BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2017-MBA-002(b)

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

BETWEEN:	Soheil Arman Kia (aka Soheil Armon Kia)	**APPELLANT**
AND:	Registrar of Mortgage Brokers	**RESPONDENT**
BEFORE:	A Panel of the Financial Services Tribunal Michael Tourigny, Panel Chair	
DATE:	Conducted by way of written submissions concluding on September 13, 2018	
APPEARING:	For the Appellant: Owais Ahmed, Legal Counsel For the Respondent: Andrea Glen, Legal Counsel	

OVERVIEW

[1] Mr. Soheil Arman Kia, aka Soheil Armon Kia (the "Appellant" or "Mr. Kia"), appeals to the Financial Services Tribunal (the "Tribunal") under section 9 of the *Mortgage Brokers Act,* RSBC 1996, c 313 (the "MBA") from two decisions made by the Designate (the "Designate") of the Registrar of Mortgage Brokers (the "Respondent" or "Registrar"). The first decision, originally released October 3, 2017, and amended by corrigendum dated December 13, 2017 (the "Merits Decision"), found that Mr. Kia conducted his business in a manner that was prejudicial to the public interest. The second decision, dated December 14, 2017, involved the resultant assessment of penalty and costs (the "Penalty Decision").

[2] Embedded within this appeal is an appeal from an interlocutory decision (the "Search Decision") of the Designate denying Mr. Kia's application for the exclusion of certain evidence obtained through a search of the offices of YesPros Mortgages Inc. ("YesPros").

[3] Section 242.2(11) of the *Financial Institutions Act,* RSBC 1996, c 141 (the "FIA") applies to this appeal, and provides that the Tribunal may confirm, reverse

or vary a decision or send the matter back for reconsideration, with or without directions.

[4] The Appellant asks that the Tribunal reverse or vary, or alternatively, send back for reconsideration with directions, each of the Merits, Penalty and Search Decisions. The Appellant further seeks an award of costs.

[5] The Respondent opposes the appeal and requests that it be dismissed with costs. In the alternative, if the appeal is not denied, the Respondent seeks that the matter be sent back for reconsideration with directions.

[6] For the reasons that follow, I find that Mr. Kia's Appeal should be dismissed in its entirety.

BACKGROUND

[7] The MBA establishes a regulatory scheme for the arranging of mortgages in British Columbia by requiring mortgage brokers and submortgage brokers to be registered with the Respondent, be suitable persons, and to meet the requirements of the MBA and the *Mortgage Brokers Act Regulations,* BC Reg. 100/73 (the "Regulations"), including conduct and disclosure requirements.

[8] Mr. Kia has been registered under the MBA as a submortgage broker since January 21, 1998. He co-founded YesPros in 2005, and YesPros has been registered as a mortgage broker under the MBA since July 07, 2005. Mr. Kia is a director of Yespros and has acted as its "designated individual" over the following two periods of time: June 07, 2005 to April 11, 2012; and April 28, 2014 to the present. A designated individual oversees the operation of a mortgage broker to ensure that it complies with the MBA and Regulations.

[9] On February 18, 2013 staff of the Respondent conducted a search of the offices of YesPros. Following an examination of mortgage files of YesPros, staff identified a number of irregularities in relation to files handled by Mr. Kia between 2010 and 2012. As a result of this search, and upon further investigation, the Respondent decided to publish a Notice of Hearing which contained the allegation that Mr. Kia had conducted his business in a manner that was prejudicial to the public interest.

[10] The matter came on for hearing before the Designate on November 28, 29 and December 1, 2016, during which time staff called its witnesses and entered its documentary evidence, a large portion of which was acquired through the search. Staff called four witnesses including Mr. C (Staff Investigator), Mr. E of North Shore Credit Union ("NSCU"), Ms. M of Paradigm Quest ("Paradigm") and Merix Financial ("Merix") and Mr. G of Merix.

[11] Following completion of the entry of the evidence against Mr. Kia, Mr. Kia brought an application for the exclusion of evidence obtained by way of the search. Written submissions were exchanged, and on February 6, 2017, the Designate gave an oral decision denying Mr. Kia's application. Written reasons (the Search Decision) were issued February 16, 2017. In the Search Decision the Designate found that the search complied with section 6(7) of the MBA and was

not contrary to section 8 of the *Canadian Charter of Rights and Freedoms*[1] (the "Charter").

[12] Mr. Kia appealed the Search Decision to this Tribunal. On April 13, 2017 this Tribunal dismissed Mr. Kia's appeal from the Search Decision as premature on jurisdictional grounds under section 31(1)(a) or, alternatively, as an abuse of process under section 31(1)(c) of the *Administrative Tribunals Act*, SBC 2004, c 45 (Decision No. 2017-MBA-001 (a)).

[13] The hearing before the Designate resumed on August 21, 22, and 24, 2017, during which time counsel for the Appellant called Mr. B, formerly with Scotiabank, to give evidence in addition to Mr. Kia. Submissions on the merits from both parties were completed on August 28, 2017. The Merits Decision was released October 3, 2017[2].

[14] In the Merits Decision the Designate found that in relation to five separate borrowers' mortgage application files handled by Mr. Kia between 2010 and 2012, there were a total of twelve instances wherein Mr. Kia had conducted his business in a manner that was prejudicial to the public interest. The Designate held that on multiple occasions, Mr. Kia knowingly failed to fully disclose borrowers' current or prospective financing or property ownership, to adequately verify or accurately disclose income particulars, and to accurately disclose occupancy status.

[15] In the Penalty Decision, the Designate ordered that Mr. Kia be suspended for two years, that he not be a designated individual for seven years, and that he pay costs of the investigation and hearing.

[16] Mr. Kia filed his Notice of Appeal to this Tribunal on December 20, 2017. The Notice of Appeal advanced numerous grounds of appeal including some grounds that have not been pursued by the Appellant in his written submissions. I will treat grounds of appeal that were set out in the Notice of Appeal but have not been referred to by the Appellant in his written submissions as having been abandoned.

ISSUES

[17] For the purpose of articulating this decision, I have adopted the grounds of appeal from the Appellant's written submissions; modified as appropriate from the Notice of Appeal, written submissions of the Respondent, and the evidence.

a. Search Decision

Did the Designate err in finding that the search was lawful and the evidence obtained from the search admissible? In particular:

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[1] *Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[2] As discussed above, the Merits Decision was subsequently amended by corrigendum dated December 13, 2017.

i. Did the Designate err in his interpretation of the term "inquiry" as used in section 6(7) of the MBA?

ii. In executing the search was the Registrar conducting an "inquiry"?

iii. Was the search "necessary" as contemplated by section 6(7) of the MBA?

iv. Did the Designate err in finding that the search was not contrary to section 8 of the *Charter*?

b. Merits Decision

Did the Designate err in finding that the Appellant conducted his business in a manner prejudicial to the public interest contrary to section 8(1)(i) of the MBA? In particular:

i. Was the Designate's assessment of the Appellant's credibility based on a misapprehension of the evidence and an adverse inference that was wrong in law?

ii. Was the Designate's assessment of Mr. B's credibility based on a misapprehension of the evidence?

iii. Did the Designate misapprehend the Information Bulletin and thereby err in deciding that the Appellant had a duty to verify the "true income" of his clients?

iv. Did the Designate breach the Appellant's entitlement to procedural fairness or otherwise err by admitting and relying on evidence on industry standards from Mr. E and Ms. B, and on the Registrar's standards for mortgage brokers and submortgage brokers from Mr. C?

v. In finding that the Appellant breached section 8(1)(i) of the MBA, did the Designate commit an error in determining that the Appellant had a duty to disclose in writing: (i) whether a concurrent mortgage application had been submitted by the borrower; and (ii) to describe the borrower's prospective use of the property rather than its current use?

c. Penalty Decision

i. Did the Designate err and act beyond its jurisdiction by ordering that the Appellant pay investigative and hearing costs under section 6(9) of the MBA?

ii. Was the penalty ordered by the Designate overly harsh and unreasonable in all of the circumstances?

DISCUSSION AND ANALYSIS

Standard of Review

[18] In *Hensel v Registrar of Mortgage Brokers,* Decision No. 2016-MBA-001(a), October 19, 2016, ("*Hensel*") this Tribunal considered the standard of review that

applies to decisions of first instance decision-makers such as the Designate on questions of fact, law and discretion. The Tribunal Chair held (at paras 17-18):

> [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 *Nguyen 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…

[19] The Respondent submits that the appropriate standard of review for procedural fairness is that of fairness, as expressed by the Tribunal in *Lin v Real Estate Council of British Columbia,* Decision No. 2016-RSA-002(d) ("*Lin*") (at paras 24-27):

> [24] The use of the fairness approach in *Seaspan* to an issue of procedural fairness was adopted by this tribunal in *Kadioglu v. Real Estate Council of British Columbia*, FST 2015-RSA-003(b). It was held there that the fairness test was appropriately applied by this tribunal in deciding whether the proceedings below were fair, though from the unique perspective of specialized knowledge of the industry factors falling within that tribunal's responsibility.
>
> [25] I note as well that in *Hensel v. Registrar of Mortgage Brokers*, FST 2016-MBA-001(a) this tribunal also assessed a procedural fairness submission on the basis of whether the procedure below had been fair in all of the circumstances.
>
> [26] I am not bound either by the Court decisions I have just referenced or even by the foregoing decisions of this tribunal, though as to the latter it is certainly desirable to strive for tribunal consistency wherever it can rightly be found.
>
> [27] I have indeed decided to consider the procedural fairness submissions made by the Appellant on the basis of whether what took place in each of the investigative and adjudicative processes below was fair, in all of the circumstances. That will need to be assessed in light of both the evidence and the legal principles applying in those spheres.

