BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2016-MBA-001(a)

In the matter of an appeal under section 9 of the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313 to the Financial Services Tribunal pursuant to section 242.2 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141

BETWEEN:	Robert John Emil Hensel	**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 July 5, 2016

APPEARING: For the Appellant: Glen Orris, Q.C., Counsel
For the Respondent: Joni Worton, Counsel

APPEAL

[1] The Appellant, Robert John Emil Hensel (the "Appellant" or "Mr. Hensel") appeals to the Financial Services Tribunal ("FST") from a decision (the "Decision") of the Registrar of Mortgage Brokers, (the "Registrar" or the "Respondent") given on February 11, 2016. The Registrar opposes the Appeal.

[2] The Appellant has been registered by the Registrar as a sub-mortgage broker continuously since 2000.

[3] This appeal arises from regulatory action taken by the Registrar of Mortgage Brokers against the Appellant under section 8(1)(i) of the *Mortgage Brokers Act*. That regulatory action arose from conduct of the Appellant on April 11, 2014, whereby the Appellant altered an official Financial Institutions Commission ("FICOM") industry alert (the "Alert") by replacing the names of the actual subjects of the regulatory enforcement action with the names of other individuals known to Mr. Joseph MacKinnon and sent the Alert to Mr. MacKinnon.

[4] On August 7, 2015, the Registrar issued to the Appellant a Notice of Hearing, which states as follows:

> **AND TAKE NOTICE** that the allegations against you are as follows:
>
> 1. You contravened Section 8(1)(i) of the [*Mortgage Brokers Act*] in that you have conducted business in a manner that is prejudicial to the public interest as follows:

a. on April 10, 2014, as a registered sub-broker, you received a Financial Institutions Commission of British Columbia industry alert warning the sub-mortgage broker industry of the existence of a cease and desist order against certain individuals (the "FICOM Industry Alert");

b. you created another version of the FICOM Industry Alert (the "Altered Industry Alert") so that the names of the individuals who were the subject of the FICOM Industry Alert were changed to the names of the potential lenders from whom Mr. Joseph McKinnon was seeking financing. Mr. McKinnon was seeking financing from those lenders to discharge the mortgage you had registered against his property, which was subject to a foreclosure proceeding in which you were acting as the listing agent;

c. on April 11, 2014 you sent, by email, the Altered Industry Alert to Mr. McKinnon when you knew or ought to have known that Mr. McKinnon would rely on it as though it was genuine.

[emphasis added]

AND TAKE FURTHER NOTICE that the Registrar will determine if you would be disentitled to registration if you were an applicant under Section 4 of the [*Mortgage Brokers Act*], pursuant to section 8(1)(e) of the [*Mortgage Brokers Act*].

[5] In October 2015, the parties prepared an Agreed Statement of Facts which was submitted to the Registrar for consideration at the Hearing. In it, the parties acknowledged the following:

20) On April 10, 2014 Karen Alton, an employee of FICOM, sent an official FICOM Industry Alert by email to mortgage brokers. Mr. Hensel in his capacity as a sub-mortgage broker received that official FICOM Industry alert. A copy of that email is attached as Exhibit "B" to this Agreed Statement of Facts.

21) On April 11, 2014, Mr. Hensel forwarded to Mr. MacKinnon an email which purported to be a FICOM industry alert dated April 10, 2014. Mr. Hensel altered the April 10, 2014 official industry alert so that it appeared as displayed in Exhibit "C" attached to this Agreed Statement of Facts.

[6] Within the *Mortgage Brokers Act*, the Registrar has been given the authority to discipline mortgage brokers. For the purposes of this Appeal, the disciplinary authority of the Registrar is found in Section 8(1) and (1.1), which state as follows:

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 specific 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;
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> (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;
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> (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).
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> (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.

[7] The Supreme Court of Canada commented on the larger purposes of the *Mortgage Brokers Act* in *Cooper v Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537 at para. 49:

> The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through mortgage financing while at the same time instilling public confidence in the system by determining who is "suitable" and whose proposed registration as a broker is "not objectionable". All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing. Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.

[8] In the Decision, the Registrar found the alteration of the Alert to constitute "conduct prejudicial to the public interest" within the meaning of section 8(1)(i) of the Act:

> Altering an official regulatory document, regardless of intent, shows a high level of contempt for the regulatory framework in place to protect the public and the profession and for the regulator itself. I consider it very serious misconduct that is clearly contrary to the public interest.
>
> I consider the altering of an official regulatory document to be an extremely serious misconduct. It is conduct whose potential harm extends beyond the parties involved and beyond the two people whom Mr. Hensel held out had committed serious offences, to the regulation of

> industry as a whole and the public's confidence in both the industry and the regulator.

[9] In the Decision, the Registrar accepted that both parties agreed that Mr. Hensel had altered an official FICOM industry alert and sent it to Mr. MacKinnon. The Registrar stated also that "Both parties agree that Mr. Hensel should be sanctioned; they differ on the severity of the penalty and rely on their differences in their arguments with respect to the points immediately above" - namely, Mr. Hensel's intent in sending the Alert and whether he intended Mr. MacKinnon to rely on it, and whether Mr. MacKinnon did in fact rely on the Alert and, if so, suffered any harm.

