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FINANCIAL SERVICES TRIBUNAL

DECISION NO. 2015-MBA-001(a)

In the matter of an appeal under section 9 of the *Mortgage Brokers Act*, R.S.B.C. 1996, C. 313

BETWEEN:	Gordon Stephen Lemon	**APPELLANT**
AND:	Registrar of Mortgage Brokers	**RESPONDENT**

BEFORE: A Panel of the Financial Services Tribunal
Theodore F. Strocel, Q.C., Chair

DATE: Conducted by way of written submissions concluding on May 19, 2016

APPEARING:
For the Appellant: Owais Ahmed, Counsel
For the Respondent: Joni Worton, Counsel

APPEAL

[1] This appeal is filed by the Appellant, Gordon Stephen Lemon, from the October 6, 2015 decision of the Registrar of Mortgage Brokers (the Registrar's Decision). The appeal is filed under section 9 of the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313 (the *Act*):

> 9 (1) A person affected by a direction, decision or order of the registrar under this Act may appeal it to the tribunal, and, unless otherwise provided for in this Act, sections 242.2 and 242.3 of the *Financial Institutions Act* apply.
>
> (2) Despite section 242.2 (2) of the *Financial Institutions Act*, an appeal under subsection (1) of this section operates as a stay unless an order is made under section 242.2 (10) (a) of the *Financial Institutions Act*.
>
> (3) In respect of an appeal taken from a suspension of registration or an order made under section 8 (2), the following provisions do not apply:
>
> (a) subsection (2) of this section;
>
> (b) section 242.2 (10) (a) of the *Financial Institutions Act*.

[2] The background to this appeal will be discussed in detail below, but it will assist at the outset to note in summary that this appeal has its genesis in a temporary "Suspension Order and Cease and Desist Order" (the Order) issued by the Registrar on February 11, 2014. The Order, as it applied to Mr. Lemon, suspended him from acting as a sub-mortgage broker and ordered him to cease promoting Northstone Investment Fund Inc. (NSIF). On January 7, 2015 - after the parties were unable to come to a settlement agreement following the issuance of the Order (which was extended on three occasions by consent) - the Registrar issued a Notice of Hearing.

[3] The Notice of Hearing prompted Mr. Lemon, through counsel (in letters dated June 26 and August 12, 2015), to apply to the Registrar for orders that:

(a) The January 7, 2015 Notice of Hearing be amended to provide "notice of the specific allegations that are being made against him", and

(b) Direction be made that "no final findings have been made against Mr. Lemon, and that he will have the opportunity to be heard at a bifurcated hearing and at such hearing will be entitled to be represented by legal counsel, make representations, cross-examine witnesses and lead evidence".

[4] The Registrar dismissed the first request, holding that the Notice of Hearing is clear. She stated: "I can think of no amendments I could order to the Notice that would provide Mr. Lemon any further information on the allegations made against him".

[5] The Registrar also dismissed the second request, holding that the February 11, 2014 Order did indeed make final factual findings with regard to contravention, which findings had never been appealed and which could not now be revisited. She held that the only remaining issue on which an opportunity to be heard could be given was the issue of penalty. The Registrar stated:

> With regard to Mr. Lemon's second request, I interpret this to be a revisiting, reconsideration, or appeal, of the facts set out in the February 11, 2014 Order. That Order was a Summary Order issued pursuant to section 8(2) of the Mortgage Brokers Act (the "Act"), which provides as follows:
>
> > *8(2) If the length of time that would be required to give a person an opportunity to be heard under subsection (1), (1.2), (1.3) or (1.4) would, in the registrar's opinion, be prejudicial to the public interest,* ***the registrar may, without giving the person an opportunity to be heard,*** *suspend a registration under subsection (1) (a) or (1.3) (a) or make an order under subsection (1) (c) or (d), (1.2) (a), (1.3) (c) or (d) or (1.4) (a) or (b).* [Emphasis added]
>
> The Order contains many findings of fact which led to the order of suspension. In my interpretation of the Act, I do not see that I have jurisdiction to revisit or reconsider the factual findings in the Order. In essence, with regard to the facts found, I am *functus officio*.

> In the Order itself it was noted that staff was continuing its investigation. From the terms of the Notice of Hearing it would appear that no new facts relating to conduct at issue are being alleged, and as such no new findings of fact regarding Mr. Lemon's conduct or suitability are being sought. He will have a full opportunity to be heard with respect to any further penalty sought.
>
> If Mr. Lemon wishes to appeal the facts of the Order his proper course is by way of appeal to the Financial Services Tribunal (the "Tribunal") pursuant to section 9 of the Act. This was noted in the Order. I acknowledge that the period of time allowed under the statute for such appeal has long-since expired; however, this fact does not open up other avenues of appeal or review as an alternative. The Tribunal does have the ability to consider new evidence, and hold oral hearings. The Tribunal may also confirm, reverse, vary or send the matter back to the Registrar with or without directions.
>
> If there were extenuating circumstances that prevented Mr. Lemon from exercising his statutory appeal rights within the allowable time period it is open to him to communicate this information to the Tribunal and request that it hear his appeal, notwithstanding the time limits provided in the statute.

[6] It is common ground that the Order was not appealed to the Tribunal at the time it was made. It is also common ground that the Order was issued under s. 8(2) of the *Act*:

> 8(2) If the length of time that would be required to give a person an opportunity to be heard under subsection (1), (1.2), (1.3) or (1.4) would, in the registrar's opinion, be prejudicial to the public interest, the registrar may, without giving the person an opportunity to be heard, suspend a registration under subsection (1) (a) or (1.3) (a) or make an order under subsection (1) (c) or (d), (1.2) (a), (1.3) (c) or (d) or (1.4) (a) or (b).