[20] With the exception of the standard of review applicable to penalty decisions, the parties to this appeal both generally agree with the summary of the applicable standard of review set out by the Tribunal in *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate*, Decision No. 2015-RSA-003(b) ("*Kadioglu*") (at para 32):

> [32] In summary, I will apply the following standards of review:
>
> (a) correctness for questions of law, including the scope of s. 37(1) of the Act and the allegation of a breach of Charter rights;
> (b) reasonableness for questions of fact, discretion and penalty;
> (c) fairness, for procedural fairness questions.

[21] Except with respect to the issue of assessment of penalty, I agree with and adopt the standard of review analyses quoted above from *Hensel, Lin* and *Kadioglu* for purposes of this appeal.

[22] The Respondent's written submissions assert that penalty decisions are owed the same level of deference as findings of fact. In support of this proposition, reference is made to the decision of the Tribunal in *Mann v Insurance Council of British Columbia,* Decision No. 2015-FIA-002(a) ("*Mann*") (at para 39):

> …[It] makes eminently good sense that a penalty decision by Council should be maintained by the FST unless unreasonable, as would be the case with an appeal centered on facts or, possibly, mixed facts and law. While it is doubtless the case that an appellate tribunal is less able, for example, to determine whether a witness before the hearing below was a truth teller than to select a penalty based on accepted facts and authorities, that does not mean that it should be more active in the latter case than the former, where the matter of penalty has been entrusted by legislation to the first instance, specialist tribunal that bears primary responsibility to deliver it. That is a consideration equally deserving of deference, even if logically sanction is a more comfortable issue for an appeal body than, say, the credibility of a witness it did not see.

[23] Following the close of submissions in this appeal, the Tribunal released its decision in *Financial Institutions Commission v Insurance Council of BC et al,* Decision No. 2017-FIA-002(a)-008(a) ("*FICOM*"). *FICOM* addresses the issue of the appropriate standard of review to be applied by this Tribunal in penalty appeals. Accordingly, I requested supplemental submissions on the issue of whether and how the decision in *FICOM* affects each party's position on the appropriate standard of review applicable to the Designate's Penalty Decision.

[24] The Respondent asserts that the standard of review for penalty decisions has changed little, if at all, as a result of the decision in *FICOM.* Reasonableness remains the standard of review and the "gloss" of intervening where the Tribunal finds an "error in principle" is not applicable to the facts of this appeal in any event.

[25] The Appellant reads *FICOM* as setting out a less deferential standard of review for penalty decisions to be applied by the Tribunal than was previously the

case. As *FICOM* speaks definitively on the issue, the less deferential standard described in *FICOM* should be applied in this appeal as a matter of consistency.

[26] As observed in *Lin*, the Panel is not bound by prior decisions of the Tribunal, although it is certainly desirable to strive for Tribunal consistency wherever it can rightly be found. The Chair in *FICOM* made it clear that it is sensible for the Tribunal to adopt a consistent approach to the standard of review applied in all penalty appeals within its jurisdiction. I agree.

[27] The Chair in *FICOM* started his analysis of the appropriate standard of review in penalty appeals, as he did in *Hensel* on questions of fact, law and discretion, from the proposition that because the Tribunal is a specialized 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.

[28] In paragraph 63 of *FICOM* the Chair stated:

> Unless the legislature expressly prescribes the standard of review the tribunal must apply, the relevant question for an appeal tribunal is not "what would a court do?" but "what standard or review would be most consistent with the legislature's intent in creating the tribunal given its purpose and the larger purposes of the statute?" There is and should be no starting assumption that *Dunsmuir* applies.

[29] After reviewing *Mann* and other relevant authorities including *Harding v Law Society of British Columbia,* 2017 BCCA 171, the Chair held as follows regarding the standard of review to be applied by the Tribunal to penalty appeals (at paras 77-78):

> [77] Taking all these factors into account, it is my view that the Tribunal should unapologetically accept that the Legislature expected it to intervene in any penalty appeal where it finds that there has been an error in principle as opposed to an "error" in line-drawing by the Insurance Council, and that it is for the Tribunal to determine where an error in principle has occurred. The Tribunal should apply this test not as if it were a court, but should apply it from its specialized institutional vantage point and with a careful eye to the public interest. …
>
> [78] The approach cautions against the Tribunal simply substituting its discretion for that of the body appealed from. However, it also recognizes the special role entrusted to the Tribunal in cases where the debate centres, as it does here, on whether the penalties in question fall below the standard necessary to protect the public interest in cases involving dishonest conduct.

[30] With respect to the standard of review to be applied to the within penalty appeal under the MBA, I agree with and will apply the less deferential reasonableness standard outlined in *FICOM* as quoted above.

[31] The parties have effectively agreed in their written submissions on the standard of review applicable to the vast majority of the issues to be addressed in this appeal. As the agreed upon standards are consistent with the authorities, I will apply those agreed upon standards of review to the particular issues in

question. Where the standard of review applicable to a particular issue is not agreed to, I will rule on the applicable standard when addressing the particular issues in question.

Assessing Reasonableness

[32] The Respondent submits that a decision is reasonable if it falls within a range of possible, acceptable outcomes, and is reached in a justified, transparent and intelligible manner[3].

[33] The Respondent further asserts that where an appellant offers a competing interpretation on an issue subject to reasonableness review, the appellant must show two things: first, that the appellant's own interpretation is reasonable, and second, that the decision-maker's interpretation was unreasonable[4].

[34] The Respondent submits in result that the Appellant must show not only that his interpretation is reasonable, but also that the Designates' interpretation does not fall within a range of possible, acceptable outcomes. To do so, the Appellant must show that the Designates' decision was not justified, transparent or intelligible.

[35] I agree with and will apply this analysis of the reasonableness standard on this appeal.

Search Decision - Did the Designate err in finding that the search was lawful and the evidence obtained from the search admissible?

[36] In order for the search to have been lawful it had to be authorized by the MBA. Section 6(7) of the MBA authorizes the Registrar to enter and search a business premises if the Registrar is engaged in an "inquiry", and if the Registrar deems the search necessary and in the public interest. Therefore, if at the time of the search of YesPros the Registrar was engaged in an "inquiry", and deemed the search necessary and in the public interest, the search was duly authorized and any evidence gathered during the search was properly admissible.

i. Did the Designate err in his interpretation of the term "inquiry" as used in section 6(7) of the MBA?

[37] The relevant provisions of the MBA are as follows:

> Power of the registrar to investigate
>
> 5 The registrar may, and on receipt of a sworn complaint must, investigate any matter or thing arising out of this Act or the regulations.
>
> Procedure and powers of registrar for inquiry
>
> 6(1) [Repealed 1998-7-2.]

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[3] Relying on *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para 47.
[4] Relying on *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 ("*McLean*") at paras 40-41.

(2) For sections 5 and 8, the registrar may investigate, inquire into and examine

a) the affairs of the person in respect of whom the investigation is being made and any books, papers, documents, correspondence, communications, negotiations, transactions, investigations, loans, borrowings and payments to, by, on behalf of or in relation to or connected with the person and any property, assets or things owned, acquired or alienated in whole or in part by that person or by any person acting on behalf of or as agent for that person,…

(2.1) The registrar, by order may

a) appoint a person to conduct an investigation, examination and inquiry referred to in subsection (2) or to assist the registrar in conducting the investigation, examination and inquiry, and

b) specify terms of reference to be followed by the person appointed.

(3) The registrar under this section has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce records, property, assets or things, as the court has for the trial of civil actions. …

(7) On an inquiry under this Act and on being satisfied that it is necessary and in the public interest, the registrar, or a person appointed under subsection (2.1) may

a) enter the business premises of a person registered or required to be registered under this Act as a mortgage broker or submortgage broker during business hours for the purpose of carrying out an inspection, examination or analysis of records, property, assets or things that are used in the business of the mortgage broker or of the mortgage broker by whom the submortgage broker is employed and that may reasonably relate to the subject matter of the inquiry,

b) require the production of the records, property, assets or things referred to in paragraph (a) and to inspect, examine or analyze them, and

c) on giving a receipt, remove the records, property, assets or things inspected, examined or analyzed under paragraph (a) or (b) for the purpose of further inspection, examination or analysis.

(7.3) Inspection, examination or analysis under this section must be completed as soon as practicable and the records, property, assets or things must be returned promptly to the person who produced them.

Interpretation of section 6(7) by the Designate

[38] In the Search Decision, the Designate interpreted the term “inquiry” as used in section 6(7) of the MBA as follows (Search Decision at p 3):

> I am satisfied that the term "inquiry" used in section 6(7) of the Act, based on Elmer Driedger's approach adopted by the Supreme Court of Canada in *Bell ExpressVu Ltd partnership v Rex,* 2002 SCC 42 ("*Bell*") at para 26, is an umbrella term to cover all of the actions involved in a full blown investigation. The actions themselves will depend on the nature of the investigation and may include an examination in the nature of an audit or other forensic assessment, an on-site investigation as here, and a host of other actions whose object is to assemble the evidence so as to critically assess the professional conduct.

Standard of review

[39] The applicable standard of review on this question of law is correctness, as supported by this Tribunal's jurisprudence, and as agreed to by the parties.

Analysis

[40] The Appellant submits that the Designate erred in law in interpreting the term "inquiry" as being an umbrella term to cover all of the actions involved in a full blown investigation. The Appellant asserts that an "inquiry" is different in kind from an "examination" or "investigation" as those terms are used in the MBA.

[41] The Designate adopted Elmer Driedger's definitive formulation of the approach to statutory interpretation as applied by the Supreme Court of Canada that "*Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*[5]" His approach also accorded with section 8 of the *Interpretation Act,* RSBC 1996, c 238.

[42] The Designate correctly considered both the object and scheme of the MBA in making his interpretation decision. He found the MBA, at its core, was a public protection statute regulating the suitability, competence and conduct of mortgage brokers and submortgage brokers operating in B.C. He also considered the scheme of the MBA, consistent with its object, as including wide powers of the Registrar under section 5 to "*investigate any matter or thing arising out of this Act or the Regulations*", as well as the procedure and powers of the Registrar for an inquiry under section 6.