[10] Upon the testimony before her, the Registrar concluded that Mr. Hensel intended that Mr. MacKinnon should rely upon the Alert. She found it unnecessary to conclude that Mr. MacKinnon actually relied upon it. Based upon her conclusion that Mr. Hensel had sent the Alert with the intention that Mr. MacKinnon should rely upon it, the Registrar found Mr. Hensel worthy of sanction and ordered his suspension for a period of 24 months effective March 7, 2016.

GROUNDS OF APPEAL

[11] The Appellant submits that the Decision should be reversed, or that the decision should be set aside and referred back to the Registrar of Mortgage Brokers for reconsideration with a direction to the Registrar that a different person who is impartial and unbiased reconsider this matter by way of a new hearing. There are six grounds of appeal which are as follows:

> GROUND 1. The learned Registrar misinterpreted the evidence and the position of the Appellant at the hearing. In addition, the Registrar erred by misinterpreting evidence before her and thereby concluded that relevant evidence and facts were not in dispute when such evidence and facts were in dispute. The specific findings made by the Registrar based on misinterpretations alleged are:
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> 1. Where the parties differ on [sic];
> 2. Both parties agree that Mr. Hensel should be sanctioned;
> 3. "To summarize, the substantive facts supporting a finding of conduct prejudicial under the Act in this case are not in dispute…."
>
> (Pages 14 and 15 of the Decision)
>
> GROUND 2: The learned Registrar erred by misinterpreting the position of the parties, by misinterpreting the evidence, and by failing to take into account relevant evidence and thereby erred in finding that the actions of the Appellant were prejudicial to the public interest.
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> GROUND 3: The learned Registrar erred in her interpretation of the Appellant's evidence which error caused her to make adverse findings against the Appellant as to (i) his credibility and (ii) intent.
>
> GROUND 4: The learned Registrar erred in making findings against the Appellant that the Appellant

(a) by his actions disregarded the regulator or the regulations in place governing his industry;

(b) was acting as an advisor to Mr. MacKinnon;

(c) was in a fiduciary relationship with Mr. MacKinnon and breached that relationship; and

(d) was in a conflict of interest in relation to Mr. MacKinnon and the foreclosure proceedings.

The Registrar was in error in considering these matters and making findings adverse to the Appellant since none of these allegations were alleged against the Appellant in the Notice of Hearing or in any other way. Consequently the Appellant was not given notice that he would have to deal with the aforesaid allegations before the Registrar. Consequently the hearing was conducted in violation of the principles of natural justice which require that a person against whom the allegations are made must have prior notice of those allegations. The hearing, therefore was unfair. The Registrar was without jurisdiction to make such findings against the Appellant.

GROUND 5: The learned Registrar erred in making the following findings when there was no evidence upon which to base those findings. These findings were therefore made as a result of speculation and accordingly the learned Registrar was wrong to make such findings:

(a) "…given that this was the third time Mr. Hensel had initiated a foreclosure proceeding against Mr. MacKinnon, it is reasonable to assume that a sale of the property was a preferable outcome to Mr. MacKinnon securing financing."

(b) "…there was no question that the most ideal outcome for Mr. Hensel would have been the sale of Mr. MacKinnon's property for a price high enough to pay out all mortgages and a commission."

GROUND 6: The learned Registrar erred in misinterpreting the Appellant's evidence and failed to take into account other relevant evidence as to his intent and his actions. In addition, the learned Registrar erred in making findings not based on the evidence and findings which were beyond her jurisdiction to make. Therefore, the learned Registrar erred in erroneously finding that the Appellant (a) lacked remorse for his actions and (b) failed to convince the Registrar that he would change his behaviour in the future.

[12] The Appellant does not appeal the finding on penalty *per se* except to say that it is inappropriate and unreasonable because he is not in breach of the *Mortgage Brokers Act*.

SCOPE OF APPEAL AND STANDARD OF REVIEW

[13] The Appellant appeals under Section 9(1) of the *Mortgage Brokers Act*. Under Section 242.2(11) of the *Financial Institutions Act*, which applies, I may confirm, reverse or vary the Decision or send the matter back for reconsideration, with or without directions.

[14] Neither the *Mortgage Brokers Act* nor the *Financial Institutions Act* prescribes a particular standard of review to govern Tribunal appeals[1]. However, the Tribunal is itself protected by a privative clause and a legislated standard of review vis-a-vis the courts: *Financial Institutions Act*, s. 242.3, *Administrative Tribunals Act*, s. 58.