[7] Where the parties differ is on the question whether, in the absence of an appeal, the Appellant was entitled to be heard on the facts alleged in the Order before the matter could proceed to penalty. The Appellant argues that the Order expressly contemplated that he could in due course challenge any factual assertions made in the Order, and that this is in any event required as a matter of procedural fairness before a penalty is imposed. If this position is correct, then it calls into question the Registrar's October 6, 2015 holding that the factual findings made in that Order cannot now be revisited. The Registrar's position, as noted above, is that the Order was a final order that contained findings of fact which cannot now be revisited, and that the only remaining issue is the issue of penalty. For the reasons that follow, I agree with the Appellant and would allow the appeal.

BACKGROUND

[8] On November 22, 2013, the office of the Registrar received a complaint against the Appellant concerning his involvement with TIB Mortgage Investment Corporation (TIB), a company registered as a mortgage broker under the *Act*. The complainant made serious allegations, including that the Appellant had misappropriated investor funds, altered a bank draft, breached his fiduciary duty to

a registered mortgage company and filed wind-up documents without consultation or endorsement of shareholders or the other company director: Order, para. 14.

[9] On January 27, 2014, the Registrar's staff interviewed the complainant, who elaborated on his complaint, provided documents to investigators and alleged that as a result of the Appellant's actions TIB lost an estimated $174,000, effectively draining the company of its assets: Order, paras. 15-19.

[10] During the complaint investigation, the Registrar's office discovered that the Appellant was also involved as a director of NSIF. On January 27, 2014, the Registrar's staff made the assessment that NSIF was holding itself out as a mortgage investment corporation despite not being registered under the *Act*: Order, paras. 21-27.

[11] The concerns regarding NSIF took on a degree of urgency in light of further information that came to the Registrar's attention that NSIF was a sponsor and scheduled presenter at an investment conference to be held in Vancouver on February 15, 2014. This urgency raised the regulatory question for the Registrar as to what if any summary action she could or should take under the *Act*.

DISCUSSION AND ANALYSIS

The Legislative Framework

[12] In order to understand the regulatory decision that the Registrar did take, it will be useful to first review the scope of the Registrar's powers under the regulatory framework under which she operates.

[13] The *Act* creates the office of registrar, a statutory official appointed by the Lieutenant Governor in Council to carry out the registrar's duties under the *Act* concerning mortgage brokers in British Columbia.

[14] This Tribunal has noted that unlike other regulatory governance schemes such as the *Securities Act*, the legislative structure under the *Act* "involves a single Registrar, issuing orders after conducting an investigation": *Cook v. Registrar of Mortgage Brokers*, Decision No. 2011-MBA-001(a), January 18, 2012, at para. 13. While the Registrar has created "staff" positions within her office as a matter of administrative efficiency designed to assist her in carrying out her multi-faceted roles, the reality is that the Registrar's functions, in law, "are a mix of investigation, inquiry and decision-making": *Cook*, para. 17.

[15] The registrar's statutory functions include granting registrations, investigating complaints and issuing various orders.

[16] For the purposes of this appeal, the key order-making powers are set out in section 8 of the *Act*, whose importance to this appeal is such that the entire section warrants quotation:

> **8** (1) After giving a person registered under this Act an opportunity to be heard, the registrar may do one or more of the following:
>
> (a) suspend the person's registration;

(b) cancel the person's registration;

(c) order the person to cease a specified activity;

(d) order the person to carry out specified actions that the registrar considers necessary to remedy the situation,

if, in the opinion of the registrar, any of the following paragraphs apply:

(e) the person would be disentitled to registration if the person were an applicant under section 4;

(f) the person is in breach of this Act, the regulations or a condition of registration;

(g) the person is a party to a mortgage transaction that is harsh and unconscionable or otherwise inequitable;

(h) the person has made a statement in a record filed or provided under this Act that, at the time and in the light of the circumstances under which the statement was made, was false or misleading with respect to a material fact or that omitted to state a material fact, the omission of which made the statement false or misleading;

(i) the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest;

(j) the person is in breach of a provision of Part 2 or 5 of the *Business Practices and Consumer Protection Act* prescribed under section 9.1 (2).

(1.1) After giving a person registered under this Act an opportunity to be heard, the registrar may order the person to pay an administrative penalty of not more than $50 000 if, in the opinion of the registrar any of paragraphs (f) to (i) of subsection (1) apply.

(1.2) After giving a person who was formerly registered under this Act an opportunity to be heard, the registrar may do one or both of the following:

(a) order the person to carry out specified actions that the registrar considers necessary to remedy the situation;

(b) order the person to pay an administrative penalty of not more than $50 000,

if, in the opinion of the registrar, any of paragraphs (f) to (i) of subsection (1) applied to the person while the person was registered.

