding a mortgage brokerage licence, contrary to subsection 5(1) of the *Mortgage Brokers Act*.
65. The Commission alleged in their statement of position that the actions and activities of McKellar in respect of the various mortgages placed on 12 Myles Drive and 710 Highmeadow Drive constitute carrying on the business of brokering mortgages contrary to section 5(1) of the *Mortgage Brokers Act*.
66. The Commission states that the renovations to 710 Highmeadow Drive were partially financed through a second mortgage on the property, which was granted to Ms Parks by Ms Patterson. According to the Commission, Mr. McKellar solicited Ms Parks to obtain the mortgage loan for the purposes of having him complete the renovations on the property, and further negotiated the terms of the loan between the parties, without being licenced to do so, contrary to section 5(1) of the *Mortgage Brokers Act*.
67. The Commission alleged that the involvement of Mr. McKellar in relation to the financing of the real estate transactions involving the two residences included the following:
- (a) assisting with the placement of a mortgage on 710 Highmeadow Drive from Ms. Parks to Ms. Patterson; and
  - (b) coordinating with mortgage brokers representing Ms. Parks and Ms. Eatman.
68. At the hearing, the Commission informed the Tribunal that the allegations of mortgage brokering were only regarding to the second mortgage on 710 Highmeadow Drive. The Commission further clarified to the Tribunal that they were no longer pursuing allegations of mortgage brokering in connection with the first mortgage on 710 Highmeadow Drive, nor with the mortgage associated with 12 Myles Drive.
69. Again, Mr. McKellar did not appear at the hearing and he did not provide the Tribunal with a Statement of Position.
70. Section 5(1) of the *Mortgage Brokers Act* states the following:
- 5(1) No person shall carry on the business of brokering mortgages, or hold itself out as doing so, unless that person holds a mortgage brokerage licence.

71. Sections 1(2) and 1(3) of the *Mortgage Brokers Act* defines carrying on the business and engaging in mortgage brokering as follows:

1(2) For the purposes of this Act, a person is considered as carrying on business in the Province if

- (a) the person solicits potential clients or provides, promotes, advertises, markets, sells or distributes any products or services by any means that cause communication from the person or the person's agents or representatives to reach a person in the Province;
- (b) the person has a resident agent or representative or maintains an office or place of business in the Province;
- (c) the person holds himself or herself out as carrying on business in the Province, or;
- (d) the person otherwise carries on business in the Province.

1(3) For the purposes of this Act, a person brokers mortgages if the person engages in one or more of the following activities:

- (a) soliciting another person to obtain a mortgage loan or to make an investment in a mortgage, but only if the soliciting is done on behalf of another person;
- (b) negotiating or arranging a mortgage loan or an investment in a mortgage on behalf of another person;
- (c) providing advice to a person with respect to the appropriateness of obtaining a particular mortgage loan or making a particular investment in a mortgage;
- (d) undertaking any other activity prescribed by regulation.

72. The Tribunal heard the testimony of Brad Donnelly, the mortgage broker who was responsible for processing Ms. Eatman's mortgage with CIBC, the proceeds of which were used for the purchase of 710 Highmeadow Drive. Mr. Donnelly described his role in the mortgage transaction and he explained his responsibility to gather and verify crucial documentation to support the loan application. This included obtaining a range of evidence, such as valid identification documents, proof of employment, credit reports, and other financial records, all necessary for the mortgage process.

73. Mr. Donnelly testified that Mr. McKellar was a friend of Ms. Eatman and, due to her shift work schedule, Mr. McKellar was authorized to provide necessary documents for the mortgage application to Mr. Donnelly, which he did.