[15] Because the Tribunal is a specialized appeal tribunal and not a generalist court, it is appropriate to approach with a degree of caution those judicial authorities that, in recognition of the distinct institutional roles of courts of law and tribunals, have addressed the standard of review to be applied by generalist courts to specialized tribunals. I therefore respectfully differ from the Registrar when she submits that given the lack of statutory direction, the "starting point" in determining the standard of review to be applied by the Tribunal to the Registrar's decision is *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In my view, the correct starting point is to recognize that when the legislature creates a statutory right of appeal, each right of appeal must be considered contextually, on its own terms and in view of its larger purposes. As noted in *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board),* 2002 BCCA 473 at para 15, the words ["may appeal"] do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act.

[16] In the absence of a legislated standard of review, the Tribunal should not proceed by reflex as if it were a generalist court hearing a judicial review or appeal from a specialized first instance decision-maker. It would make little sense for the legislature to create a specialized administrative appeal tribunal to merely parrot a court. The legislature, by vesting the Tribunal with a strong privative clause, has made clear that the Tribunal, within its exclusive jurisdiction, is deemed to possess expertise that a generalist court does not have: *Administrative Tribunals Act*, section 58(1).

[17] In recognition of these principles, the Tribunal has developed its own appellate "standard of review" jurisprudence. It has held that the case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings *de novo*, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nuguyen v. Registrar of Mortgage Brokers*, July 20, 2005, p. 9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision".

[18] On the other hand, where the first instance regulator has made a finding of law, the Tribunal has generally held that deference is not required. Indeed, just as

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[1] Compare *Health Professions Act,* R.S.B.C. 1996, c. 183, s. 50.6(5); *Employment and Assistance Act*, S.B.C. 2002, c. 40, s. 24.

our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the Tribunal is also entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator. I note that the British Columbia Court of Appeal has considered this position to be a reasonable one in *Westergaard v. British Columbia (Registrar of Mortgage Brokers),* 2011 BCCA 344.

[19] The Tribunal has not spoken definitively on whether or to what extent the Tribunal, given its specialized function, owes deference to a first instance decision-maker on matters of penalty. One question that arises here is whether given the Tribunal's specialized legislative role, its application of a "reasonableness" test to a question of penalty might differ from that applied by a generalist court to a decision of a professional regulatory body: see for example: *Kulkarni v. Insurance Council of British Columbia* (Decision No. 2014-FIA-001(a)), May 29, 2014; *Parsons v. Real Estate Council of British Columbia*, (Decision No. 2015-RSA-002(d)), November 13, 2015. As this case does not involve an appeal from penalty, I leave that issue to another day.

[20] The Registrar submits that a standard of reasonableness should apply to all issues before the FST.

[21] The Appellant says that the standard of review in relation to grounds 1, 2, 3, 4(a) and (b) and 5 and substantially ground 6 is one of reasonableness. He submits that the standard of review in relations to grounds 4(c) and (d) and a portion of 6 as these relate to findings pertaining to a "fiduciary duty" and "conflicts of interest" is on a correctness basis. The Appellant's argument is that insofar as he argues that the Registrar considered issues (conflict of interest and fiduciary duty) falling outside the scope of the Act and her Notice of Hearing, the standard of review is correctness on the basis that she acted outside her authority. Similarly, insofar as to the Appellant argues that the Registrar was procedurally unfair because she failed to give proper notice to the Appellant that she might be making adverse findings on those matters, the test is also correctness.

[22] I substantially agree with the Appellant's position with regard to the standard of review. I will assess on a correctness standard the Appellant's argument that neither the Act nor the Notice of Hearing conferred authority for her findings on conflict of interest and breach of fiduciary duty. I will consider the alternative argument about procedural fairness using the standard as to whether the procedure was "fair" in all the circumstances. I will review all other findings at issue on this appeal, which are largely evidentiary in nature, on a reasonableness standard of review.

DISCUSSION AND ANALYSIS OF THE GROUNDS OF APPEAL

GROUND 1. The learned Registrar misinterpreted the evidence and the position of the Appellant at the hearing. In addition, the Registrar erred by misinterpreting evidence before her and thereby concluded that relevant evidence and facts were not in dispute when such evidence and facts were in dispute. The specific findings made by the Registrar based on misinterpretations alleged are:

1. **Where the parties differ on [sic];**
2. **Both parties agree that Mr. Hensel should be sanctioned;**
3. **"To summarize, the substantive facts supporting a finding of conduct prejudicial under the Act in this case are not in dispute…."**

[23] The Appellant submits that it was unreasonable for the Registrar to conclude that the parties had agreed that there had been a breach of section 8(1)(i) of the Act. He submits that he strenuously denied, throughout, the portion of the Notice of Hearing alleging that "he knew or ought to have known that Mr. MacKinnon would rely on [the Altered Alert] as though it was genuine". He emphasizes that his position throughout his defence at the hearing was that he sent the altered Alert to Mr. MacKinnon to warn him about Mr. W and Mr. G, that he did so as a prank and that, in view of his communication with Mr. MacKinnon the next day, "Mr. MacKinnon knew it was a prank from the outset". Further, the Appellant was not conducting business with the Appellant or anyone else when he did this; they were opposing parties in a foreclosure proceeding.