(1.3) After giving a person registered under this Act an opportunity to be heard, the registrar may do one or more of the following:

(a) suspend the person's registration;

> (b) cancel the person's registration;
>
> (c) order the person to cease a specified activity;
>
> (d) order the person to carry out specified actions that the registrar considers necessary to remedy the situation,
>
> if the person
>
> (e) has been convicted of an offence in Canada or another jurisdiction arising from business, a transaction or a course of conduct related to mortgages, mortgage brokerage, real estate, insurance or securities, or
>
> (f) has been found by a regulator or court in Canada or another jurisdiction to have contravened the laws of the jurisdiction respecting mortgages, mortgage brokerage, real estate, insurance or securities.
>
> (1.4) After giving a person an opportunity to be heard, the registrar may do one or more of the following:
>
> (a) order the person to cease a specified activity;
>
> (b) order the person to carry out specified actions that the registrar considers necessary to remedy the situation;
>
> (c) order the person to pay an administrative penalty of not more than $50 000,
>
> if, in the opinion of the registrar, the person was or is carrying on business as a mortgage broker or submortgage broker without being registered as required by this Act.
>
> (2) If the length of time that would be required to give a person an opportunity to be heard under subsection (1), (1.2), (1.3) or (1.4) would, in the registrar's opinion, be prejudicial to the public interest, the registrar may, without giving the person an opportunity to be heard, suspend a registration under subsection (1) (a) or (1.3) (a) or make an order under subsection (1) (c) or (d), (1.2) (a), (1.3) (c) or (d) or (1.4) (a) or (b).
>
> (3) If under subsection (2) the registrar suspends registration or makes an order without giving a person an opportunity to be heard, the registrar must promptly send written notification of the suspension or order to the person and to the tribunal.

[17] As will be seen, all but one of the powers listed in section 8 of the *Act* expressly requires that the person affected be given an "opportunity to be heard" *before* the power is exercised. The express statutory incorporation of the opportunity to be heard before regulatory power adversely affecting an individual is exercised (a right that would be implicitly recognized at common law) reflects the legislature's recognition that orders that may adversely affect a person's livelihood and reputation should not be made without first giving the person affected a fair opportunity to respond to allegations made against them.

[18] To all this, there is, however, an exception set out in s. 8(2) of the *Act*. Section 8(2) expressly states that certain of the powers set out in s. 8 – including the power to suspend a person's registration (s. 8(1)(a)) or to order that an unregistered person cease a specified activity (s. 8(1.4)(a)) – may be exercised *without* giving the person an opportunity to be heard if the length of time that would be required to give a person an opportunity to be heard would, in her opinion, be prejudicial to the public interest.

[19] The type of urgent and summary regulatory power set out in s. 8(2) of the *Act* is necessary in any regulatory regime designed to protect the public in a dynamic environment where events may be moving quickly, and where procedural fairness *before* the order is made would frustrate the regulator's ability to protect the public. For such power to be effective, the kind of order-making power set out in s. 8(2) must not only be subject to exercise without giving a person a prior opportunity to be heard; it must also be subject to exercise as required on a temporary or time-limited basis. This ensures that the regulator can tailor the order to the exigencies of the particular circumstances that made the order urgent in the first place.

[20] All this makes clear that there will be many circumstances where the issuance of an order under s. 8(2) is not the end of the matter. Where a regulator exercises this kind of urgent and summary power without first giving a person an opportunity to be heard, a question may still arise, depending on the facts, as to what if any procedural safeguards are necessary or appropriate *afterward* as a term of the order or as a matter of law in order to give recognition to the purposes of procedural fairness, which purposes include not only the interests of the person affected, but also the regulator's functional interest in sound decision-making informed by hearing both sides of the story. This reflects the reality that where actions are taken in urgency, mistakes can be made. For this reason, it is common in our legal system for orders that are made without hearing both sides to be time-limited and/or be subject to terms that allow the order to be revoked or varied later after giving the person affected an opportunity to be heard.

[21] It should be noted that other regulatory statutes *in pari materia* expressly provide opportunities for "fairness after the fact" where powers such as section 8(2) of the *Act* are exercised.

[22] For example, s. 238 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141, which includes governance of financial institutions and the insurance industry, states:

> 238 (1) If the superintendent acting in accordance with a delegation by the commission, or the council, depending on which of them has the power to make the order,
>
> (a) intends to make an order under section 48 (2), 93 (1) or (2), 99 (2), 144 (3), 231 (1) (g), (h), (i) or (j), 244 (2) or (5), 245 (1), 275 or 277 (d) to (f), and
>
> (b) considers that the length of time that would be required to hold a hearing would be detrimental to the due administration of this Act,

> then, despite section 237, the superintendent or council, as applicable, may make the intended order without giving a person directly affected by it an opportunity to be heard, but the superintendent or council, as soon as practicable after making the order, must deliver to that person
>
> > (c) a copy of the order and written reasons for it, and
> >
> > (d) written notice of the person's rights under subsection (2).
>
> (2) A person directly affected by an order made under subsection (1) may, within 14 days of receiving a copy of the order,
>
> > (a) require a hearing before the superintendent or council, as applicable, by delivering written notice to the superintendent or council, or
> >
> > (b) appeal the order to the tribunal.
>
> (3) Within a reasonable time after receiving written notice referred to in subsection (2) (a), the superintendent or council, as applicable, must hold the required hearing and following the hearing must confirm, revoke or vary the order.
>
> (see also s. 238.1)

[23] Section 45 of the *Real Estate Services Act*, S.B.C. 2004, c. 42, which governs realtors, states:

> 45 (1) A discipline committee may act under this section if the committee considers that
>
> > (a) there has been conduct in respect of which a discipline committee could make an order under section 43 *[discipline orders]* against a licensee,
> > (b) the length of time that would be required to complete an investigation or hold a discipline hearing, or both, in order to make such an order would be detrimental to the public interest, and
> > (c) it is in the public interest to make an order under this section against the licensee.
>
> (2) If the circumstances referred to in subsection (1) apply, the discipline committee may, by order, do one or more of the following:
> > (a) suspend the licensee's licence;
> > (b) impose restrictions or conditions on the licensee's licence or vary any restrictions or conditions applicable to the licence;
> > (c) require the licensee to cease or to carry out any specified activity related to the licensee's real estate business.
>
> (3) Despite any other provision of this Division, a discipline committee may make an order under subsection (2)
> > (a) whether or not notice of a discipline hearing has been issued under section 40 *[notice of discipline hearing]*,