[43] The Respondent referred to the Oxford English Dictionary (the "OED") to provide guidance on the grammatical and ordinary sense of the terms "inquiry", "investigation" and "examination". The OED definitions of these terms support the Designate's interpretation of "inquiry". In the grammatical and ordinary sense, an inquiry can include and be synonymous with either an investigation or an examination or both.

[44] The Designate interpreted "inquiry" as including all the actions involved in a full-blown investigation, including examination and inspection of records. This interpretation is in harmony with the scheme and objects of the MBA.

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[5] *Bell ExpressVu Ltd partnership v Rex*, 2002 SCC 42 ("Bell") at para 26.

[45] While I agree that marginal notes (or "head note" as used in section 11 of the *Interpretation Act)* are not to be used in the legal process of statutory interpretation, I also agree with the Respondent that the marginal note "*Procedure and powers of registrar for inquiry"* for section 6 is consistent with the Designate's interpretation of "inquiry" under section 6(7).

[46] The Appellant asserts that the wording used in section 6(2), "*the registrar may investigate, inquire into and examine",* and section 6(2.1), "*to assist the registrar in conducting the investigation, examination and inquiry",* supports his interpretation that the MBA distinguishes between investigation, examination and inquiry as three separate and distinct undertakings by the Registrar. This assertion is not supported by a reading of the quoted provisions applying the ordinary meaning of the words used in the context of the MBA.

[47] The Appellant submits that if the Legislature intended that the Registrar should have the authority to conduct a search of a business premises on an investigation, examination or inquiry, section 6(7) would have been drafted in a manner similar to section 6(3). This submission lacks substance. Contrary to the inference in the Appellant's submissions, the terms investigation, examination or inquiry are not used in section 6(3). As pointed out in the Respondent's submissions, the Designate's interpretation is not contradictory to the other sections of the MBA simply because section 6(3) of the MBA permits a summons to be issued. The summons is merely an additional tool the Registrar can use to assist with inquiries.

[48] The reference by the Appellant in his submissions to the wording of section 5 of the MBA does not assist his interpretation argument. Section 5 grants the Registrar the power to investigate any matter or thing arising out of the MBA or Regulations. The MBA clearly contemplates that the section 5 power to investigate can lead to a section 6 inquiry. Section 6(2) specifically refers to sections 5. These provisions are consistent and harmonious with one another and with the Designate's interpretation of "inquiry".

[49] The Appellant argues that the Designate's finding that "inquiry" is an "umbrella term" is contrary to the legislative presumption against tautology[6]. I disagree. As the Search Decision states, the word inquiry is used in section 6(7) to cover all of the different actions the Registrar may take under the MBA; which actions will depend on the circumstances. The Designate's interpretation does not make the words "investigation" or "investigate" or "examination" or "examine", as used in section 6, either superfluous or meaningless.

[50] Given the stated purpose of an inquiry under section 6(7) is to enable further "inspection, examination or analysis" to occur, I agree with the Respondent that it is highly unlikely that an inquiry would <u>not</u> include an examination, inspection, or analysis.

[51] I also agree with the Respondent's submission that on the Appellant's interpretation, the Registrar would be prohibited from exercising its powers under

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[6] Relying on *Canada (Canadian Human rights Commission) v Canada (Attorney General)*, 2011 SCC 53.

section 6(7) of the MBA when conducting an "investigation". This would be an absurd result, and at odds with the Registrar's public protection mandate. The more logical and straightforward interpretation is that both investigations and examinations are included under the term "inquiry".

[52] The Designate provided thorough reasons for his interpretation, and in reaching his decision considered the purpose and structure of the MBA, and the modern approach to statutory interpretation. I find that the Designate's interpretation of the term "inquiry" was correct in law. Accordingly, this ground of appeal is dismissed.

ii. In executing the search was the Registrar conducting an "inquiry"?

Standard of review

[53] The Respondent submits that the applicable standard of review on this issue is reasonableness as it involves a question of mixed fact and law. While agreeing that the reasonableness standard applies to questions of fact, the Appellant did not directly reply to the Respondent on this issue. I find this decision of the Designate should be accorded a degree of deference based on his specialized knowledge and experience, and agree with the Respondent that the applicable standard of review to be applied is reasonableness.

Analysis

[54] The Appellant asserts that at the time of the search of YesPros offices, the Registrar was performing an examination or investigation, but not an inquiry. To support this argument the Appellant relies, in part, on a case note from one of the investigators which stated the following: *"We all agreed that at this point, this file is more akin to an examination as opposed to an investigation"*.

[55] The Appellant also points to the fact that the Notice of Hearing refers to the search as an "examination" followed by a subsequent "investigation".

[56] I have already held that the Designate was correct in law in his interpretation of an "inquiry" under section 6(7) of the MBA as being an umbrella term including the actions involved in an investigation or examination. The evidence before the Designate supported the finding that the search was conducted properly pursuant to an inquiry under section 6(7) of the MBA. This is so whether the activities involved in the search were referred to in the evidence as an investigation or an examination.

[57] For the reasons above, I find that the Designate's finding that the search was executed as part of an inquiry was reasonable, and therefore this ground of appeal is dismissed.

iii. Was the search "necessary" as contemplated by section 6(7) of the MBA?

Designate's finding that the Search was necessary

[58] The introductory wording of section 6(7) reads: *"On an inquiry under this Act and on being satisfied that it is necessary and in the public interest…".*

[59] In the Search Decision the Designate held (Search Decision at p. 2-3):

> …[A] lead investigator, expressed his concerns … prior to the Search that there appeared to be inadequate oversight of submortgage brokers and unlicensed staff at YesPros. At times the responsibility for that oversight rested with the Applicant, amongst other submortgage brokers.
>
> The wrongdoing at YesPros … revealed particularly egregious deceptive conduct. One submortgage broker registered with YesPros had been investigated for submitting falsified documents to lenders, including fabricated CRA documents, employment letters and real estate contracts. She continued to broker deals while unregistered. Another submortgage broker was investigated for authoring a fraudulent employment letter.
>
> Actions such as these are examples of extremely serious misconduct. Not only do they significantly contravene the occupational standards required of registrants, they undermine the trust consumers must have in the mortgage marketplace, and they put the public at risk. The BC Court of Appeal in *R v Semeniuk,* 2004 BCCA 115, ("*Semeniuk"*) at para 115 affirmed the finding of the BC Supreme Court that trust is essential in mortgage financing approvals and the gravity of submitting false documents to prospective lenders with the goal of mortgage financing.
>
> …
>
> I am also satisfied that the Search was necessary and in the public interest. Moreover, the Registrar, or a person appointed under section 6(2.1), was arguably duty bound to conduct it in these circumstances….
>
> The Registrar is not required to adopt a less intrusive approach to an investigation of a brokerage and its submortgage brokers simply because one of the submortgage brokers believed he had cooperated with the Registrar in the past. The Deceptive conduct of other submortgage brokers at YesPros and the concern as to the manner in which YesPros was being operated, demanded an inquiry that included a proper and effective investigation, including an on-site attendance and the seizure of evidence.

Standard of review

[60] The Respondent submits that the applicable standard of review on this issue is reasonableness as it involves a question of mixed fact and law. While agreeing that the reasonableness standard applies to questions of fact, the Appellant did not directly reply to the Respondent on this issue. As with the previous issue, I find that the applicable standard of review to be applied to this issue is reasonableness.

Analysis

[61] As noted above, the Designate correctly held that the MBA is, at its core, a public protection statute. The Designate relied on the decision of the Supreme Court of Canada in *Cooper v Hobart,* 2001 SCC 79, where the court pointed out that in performing duties under the MBA (at para 49):

> 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... All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing.

[62] Determining whether a search under section 6(7) is "necessary" and in the public interest involves such a balancing of interests by the Registrar with the protection of the public as the primary directive. The interests of mortgage brokers and submortgage brokers are secondary to the public interest wherever those interests may conflict.

[63] A memo which forms part of the appeal record in this case was referred to extensively by both parties. The memo sets out the approach to the investigation, and the rationale for the decision to proceed by search under section 6(7). The memo concludes:

> Risk Analysis
>
> *Regulatory Risk:* From a regulatory perspective, this investigation is targeting a substantive risk to the public. Without any other quantifying information, using the $13M annual volume placed by [M] figure, and multiplying by 25 brokers, yields $325M in potential mortgages that are being placed annually by YesPros. To date, an in-depth review of one broker, [M], at this firm has revealed significant amounts of misconduct.
>
> *Operational Risk*: It is imperative that this process be well thought out and executed in a methodical manner. There is a risk that once the subjects of this investigation (and their network of participants) are aware of this operation, evidence will be destroyed and further actions may be taken to conceal their activities.

[64] The Appellant asserts that the author of the memo decided to proceed with the search based on speculation rather than evidence that there was a risk that evidence would be destroyed or concealed. I find that this is not a reasonable interpretation of the evidence before the Designate. The investigation was to determine whether there was a systemic problem occurring at YesPros beyond the clearly dishonest conduct staff was aware of at the time.

[65] Perceiving a risk that evidence might have been destroyed and further actions may have been taken to conceal certain activities was both prudent and reasonable in the circumstances, particularly given that protection of the public is the primary objective of the MBA.

[66] The contents of the memo, paired with the testimony of Mr. C, formed a solid evidentiary foundation for the Designate's decision that the search was necessary and in the public interest.

[67] The memo set out clear concerns that there may have been a systemic problem in the way that YesPros was operating, and the rationale for those concerns. The broker referenced in the memo, M, had been investigated for submitting falsified documents to lenders, including fabricated CRA documents, employment letters, and real estate contracts. Another broker, S, was under investigation for authoring a fraudulent employment letter. Both were registered submortgage brokers with YesPros. A further concern referenced in the memo

was that M had been allowed by Mr. Kia to continue brokering deals during a period of being unregistered.