[24] The Appellant states that his position at the hearing was: (a) that the evidence overwhelmingly supported his position that this was meant as a prank between two private individuals, (b) that Mr. MacKinnon only filed his complaint with FICOM to forestall the foreclosure proceedings; (c) that Mr. MacKinnon, an experienced businessman, knew it was a prank. He submits:

> It was also the Appellant's position that since this action by him as specified was "not conducting business in a manner that is prejudicial to the public interest", i.e. was not in contravention of section 8(1)(i) of the *Mortgage Brokers Act*, the Registrar should only reprimand him for having altered the FICOM alert and sending it to Mr. MacKinnon as a prank."

[25] The Appellant argues that the Registrar misinterpreted the Appellant's position when she found that "the substantive facts supporting a finding of conduct prejudicial under the Act in this case are not in dispute" and thus approached her assessment of the evidence on the basis that she was only concerned with the appropriate penalty. Instead of first making an unbiased finding on whether the Act had been breached as alleged, when there was no such concession, the Registrar misinterpreted the Appellant's position and breached his right to a fair hearing. The Appellant submits that the Registrar's perception of an agreement between the parties that Mr. Hensel had violated the *Mortgage Broker's Act* rendered her assessment of the evidence biased and partial, to the detriment of the Appellant.

[26] The Appellant argues that the differences between the parties were not just over penalty, but over whether or not the behaviour constituted a breach of the Act. In his submission, these differences were ignored by the Registrar, affected the balance of her conclusions, and rendered the Decision unfair.

[27] The Appellant says that in order for there to be a breach of the *Mortgage Brokers Act*, there must be something more than the fact that Mr. Hensel altered a FICOM industry alert and sent it to Mr. MacKinnon. During the hearing, he advanced

evidence of the context in which the Altered Alert was sent to Mr. MacKinnon and the discourse between the parties that he says minimizes the intent and effect of that communication. From this he says that the Registrar cannot conclude that he breached the *Mortgage Brokers Act*.

[28] The Respondent submits that the Decision did not find that the Appellant admitted his actions were in contravention of section 8(1)(i) of the Act. The Respondent submits that "it was the substantive facts supporting the finding that were not in dispute, not the finding that the Appellant had conducted business in a manner that was prejudicial to the public interest."

[29] In the Decision, the Registrar noted the differences between the parties, as follows:

> Where the parties differ on:
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> - Mr. Hensel's intent in sending the altered Registrar Alert and specifically whether or not Mr. Hensel intended Mr. MacKinnon to rely on the Alert; and,
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> - whether Mr. MacKinnon did, in fact, rely on the alert and if so, whether he suffered any harm.
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> Both parties agree that Mr. Hensel should be sanctioned; they differ on the severity of penalty and rely on their differences in their arguments with respect to the points immediately above.

[30] In my view, based on the following statements of Appellant's counsel in closing, it was not unreasonable for the Registrar to have found that "both parties agree that Mr. Hensel should be sanctioned":

> "So if you are looking at simply altering the alert ... the general deterrence to doing this ... There's no suggestion that this has been done before, ever. Even in a prank situation. *But there has to be some sanction in my submission, for doing this. Acknowledgement that this shouldn't be done."* [emphasis added] (Proceedings p. 345)
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> and Proceedings at p. 355
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> "We're dealing with the altering of the alert.
>
> And we acknowledge absolutely that he shouldn't have done that. And we acknowledge absolutely that there should be some sanction as a result of that. No question about it, for the reasons I've indicated."
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> and Proceedings at p. 357
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> "In my submission I say what's appropriate in this case is a reprimand and a decision from Madam Registrar saying that this is the potential problems even when you commit a prank. Keep this in mind. That's why we don't do it.
>
> And with respect to an order of costs, I would suggest that of the $6,000 that it be reduced to $3,000, for the reasons I've indicated. And that combined with a reprimand is the appropriate penalty or sanction in this case."

[31] The Appellant now says that the Registrar erred in interpreting his statement that there has to be some "sanction". With respect, it was in my view reasonable

for the Registrar, based on the closing submissions quoted above, to have concluded that the Appellant acknowledged that his actions were deserving of sanction by the Registrar, - albeit a far lesser sanction than was being proposed by the Registrar's staff. Appellant's counsel stated on more than one occasion that there should be some sanction. While it is true that his suggestion of a "reprimand" is not specifically listed in section 8 of the Act, in my view a reprimand would necessarily accompany an order to cease such behavior which is enumerated in paragraph 8 and it is reasonable that the Registrar viewed the submissions in that light. It is also true that Appellant's counsel even proposed an amount of costs as "the appropriate penalty or sanction in this case". As any experienced decision-maker knows, no appellant proposes a sanction, or costs against his client, except in the alternative, when their primary position is that there has been no contravention. These submissions were not posed as alternative submissions.

[32] Based on how the case was argued, I do not find it either surprising or problematic that the Registrar did not devote a separate section in her reasons to the question "was there a contravention?" It makes sense, when the matter is considered in context, that the issues in dispute between the parties were addressed as part of the consideration of penalty.