> (b) without giving notice to the licensee, and
> (c) without providing the licensee an opportunity to be heard.
>
> (4) A discipline committee may, by order,
> (a) on its own initiative, rescind an order under this section, or
> (b) on the application of or with the consent of the licensee subject to the order, vary or rescind an order made under this section.
>
> (5) Promptly after an order under subsection (2) is made, the real estate council must give to the licensee
> (a) a copy of the order and written reasons for it, and
> (b) written notice that a discipline hearing may be held respecting the matter.
>
> (6) Without affecting the authority of the real estate council to initiate a discipline hearing, a licensee who is the subject of an order under subsection (2) may require a discipline hearing to be held by delivering written notice to the real estate council.
>
> (7) Within a reasonable time after receiving a written notice under subsection (6), the real estate council must issue a notice under section 40 *[notice of discipline hearing]*, subject to the difference that the time for issuing the notice is at least 14 days before the time set for the discipline hearing, rather than 21 days, unless the licensee agrees to a shorter period.
>
> (8) After a discipline hearing respecting a licensee who is subject to an order under this section, the discipline committee must
> (a) rescind the order under this section and make an order under section 43 *[discipline orders]*, if it determines that the licensee has committed professional misconduct or conduct unbecoming a licensee, or
> (b) in any other case, rescind the order under this section.

[24] Section 157(2)-(5) of the *Securities Act*, R.S.B.C. 1996, c. 418, which governs the securities industry, provides:

> 157(2) If the commission or the executive director considers that the length of time required to hold a hearing under subsection (1), other than under subsection (1) (e) (ii) or (iii), could be prejudicial to the public interest, the commission or the executive director may make a temporary order, without providing an opportunity to be heard, to have effect for not longer than 15 days after the date the temporary order is made.
>
> (3) If the commission or the executive director considers it necessary and in the public interest, the commission or the executive director may, without providing an opportunity to be heard, make an order extending a temporary order until a hearing is held and a decision is rendered.
>
> (4) The commission or the executive director, as the case may be, must send written notice of every order made under this section to any person that is directly affected by the order.

> (5) If notice of a temporary order is sent under subsection (4), the notice must be accompanied by a notice of hearing.

[25] In the examples just given, the legislature has expressly prescribed the "after the fact" process, and has done so in very particular ways tailored to the realities of the particular regulatory structures created within the statutes in question.

[26] And so the question arises: where, as in the *Mortgage Brokers Act*, the legislature has created the Registrar as a single regulatory official exercising a mix of powers, and where, as here, the *Act* has expressly excluded procedural fairness *before* an order is issued, does this necessarily preclude the operation of some form of procedural fairness *after* the fact as a matter of legal authority, duty or administrative practice?

[27] For the reasons given below, I would answer that question "no". Before I provide those reasons, however, it will be helpful to pause and review the terms of the Order itself. In my view, a review of that Order makes clear that the Registrar, when she issued the Order, also answered this question "no".

The February 11, 2014 Order

[28] After setting out the background, applicable legislation, the complaint and the investigative allegations against Mr. Lemon and NSIF, the Order set out several findings and opinions with respect to both NSIF and Mr. Lemon.

[29] With respect to NSIF, and based on the factual findings set out at paragraphs 29-36 of the Order, the Registrar expressed the opinion that "NSIF has been conducting mortgage broker activity, which requires registration under the *Act*, by holding itself out as a mortgage broker (Mortgage Investment Corporation)".

[30] With respect to Mr. Lemon, the Registrar, based on the factual findings set out at paragraphs 37-39 of the Order, concluded as follows:

> I AM THEREFORE OF THE OPINION that Mr. Lemon is unsuitable and his registration as a sub-mortgage broker is objectionable because of the following:
>
> a. Evidence of his past misconduct in relation to Mortgage Investment Corporations; and
>
> b. His ongoing involvement with NSIF which is holding itself out as a mortgage broker (Mortgage Investment Corporation) while it is not in fact registered as a mortgage broker.
>
> I AGREE with Staff that hearings in relation to Mr. Lemon's suitability and NSIF's unregistered mortgage activity would require more time than is available between now and February 15, 2014, when Mr. Lemon and NSIF are expected to promote investment opportunities in NSIF to the public at the Investment Alternatives Conference.
>
> I AM THEREFORE OF THE OPINION that the length of time that would be required to hold hearings to make orders under ss. 8(1) or 8(1.4) of the *Act*

