BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2017-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:	Soheil Arman Kia (aka Soheil Armon Kia)	**APPELLANT**
AND:	Registrar of Mortgage Brokers	**RESPONDENT**
BEFORE:	Theodore F Strocel, QC, Chair	
DATE:	Conducted by way of written submissions concluding on March 20, 2017	
APPEARING:	For the Appellant: Owais Ahmed, Legal Counsel For the Respondent: Joni Worton, Legal Counsel	

OVERVIEW

[1] The Appellant, Soheil Arman Kia aka Soheil Armon Kia (the "Appellant" or "Mr. Kia") appeals to the Financial Services Tribunal ("FST") from a decision the ("Decision") of the Appointee of the Registrar of Mortgage Brokers, Brian Evans (the "Registrar's Designate" or the "Respondent") given on February 6, 2017. The Registrar opposes the Appeal.

[2] This appeal arises from an interlocutory order of the Registrar's Designate rejecting the application of the Appellant to exclude evidence obtained by the Registrar during the course of an investigation of the activities of the Appellant by the Registrar. The order was made during a disciplinary proceeding before the Respondent concerning the Appellant. The hearing has encompassed 4 days (November 28 and 29, 2016, December 1, 2016 and February 9, 2017) and is scheduled to continue on April 19 and 20, 2017 (the "Proceedings"). The impugned evidence consists of documents which have now been entered as exhibits in the Proceedings.

[3] After the Registrar had entered all her evidence, the Appellant made an application to exclude some or all of that evidence. On February 6, 2017, the Registrar's Designate rejected that application and on February 16, 2017 provided reasons.

[4] The Appellant seeks exclusion of the evidence on the basis that the evidence was obtained by the Registrar during her search of the premises of the Appellant that was not in compliance with Subsection 6(7) of the *Mortgage Brokers Act* and

thereby ultra vires the Registrar and a nullity or alternatively that the actions of the Registrar were unreasonable and contravened Section 8 of the *Charter of Rights and Freedoms*, rendering the evidence inadmissible under Subsection 24(2) of the Charter.

[5] The Appellant has filed this Appeal under Subsection 9(1) of the *Mortgage Broker's Act*. The Respondent opposes the appeal in its entirety and submits that the Decision should be affirmed.

[6] Furthermore, in a cross-application, the Registrar says that this appeal should be summarily dismissed under Section 31 of the *Administrative Tribunals Act.* The Respondent contends that this Tribunal has no jurisdiction to hear this appeal as the Decision is not a decision which is appealable pursuant to Subsection 9(1) of the *Mortgage Broker's Act*, the application is premature, and appeals of this nature result in an abuse of process.

SUMMARY APPLICATION OF THE RESPONDENT

[7] The Respondent submits that the Tribunal does not have the jurisdiction to interfere with the interim evidentiary finding of the Registrar's Designate in the middle of the Proceedings. She says:

> The effect of applications of this nature results in an abuse of process that not only grinds proceedings to a halt in this particular case, but may have the effect of doing the same in future hearings. The Respondent submits that this is an impossible result which does not reflect the intent of the legislature.

[8] Citing *Ackerman v Ontario (Provincial Police)* [2010] O.J. No. 738, she submits the following:

> Generally speaking, courts will be reluctant to intervene in administrative proceedings. The principle that a court will decline to judicially review a tribunal decision that is interlocutory or interim in nature and does not determine the rights of the parties is a principle rooted in public policy, respect for parliamentary intention, and deference to administrative tribunals.

[9] The Respondent argues that the principle also applies to appeals that come before appellate tribunals or other appellate bodies (such as this Tribunal) from originating tribunals. She cites *Roomsma v Ford Motor Co. of Canada Ltd.* 66 O.R. (2d) 18, a decision of the Ontario Divisional Court as persuasive, if not binding authority.

[10] Mr. Justice Frankel of our Court of Appeal, in *Get Acceptance Corporation v British Columbia (Registrar of Mortgages)* made clear that the question whether an appeal lies to the FST is a question of law, and not one of discretion for the tribunal:

> I am unable to accept the proposition that the determination of whether an appeal lies under s. 9(1) of the *Mortgage Brokers Act* can involve discretion on the part of the Tribunal. Section 9(1) provides a right of appeal. It does not vest in the Tribunal any discretion with respect to whether it will hear an appeal, as would be the case if leave to appeal were required. If the subject matter of the appeal is a "direction, decision, or order of the registrar under [the] Act", then the Tribunal must hear it.

[11] Of course, just as the right to file an action is subject to an application for summary dismissal, so too the right of appeal must be read in light of the summary dismissal power in s. 31(1) of the *Administrative Tribunals Act*("*ATA*"),which applies to this Tribunal pursuant to Subsection 242.1(7) of the *Financial Institutions Act.* It reads as follows:

> 31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> (a) the application is not within the jurisdiction of the tribunal;
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> (b) the application was not filed within the applicable time limit;
>
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the application was made in bad faith or filed for an improper purpose or motive;
>
> (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
>
> (f) there is no reasonable prospect the application will succeed;
>
> (g) the substance of the application has been appropriately dealt with in another proceeding.
>
> (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.
>
> (3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

[12] Pursuant to s. 31 of the *ATA*, this Tribunal may consider this cross-application of the Respondent.

[13] The Appellant opposes this cross-application. Citing *Get Acceptance*, he says that the Court did not find that interlocutory decisions of the Registrar could not be appealed from. He says that the Court found that "any directions, decisions, or

orders" made by the Registrar under Part 1 of the Act or in other words made in the exercise of an adjudicative or coercive power, fall within the scope of section 9(1).