[68] On cross-examination, one of the investigators, Mr. C, was firm in his position that the search was necessary because of the general concern that evidence could be destroyed. He further indicated that sending a summons in advance of attending the office would not have been an effective investigative technique because, "you only get one chance to get it right".

[69] The finding that the memo revealed particularly egregious deceptive conduct making the search necessary was reasonable.

[70] In finding that the search was "necessary" the Designate properly considered all relevant factors, including the issues raised by the Appellant concerning the availability of a summons under section 6(3) and the cooperation of Mr. Kia in the past.

[71] The Designate properly took into account the protection of the public as the primary objective of the MBA in deciding that the search was "necessary" in the circumstances.

[72] The crux of the Designate's decision is that suspected egregious circumstances necessitated on-site attendance and seizure of evidence in order for a proper inquiry to occur. His decision was reasonable in that it falls within the range of possible, acceptable outcomes, and was reached in a justified, transparent and intelligible manner.

[73] In conclusion, I find that the Designate's conclusion that the search was necessary for the purposes of section 6(7) of the MBA was reasonable, and this ground of appeal is therefore dismissed.

iv. Did the Designate err in finding that the search was not contrary to section 8 of the *Charter*?

[74] Section 8 of the *Charter* states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

Designate's finding

[75] The Designate held that the search was authorized, reasonable, carried out in a reasonable manner, and not contrary to section 8 of the *Charter,* referring to *British Columbia Securities Commission v Branch,* [1995] SCJ No 32, ("*Branch*"), and *Kelly v Ontario,* 2014 ONSC 3824, ("*Kelly*") in support.

[76] The Supreme Court of Canada in *Branch* held (at para 52):

> Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: *per* La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or

> administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thompson Newspapers*.

Standard of review

[77] The applicable standard of review on this question of law is correctness, as supported by this Tribunal's jurisprudence, and as agreed to by the parties.

Panel's findings

[78] Standing on his submission that the search was not in compliance with section 6(7) of the MBA, the Appellant asserts that the search was unlawful and *prima facie* unreasonable contrary to section 8 of the *Charter.* In reliance upon a finding of a breach of section 8 of the *Charter*, the Appellant submits that all evidence obtained by way of the search should have been excluded from the hearing pursuant to section 24 of the *Charter.*

[79] Even though the parties to this appeal proceeded on the basis that I have jurisdiction over this issue, I will briefly address the question. By operation of statute, the Tribunal does not have jurisdiction to consider "constitutional questions" where *Charter* arguments trigger the notice requirements of section 8 of the *Constitutional Question Act,* RSBC 1996 c 68, (the "*CQA*")[7]. However, section 8 of the *CQA* makes it clear that notice need not be given where the remedy sought under section 24 of the *Charter* is the exclusion of evidence or consequential on such exclusion, as sought here by the Appellant. Accordingly, I find that in the circumstances of this appeal I am not dealing with a "constitutional question" and have jurisdiction to address this issue.

[80] I have already held in this appeal that the Designate's finding that the search was in compliance with section 6(7) of the MBA is correct in law. Accordingly, I further find that the search was "authorized by law" as outlined in *R. v Collins,* [1987] 1 SCR 265 ("*Collins*").

[81] In finding that the search was reasonable and carried out in a reasonable manner*,* the Designate referred to and was guided in his approach by the statement of law referred to above in *Branch.* I find that the Designate was correct in law, and applied an appropriate standard of reasonableness under section 8 of the *Charter* in the context of searches and seizures under section 6(7) of the MBA.

[82] The Respondent submits that the search was carried out in a reasonable manner and specified that in carrying out the search staff ensured that it was completed quickly and efficiently. In its written submission, the Respondent pointed to the following four facts to support this submission:

a. Eight staff members attended at the search ensuring the search would be completed in an efficient and timely manner;

b. Mr. [C] handed the Authorization to Mr. [M] to ensure Mr. [M] understood they were authorized to proceed with the search;

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[7] See: *Cook v The Registrar of Mortgage Brokers,* Decision No. 2011-MBA-001(a).

c. The proper receipts were prepared for the removal of documents; and

d. The search was completed in one day.

[83] I find these facts formed a sufficient evidentiary foundation for the Designate's finding that the search was in fact reasonable and carried out in a reasonable manner in accordance with both the statement in *Branch* and the requirements of *Collins*.

[84] I find that the Designate was correct in law in holding that the search was not contrary to section 8 of the *Charter*, and the evidence obtained by the search ought not to have been excluded under section 24(2) of the *Charter*. Accordingly, I do not need to, and will not, address the arguments advanced by the parties on the premise that I was to find that the search was in violation of section 8 of the *Charter.*

[85] I find that the Designate did not err in finding that the search was lawful and the evidence obtained from the search was admissible. The appeal of the Search Decision is accordingly dismissed.

Merits Decision - Did the Designate err in finding that the Appellant conducted his business in a manner prejudicial to the public interest contrary to section 8(1)(i) of the MBA?

Key findings by the Designate

[86] As previously stated, the Designate found that in relation to five separate borrowers' mortgage application files handled by Mr. Kia between 2010 and 2012 there were a total of twelve instances wherein Mr. Kia had conducted his business in a manner that was prejudicial to the public interest under section 8(1)(i) of the MBA.

[87] In reaching the Merits Decision, the Designate weighed all of the admitted witness testimony and documentary evidence.

[88] At the hearing, staff of the Registrar introduced a significant body of documentary evidence including the Filogix applications prepared by Mr. Kia for the five borrowers in question. Staff of the Registrar also led evidence from the following witnesses:

a. Mr. E, a representative of NSCU, where Mr. Kia processed the mortgage applications for all five of the borrowers;

b. Ms. B, a representative of Paradigm and Merix, who processed an application for one of the borrowers;

c. Mr. G, another representative of Merix who testified about that organization's underwriting requirements and the standards of practice expected of submortgage brokers when submitting mortgage applications during the period in question; and

d. Mr. C, a staff member of the Registrar, who presented the information and documents found in the course of the investigation and in relation to the Registrar's standards for mortgage brokers and submortgage brokers under the MBA.

[89] In response, Mr. Kia testified on his own behalf. Mr. B, a former employee of Scotiabank, was called as a witness in support of Mr. Kia. He testified, not as a representative of Scotiabank, but rather as an underwriter who, prior to his retirement, received and processed Mr. Kia's applications to Scotiabank for mortgage financing. Both Mr. Kia and Mr. B testified in relation to the five borrowers in question, and in relation to their standards of practice during the period in question.

[90] In assessing the evidence led by staff at the hearing the Designate held (Merits Decision at p 29):

> The Staff's witnesses testified objectively and, without exception, were consistent with the documentary evidence. I am satisfied that the Staff met the burden of proof by advancing reliable evidence in support of all the allegations. I also conclude that this is not a case where the Staff fell short of its burden of proof or where it failed to prove all material averments, as suggested by Mr. Ahmed.

[91] The Designate accepted and relied on the testimony of Mr. C in relation to the Registrar's standards for mortgage brokers and submortgage brokers under the MBA. The Designate further accepted and was satisfied that the standards of practice suggested by Mr. E for NSCU and Ms. B for Paradigm and Merix represented appropriate industry standards from 2010 to 2012.

[92] In addressing the credibility of staff witnesses the Designate found (Merits Decision at p 29 and 30):

> Mr. [C] was subjected to a strenuous cross-examination, which did not undermine his credibility…
>
> The Staff's witnesses testified objectively and, without exception, were consistent with the documentary evidence…
>
> I found Mr. [C], Mr. [E], Ms. [B] and Mr. [G] to be careful and thoughtful witnesses, and I found their evidence helpful and credible. I am satisfied that they provided relevant, reliable and probative evidence. The evidence was trustworthy and it was sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

[93] The Designate did not believe key testimony given by Mr. Kia at the hearing. He determined that Mr. Kia's testimony as a whole was not reliable. He found that his testimony was inconsistent with both the documentary evidence and admissions made by Mr. Kia to Mr. C at a July 7, 2014 interview. The Designate further found that Mr. Kia's interview admissions were consistent with the documentary evidence. The Designate preferred the evidence presented by staff where there was a conflict with the testimony of Mr. Kia.

[94] In particular, the Designate did not believe Mr. Kia's testimony that he had made important disclosure to lenders by phone, fax or email that either supplemented or explained the representations by him in the Filogix applications in question. The Designate found that it was open to Mr. Kia to call obvious key witnesses or documentation to corroborate his testimony on this key issue, but

he did not do so. The Designate drew an adverse inference against Mr. Kia as a result. The Designate held (Merits Decision at p 28):

> There was little corroboration of important disclosures to lenders by phone, fax or email. Mr. Arman Kia also could not explain why documents he claims he sent to lenders, such as a "complete" version of the P and H rental sheet for Scotiabank cannot be found in his files. Worse, Mr. Arman Kia suggests that the Staff is remiss in not obtaining them.
>
> His assertions about his communications with [Ms. G] at NSCU are in direct contradiction to NSCU's policies. It was open to him to call obvious key witnesses such as NSCU underwriters like Ms. [G] for all of the Borrowers and his assistant for her involvement in P and H to testify, but he did not do so. This approach invites an adverse inference that their evidence would have harmed, or at least not helped, Mr. Kia's case.
>
> Mr. Arman Kia's conduct in the applications, including his failure to document the applications in any acceptable way, fell far short of standards of the Registrar. It is noteworthy that Mr. [B] and Mr. Arman Kia differed on who had the duty to document communications between them, although I conclude that this is not a case of simply inadequate books, records and record-keeping. I am satisfied that Mr. Arman Kia did not provide documentation from any source that should have been available and that would corroborate his testimony because it was unhelpful or it did not exist.