[33] A review of the Decision makes clear that the Registrar was very much alive to where the parties agreed, and where the evidence was in dispute. There was no bias or preconception that the Appellant had agreed that he admitted that he "knew or ought to have known that Mr. McKinnon would rely on it as though it was genuine". It is apparent that the Registrar knew full well that the Appellant's intent in sending the Alert, and Mr. MacKinnon's reliance on it, were live and disputed issues. In my view, she dealt with them objectively and fairly, as is made clear in her discussion under the headings "Gravity of the contraventions" and "Intent".

[34] Thus, it is my view that the Registrar's statement that "the substantive facts supporting a finding of conduct prejudicial under the Act in this case are not in dispute and the issue at hand is ultimately one of penalty" is nothing more or less than a finding that based on the facts not in dispute, it was the Registrar's opinion the Appellant engaged in conduct prejudicial under the Act and that the Appellant's submission acknowledged this too.

[35] The Legislature has delegated to the Registrar the duty to form an opinion at first instance as to what behaviour constitutes conducting business in a manner that is otherwise prejudicial to the public interest, and to apply that opinion to matters before her. I find that it was reasonable for the Registrar to have formed the opinion the Appellant has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest

[36] Section 8(1)(i) of the *Mortgage Brokers Act* is an open-textured provision. Its text, including the references to "conducting business" and "prejudicial to the public interest", can be interpreted broadly or narrowly. In this case, it is evident that the Registrar was approaching the provision in a purposive and contextual way, consistent with the overarching protective purposes of the Act. It is in my view eminently reasonable for the Registrar to take the view that when a licensed mortgage broker sends a member of the public what purports to be an official (and intentionally altered) regulatory document, that person is, for the purposes of

section 8(1)(i), "conducting business" as he is acting with the authority, legitimacy and imprimatur of his office. This reflects that a mortgage broker has specialized knowledge and is licensed by the government to conduct business. As such the public is entitled to rely upon the proper behaviour of the mortgage broker in the public arena. This is particularly true when, as in this case, his position as a mortgage broker gives credibility to his actions.

[37] The Registrar gave careful consideration to the evidence and concluded as follows:

> Altering an official regulatory document, regardless of intent, shows a high level of contempt for the regulatory framework in place to protect the public and the profession and for the regulator itself. I consider it very serious misconduct that is clearly contrary to the public interest.
>
> …
>
> I consider the altering of an official regulatory document to be an extremely serious misconduct. It is conduct whose potential harm extends beyond the parties involved and beyond the two people whom Mr. Hensel held out had committed serious offences, to the reputation of the industry as a whole and the public's confidence in both the industry and the regulator.

[38] Her assessment is not unreasonable and I will not interfere with it.

[39] It is evident that in the opinion of the Registrar nothing more is required for her finding than that Mr. Hensel altered the Alert and sent it to Mr. MacKinnon and that Mr. Hensel intended the altered alert to influence Mr. MacKinnon's actions. I find nothing unreasonable in the opinion of the Registrar. The Registrar was not bound by the terms of the Notice of Hearing as if that Notice was a criminal information, or a document that somehow dictated the interpretation of the Act. The Registrar's concern for the industry and its regulator were well placed, as was the necessarily implicit finding that a person in the position of registered mortgage broker engaging in such conduct is, by virtue of this position as a registered mortgage broker, conducting business in a manner prejudicial to the public interest. Accordingly, the Appellant's challenge to the Registrar's finding of the constituent elements of a breach of the *Mortgage Broker's Act* by Mr. Hensel fails.

[40] In summary, and in reading the Decision and the proceedings as a whole, I am satisfied that the Registrar assessed the evidence based upon her opinion as to what constituted culpable behaviour.

GROUND 2: The learned Registrar erred by misinterpreting the position of the parties, by misinterpreting the evidence, and by failing to take into account relevant evidence and thereby erred in finding that the actions of the Appellant were prejudicial to the public interest.

GROUND 3: The learned Registrar erred in her interpretation of the Appellant's evidence which error caused her to make adverse findings against the Appellant as to (i) his credibility and (ii) intent.

[41] The Appellant argued these grounds together, and continued the position that the "Registrar, having mistakenly believed that the parties herein had agreed

that the actions of the Appellant had violated the *Mortgage Broker's Act*, had approached her interpretation of the evidence on the basis that the Appellant had conducted himself in a manner that was prejudicial to the public interest. In that regard, of course, she was wrong. Such an approach tainted her interpretation of the evidence so that she misinterpreted much of the evidence and failed to take into account relevant evidence."

[42] To the extent that these grounds are simply a reiteration of Ground 1 above; they fail for the same reasons.

[43] With regard to the additional submissions regarding the Registrar's assessment of the evidence, it is, as noted above, trite law that the FST should give the Registrar deference in findings of fact, given that she heard the witnesses, assessed their credibility directly and made findings of reliability regarding their testimony.

[44] The Appellant challenges the Registrar's finding that Mr. MacKinnon was a person with whom the Appellant had business interests because on April 11, 2014, Mr. Hensel was only the holder of a second mortgage on Mr. MacKinnon's property, which the Appellant asserts is not a business interest.