> would be detrimental to the due administration of the *Act* given that it would likely result in further non-compliance with the provisions of the *Act* and therefore significant further potential risk to the public.
>
> Of particular concern is the evidence against Mr. Lemon regarding his involvement with Mortgage Investment Corporations and his role as a controlling mind in NSIF, an unregistered mortgage broker (Mortgage Investment Corporation). NSIF appears to be preparing to solicit investment from the public. By stating on its website that NSIF operates within a regulatory environment which includes "British Columbia Financial Institutions Commissions (FICOM)" and "Mortgage Brokers Act", NSIF leaves the impression it is operating in compliance with this legislation when it is not.
>
> Suspension of Mr. Lemon's registration and a Cease and Desist Order in relation to NSIF is an appropriate response to imminent and ongoing risk of harm to the public and provides Staff with an opportunity to undertake further investigation to which Mr. Lemon and NSIF will have an opportunity to respond.
>
> I AM OF THE OPINION that it is in the public interest to make a summary order as permitted by s. 8(2) of the *Act* for an [sic] under ss. 8(1) and 8(1.4) of the *Act* so that the public is protected against further non-compliance with the *Act*.
>
> I HEREBY SUSPEND Mr. Lemon pursuant to s. 8(2) and 8(1) of the *Act,* from acting as a sub-mortgage broker in British Columbia until the investigation into the conduct and activities has been completed; Mr. Lemon has been provided with an opportunity to be heard; and a determination is made by the Registrar as to whether his registration be further suspended, or cancelled pursuant to s. 8(1) of the *Act*.
>
> THIS SUSPENSION ORDER will remain in force for a period of one hundred and eighty (180) days from the date of this Order or until the determination referred to above is made by the Registrar, whichever is sooner. In the event that the determination above is not made by the Registrar within one hundred and eighty (180) days of this Order, Staff may apply for a further Order under s. 8(2) of the *Act.*
>
> I HEREBY ORDER Mr. Lemon to cease promoting NSIF in the Province of British Columbia, effective immediately, until NSIF becomes registered under the *Act*, pursuant to ss. 8(1) and 8(2) of the Act...
>
> TAKE NOTICE THAT each of Mr. Lemon and NSIF may, under section 9 of the *act*, appeal this Order to the Financial Services Tribunal. [emphasis added]

[31] The Order is in my view clear and unambiguous on several key points.

[32] First, the Registrar chose on February 11, 2014 to take the exceptional step of invoking s. 8(2) because of the imminent investor conference scheduled for February 15, 2014. Faced with a choice between the delay occasioned by procedural fairness and public protection, the Registrar understandably chose the latter. The key point is that but for that conference, which was only a few days away, there is no suggestion in the Order that the Registrar would have taken the action of suspending Mr. Lemon's registration without first providing him with a fair

opportunity to respond to the allegations that had been made against him, as required by s. 8(1) of the *Act*.

[33] Second, the Registrar made clear that the Order under s. 8(2) was not permanent, but was designed to be time-limited and interim in nature:

> I HEREBY SUSPEND Mr. Lemon pursuant to s. 8(2) and 8(1) of the *Act,* from acting as a sub-mortgage broker in British Columbia *until* the investigation into the conduct and activities has been completed; Mr. Lemon has been provided with an opportunity to be heard; and a determination is made by the Registrar as to whether his registration be further suspended, or cancelled pursuant to s. 8(1) of the *Act.*
>
> THIS SUSPENSION ORDER will remain in force for a period of one hundred and eighty (180) days from the date of this Order or until the determination referred to above is made by the Registrar, whichever is sooner. In the event that the determination above is not made by the Registrar within one hundred and eighty (180) days of this Order, Staff may apply for a further Order under s. 8(2) of the *Act*. [emphasis added]

[34] The time-limited and interim nature of the Order was reinforced by time-limited extensions the Registrar issued under s. 8(2), all of which showed that the Registrar considered (in my view correctly) that the February 11, 2014 Order did not render her *functus* and that she had ongoing and continuing authority in respect of the Order. Indeed the final step in the process was to be a determination "made by the Registrar as to whether his registration be further suspended, or cancelled pursuant to s. 8(1) of the *Act*". Section 8(1) of the *Act*, of course, expressly requires an opportunity to be heard before that power is exercised.

[35] Third, the Registrar expressly recognized that Mr. Lemon would be given an opportunity to be heard before the Registrar made a subsequent determination "as to whether his registration be further suspended, or cancelled pursuant to s. 8(1) of the *Act*". This is apparent not only from the paragraphs of the Order just quoted but also this paragraph earlier in the Order:

> Suspension of Mr. Lemon's registration and a Cease and Desist Order in relation to NSIF is an appropriate response to imminent and ongoing risk of harm to the public and provides Staff with an opportunity to undertake further investigation to which Mr. Lemon and NSIF will have an opportunity to respond.

[36] It is readily apparent that the Registrar did not draft the Order to be the last word as to the facts or penalty. Rather, the Registrar reasonably and fairly drafted it as an interim and summary order designed to address an urgent situation, which interim order was to work in tandem with a later determination to be made under s. 8(1) after further investigation and after giving the Appellant the opportunity to be heard. That is how I read the Order and that in my view is how the Appellant would reasonably have understood the Order. That understanding is reinforced by the January 7, 2015 Notice of Hearing, which makes clear that a further step was necessary, at which staff intended, among other things, to invite the Registrar to cancel the Appellant's registration indefinitely under s. 8(1)(b). This shows very clearly that the Order was time-limited and temporary, and an independent judgment would later have to be made by the Registrar pursuant to the other

provisions set out in s. 8(1), all of which, as noted above, expressly require an opportunity to be heard before they are exercised.

[37] Thus, while it was open to the Appellant to appeal the Order, that right of appeal did not, given the language of the Order, preclude the Appellant choosing the entirely reasonable alternative course of accepting that Order as an interim order, and attempting to achieve a settlement with the Registrar, failing which he could to invoke his opportunity to be heard prior to a final determination being made following the expiry of this time-limited Order. In such case, the Appellant would then have had a fresh right to appeal the final order, and such right of appeal could be exercised based on a Registrar's decision as to both facts and penalty informed by a process that heard from both sides. I therefore agree with the Appellant when he submits that "In those circumstances the only reason to appeal the Order was if Mr. Lemon contested the temporary suspension, which he did not".

[38] By failing to reasonably interpret the Order on this critical point in her October 6, 2015 decision, the Registrar erred.