74. The record contained CIBC documents which confirmed that Mr. Donnelly was the mortgage broker who facilitated the mortgage for Ms. Eatman's purchase of 710 Highmeadow Drive.
75. The tribunal accepts that Mr. Donnelly was the mortgage broker working with Ms. Eatman for the purchase of 710 Highmeadow Drive and Mr. McKellar was not carrying on the business or holding himself out as a mortgage broker in that transaction.
76. Ms. Parks testified that, initially, her intention was to purchase 12 Myles Drive from Ms. Patterson while retaining 710 Highmeadow Drive as a rental property. However, after numerous attempts to secure the necessary financing for the purchase of 12 Myles Drive, when she was unable to secure the required funds, Ms. Parks was ultimately forced to sell 710 Highmeadow Drive in order to purchase 12 Myles Drive.
77. Ms Parks testified that her property at 710 Highmeadow Drive required renovations in order to increase it's selling price. She stated that Mr. McKellar had flipped houses and he seemed to know the real estate market. Ms Parks stated that Ms Patterson agreed to loan the money for the renovations and Mr. McKellar guided her in the renovations.
78. Ms Parks explained that the renovations at 710 Highmeadow Drive were partially funded through a loan extended by Ms. Patterson to Ms. Parks. Mr. McKellar played an important role in facilitating this arrangement, actively encouraging Ms. Parks to secure the necessary financing to cover the cost of renovations. He not only prompted her to obtain the loan but also took it upon himself to negotiate the specific terms and conditions between the two parties, ensuring that the agreement was structured to meet their mutual objectives.
79. Ms. Parks testified that Mr. McKellar provided her with a Demand Loan document in relation to the funds lent to her by Ms. Patterson for the renovation project. According to Ms. Parks, the terms of the Demand Loan were entirely negotiated by Mr. McKellar, as she had no direct communication or involvement with Ms. Patterson regarding the specifics of the loan. Ms. Parks further clarified that all discussions and arrangements concerning the loan were facilitated through Mr. McKellar, who acted as the primary intermediary between the two parties throughout the process.
80. Subsequent to the formal execution of the Demand Loan document, an email exchange occurred between Mr. McKellar and Donald Cullinan, the solicitor acting on behalf of Ms. Patterson. The email communication outlined that, in accordance with the bank's stipulations, it was essential to place a second mortgage on 710 Highmeadow Drive. This additional requirement, put forth by the bank, was a necessary condition to secure the loan and ensure the proper safeguarding of the financial interests involved in the renovation project.
81. In response to the bank's requirement for a second mortgage on 710 Highmeadow Drive, the office of Gandy Law prepared the necessary mortgage documents in accordance with the terms outlined in the Demand Loan.

82. Ms. Parks testified that she visited the office of Gandy Law, accompanied by Mr. McKellar. During this visit, she executed all of the relevant documents related to the second mortgage on 710 Highmeadow Drive which were prepared by Gandy Law. Ms. Parks confirmed that Mr. McKellar was present with her at Gandy Law but the lawyer was also present.
83. The tribunal makes a distinction that even though a cheque stub made payable to Mr. McKellar has a note at the bottom stating broker fee and that an email from Mr. McKellar also refers to a broker fee, as previously stated, the Tribunal determines that this fee was a real estate fee.
84. The tribunal does not find that Mr. McKellar solicited clients, provided, promoted, advertised, marketed, sold or distributed any products or services relating to mortgage brokering. Mr. McKellar did not have an office or place of business in the Province relating to mortgage brokering and there was no evidence that he held himself out as carrying on business of mortgage brokering.
85. Mr. McKellar did not act as a mortgage broker pertaining to the purchase of 710 Highmeadow Drive and he also did not act as a mortgage broker pertaining to the Purchase of 12 Myles Drive as Mr. Donnelly was the mortgage broker in both transactions.
86. Mr. McKellar did not act as a mortgage broker pertaining to the second mortgage on 710 Highmeadow Drive as Ms. Parks lawyer received instructions from the bank that a second mortgage was necessary to obtain the financing.
87. The Tribunal concludes that Mr. McKellar was not carrying on the business and engaging in mortgage brokering activities as defined by sections 1(2) and 1(3) of the Mortgage Brokers Act and we accept that the demand loans are not a mortgage.

#### **D. TRADING IN A SECURITY**

88. For the reasons set out below, we conclude that Mr. McKellar did trade in a security on his own account or on behalf of another person where the trade would be a distribution of a security without a prospectus or exemption therefrom contrary to subsection 71(1) of the *Securities Act*.
89. We also conclude that 668054 N.B. Ltd. did trade in a security on their own account or on behalf of another person where the trade would be a distribution of a security without a prospectus or exemption therefrom contrary to subsection 71(1) of the *Securities Act*.
90. The Commission's position is that the various loan agreements together with the agreement and promissory note issued by McKellar and 668054 N.B. Ltd. constitute securities issued in the province of New Brunswick without a prospectus or exemption therefrom, contrary to section 71(1) of the *Securities Act*.

91. Section 71(1) of the Securities Act states the following

71(1) Unless exempted under this Act or the regulations, no person shall trade in a security on the person's own account or on behalf of any other person where the trade would be a distribution of the security unless

(a) a preliminary prospectus and a prospectus that are in the form prescribed by regulation have been filed with the Executive Director in relation to the security, and

(b) the Executive Director has issued receipts for the preliminary prospectus and prospectus.