[45] The evidence is clear that the history between these individuals is one where, over the years, they had numerous business dealings. The Respondent has made reference to many of the business interests they had over the years. I will not repeat them all here, but briefly, Mr. Hensel acted as a mortgage broker for Mr. MacKinnon in 2011, arranging three mortgages for Mr. MacKinnon. Mr. Hensel assisted Mr. MacKinnon with the development of property in Pemberton, British Columbia. Mr. Hensel arranged financing to get Mr. MacKinnon out of foreclosure proceedings. I agree with the Respondent's submission that "It was not only reasonable to state that the parties had various business interests, it was simply correct."

[46] The Appellant submits that the Registrar did not believe his assertion that his production and delivery of the Altered Alert was meant only to be a prank. In the Appellant's submission, "it was intended to be an obvious "paste-up job" sent to emphasize the Appellant's prior advice to be careful or cautious when dealing with Mr. W and Mr. G".

[47] The Registrar heard evidence that this Altered Alert was sent to Mr. MacKinnon at a time when Mr. MacKinnon was under foreclosure proceedings on a piece of property over which Mr. Hensel had one of three mortgages. Mr. Hensel was appointed by the Court as the real estate agent to sell this property. Mr. MacKinnon had approached Mr. W and Mr. G to provide him with a loan to redeem the mortgages. Mr. MacKinnon introduced them to Mr. Hensel at a court appearance concerning the foreclosure proceedings.

[48] In these circumstances, the Registrar rejected the evidence and submissions of the Appellant that it was "just a prank". It is a reasonable conclusion supported by the evidence. Furthermore, by the Appellant's admission that he had sent the Altered Alert "to emphasize the Appellant's prior advice to be careful or cautious when dealing with Mr. W and Mr. G", it was reasonable for the Registrar to conclude

that Mr. Hensel sent the Altered Alert with the intention that Mr. MacKinnon should rely upon it.

[49] In summary, I find that the Registrar was not mistaken in her view of which facts the parties agreed to, that her findings of fact were not influenced thereby, and that her findings were reasonable and supported by the evidence as a whole. Accordingly, these grounds of appeal fail.

GROUND 4: The learned Registrar erred in making findings against the Appellant that the Appellant

(a) by his actions disregarded the regulator or the regulations in place governing his industry;

(b) was acting as an advisor to Mr. MacKinnon;

(c) was in a fiduciary relationship with Mr. MacKinnon and breached that relationship; and

(d) was in a conflict of interest in relation to Mr. MacKinnon and the foreclosure proceedings.

The Registrar was in error in considering these matters and making findings adverse to the Appellant since none of these allegations were alleged against the Appellant in the Notice of Hearing or in any other way. Consequently the Appellant was not given notice that he would have to deal with the aforesaid allegations before the Registrar. Consequently the hearing was conducted in violation of the principles of natural justice which require that a person against whom the allegations are made must have prior notice of those allegations. The hearing, therefore was unfair. The Registrar was without jurisdiction to make such findings against the Appellant.

[50] In his submissions, the Appellant disputes the Registrar's jurisdiction to make the listed findings primarily because they were not specified in the Notice of Hearing. He submits that he was not given notice that he would be in jeopardy of such a finding.

[51] The Appellant also argues, more broadly, that the Registrar's jurisdiction under the *Mortgage Brokers Act* did not allow her to "make findings of fact in relation to whether the Appellant was in a conflict of interest within the foreclosure proceedings because of his activities as a real estate agent".

[52] With regard to the latter issue, it is my view that the Registrar's jurisdiction under the *Mortgage Brokers Act* was sufficiently broad as to allow her to consider the conflict of interest issues as factors in establishing an appropriate penalty based on her findings of the Appellant's misconduct in sending the Altered Alert, which finding did not in any way depend on a finding of conflict of interest.

[53] Over and above this, it is my view that the jurisdiction submission advanced by counsel for the Appellant conflates the allegation against his client with the evidence that supported the appropriate penalty. The findings in question were derived from evidence placed before the Registrar which supported the Registrar's finding that Mr. Hensel intended that Mr. MacKinnon should rely upon the Altered

Alert. For instance, the Registrar did not issue the suspension because Mr. Hensel breached a fiduciary duty to Mr. MacKinnon. However, the proof of the existence of such a duty was evidence of the relationship of trust that Mr. MacKinnon had with Mr. Hensel. This applies to all of the disputed findings. Such findings were instructive in the assessment of the penalty by the Registrar.

[54] In my view, this is not a jurisdictional issue but an evidentiary issue. Care should be taken to distinguish the issue to be decided and the findings of fact necessary to determine such issues. In this regard, the Registrar was entitled to make such findings of fact from the evidence presented to her, and to draw such conclusions from them to determine matters within her jurisdiction. In my view, the Registrar had jurisdiction to consider these matters and was reasonable in doing so.

[55] The Appellant submits that "The principles of natural justice prohibit the Registrar from making such a finding adverse to the Appellant when there had been no prior notice of such allegation. The hearing, therefore, was unfair. The Registrar was without jurisdiction to make such findings against the Appellant."