Registrar's submissions

Interpretation of Order

[39] Registrar's counsel has argued before me that any understanding of the Order as contemplating a future right to be heard by the Appellant with regard to the facts alleged is "an incorrect, incomplete and merely convenient interpretation of the terms of the Order". The support offered for that very strong statement is as follows:

> 51. The Respondent submits that read in context and as a whole, the reference to the Appellant's opportunity to be heard is in respect to his ability to appeal the Order. The evidence before the Respondent clearly indicated that the investigation was complete, no further facts were alleged, and no appeal was initiated. The Appellant's suspension was extended by consent on three occasions following the Order, during which the parties were engaged in settlement discussions regarding penalty.
>
> 52. In addition, the Respondent submits that the evidence overwhelmingly supported the Staff's position that all discussions with respect to the Appellant were in respect of penalty alone, and there was no indication of dispute as to the findings of fact, until approximately 16 months after the NOH was issued.

[40] I do not accept this submission.

[41] First, it is not reasonable to suggest that the "opportunity to be heard" in the Order refers to the right of appeal, when the Order itself differentiates between the "opportunity to be heard" and the right of appeal. The Order makes clear by its plain language and context that the opportunity to be heard – the precise term used in s. 8 of the *Act* – is something that would be done at the Registrar's level.

[42] Second, the submission that "the investigation was complete" directly contradicts the Order, which makes clear that the Registrar took the view at the

time she issued the Order that the investigation was not complete and that more investigation was contemplated.

[43] Third, the settlement discussions that came later are irrelevant to the proper interpretation of the Order. Indeed, the fact that that Order was extended by consent three times, on the same terms, makes clear that the substantive terms of the original Order remained in play, and that therefore that the formal process contemplated by the Registrar would prevail if the matter could not otherwise be resolved informally.

Authority of the Registrar to provide for an opportunity to be heard

[44] All this raises a further point which it is important to confront directly – namely, whether the Registrar had legal authority to craft the Order contemplating a subsequent opportunity to be heard for the Appellant as to the facts alleged before a final order was made. Registrar's counsel has strongly emphasized that s. 8(2) of the *Act*, enacted in 2009[1], expressly authorizes an order to be made under section 8(1) "without giving the person an opportunity to be heard" and has emphasized established case law making clear that "the common law requirements of procedural fairness cannot trump legislation": *Inisfill (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145; *Berg v. British Columbia (Police Complaint Commissioner)*, 2006 BCCA 225; *Ocean Port Hotel Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

[45] In order to properly assess this submission in the regulatory context and facts here, it will be convenient once again to reproduce section 8(2) of the *Act*:

> 8(2) If the length of time that would be required to give a person an opportunity to be heard under subsection (1), (1.2), (1.3) or (1.4) would, in the registrar's opinion, be prejudicial to the public interest, the registrar may, without giving the person an opportunity to be heard, suspend a registration under subsection (1) (a) or (1.3) (a) or make an order under subsection (1) (c) or (d), (1.2) (a), (1.3) (c) or (d) or (1.4) (a) or (b).

[46] Read carefully and in context, section 8(2) of the *Act* states no more or less than that the Registrar may dispense with procedural fairness *before* making an order under the listed sections *if* delay would be contrary to the public interest. To that extent, the *Act* has clearly and unequivocally displaced common law procedural fairness.

[47] However, nothing in s. 8(2) limits and fetters the authority and discretion of the Registrar to issue an order, as she has done here, which in her discretion provides a measure of post-order procedural fairness designed the serve the same purposes as is reflected in the other legislative provisions described above where urgent and summary orders are issued.

[48] The law is clear that the Registrar's powers under the *Act* include all those implicit powers that are "practically necessary to enable the Registrar to effectively and efficiently carry out her legislative role": *Pugliese v. Clark*, 2008 BCCA 130 at para. 30. Those powers must surely include the power and discretion to allow a

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[1] *Finance Statutes Amendment Act, 2009*, S.B.C. 2009, c. 15, s. 12.

person who is subject to an urgent and summary order under s. 8(2) to make submissions concerning the facts at a later date. The fact that s. 8(2) rules out such a right before the Order is made does not limit the Registrar's authority to provide an opportunity to be heard at a later date as part of the Order itself – which opportunity not only offers a degree of fairness to the person affected, but also serves the functional purpose of preventing or not perpetuating factual error by the Registrar. It would be grave injustice indeed if a person faced with a summary order issued after the Registrar considered only one side of the story was thereafter precluded from putting his side of the story forward before being faced with a penalty hearing. As noted by the Appellant, that injustice would be very difficult for this Tribunal to correct on appeal given that we do not exercise a *de novo* fact-finding jurisdiction.

[49] The fact that the legislature chose not to prescribe a particular *kind* of post-order procedure to govern the Registrar in my view shows only that the Legislature eschewed a "one size fits all" procedure in this unique regulatory context. Given the multi-faceted role of the Registrar under the *Act*, and the environment in which she operates, that makes good sense. In this case for example, it would not have made sense to give NSIF a subsequent right to be heard in relation to an order to "cease and desist" presenting at a conference 4 days hence, as the matter would by then have been moot; no further proceedings would be necessary. Equally, however, it made eminent good sense for the Registrar to ensure, as in my view she did in the Order, that the Appellant had an opportunity to be heard before issuing her final disposition under one or more of the other provisions of s. 8 regarding the serious allegations advanced. All this reflects the wisdom in recognizing the Registrar's broad authority to design and tailor her s. 8(2) orders as she considers appropriate to fit the circumstances.

Post-Order Procedural Fairness

[50] I now turn to the question whether, over and above the Registrar's *discretion* to provide Mr. Lemon with an opportunity to be heard after the section 8(2) order is made, the Registrar was under a legal duty to provide such opportunity after the order was made.