92. It was established and the Tribunal accepts that Mr. McKellar and 668054 N.B. Ltd. never filed a preliminary prospectus and a prospectus with the Commission. Therefore, 668054 N.B. Ltd. and Mr. McKellar did not hold a licence to trade in a security.

93. The Tribunal heard the testimony of Robert Burke who stated that he first met Mr. McKellar in May of 2016 after he had loaned money to his friend, Ms. Patterson. Mr. Burke stated that he thought Mr. McKellar was helping Ms. Patterson

94. Mr. Burke testified that he did swim with Mr. McKellar in Rockwood Park a few times and that he thought Mr. McKellar was a friend at the time, that he was a church guy. Mr. Burke also testified that he did not spend too much time with Mr. McKellar.

95. Mr. Burke testified that Mr. McKellar would contact him and he would go for drives with Mr. McKellar and Mr. McKellar would show him all the properties he owned. Mr. Burke stated that the drives seemed more for business, sometimes to get money at the bank. He would see Mr. McKellar when Mr. McKellar wanted money.

96. Mr. Burke testified that he loaned Mr. McKellar money because Mr. McKellar told him he needed it because he would be penalized on his other loans. Mr. McKellar promised to pay him interest, but he did not recall the amount. Mr. Burke stated that when he loaned Mr. McKellar money, Mr. McKellar would have him sign documents.

97. Mr. Burke testified that Mr. McKellar came to see him at his house with the documents and he told him that he could make him rich and that the money would come back.

98. Mr. McKellar presented Mr. Burke with three loan documents namely:

- a) **Demand Loan Agreement dated May 31, 2016:** the demand loan agreement evidences a debt of \$5,500 owing by John McKellar to Robert Burke, together with a "fee" of \$500 if repaid within its term of 30 days. There is an additional "fee" of \$500 if the loan is not repaid by the end of its term on June 30, 2016;

- b) **Demand Loan dated July 27, 2016:** This demand loan evidences a total debt of \$21,274.55 owing jointly by John McKellar and 668054 N.B. Ltd. to Robert Burke bearing interest at a rate of 1% per month; and
- c) **Agreement and Promissory Note dated March 6, 2018:** This document constitutes both a promissory note evidencing a debt of \$30,936 and an investment contract entitling Robert Burke and others to 30% of net profits of John McKellar and 668054 N.B. Ltd. in relation to certain contemplated real estate transactions.

99. As previously mentioned, Mr. McKellar did not attend the hearing and he did not present any evidence. However, the tribunal requested post hearing submissions from the parties regarding the Securities Act.

100. The tribunal asked the parties the following questions:

- a. How do the promissory notes and demand loans constitute securities under the definition of "security" contained in section 1 of the Securities Act?
- b. Can a demand loan or promissory note with no expectation of a return constitutes a security?
- c. Does the conduct of the respondents come within the definition of "trade" in section 1 of the Securities Act and if so, which elements of the definition of "trade" does it engage?

101. The Commission's position according to their post hearing submission is that the promissory note and demand loans each constitute a "note or other evidence of indebtedness" pursuant to clause (e) of the definition of "security" found in section 1(1) of the Securities Act. The Commission further submitted that the Agreement dated March 6, 2018 constitutes an investment contract pursuant to clause (n) of the definition of "security" found in section 1(1) of the *Securities Act*.

102. Sections 1 of the *Securities Act* defines security as follows:

"security" includes any of the following, whether they relate to an issuer or proposed issuer, but does not include a derivative,

[...]

(e) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than a contract of insurance issued by an insurance company licensed under the *Insurance Act* or an evidence of deposit issued by a bank listed in Schedule I, II or III of the *Bank Act* (Canada), by a credit union as defined in the *Credit Unions Act* or by a loan company or trust company licensed under the *Loan and Trust Companies Act*,

[...]

(n) an investment contract,

[...]

103. Sections 1 of the *Securities Act* defines “distribution” and a “trade” as follows:

“distribution”, where used in relation to trading in securities, means (*placement*)

(a) a trade in securities of an issuer that **have not been previously issued**,

“trade” includes

(a) a sale or **disposition of a security for valuable consideration** or an attempt to sell or dispose of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in paragraph (g), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,

[...]

(h) an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (g).

104. The Commission’s position is that the issuance of each instrument to Mr. Burke constitutes a first disposition of each security for valuable consideration, being the loan proceeds advanced by Mr. Burke, and, therefore, a distribution of securities that triggers the prospectus requirement under section 71(1) of the *Securities Act*.