[95] The Designate also preferred the evidence presented by staff where there was a conflict with the testimony of Mr. B. The Designate held that Mr. B's testimony as to Scotiabank's expectations and standards and his recollections generally as to the five sets of borrowers in question was inherently unreliable, and he gave that testimony little weight. He also found that standards of practice suggested by Mr. Kia and Mr. B did not represent appropriate industry standards from 2010 to 2012.

i. Was the Designate's assessment of the Appellant's credibility based on a misapprehension of the evidence and an adverse inference that was wrong in law?

Standard of review

[96] The parties agree that reasonableness is the applicable standard of review on findings of credibility in this appeal. As asserted by the Respondent, credibility findings are squarely within the reasonableness standard and are typically afforded the greatest deference[8].

[97] The Respondent submits that reasonableness also applies to the question of whether an adverse inference should have been drawn against Mr. Kia, however the Appellant asserts that this was an error of law to which the correctness standard applies.

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[8] See discussion in *Kadioglu* at para 36.

[98] The B.C. Court of Appeal discussed this issue in *The Cambie Malone's Corporation v British Columbia (Liquor control and Licensing Branch),* 2016 BCCA 165, ("*The Cambie*"), where the court stated (at para. 40), *"whether to draw an adverse inference is a highly discretionary fact-based assessment which must be accorded deference."*

[99] Further, in *Jalloh v Insurance Council of British Columbia,* 2012-FIA-002(a), this Tribunal held that an appeal based on the ground that an adverse inference was improperly drawn was a question of mixed fact and law, and applied the reasonableness standard (at paras 23 and 25).

[100] I agree with Respondent's submission, based on the foregoing authorities, that whether the Designate should have drawn an adverse inference against Mr. Kia was a highly discretionary fact-based assessment that is subject to the reasonableness standard.

Analysis

[101] This Tribunal is required to hear appeals on the record rather than conduct hearings *de novo.* Accordingly, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments.

The Designate observed and heard the witness testimony at the hearing. This is an advantage that is not afforded to this Tribunal on appeal. Further, the Designate applied his specialized knowledge and experience in weighing all of the admitted evidence and assessing witness testimony first-hand.

Analysis - Adverse inference

[102] The Staff presented a case against the Appellant that required an explanation. The Appellant's explanation deviated sharply from the Registrar's standards and the evidence of other witnesses. He offered no corroborating evidence besides that of Mr. B, whose evidence also deviated from the Registrar's standards and the evidence of other witnesses.

[103] The Appellant testified that he had made disclosures by phone, fax or email, but had not retained records of the disclosures. He claimed that some records of the purported disclosures were never made, while others were missing or incomplete. It was open to the Appellant to corroborate his account by calling appropriate witnesses or documentary evidence. He did not.

[104] The Designate noted that if the Appellant had made the disclosures he had claimed to, *"a record of some type would have been available and would have reflected that fact"*[9]. I find the Designate's expectation that the Appellant should have been able to "recreate" the alleged corroborating documents was reasonable and made sense.

[105] The Appellant's legal argument rests on the statement in *Zawadzki v Calimoso,* 2011 BCSC 45 ("*Zawadzki*") (at para 149), that an adverse inference is not available when the witness or documents are equally available to both parties. *Zawadzki* was a civil suit over a vehicle/pedestrian accident.

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[9] Merits Decision at p 30.

[106] The Appellant refers to the Registrar's statutory investigative powers and asserts that staff had equal access to all the documents obtained through the search, and better access than the Appellant to underwriter witnesses. The Appellant asserts that staff had the power to compel evidence of underwriters such as Ms. G while Mr. Kia did not. Accordingly, the Appellant asserts it was a clear error to draw the adverse inference.

[107] The Appellant's assertion that staff had equal access to all the documents that existed through the search is inconsistent with the testimony of Mr. Kia to the effect that he had made disclosures by phone, fax or email, but had not retained records of the disclosures. He claimed that some records of the purported disclosures were never made, while others were missing or incomplete. These alleged missing or incomplete documents were not found in the search. The nature and whereabouts of these alleged documents would be in the knowledge of the Appellant, not staff. They would not be "equally available to both parties".

[108] Mr. Kia acknowledged in his testimony that as a designated individual for YesPros, it was his responsibility to ensure YesPros conducted its business in accordance with the Regulations. This would include section 6 of the Regulations that obliged YesPros to keep such books and records as are necessary for the proper recording of its business transactions, such as the mortgage applications in question. Accordingly, it was reasonable for the Designate to expect that if the Appellant had made the disclosures he had claimed to, there would have been supporting records available.

[109] The fact that the Registrar has statutory powers to compel evidence does not, standing alone, constitute a basis to find the Designate was not able to draw an adverse inference against the Appellant.

[110] I find support for this conclusion in the decision of the B.C. Supreme Court in *Liquor Stores Limited Partnership v British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2008 BCSC 1264 ("*Liquor Stores*"). In *Liquor Stores* the general manager of the Liquor Control Branch brought enforcement proceedings against a licensee before an adjudicator. The licensee testified he had seen accounts of liquor sales in the pub, but chose not to bring those sales records to the hearing. The adjudicator drew an adverse inference against the licensee as a result. On judicial review the licensee argued that the adjudicator could not draw an adverse inference because the general manager had broad statutory powers to seek production of business records, and had not done so. The Court found that (at paras 5-59):

> …There was no obligation on the manager to seek such production and because he could not have known what was in the records it cannot be said that he did not seek their production because he knew it would favour the petitioner.
>
> I cannot conclude that the adjudicator's drawing an adverse inference was unreasonable under the circumstances.

[111] I agree with the Respondent that the evidence the Appellant failed to call was under his control in the sense that only he was aware of its significance up

until the last days of the hearing. While the Registrar has broad powers to find evidence and compel witnesses, neither it nor its staff could have known the importance of the evidence that could corroborate the Appellant's testimony before the Appellant gave his testimony. Although the Appellant did not have greater access to the evidence than the staff, he had control in the sense that he was the only party with a meaningful chance to bring it before the Designate.

[112] Accordingly, I find that in these circumstances the witnesses or documents were not, in fact, equally available to both parties as contemplated in *Zawadzki.*

[113] The Appellant had the same ability as the staff to request that the Registrar summon witnesses for the hearing. Further, the Appellant has not presented any evidence or even suggested that he tried getting documents or other corroborating evidence from any of the underwriters he claims he made disclosures to, apart from Mr. B.

[114] I cannot conclude that the Designate's drawing an adverse inference was unreasonable in the circumstances. This ground of appeal is dismissed.

Analysis - The Interview and credibility assessment

[115] Broadly speaking, the Merits Decision was the result of the Designate weighing all of the admitted evidence after experiencing the hearing first-hand, observing the witnesses, and reviewing the documentary evidence, combined with his experience and knowledge given his position as a specialized tribunal. The Designate's expertise assisted him in making assessments of witness credibility. His credibility findings were clearly reasonable and should be given deference by the Tribunal.

[116] The Appellant asserts that he was "taken by surprise" by issues addressed at the July 7, 2014 interview. This assertion is inconsistent with the fact that Mr. Kia would have been well aware of the details of the search, and, more importantly, was served with a Summons to attend the interview which instructed him to bring with him a *"list of all mortgage files brokered by you from January 1, 2010 to December 31, 2012 while registered as a submortgage broker with Yespros."*

[117] The Appellant's assertion that the circumstances of the interview were fundamentally unfair is unsupported by the evidence. The Designate did not misapprehend the evidence of what transpired at the July 7, 2014 interview. Contrary to the assertion of the Appellant, the Designate did not comment on whether the Appellant had admitted to failing to make the disclosures on an intentional or mistaken basis, he simply found that the Appellant admitted to not making full disclosure with respect to three borrowers.

[118] The Appellant's assertion that preferring the evidence of the interview over Mr. Kia's testimony was unreasonable or unfair to the Appellant lacks merit. As does the assertion that the Designate's overall credibility assessment of Mr. Kia was unreasonable.

[119] In contrast to the testimony of the staff's witnesses, the Designate found Mr. Kia's evidence contained significant internal and external inconsistencies. Specifically he found that (Merits Decision at p 29-30):

a. Mr. Kia's admissions in his interview were inconsistent with his testimony and the admissions were "*more plausible and consistent with the reliable evidence at the hearing"* than his hearing testimony;

b. Mr. Kia was evasive on some questions;

c. Concurrent mortgage applications prepared by Mr. Kia contained significant internal inconsistencies, such as borrowers' incomes and properties owned; and

d. Mr. Kia's evidence about how he provided disclosures did not accord with industry practice as outlined in Mr. E and Ms. B's testimony, and did not accord with the Registrar's standards, as outlined by Mr. C.

[120] I agree with the Respondent that the Designate's assessment of the Appellant's credibility was based on factors additional to the two factors the Appellant takes issue with. Further, I agree that in finding Mr. Kia to be neither straightforward nor candid in his testimony, the Designate carefully assessed the evidence before him and supported his findings with reference to other witness testimony, documentary evidence and his own expertise.

[121] The finding by the Designate that Mr. Kia's testimony was unreliable as a whole, and the Designate's preference of other, more reliable evidence was reasonable. There is no basis to interfere with this finding. This ground of appeal is dismissed.

ii. Was the Designate's assessment of Mr. B's credibility based on a misapprehension of the evidence?

Designate's key findings

[122] The Designate found that Mr. B's testimony lacked the objectivity that was seen with Mr. E, Ms. B and Mr. C. He afforded Mr. B's testimony "little weight".

[123] A review of the Merits Decision provides the Designate's reasons for deciding Mr. B was not a reliable witness and placing little weight on his testimony, including that (Merits Decision at p 26):

a) Mr. B testified in his personal capacity and without Scotiabank's knowledge;
b) Mr. B testified that he expected the Appellant to adhere to Scotiabank's policies even if it contravened the Registrar's standards;
c) Mr. B was reluctant to admit that rental properties are higher risk than owner occupied properties and attract higher interest rates; and
d) Mr. B's evidence lacked objectivity.