[51] It is not strictly speaking necessary to decide that issue given my finding that the Registrar has in any event exercised her authority to provide for an opportunity to be heard. However, given the care the parties have put into their submissions, I consider it appropriate to make several points that speak in favour of this being a duty rather than a discretion.

[52] First, given the interests at stake, there is no question that the common law would hold the Registrar to a high standard of procedural fairness in issuing a final order suspending a licence on the kind of grounds asserted here: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[53] Second, the law is clear that courts will not lightly assume that procedural fairness has been displaced by inference; legislation doing so must be clear and unequivocal: *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, cited in *Hundal v. Superintendent of Motor Vehicles*, (1985), 20 D.L.R. (4th) 592 (B.C.C.A.).

[54] Third, while section 8(2) is clear and unequivocal insofar as it removes the opportunity to be heard *before* an order is made (for reasons of urgency), it is silent about post-hearing process and does not remove, let alone unequivocally remove, what I would regard as the opportunity the common law would provide to an affected person to request afterward that the Registrar withdraw or vary a suspension order such as the one made here based on factual inaccuracies in the Order itself prior to any final penalty determination being made.

[55] Fourth, leaving aside the common law of procedural fairness, the Order in this case was specifically designed to be time-limited, and subject to final orders being made pursuant to other provisions of s. 8, all of which expressly require an opportunity to be heard before those orders are made. I see nothing in the language or purpose of section 8(2) that would justify reading down or failing to give full effect to the express "opportunity to be heard" in those subsections. That is especially so, as here, the Registrar has issued a time-limited order under s. 8(2) which is subject to a later and final disposition under s. 8(1). On the contrary, the legislature's intent and the interests of justice much more strongly favour ensuring that where, as here, the summary power in s. 8(2) is exercised on an interim basis without giving the person affected an opportunity to be heard as to the facts, any final order issued under section 8(1) provides that opportunity before the Order is made just as it would in any other case.

[56] Thus, it is my view that what the Registrar designed the Order to do in this case was not only good practice within the scope of her jurisdiction; it was required as a matter of law.

The Appellant's "Failure to Appeal"

[57] While I addressed this point earlier in these reasons, I will make clear again here that the Appellant's "failure" to appeal the Order is irrelevant to the question whether the Appellant is entitled by the Order itself to an opportunity to be heard before a final order is made.

[58] While the Order could have been appealed, the Appellant was perfectly entitled to take the course that he did, which was to accept the temporary and interim order as such and to attempt a settlement and, failing that, to rely on the fact that no final order would be made without giving him an opportunity to be heard as to the underlying facts. Given that an appeal to the Tribunal is not a hearing *de novo* as to the facts, it would be and was entirely reasonable for the Appellant to proceed on the basis that the Registrar was the official in the best position to respond to any submissions on the facts, following which he would have a right of appeal to the Tribunal.

The Appellant did not advise Staff that he disagreed with the facts set out in the Order

[59] Counsel for the Registrar argues that the evidence before the Respondent was clear that at key points throughout the process he did not advise staff that he disagreed with the facts set out in the Order, and submits that it was not until June 10, 2015 – well after he received the Notice of Hearing and after he retained new

counsel – that he indicated that he disagreed with many of the findings set out in the Order.

[60] In my view, "the process" referenced by counsel was in part an investigation process and in part a settlement process. It was not the "opportunity to be heard" contemplated by the Order, and counsel for the Registrar does not submit that it was. Counsel for the Registrar quite properly did not submit that the May 21, 2014 interview of Mr. Lemon under compulsion constituted an "opportunity to be heard" at common law, and it would in my view be unreasonable to suggest that such opportunity was exercised or waived in settlement discussions, the evidence of which does not in any event satisfy me that the Appellant formally "accepted the terms of the Order and the facts that underlie it."

[61] To repeat, the Appellant was perfectly entitled in the face of the temporary section 8(2) Order to attempt in good faith to resolve the matter without recourse to a formal process. That being so, I do not find it necessary to delve into the nature of the retainer between the Appellant and his former counsel or the question whether the emails exchanged between the Appellant's former counsel and counsel for the Registrar during that period evinced an intention to challenge the merits of the factual findings contained in the Order. When the informal process broke down, the Appellant was entitled to his opportunity to be heard, which opportunity was not removed in any of the subsequent "consent" extensions to the Order to which the parties agreed, and which in my view, based on the material before me, the Appellant did not expressly and unequivocally waive.

Functus Officio

[62] While this issue has also been dealt with above, I will simply state for completeness that for the reasons given above, I reject the argument that the Registrar was *functus officio* in regard to the facts stated in the Order.

[63] The Registrar was not *functus officio* because she had the authority (and in my view, the duty with regard to the suspension) to craft a section 8(2) order that provided the Appellant with an opportunity to be heard as to the facts at a later date. Indeed, her own conduct in extending the time-limited order (which could not be done by consent if the power did not otherwise exist) makes clear that the Registrar herself recognized that the power in section 8(2) is a continuing power that can and must practically speaking be exercisable on that basis and that can result in the Order itself being revised, or cancelled, or spent without a new order taking its place if new facts come to light following further investigation or an opportunity to be heard.

The Appellant's argument based on 8(1.1) of the *Act*

[64] While the conclusions above are sufficient to dispose of this issue, I note that the Appellant has also advanced a separate argument based on the interaction of ss. 8(1.1) and 8(2) of the *Act*:

> 8(1.1) After giving a person registered under this Act an opportunity to be heard, the registrar may order the person to pay an administrative penalty of not more than $50 000 if, in the opinion of the registrar any of paragraphs (f) to (i) of subsection (1) apply.