105. Regarding the question of whether a demand loan or promissory note with no expectation of a return constitutes a security, the Commission alleges that the Demand Loan Agreement dated 31 May 2016, and issued on 1 June 2016, explicitly contemplates a “fee” of \$500 if the loan is repaid according to its terms, and a further “fee” of \$500 if it is not repaid at maturity. This represents a return on the money advanced by Mr. Burke.

106. The Commission further states that the Demand Loan issued 27 July 2016, explicitly contemplates interest payable at a rate of 1% per month and this represents a return on the money advanced by Mr. Burke.

107. And finally, according to the Commission, the Promissory Note issued 6 March 2018, explicitly provides that it “replaces any prior promissory notes or acknowledgement of debt or receipts given to Robert Burke by John McKellar”. Given that those previous debt instruments

provided for a return in excess of the amount advanced, the Promissory Note inherently incorporates a return beyond the initial outlay of funds provided by Mr. Burke.

108. Regarding the question of whether the conduct of the respondents come within the definition of "trade" in section 1 of the Securities Act and if so, which elements of the definition of "trade" does it engage, the Commission's position is that the debt securities were issued to Mr. Burke by Mr. McKellar and/or 668054 N.B. Ltd. in return for Mr. Burke advancing the funds as set out in each instrument. This constitutes a "disposition of a security for valuable consideration" as set out in clause (a) of the definition of "trade" found in section 1(1) of the *Securities Act* (including acts in furtherance of such disposition as set out in clause (h) of the definition of "trade").

109. Mr. McKellar sent an email to the Tribunal which is dated November 2, 2022. Although it is not a post submission format, his position is as follows:

My post hearing submission is very simple as stated numerous times in all dialogue related to my opinion and statement of the Facts.

Firstly, I had NO IDEA that I was acting in either role of mortgage broker or realtor

FCNB was not practicing in New Brunswick in 2016, and I had no education of the facts, related to the accusations presented in Mr. McElman's post hearing submission

Most importantly this accusation is acute and specific to Robert Bourque and Ray Patterson, both of which we're friends in some form of the sense of context

To say that I'm trading or brokering is plural, not singular and more than one case

My conclusion is this is not just and does deserve a "written warning", now that I know the facts of right and wrong, prescribed by the FCNB (mandate)

I acknowledge the severity of the accusations and can agree that should there be other cases or issues of this dynamic in the future, yes, that would seem more appropriate of this case presented before this tribunal

107. Mr. McKellar has not presented any evidence to establish the operation of an effective exemption to the prospectus requirement. There was some evidence that Mr. McKellar and Mr. Burke were friendly, spent time together and engaged in recreational activities, but this does not rise to proof that Mr. Burke was a "close personal friend" of Mr. McKellar pursuant to National Instrument 45-106.

108. Such a finding would require, at the very least, that Mr. McKellar provided evidence that at the time of the issuance of the securities in question he was a close personal friend of Mr. Burke. Such evidence was never presented. More importantly, Mr. McKellar failed to file the required Report of Exempt Distribution under section 6.1(1)(b) of National Instrument 45-106.
109. Mr. Burke did give some evidence regarding his relationship with Mr. McKellar and stated he thought Mr. McKellar was a friend at the time, that he was a church guy. Mr. Burke also testified that he did not spend too much time with Mr. McKellar and that he only met Mr. McKellar as he was helping his friend, Ms. Patterson.
110. There is no evidence of a close friendship between Mr. McKellar and Mr. Burke and even if there was, Mr. McKellar failed to file the required Report of Exempt Distribution under section 6.1(1)(b) of National Instrument 45-106.
111. Section 71(1) of the Securities Act mandates that any distribution of securities requires a prospectus unless an exemption applies. The Respondents did not obtain an exemption, nor did they provide evidence that an exemption was applicable.
112. In *Re Nelson*, 2016 BCSECCOM 50 (CanLII), the British Columbia Securities Commission examined whether promissory notes issued in a payday lending scheme constituted securities. The Tribunal found that the notes were indeed securities under the Securities Act and that their distribution without a prospectus was an illegal trade. The case highlighted the broad interpretation of securities laws to include a wide range of financial instruments, reinforcing the need for compliance with prospectus requirements to ensure investor protection.
113. In *Re Nelson*, the Commission stated the following concerning distribution of securities at paragraphs 64, 65 and 66:

[64] The respondent solicited investors to provide funds to the business by promising returns of 40 to 60 percent and stating the business was highly profitable and therefore able to pay such returns. The respondent also caused the various entities involved in the business to issue promissory notes in consideration of the funds provided by investors. She also signed the promissory notes as a director or managing member of the issuing entity.