Standard of review

[124] As stated previously in these reasons, reasonableness is the standard of review applicable to findings of credibility in this appeal.

Analysis

[125] The Designate applied his specialized knowledge and experience in weighing all of the admitted evidence and assessing Mr. B's testimony first-hand.

The application of his expertise in his assessment of Mr. B's credibility was particularly apparent in his finding that it was "*implausible that it is the view of Scotiabank, which is federally regulated, that its borrowers' concurrent real estate financing plans are immaterial in the underwriting process or that it has adopted a policy limiting disclosure to it which overrides a submortgage broker's disclosure obligations under the Act*" [underlining added] (Merits Decision at p 25).

[126] The Designate gave thorough reasons for deciding Mr. B was not a reliable witness and placing little weight on his testimony. The Appellant has failed to demonstrate that the Designate's interpretation of Mr. B's evidence was unreasonable.

[127] The Designate's finding that Mr. B expected the Appellant to adhere to Scotiabank's policies even if it contravened the Registrar's standards was not an unreasonable interpretation of the evidence. When it was put to Mr. B in cross-examination that a broker should follow the Respondent's standards if the Respondent's standards were more stringent than a lender's standards Mr. B responded, *'Well, when it came to bank policy they would have to follow bank policy.'* When counsel tried to clarify this answer, he stated '*It would be up to the broker. My only interest of course is they're complying with the bank policy*'.

[128] Further, I disagree with the Appellant's submission that the Designate misapprehended Mr. B's evidence as to what documentation was needed for stated income applications. I agree with the Respondent that the purpose for which the Designate contrasted the minimal documentation required by Scotiabank on stated income applications and the stricter requirements of other institutions was not to further diminish Mr. B's evidence, which he found unreliable for a number of other reasons, but to support his conclusion that "*Submortgage brokers must verify income and not rely on educated guesses as to what a Borrow should earn*" (Merits Decision at p 25). The Appellant's criticism of the Designate's comment is taken out of context and does not support his contention that the Designate misapprehended the evidence.

[129] The Designate had an ample basis for finding Mr. B's evidence unreliable, and the Appellant has failed to show that this finding was unreasonable or was the result of any unfair procedure. This ground of appeal is dismissed.

iii. Did the Designate misapprehend the Information Bulletin and thereby err in deciding that the Appellant had a duty to verify the "true income" of his clients?

Designate's findings

[130] The Registrar's July 26, 2007 Bulletin Number MV07-005, "*Due diligence of Mortgage Brokers Who Arrange Stated Income Mortgages*"(the "Information Bulletin") was entered as an exhibit at the hearing, and was referred to by the Designate in the Merits Decision when he addressed the testimony of Mr. C on the issue of mortgage brokers' disclosure duty (Merits Decision at p 8-9):

> Mr. [C] referred to the [Information Bulletin]. The bulletin refers to self-employed persons who may write off expenses from their gross income such

that the income they are asked to declare is neither their gross income nor their net income, but a "reasonable estimate of their actual income, which may fall somewhere in between their gross and net income… ". It also refers to borrowers who may "… simply fill in the number representing their stated income which is sufficient to qualify them for the mortgage they are seeking, as some lenders have indicated that this is acceptable."

He noted that it is the Registrar's expectation that the mortgage broker will determine what essentially the borrower's true income is. The bulletin also provides that:

> … mortgage brokers must undertake reasonable due diligence to ensure that the information being passed on to lenders is accurate and not misleading, even if it appears that the lender encourages or tolerates misleading statements from borrowers about the source or amount of income on stated income applications. Exercising due diligence for stated income mortgages would require mortgage brokers to ensure that the borrower knows to state only truthful information in the mortgage application. Remember that if a stated income mortgage results in default or foreclosure, the lender may look for evidence of fraud. If there are any misrepresentations about the amount or source of income, lenders may place responsibility for the misrepresentation on the mortgage broker who submitted the application, while borrowers may blame the mortgage broker for counseling them to provide false information. [underlining added]

[131] In making his findings concerning stated income inconsistencies in the mortgage applications advanced by Mr. Kia for two of his clients the Designate stated (Merits Decision at p 33):

> The Registrar's [Information Bulletin] describes the due diligence needed of mortgage brokers who arrange stated income mortgages and, in particular, that:
>
> - "… it is the Registrar's expectation that the mortgage broker will determine what essentially the borrower's true income is";
> - " … mortgage brokers must undertake reasonable due diligence to ensure that the information being passed on to lenders is accurate and not misleading even if it appears that the lender encourages or tolerates misleading statements from borrowers about the source or amount of income on stated income applications";
> - "… due diligence for stated income mortgages … [requires] … mortgage brokers to ensure that the borrower knows to state only truthful information in the mortgage application";
> - "[i]f there are any misrepresentations about the amount or source of income, lenders may place responsibility for the misrepresentation on the mortgage broker who submitted the application, while borrowers may blame the mortgage broker for counseling them to provide false information."
>
> The actual income of a self-employed borrower must be determined and disclosed to a lender even when the lender's policy is to accept amounts

> higher than the borrower's actual income. This duty to ascertain the actual income is heightened when borrowers' line 150 in their Notice of Assessment is significantly different than their stated income, as in RP.

[132] With respect to the Information Bulletin, the designate accepted Mr. C's evidence on the standards of the Registrar regarding mortgage brokers' due diligence and disclosure duty. In particular, he accepted that mortgage brokers have a responsibility to confirm a self-employed buyer's estimated true or actual income as something between the buyer's gross and net income, and if mortgage brokers notice any inaccuracy in reported income, they have a duty to do their "due diligence" to verify what the true or actual income is.

Standard of review

[133] The Respondent submits that this issue should be assessed against the standard of reasonableness, because it is discretionary and involves the weighing of evidence heard in the first instance.

[134] The Appellant asserts the Designate misapprehended the meaning of the Information Bulletin and there was no weighing of evidence involved in the Designate's interpretation of the Information Bulletin. He asserts that the exercise is analogous to interpreting the MBA, which attracts a standard of correctness.

[135] I agree with the Respondent and will apply a reasonableness standard of review.

Analysis

[136] Contrary to the submission of the Appellant, the Designate did not misapprehend the Information Bulletin to include the phrase: "*it is the Registrar's expectation that the mortgage broker will determine what essentially the borrower's true income is*" even though the Designate included that quoted phrase in his description of the due diligence called for by mortgage brokers' in the Information Bulletin. Insofar as it appears that the quoted phrase is set out as a quote from the Information Bulletin, it is no more than an obvious editing error. The phrase is a quote from the testimony of Mr. C relating to his interpretation of the Information Bulletin. I find that the Designate did not intend to state that the Information Bulletin contained that phrase.

[137] The Designate accepted Mr. C's evidence that: "*it's the Registrar's expectation that the mortgage broker determine what—essentially what is the true income. And it's essentially saying that it's something within their gross income and net income.*" as a correct interpretation of the intent of the Information Bulletin applicable in the circumstances of this case. The Designate ruled that Mr. C's evidence was objective, detailed, credible, and not shaken in cross-examination. This included Mr. C's interpretation of the Information Bulletin.

[138] The Appellant's restrictive reading of the Information Bulletin to only require mortgage brokers to "*ensure that the borrower knows to state only truthful information in the mortgage application*", and nothing more, to satisfy his duty of due diligence, is both unreasonable generally and inconsistent with the

public protection objects of the MBA. Reading the Information Bulletin as a whole and in light of the objects of the MBA, I find that the intended due diligence responsibility of the mortgage broker can and should, depending on the circumstances, go well beyond the bare minimum of telling the borrower he is to tell the truth.

[139] The Information Bulletin refers to the risk of fraud and the potential of lenders or borrowers placing blame on mortgage brokers for such misrepresentations. It also refers to the Registrar seeking to impose regulatory penalties against a broker who does not exercise due diligence in ensuring that the information contained in the stated income mortgages is accurate and not misleading.

[140] I agree with the Respondent that the requirements of due diligence will depend on the circumstances. Where there are obvious red flags, such as a significant discrepancy between a borrower's tax documents and their stated income, as was apparent in the present case, the mortgage broker must do more than merely ensuring that the borrower knows to state only truthful information in the mortgage application in order to satisfy reasonable due diligence. They have a duty to verify what the actual income is and to ensure that the information being passed on to lenders is accurate and not misleading.

[141] A review of the transcripts outlining the testimony of Mr. C demonstrates that both he and counsel for the Appellant used "true income" and "actual income" as synonymous or interchangeable terms.

[142] Whether the term used is "true income" or "actual income", I find that the Designate, (and Mr. C in his testimony), meant the same thing; that being the reasonable estimate of income that may fall somewhere in between gross and net income as set out in the Information Bulletin.

[143] On the above bases, I find that the Designate did not misapprehend the Information Bulletin, and reasonably held that the Appellant had a duty to verify the actual income of the borrowers in question. The appeal on this issue is dismissed.

iv. Did the Designate breach the Appellant's entitlement to procedural fairness or otherwise err by admitting and relying on evidence on industry standards from Mr. E and Ms. B and on the Registrar's standards for mortgage brokers and submortgage brokers from Mr. C?

Designate's findings

[144] More than 30 days prior to the hearing, will-say statements of staff witnesses Mr. E and Ms. B were provided to counsel for Mr. Kia. These statements raised concerns with counsel for Mr. Kia that staff intended to lead expert opinion evidence from these witnesses without complying with section 11(1) of the *Evidence Act*, RSBC 1996, c 124 (the "*Evidence Act*") which requires that a written statement of the opinion and the facts upon which that opinion is based be provided at least 30 days before the witness testifies.