> 8(2) If the length of time that would be required to give a person an opportunity to be heard under subsection (1), (1.2), (1.3) or (1.4) would, in the registrar's opinion, be prejudicial to the public interest, the registrar may, without giving the person an opportunity to be heard, suspend a registration under subsection (1) (a) or (1.3) (a) or make an order under subsection (1) (c) or (d), (1.2) (a), (1.3) (c) or (d) or (1.4) (a) or (b).

[65] The Appellant points out that even if s. 8(2) completely displaces any opportunity to be heard as to the facts, that applies only to the subsections listed in s. 8(2). Section 8(1.1) – which subsection is specifically referenced in the Notice of Hearing - is not one of the subsections listed in s. 8(2). Because of that omission, the "opportunity to be heard" in section 8(1) must apply not only to the issue of the penalty but also the issue of "what happened" and whether there was a contravention to begin with.

[66] In my view, this submission has merit. Even if one were to accept (which I do not) the principle of legislative exclusion eliminates any later right to be heard on the facts before a final order is made with regard to the subsections listed in section 8(2), that principle cannot extend to a power that is not listed in s. 8(2). Where a person is subject to an administrative penalty, the "opportunity to be heard" would necessarily apply to the issues of contravention and penalty. Because the Registrar is being asked to consider an administrative penalty in this case, the opportunity to be heard with regard to the facts must at a minimum be given before any administrative penalty is levied.

The Notice of Hearing

[67] Having decided that the Registrar erred on October 6, 2015 when she concluded that she was "*functus officio* with regard to the facts found", a separate question arises as to whether the Notice of Hearing, issued on January 7, 2015, provided adequate and sufficient notice to enable the Appellant to exercise his opportunity to be heard.

[68] The Appellant complains that the Notice of Hearing "simply attached a copy of the Order as a schedule".

[69] On this issue, the Registrar, as noted above, stated that "I can think of no amendments I could order to the Notice that would provide Mr. Lemon any further information on the allegations made against him".

[70] Having reviewed the Order in light of the submissions, I find that the Notice is adequate insofar as it sets out the *facts* the Appellant is alleged to have committed.

[71] However, given what is at stake, and given the serious remedies being sought in the Notice of Hearing, it is my view the Notice of Hearing should go further as a matter of procedural fairness, and describe, based on those facts, which particular contraventions of the *Act* the Appellant is alleged to have committed. It is, after all, the particular contravention or contraventions of the *Act* found by the Registrar that would constitute the basis for any subsequent penalties imposed.

DECISION

Remedy

[72] The Tribunal's remedial jurisdiction is set out in s. 242.2(11) of the *Financial Institutions Act*:

> 242.2 (11) The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[73] Pursuant to this authority, I have decided to set aside the Registrar's October 6, 2015 decision, and send the matter back to her for reconsideration with these directions:

1. The Registrar is directed to issue a new Notice of Hearing which sets out, based on the facts alleged in the Order, the particular contraventions of the *Act* the Appellant is alleged to have committed.

2. The Registrar is directed to provide the Appellant with a fair opportunity to respond to the factual findings made in the Order. I will not in this order direct that the Registrar must necessarily provide that opportunity in a full oral hearing as I do not have sufficient information before me to issue that direction. This will be a procedural assessment for the Registrar to make based on her practice and her assessment of the circumstances, which assessment will be subject to appeal should the Registrar's final decision be appealed.

3. The Registrar is directed to defer holding a penalty hearing until such time as she has made her final findings of fact following step 2.

[74] While the point is perhaps obvious from these reasons and directions, it is nonetheless worth emphasizing that nothing in this decision is intended as any comment on the merits of the allegations, and nothing in this decision is intended to fetter the Registrar in respect of any findings she makes on the merits, or as to penalty. What this decision is about is ensuring that the Registrar is able to make those determinations pursuant to a process that is fair and lawful.

[75] For completeness, I will note finally that in light of the decision and remedy I have issued above, it is unnecessary for me to address the Appellant's alternative ground which seeks leave to appeal the Order itself.

Costs

[76] Each party has applied for an order of costs by virtue of section 47(1) of the *Administrative Tribunals Act*, which applies to the Tribunal on this appeal by virtue of s. 242.1(7)(g) of the *Financial Institutions Act*.

[77] If the parties are unable to come to an agreement regarding costs, it will be open to them to make submissions on the issue. In particular, I direct that the Appellant give the Tribunal notice, no later than 7 business days from the date of this decision, whether he intends to pursue costs. If such notice is not received within 7 business days, the claim for costs will be considered withdrawn.

[78] Should the Appellant wish to pursue a claim for costs, I will instruct the Tribunal's Executive Director to contact the parties to facilitate an agreed submissions schedule. In the event agreement on a schedule cannot be reached, I am prepared to provide the necessary direction.

[79] Should the costs issue be pursued, I bring to the attention of the parties two administrative tribunal decisions concerning this subject which, in addition to any other submission they intend to make, they may wish to make reference in their submissions: this Tribunal's decision in *Brewers' Distributor Ltd. v. Superintendent of Pensions*, Decision No. 2010-PBA-001(c)[2] and the decision of the Hospital Appeal Board in *Behn v. Vancouver Island Health Authority* (December 31, 2010)[3].

"Ted Strocel"

Theodore F. Strocel, Q.C.
Chair

June 7, 2016

[2] http://www.fst.gov.bc.ca/pdf/2010-PBA-001%28c%29.pdf
[3] http://www.hab.gov.bc.ca/final_dec/behn_costs_2010.pdf