

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** Nova Scotia Real Estate Commission (Re), 2004 NSSC 72

**Date:** 2004/03/31  
**Docket:** S. H. No. 216426  
**Registry:** Halifax

In the Matter of: *The Real Estate Trading Act*, S.N.S. 1996 c.28, as amended;

and

In the Matter of: An application of the Nova Scotia Real Estate Commission, on behalf of certain real estate brokerages, for an Order to have undistributed trust funds transferred to the Nova Scotia Real Estate Commission pursuant to s. 32 of the *Real Estate Trading Act*, as amended.

**Judge:** The Honourable Justice John M. Davison  
**Heard:** March 5 and 16, 2004, in Halifax, Nova Scotia  
**Counsel:** Catherine S. Walker, Q.C. and  
Cynthia L. Chewter, for the Applicant

**Davison, J.**

[1] An application came before me in Chambers on March 5, 2004 and March 16, 2004 on behalf of the Nova Scotia Real Estate Commission pursuant to s. 32 of the *Real Estate Trading Act*, S.N.S. 1996, c.28, s. 1 for an Order transferring stale, unclaimed and unresolved trust funds to the Commission.

[2] The relevant sections of the *Act* are as follows:

32 (1) Every licensed person who receives money to be held in trust by a brokerage with respect to a trade in real estate shall deposit the money in an interest-bearing trust account that is opened and maintained in accordance with this Act and shall instruct the bank to remit the interest earned thereon to the Commission semi-annually and such interest, including interest accruing due, is the property of the Commission.

(4) Where a dispute between a buyer and a seller over trust money is not resolved at the closing, the brokerage holding the money in trust may ask an arbitrator to settle the dispute.

(5) Where unclaimed money remains in a brokerage trust account for a period of at least two years and the broker is unable to locate the parties or settle the matter pursuant to subsection (4), the Commission may

bring an action on behalf of all brokerages to dispose of all unclaimed money.

(6) On an application pursuant to subsection (5), the court may order that the funds be paid to the Commission to be used for such public or charitable purpose, including the education of licensed persons, as the Commission specifies in its application.

(7) Any person may recover trust funds that have been transferred to the Commission pursuant to this Section by application to the Commission within six years after the funds were deposited to the brokerage trust account.

[3] The Application was supported by two Affidavits of Douglas David Dixon, the Registrar of the Nova Scotia Real Estate Commission. As an Exhibit to his first Affidavit, he attached a listing of unresolved or unclaimed trust funds, and Affidavits of brokers “outlining the efforts made by the brokers to resolve the trust funds so held”. The Affidavits of the brokers were of standard form and each contained the following clause:

I have held the funds in trust for in excess of two years and have endeavoured to return the funds, or I have held the funds in excess of two years and the parties to the transaction have not resolved the

disposition of the funds and there has been no activity in resolving it for over two years.

- [4] A second Affidavit of Mr. Dixon stated that a Notice to Appear would be set out in the Halifax Chronicle Herald, and the Notice would contain a list of the buyers and sellers along with the date the trust amount was deposited. The same information would be set out on the Commission's website.
- [5] Attached to the brief of counsel there was a schedule which set out 26 unresolved trust amounts over \$501.00. Each amount had a series of columns, one of which was referred to as "comments" and seemed to be the reason the request was made to transfer the amount to the Commission. Only two of the transactions indicated neither party could be located. The comments on 22 of the transactions indicate either the seller or the buyer or both were contacted. Typical of many of these transactions had the comment "parties contacted, cannot agree and neither intends further action". This does not comply with s. 32 (4).
- [6] Counsel seek a statutory remedy and they must advance evidence to show the requirements of s. 32(4) and s. 32(5) have been met. Regardless of how desirable the transfer of funds may be I have no discretion to change the legislation.

- [7] S. 32(5) of the *Act* is clear in its terms. Its disposal of the unclaimed money relates to monies which have been in the trust account for at least two years. The section says that the requirement for the disposal is either the broker being unable to locate the parties or the broker is unable to settle the matter pursuant to subsection (4) which relates to settlement by arbitration. Counsel advise that the arbitration process has not been set up. There are very few transactions where a party cannot be located. Each affidavit of the brokers (there are 34 in number) contain the same words including the clause recited in paragraph 3 of these reasons. Lines are drawn for the broker to insert his or her name and the name and address of the brokerage.
- [8] Thus the evidence does not reveal which of the two requirements under s.32 (5) the applicant relies on to effect a transfer of funds. Furthermore, from the material advanced in the brief the dispute was not put to arbitration.
- [9] The affidavit of Mr. Dixon refers to the funds as trust funds. Care must be exercised over the disposal of trust funds. The affidavits must show the manner in which attempts were made to dispose of trust funds. The meaning of the legislation is clear and there was no evidence advanced to show the attempts to locate the parties or to prove in the vast majority of the transactions that an arbitrator was appointed to settle the dispute.

[10] The application is dismissed. It is not my intention to preclude further applications if there is evidence advanced to satisfy the legislation.

J.