[145] During the direct examination of Mr. C, counsel raised objections to specific questions on the basis that opinion evidence was being sought. Rulings on these objections went both ways. The Designate ruled that Mr. C could give evidence on standards of the Registrar as it was relevant and admissible. He ruled that the evidence would go in subject to weight.

[146] Following completion of the direct examination of Mr. [C], counsel for Mr. Kia brought an application for a declaration that staff had failed to comply with section 11(1) of the *Evidence Act.* Counsel sought consequential orders that expert opinion evidence with respect to mortgage industry standards and practices already tendered through Mr. C be excluded and that staff not be allowed to tender expert opinion evidence from Mr. E or Ms. B on topics including mortgage industry standards and practices.

[147] In response, counsel for the Respondent advised the Designate that Mr. E and Ms. B were expected to give evidence primarily about their respective organizations' expectations of mortgage brokers. To the extent that any of their evidence could be characterized as opinion evidence, the Appellant had been given will-say statements more than 30 days in advance and the Designate had discretion under section 11(2) of the *Evidence Act* to admit opinion evidence even if notice under section 11(1) of the *Evidence Act* had not been given.

[148] The Designate denied the objection to Mr. C's opinion evidence. The Designate held that his evidence was relevant and admissible.

[149] The Designate denied the application to disallow evidence from Mr. E or Ms. B on topics including mortgage industry standards and practices. As with Mr. C's testimony, the Designate ruled he would allow counsel to raise objections when the witnesses testified, not knowing their testimony in advance.

[150] In ruling that he was going to allow the evidence to proceed the Designate referred to extracts from Sarah Blake, *Administrative Law in Canada* (*"Blake"*)[10] (at paras 2.172-2.174):

> A tribunal may consider relevant expert evidence recycled from previous cases involving different parties, provided disclosure is made. This contributes to the goal of being an inexpensive forum accessible to the public.
>
> A tribunal may use its own expertise in assessing the evidence. Expertise is one of the reasons for conferring decision-making powers upon tribunals…
>
> …Expertise may assist a tribunal in drawing inferences from primary facts. However, the expertise of the tribunal should not be the basis of an essential finding of fact upon which a decision turns. Evidence tending to prove essential facts should be adduced.
>
> A tribunal may take notice of commonly accepted facts and generally recognized facts within its specialized knowledge. Facts that are generally recognized within the field regulated by the tribunal need not be proven.

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[10] Sarah Blake, *Administrative Law in Canada*, 6th ed (Toronto:Lexis Nexus Canada Inc., 2017).

[151] Ultimately, the Designate accepted and relied on the testimony of Mr. C in relation to the Registrar's standards for mortgage brokers and submortgage brokers under the MBA. He further accepted and was satisfied that the standards of practice suggested by Mr. E for NSCU and Ms. B for Merix represented appropriate industry standards from 2010 to 2012.

Standard of review

[152] There are two elements to this issue, each attracting a different standard of review. First, there is the element of notice of the admission of expert opinion evidence. Second, there is the element of the admissibility of the factual, non-opinion evidence.

[153] The parties agree that fairness is the standard as to whether the Appellant had sufficient notice about any admitted opinion evidence. I will apply fairness as the standard in relation to the issue of notice under section 11 of the *Evidence Act.*

[154] Insofar as the evidence in question was factual in nature, as opposed to expert opinion evidence, the issue is the admissibility of such evidence. I agree with the Respondent that this involved the exercise of discretion and the weighing of evidence by the Designate that attracts a reasonableness standard of review.

Analysis

[155] The Appellant describes this ground of appeal as being based on the erroneous admission and reliance by the Designate upon "expert evidence" from Mr. E and Ms. B on industry standards and from Mr. C on the Registrar's standards.

[156] This issue becomes more nuanced when reviewing the written submissions of the parties and the record on this appeal.

[157] The Appellant asserts that the only opinion evidence that was admitted into the record was Mr. C's testimony as to the Registrar's standards. The Appellant, in essence, asserts that the Designate erred in treating the factual testimony of Mr. E and Ms. B on their employers' standards as expert opinion evidence. In the alternative, even if the evidence of Mr. E and Ms. B was "factual" and not opinion, the Designate did not provide sufficient notice that he intended to make inferences about applicable industry standards from that evidence.

[158] In accepting as correct the standards of practice outlined by Mr. E and Ms. B over those outlined by Mr. B or Mr. Kia, the Appellant asserts that the Designate treated the testimony of Mr. E and Ms. B as expert opinion evidence. This was in breach of the Appellant's right to procedural fairness as they weren't qualified as experts and only testified as to their respective employer's standards. The Appellant was treated unfairly in not knowing the case he had to meet and in being denied adequate notice to arrange for rebuttal opinion evidence if necessary.

[159] The Respondent asserts that the evidence of Mr. E and Ms. B was factual evidence about the policies of their own employers, and asserts that the

Designate used this factual evidence and his expertise as a specialized tribunal to make an inference about applicable industry standards. I agree that this is what the Designate did.

[160] I find from a review of the record that little, if any, of what could properly be characterized as expert opinion evidence was either given by or relied upon by the Designate in making his inferences about applicable industry or the Registrar's standards. Any of the relevant testimony that could be characterized as expert opinion was border-line at best. Accordingly, I have considered this issue on that basis.

[161] The Designate was acting as a specialized administrative tribunal and not a court of law. His approach to the evidence was to allow it in if relevant, with the question being the weight to be given to the evidence.

[162] I find the Designate's finding that Mr. C's evidence was relevant and admissible to be reasonable.

[163] The Designate's summaries of Mr. E and Ms. B's evidence makes it clear to me that he was relying on their factual evidence about their specific organizations' standards and expectations of mortgage brokers, and not expert opinion evidence on general industry standards. It was a reasonable exercise of his discretion to do so.

[164] The Designate's summary of Mr. E's evidence was expressly linked to NSCU policies. Ms. B's evidence about Merix's policies came primarily from the Merix Originator Agreement signed by Mr. Kia and entered as Exhibit 7 at the hearing. The evidence was factual in nature.

[165] I note that the summary of Ms. B's evidence includes a reference to "*a fiduciary responsibility to actually look at the information to a degree to make sure it's accurate as well*" which was not expressly stated in the Originator Agreement. This was her opinion of the purpose of the Originator Agreement.

[166] In assessing the evidence on industry standards of practice the Designate held (Merits Decision at p 29 and 30):

> I am satisfied that the standards of practice suggested by Mr. [E] for NSCU and Ms. [B] for Merix, not the standards of practice suggested by Mr. [B] or those displayed by Mr. Arman Kia, represent appropriate industry standards from 2010 to 2012. Further, I accept that the full disclosure standards suggested by Mr. [E] for NSCU and Ms. [B] for Merix are consistent with a protection of the public interest and the requirements of the Registrar under the Act. These include Mr. [E]'s opinion that a final outcome should govern whether a property should be characterized as owner-occupied or rental. Their testimonies were externally consistent and had inherent reliability.
>
> ...
>
> There were a number of significant internal inconsistencies in concurrent applications prepared by Mr. Arman Kia, such as particulars of properties owned by borrowers and the borrowers' incomes. It is simply inconceivable that a prudent submortgage broker or lender would permit incomplete information on assets and liabilities simply because he had earlier spoken to

> the underwriter in question and he had explained the situation to their satisfaction. If that were the case, a record of some type would have been available and would have reflected that fact. Mr. Arman Kia's evidence on this point contrasts sharply with the industry standards as outlined by Mr. E and Ms. B, the standards of the Registrar as outlined by Mr. C, and it is inherently unreliable.

[167] The Designate applied his own industry expertise in assessing the witness testimony. The fact that the Designate's inferences were reasonably made with regard to the evidence is apparent from the foregoing assessment of the evidence.

[168] The Designate relied on the evidence of Mr. C, Mr. E and Ms. B, in combination with his expertise as a specialized tribunal, to infer the relevant standards that apply to the Appellant's case, as he was entitled to do. On the same basis, the Designate found Mr. B's evidence did not represent the industry standard and was likely not an accurate representation of a federally regulated bank's lending policies. These determinations were reasonable and supported by the evidence. The Designate did not require expert opinion evidence in order to draw the inferences he did.

[169] I find the Designate's ruling to be reasonable. I agree with the applicability of the quoted references from *Blake* as support for his ruling; in particular, that (*Blake* at para 2.173):

> Expertise may assist a tribunal in drawing inferences from primary facts. However, the expertise of the tribunal should not be the basis of an essential finding of fact upon which a decision turns. Evidence tending to prove essential facts should be adduced.

[170] I find that the Delegate's expertise as a specialized tribunal was assisted by essential facts provided through the evidence of Mr. C, Mr. E and Ms. B.

[171] Further, even if any of the evidence relied upon by the Designate was expert opinion evidence subject to section 11 of the *Evidence Act*, the Designate's ruling was consistent with his discretion codified in section 11(2) of the *Evidence Act;* regardless of whether the notice under section 11(1) of the *Evidence Act* had been provided.

[172] The Appellant was given sufficient notice and should have been well aware of the possibility that the Designate could make inferences about applicable industry and Registrar standards from the evidence of Mr. C, Mr. E and Ms. B. Insofar as Mr. E and Ms. B offered opinion evidence, the Appellant had ample notice to enable him to respond. The eight months that the Appellant had to consider whether or not to call rebuttal evidence was more than adequate.

[173] In the result, I find that the Appellant received fair notice and the Designate's treatment of the evidence was reasonable. This ground of appeal is dismissed.

v. In finding that the Appellant breached section 8(1)(i) of the MBA, did the Designate commit an error in determining that the Appellant had a duty to disclose in writing: (i) whether a concurrent mortgage application had been submitted by the borrower; and (ii) to describe the borrower's prospective use of the property rather than its current use?