[14] The Appellant cites *Cooper v British Columbia (Registrar of Mortgage Brokers)* and emphasizes "The Registrar's important decisions … if, when, and how to investigate the affairs of a registered mortgage broker." In paragraph 6 of his Reply Submissions, the Appellant states as follows:

> The matter at issue in this appeal is the Registrar's important decision on how she decided to "investigate the affairs" of the Appellant.

[15] The Appellant says that the Registrar's decision to conduct the search (during which the impugned evidence was obtained) is similar to the issuance of a summons or freeze order, which this Tribunal held was appealable in *Cook v Registrar of Mortgage Brokers* FST 2011-MBA-001(a). The only substantive difference between this case and *Cook* is that the Appellant is challenging the validity of the search during a hearing and not prior to it.

[16] The reasons given by the Appellant for waiting until the hearing to challenge the Search are that "Staff refused to disclose the clearly relevant information, and therefore the appellant was not in a position to challenge the validity of the search prior to the hearing." He says that this failure of the Staff "should not now be visited on him by denying him the ability to effectively challenge the search and his right to have the appeal heard."

[17] The Appellant says that this appeal involves much more than an "evidentiary matter":

> If the appellant is successful on the appeal and the fruits of the search quashed, the vast majority of the Staff's evidence including all of the impugned Filogix mortgage applications will be excluded. Staff will not be able to make out its case, and the proceedings will effectively be at an end….
>
> In stark contrast, if the Tribunal declines to hear this appeal the appellant's ability to challenge the validity of the Search will be frustrated. His appeal will in practical terms be moot. On the resumption of the hearing on April 19, 2017 the appellant will be required to open his case, and his current intention is to testify in his defence. In doing so, it is anticipated that the appellant will provide detailed evidence pertaining to the Filogix mortgage applications that were obtained from the Search. The appellant's own evidence could then be used against him, even if the Tribunal later finds that the Search was unlawful and that any evidence flowing from it should have been excluded.

[18] The Appellant has submitted that in *Get Acceptance,* the Court did not distinguish between interlocutory and final orders and in *Cook v Registrar of Mortgage Brokers*, this Tribunal decided that the issuance of a summons by the Registrar could be appealed from. From this, the Appellant submits that, based upon the same logic, "the Registrar or her designate's decision to conduct the Search is similar to the issuance of a summons or freeze order."

[19] Section 9(1) of the *Mortgage Brokers Act* reads as follows:

> **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.

[20] The ruling sought to be appealed is not akin to an order issuing a summons which requires a person to attend on pain of a finding of contempt: *Cook*, para. 29. This is an appeal of an interim decision to admit evidence in the Proceedings.

[21] I agree with the Respondent that the Tribunal does not have jurisdiction to hear this appeal.

[22] The Registrar's designate has allowed evidence to be admitted to the hearing. That evidence has not been disclosed to this Tribunal. In my view, that is a preliminary ruling, made along the way in a proceeding that has the potential to adversely affect the appellant's legal rights or interests, but which ruling by itself does not have such effect. Indeed, the Registrar's Designate has only admitted the evidence. He has not yet made any finding of fact. Nor has he had the benefit of contrary evidence or explanations from the Appellant in mitigation of that evidence. At the end of the day, the Registrar's Designate could find the Appellant not culpable in any way, despite admitting the impugned evidence. In my view, the evidentiary ruling made here does not constitute a "a direction, decision or order of the registrar" that is subject to appeal. To borrow a phrase from *Roosma v. Ford*, *supra*, it cannot be the case that a decision, however trifling, could be appealed at any stage of the hearing by any party. Successive appeals could be launched without limit. Each appeal would bring the inquiry to a stop. While certain kinds of pre-hearing decisions are subject to appeal because of their legal effect (for example, as discussed in *Cook,* a freeze trading order or a summons, which can be a final order and the failure to comply with which can result in a finding of contempt), the admission of evidence in the hearing in this case is not the type of decision that the legislature intended should be subject to appeal.

[24] Therefore, I find that this Appeal should be dismissed under subsection 31(1)(a) of the *Administrative Tribunals Act*.

[25] If I am wrong in this, I would dismiss this Appeal under subsection 31(1)(c) of the *Administrative Tribunals Act*, on the basis that filing this appeal of from an interim evidentiary ruling by the presiding Registrar's Designate in the middle of a hearing is an abuse of the Tribunal's process.

[26] Again, I am not going so far as to state that no interim orders appeals will ever be entertained: see Cook, para. 33. However, in my view, the general principle should be that appeals from interim evidentiary rulings of the Registrar, made during the course of a hearing and before the Registrar has given a final decision arising out of that hearing, are an abuse of the Tribunal's process. That abuse arises from the fragmentation of the administrative process and piecemeal appeals, the costs and delays associated with such appeals, and the inefficiency this

creates for the administration of the regulatory system. Such issues can properly be raised on appeal if and when a final adverse order is made against the registrant. Accordingly, in my view, this Appeal results in an abuse of process and should be dismissed.

[27] In my view, the Appellant's complaint that waiting until the end of the hearing will prejudice him is unfounded. On a proper appeal of any order affecting the Appellant arising out of the Proceedings, an adequate remedy, including a proper assessment of the consequence of any alleged error in the circumstances of the case, would be available.

[28] For all of these reasons, the Respondent's application to summarily dismiss the appeal under s. 31 of the *ATA* is granted.

[29] The Respondent has sought and is entitled to 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 May 15, 2017, to which the other party will have a right of reply until June 15, 2017. 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

April 13, 2017