[65] Sales of promissory notes to investors in return for their providing funds to the respondent's payday/short-term loan business are trades under subparagraph (a) of the definition of "trade". Because the promissory notes were previously unissued securities, trades in the promissory notes are also a distribution under the Act.

[66] The respondent's actions in soliciting loans, causing the various entities to issue promissory notes and signing the promissory notes are all acts in furtherance of trades in the promissory notes. As such, these actions of the respondent are trades under subsection (f) of the definition of "trade".

114. In *Ontario Securities Commission v. Tiffin*, 150 O.R. (3d) 714; 2020 ONCA 217, the Ontario Court of Appeal considered whether promissory notes issued by an individual as part of a business transaction fell within the definition of "securities." The court determined that the promissory notes were securities under the Ontario Securities Act because they constituted "evidence of indebtedness." The case reaffirmed the principle that securities legislation is broad and is designed to regulate financial instruments that may pose risks to investors.
115. The facts of *Tiffin* involved Mr. Tiffin, who had previously been convicted of fraud and was under a cease-trade order prohibiting him from dealing in securities. Despite this order, Mr. Tiffin issued promissory notes to investors as a means of raising funds for his business. These notes promised repayment with interest but were not registered as securities. The Ontario Securities Commission brought an enforcement action, arguing that the promissory notes met the definition of securities and should have been registered accordingly.
116. The Ontario Court of Appeal upheld the Commission's position, ruling that the promissory notes issued by Mr. Tiffin fell squarely within the definition of "securities" under the Securities Act. The court emphasized that promissory notes, regardless of their form, can be considered securities when they serve as investment vehicles. It further ruled that Mr. Tiffin's argument—that the notes were merely private transactions and not subject to securities regulation—was inconsistent with the broad regulatory mandate of the Securities Act. The decision reinforced the principle that securities laws are meant to protect investors and ensure transparency in financial transactions, particularly when dealing with unregistered investments.
117. The Tribunal therefore concludes that Mr. McKellar and 668054 N.B. Ltd. both did trade in a security on their own account where the trade would be a distribution of a security without having a prospectus or an exemption therefrom which is contrary to subsection 71(1) of the *Securities Act*.

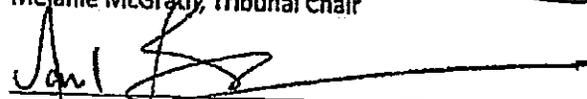
## VI. CONCLUSION & ORDER

118. The Tribunal hereby order that:
- a) Pursuant to section 2 of the *Real Estate Agents Act*, Mr. McKellar held himself out as trading in real estate as an agent without holding a valid and subsisting licence;
  - b) Pursuant to section 35(a) of the *Real Estate Agents Act*, Mr. McKellar collected or attempted to collect a commission or remuneration for services rendered in connection with a trade in real estate without being licenced as an agent at the time of rendering the services contrary to subsection 35(a) of the *Real Estate Agents Act* and that Mr. McKellar collected remuneration for, inter alia, these activities, contrary to section 35 of the *Real Estate Agents Act*;

- c) Pursuant to section 5(1) of the *Mortgage Brokers Act*, Mr. McKellar did not carry on the business of brokering mortgages, or hold himself out as doing so, without holding a mortgage brokerage licence;
- d) Pursuant to section 71(1) of the *Securities Act*, Mr. McKellar did trade in a security on his own account or on behalf of another person where the trade would be a distribution of a security without a prospectus or exemption therefrom contrary to subsection 71(1) of the *Securities Act*.
- e) Pursuant to section 71(1) of the *Securities Act*, 668054 N.B. Ltd. did trade in a security on its own account or on behalf of another person where the trade would be a distribution of a security without a prospectus or exemption therefrom contrary to subsection 71(1) of the *Securities Act*.
119. A hearing will be held to hear the parties' position regarding sanctions.

DATED this 1<sup>st</sup> day of April, 2025.

  
\_\_\_\_\_  
Mélanie McGrath, Tribunal Chair

  
\_\_\_\_\_  
Raoul Boudreau, Vice-Chair of the Tribunal

  
\_\_\_\_\_  
Sonia St-Pierre, Tribunal Member