[56] The Appellant cites *Re Nath Investment Group Ltd*. [2016] CarswellBC 566 [2016] B.C.W.L.D. 2940 in support of his submission. The relevant part appears to be paragraph 18 which states as follows:

> Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. The record confirms that Mr. Nath received, by registered mail, the results of the Director's preliminary assessment of the complaint. The record also indicates that Mr. Nath confirmed receipt of that letter in a subsequent telephone call to the delegate. Therefore, I find that Nath was aware of the allegations, as well as his potential liability for the wages owed to the complainants and had every opportunity to respond.

[57] In general, proper notification includes the following:

(a) whom the parties are;

(b) what statutory authority is publishing, delivering, or serving notification;

(c) what statutory provisions are being relied on (note that in the course of an administrative proceeding, issues may expand and further sections or provisions may be referred to as proceedings unfold);

(d) what conduct, or failure to act, is the subject of the allegations;

(e) what the time limits are for responses and production of evidence;

(f) how the hearing will proceed; and

(g) the possible results of the administrative process.

(BC Administrative Law Practice Manual, May 2012 CLEBC Section 5.9)

[58] The Respondent has provided a useful quote from Sara Blake, who describes the notification requirements of professional discipline matters as follows:

> In professional discipline, factual particulars should be described in the notice of hearing or supplementary document. Both the client and the

> specific misconduct should be identified. However, a notice should not read like an Information in a criminal proceeding. How detailed it should be depends on the complexity and seriousness of the case. A failure to provide details in the notice of hearing can be cured by full disclosure of the evidence to be filed at the hearing. The tribunal is not restricted to considering only the facts alleged in the notice of hearing, but should make its decision in light of all of the facts adduced at the hearing. The notice is merely an outline of the alleged facts.
>
> [emphasis added]

(Administrative Law in Canada, 5th ed, Sara Blake, Lexis Nexus Canada Inc. 2011, Pages 40-41)

[59] I agree with the Respondent that the Appellant received adequate notice of the allegations against him and that the Appellant fully understood the case against him. The Notice of Hearing set out the allegations against Mr. Hensel and included the context against which the Altered Alert was produced and sent. It gave notice that the relationship between Mr. Hensel and Mr. MacKinnon was an important factor in the allegations against Mr. Hensel. The Notice of Hearing stated in part:

> b. you created another version of the FICOM Industry Alert (the "Altered Industry Alert") so that the names of the individuals who were the subject of the FICOM Industry Alert were changed to the names of the potential lenders from whom Mr. Joseph McKinnon was seeking financing. Mr. McKinnon was seeking financing from those lenders to discharge the mortgage you had registered against his property, which was subject to a foreclosure proceeding in which you were acting as the listing agent;

[60] The Agreed Statement of Facts contains an admission that the Appellant was continuing to provide information to Mr. MacKinnon and had advised Mr. MacKinnon all while Mr. MacKinnon's property was being foreclosed.

[61] It is clear that the Appellant had notice of the case against him, which included an assessment of the nature of the relationship he had with Mr. MacKinnon. The conclusions of the Registrar arise in this context, and are reasonable given the evidence presented to her.

[62] The Appellant's objection to the finding of the Registrar that Mr. Hensel was in a conflict of interest (Ground 4(d)) rests on her refusal to allow the Appellant to admit into evidence two pieces of documentary evidence which were attached as Appendix "A" and "B" to the Appellant's written submission. Appendix "A" contained the Industry Alert issued by the Registrar as received by Mr. Hensel and the Altered Alert that Mr. Hensel sent to Mr. MacKinnon. Appendix B is a document prepared by the Appellant which contains details of the foreclosure proceedings in the Supreme Court and details of Mr. MacKinnon's dealings with a Mr. Wilson of Dominion Grand Mortgage Company. The Appellant submits that this evidence would have shown that he was not in a conflict of interest vis a vis Mr. MacKinnon.

[63] The Respondent submits that these documents were never before her because they were never tendered in evidence by the Appellant. It appears from the relevant portion of the Transcript of Proceedings (page 226, lines 18 and 19) that, after an objection from counsel, the Appellant abandoned any attempt to put

these documents into evidence. Accordingly, the Registrar never made a ruling on admissibility.

[64] The Respondent submits that, although the Appellant had not made an application to admit new evidence in this appeal, under section 242.2(8)(b) of the *Financial Institutions Act*, I may permit the introduction of new evidence if I am satisfied that the new evidence is substantial and material to the decision and did not exist at the time the original decision was made, or did exist but was not discovered.

[65] The documents in Appendix "A" appear to be versions of the Industry Alert and the Altered Alert which are attached as Appendix "B" and "C" to the Agreed Statement of Facts. It was attempted to be put to Mr. MacKinnon in cross-examination before its admissibility was objected to by counsel. The Appellant submits that the documents are relevant to show that Mr. Hensel was not in a position of conflict of interest with Mr. MacKinnon. He does not explain the relevance of those documents for that purpose, and I cannot discern it.

[66] The document in Appendix "B" appears to be a summary of evidence. There is no indication who authored the documents or their content. The Appellant submits that the Appellant was free to call evidence with respect to the circumstances regarding the Appellant's role during the foreclosure. In fact, many of the circumstances surrounding the foreclosure were set out in the Agreed Statement of Facts. In addition, the Appellant had opportunity to enter all of the evidence contained in Appendix "B" through direct evidence, which he did. He also had full opportunity to cross-examine Mr. MacKinnon as to the facts alleged in Appendix "B" without entering the document into evidence.

[67] In my view, these documents do not meet the level of materiality and substance necessary for them to be admitted into evidence now. Furthermore, I find that the fact that these documents were not admitted did not render the decision of the Registrar unfair.

[68] In summary, I find that the Registrar was within her jurisdiction to make the findings she did, that the Appellant had proper notice of all matters before the Registrar, and that such findings were supported by the evidence and were not unreasonable. I find that the documents sought to be entered by the Appellant are not material to the outcome.

GROUND 5: The learned Registrar erred in making the following findings when there was no evidence upon which to base those findings. These findings were therefore made as a result of speculation and accordingly the learned Registrar was wrong to make such findings:

(a) "…given that this was the third time Mr. Hensel had initiated a foreclosure proceeding against Mr. MacKinnon, it is reasonable to assume that a sale of the property was a preferable outcome to Mr. MacKinnon securing financing."

(b) "…there was no question that the most ideal outcome for Mr. Hensel would have been the sale of Mr. MacKinnon's property for a price high enough to pay out all mortgages and a commission."

[69] The Appellant submits that there was no evidence upon which the Registrar could draw these conclusions. Mr. Hensel gave evidence that his primary objective was to have his mortgage paid out, and he denied that he preferred that the property be sold.

[70] I agree with the Respondent that she simply rejected the Appellant's evidence in that regard, as she is entitled to do. In my view, these are not findings but a description of scenarios which appeared more likely to her to be true than the evidence proffered by Mr. Hensel. The conclusion that the Respondent came to was that, despite his denial, Mr. Hensel wanted the property sold.

[71] I also agree with the Respondent that there was significant evidence upon which to base this finding. Her finding that Mr. Hensel preferred to have the property sold is not unreasonable.

[72] Accordingly, this ground of appeal fails.

GROUND 6: The learned Registrar erred in misinterpreting the Appellant's evidence and failed to take into account other relevant evidence as to his intent and his actions. In addition, the learned Registrar erred in making findings not based on the evidence and findings which were beyond her jurisdiction to make. Therefore, the learned Registrar erred in erroneously finding that the Appellant (a) lacked remorse for his actions and (b) failed to convince the Registrar that he would change his behaviour in the future.

[73] This ground of appeal is similar to the other grounds of appeal in that it attempts to dispute the findings of the Registrar and her interpretation of the evidence before her. As I have said before in these reasons, the Registrar has the duty to hear the evidence and to decide which evidence to accept or reject. Unless the findings of fact are unreasonable or unsupported by the evidence, I will defer to the judgment of the Registrar.

[74] These disputed findings were made by the Registrar in consideration of the circumstances she considered in assessing penalty. The Appellant has not appealed the length of the suspension. These findings in regard to penalty do not bear upon the Registrar's determination that the Appellant breached the provisions of the *Mortgage Brokers Act*, and any discussion may therefore be moot.

[75] In any event, I find that the Registrar considered all of the relevant evidence submitted at the hearing. She considered the Appellant's evidence that he had tried to contact Mr. MacKinnon to ensure that he knew that the Altered Alert was a prank. She chose not to believe him, and found his efforts to correct the situation "entirely lacking."

[76] I find that the Registrar was within her jurisdiction to find that the Appellant's lack of remorse was a factor in determining penalty. She was not satisfied with the efforts of the Appellant to correct his lapse in judgment, and from his testimony was not satisfied that he would change his behaviour in the future.

[77] In my view, there was ample evidence upon which the Registrar could base her decision, and I find that the decision was reasonable. Accordingly, this ground of appeal fails.

DECISION

[78] In making this decision, I have carefully considered all of the evidence before me and the submissions and arguments made by each of the parties, whether or not they have been specifically referenced in these reasons.

[79] Following on my conclusions above that each ground of appeal advanced by the Appellant fails, I dismiss the appeal in its entirety. The Decision is affirmed.

[80] The Respondent has sought costs against the Appellant pursuant to section 47 of the *Administrative Tribunals Act* as applicable to the FST pursuant to section 242.1(7) of the *Financial Institutions Act*. Either party shall be entitled to make submissions regarding costs by November 9, 2016, to which the other party will have a right of reply until November 23, 2016. In the event both parties make an initial submission, a right of reply will exist for both parties to the extent of dealing with matters not already addressed.

"Theodore F. Strocel"

Theodore F. Strocel, Q.C.
Chair
Financial Services Tribunal

October 19, 2016