Designate's findings

[174] In answering the question as to what constituted "*conducting business in a manner that is otherwise prejudicial to the public interest*" the Designate held (Merits Decision at p 31):

> I am satisfied that paragraph 11 of the Notice of Hearing fairly summarizes a submortgage brokers' duties to lenders and borrowers:
>
> > "… submortgage brokers … have a responsibility to conduct reasonable due diligence with respect to information they provide to lenders. Failure to disclose known material facts or knowingly misrepresenting facts to a lender places borrowers at risk of being placed in mortgages that they cannot afford and places lenders at risk of making mortgage loans that they would not otherwise have made with full disclosure of the borrower's circumstances."
>
> As noted by the Supreme Court of Canada in *Cooper* (supra), a submortgage brokers' duties are not limited to lenders and borrowers.

[175] In support of his analysis, the Designate referred to *In the Matter of the Mortgage Brokers Act and Gurdip Chand,* March 13, 2006, pp. XV-XVIII, wherein the Registrar found that arranging a second mortgage without disclosing it to the first mortgagee, which required a minimum 75% loan to value for its mortgage and would not allow a second mortgage given the borrower's debt to service ratio, amounted to having conducted business in a manner prejudicial to the public interest.

[176] The Designate further referred to the Registrar's decision in *In the Matter of the Mortgage Brokers Act v 0707543 BC Ltd et al,* January 8, 2008 pp. 12-13, wherein it was found that misleading a lender about the actual indebtedness of the borrower amounts to having conducted business in a manner prejudicial to the public interest.

[177] The Designate found that the Appellant had a duty to disclose in writing: (i) whether a concurrent mortgage application had been submitted by the borrower; and (ii) to describe the borrower's prospective use of the property rather than its current use.

Standard of review

[178] The Appellant and the Respondent come at this issue differently, and, accordingly, suggest different standards of review.

[179] The primary focus of the Appellant's submissions is on the fact that the specific duties of disclosure held by the Designate to be required are not promulgated by the legislature or the Registrar in the MBA, the Regulations, or even any bulletin or written policy statement. Accordingly, the Appellant asserts

it was a breach of natural justice and procedural fairness to ascribe such duties to him and that fairness is the appropriate standard of review.

[180] The Respondent's submissions primarily focus on whether it was an appropriate exercise of discretion by the Designate to find that breaches of the specific duties in question would constitute a breach of section 8(1)(i) of the MBA and accordingly, reasonableness is the appropriate standard of review.

[181] I disagree with the Appellant's characterization of the issue as involving a breach of natural justice and procedural fairness and instead agree with the Respondent that the Designate was exercising his discretion in finding that breaches of the specific duties in question would constitute a breach of section 8(1)(i) of the MBA.

[182] What is reasonably seen to be conduct prejudicial to the public interest will depend on the circumstances and is not limited to what has been previously found to be such conduct or by any published list of indicia. Section 8(1)(i) is purposely open ended in this regard.

[183] The absence of public or personal notice on the specific issues at earlier points in time does not constrain the Designate's discretion to determine that such conduct is prejudicial to the public interest.

[184] I will apply reasonableness as the standard of review.

Analysis

[185] The focus of this issue concerns the findings by the Designate that it was a breach of section 8(1)(i) of the MBA for Mr. Kia to knowingly fail to disclose in writing to potential lenders:

i. Whether a concurrent mortgage application had been submitted by the borrower; and

ii. To describe the borrower's prospective use of the property rather than its current use, (rental vs owner occupied).

[186] I note the Appellant in his grounds of appeal says "*in writing in the Filogix application*" even though the Designate did not so specify.

[187] It is important to note the language of section 8(1) of the MBA:

> …if, <u>in the opinion of the registrar</u>, … (i) the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest" [underlining added]

This provision clearly vests the Designate with a broad discretion in determining what constitutes business conduct which is prejudicial to the public interest.

[188] In *Hensel,* this Tribunal addressed a finding by the Registrar relating to conduct which was prejudicial to the public interest, and stated (at paras 35-36):

> [35] The Legislature has delegated to the Registrar the duty to form an opinion at first instance as to what behavior 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. …

[189] I agree with the quoted analysis of section 8(1)(i) applied by the tribunal in *Hensel.*

[190] I am further guided by the decision of the B.C. Supreme Court in *R v Semeniuk,* 2001 BCSC 1905 ("*Semeniuk #1"*), and in particular the finding that (at para 7):

> [7] In approving mortgage financing, to a large extent, trust is essential to the process. False information impacts on that trust, on the risk to the bank, and on its ability to claim on insurance in the event of default. Critical information to assess an application for mortgage financing includes accurate employment and income information. … Accurate information about assets and liabilities is necessary for assessing the risk to the bank.

[191] The Designate began his analysis of whether Mr. Kia was conducting his business in a manner that was prejudicial to the public interest by reviewing the Registrar's overriding duty of care as set out by the Supreme Court of Canada in *Cooper,* as being owed to "the public as a whole". The Designate held (Merits Decision at p 25):

> I am satisfied that the "public as a whole" includes lenders, borrowers, public and private mortgage insurance companies like CMHC, the mortgage broker industry, and numerous other interested stakeholders. The Registrar must maintain public confidence in the mortgage marketplace.

[192] The Designate found that paragraph 11 of the Notice of Hearing fairly summarized a submortgage brokers' duties to lenders and borrowers. I find that the specific duties in question were reasonably covered by these duties of full disclosure. The Designate's determinations were made with regard to relevant authorities, his knowledge of and admitted evidence relating to industry practices and standards, the Registrar's policies and existing jurisprudence.

[193] In written submissions to this Tribunal, the Appellant acknowledged that at the hearing before the Designate he had agreed with the principle that submortgage brokers are required to make full disclosure to prospective lenders in mortgage applications.

[194] For a number of years Mr. Kia was the designated individual for YesPros, and before the Designate he acknowledged that it was his responsibility to ensure that YesPros conducted its business in accord with the Regulations. Section 6 of the Regulations calls for proper recording of business transactions and the maintenance of written records.

[195] The finding of the Designate that the disclosure duties in question required disclosure in writing is clearly in accord with section 6 of the Regulations.

[196] I also find it trite to observe that the failure to disclose known material facts or knowingly misrepresenting material facts to a lender should be seen as "conducting business in a manner that is otherwise prejudicial to the public interest".

[197] In exercising his discretion in determining that knowingly failing to make the disclosures in question amounted to a breach of section 8(1)(i), the Designate was approaching the provision in a purposive and contextual way, consistent with the overarching protective purposes of the MBA.

[198] The Designate's interpretation of section 8(1)(i) as applied to the Appellant's conduct was reasonable, and therefore this ground of appeal is dismissed.

Penalty Decision

i. Did the Designate err and act beyond his jurisdiction by ordering that the Appellant pay investigative and hearing costs under section 6(9) of the MBA?

Designate's findings

[199] Section 6(9) of the MBA provides:

> 6(9) If the inquiry discloses a contravention of this Act or the regulations or orders or directions of the registrar, the registrar may order the costs to be paid by the person.

[200] The Penalty Decision included the following orders (Penalty Decision at p 10):

> 3. Pursuant to section 6(9) of the Mortgage Brokers Act, Mr. Arman Kia will pay costs of this proceeding, as agreed between counsel [or under the Supreme Court Rules after written submissions if agreement could not be reached].
>
> 4. All payments will be made by cheque, bank draft or money order payable to the Minister of Finance and all amounts outstanding 30 days following execution of this Order will represent a debt owing and be subject to interest pursuant to the *Financial Administration Act,* R.S.B.C. 1996, c. 138.
>
> 5. Mr. Arman Kia will not be considered for registration unless and until the costs under this Order are paid, in full.

[201] By way of Consent Order, the parties have agreed on the quantum of costs payable by Mr. Kia pursuant to section 6(9) of the MBA in the aggregate amount of $17,787.50; made up of $5,287.50 for investigation costs and $12,500.00 for hearing costs. This agreement was expressed to be without prejudice to the Appellant's right to appeal the costs aspect of the Penalty Decision.

[202] In finding that he had the jurisdiction to make the costs order under section 6(9) of the MBA the Designate held (Penalty Decision at p 8):

> I do not agree that the *Act* should be narrowly construed so that costs are only payable when section 8(1)(f) of the *Act* is charged and there is an adverse finding of that paragraph. Section 6(9) of the *Act* provides if "… the inquiry discloses a contravention of this Act or the regulations or orders or directions of the registrar, the registrar may order the costs to be paid by the person." The Findings relate specifically to section 8(1)(i) of the *Act*, which while general in scope is a more focused allegation than the more general section 8(1)(f) – "… breach of this Act, the regulations or a condition of registration" – a common catch-all provision found in regulatory statutes.
>
> The registrar may order that costs are payable if the inquiry discloses a contravention of:
>
> 1. section 8(1)(e) – (j), inclusive, of the *Act*;
> 2. other provisions of the *Act*;
> 3. the regulations, or
> 4. orders or directions of the registrar.
>
> The Findings amount to contraventions of the *Act* for which the registrar may order that costs are payable. I have decided that costs should be payable.

Standard of review

[203] By reason of the Consent Order between the parties the quantum of costs payable is not in issue. The issue is the jurisdiction of the Designate to make the costs order under section 6(9) for breaches of section 8(1)(i) of the MBA.

[204] I agree with the parties that the correctness standard of review applies to the Designate's interpretation of section 6(9) of the MBA as applying when a contravention of section 8(1)(i) of the MBA is found to have occurred.

Analysis

[205] The Appellant asserts that while the Designate found the Appellant to have been in contravention of section 8(1)(i) of the MBA, there was no finding that the Appellant "had breached the Act" and that accordingly the Designate did not have the statutory authority to make a costs order under section 6(9) of the MBA.

[206] The Appellant's submission requires an interpretation of the language of section 6(9) of the MBA to only become operative for a contravention of the MBA if that finding is made under section 8(1)(f) "*… (f) the person is in breach of this Act, the regulations or a condition of registration".*

[207] I find this submission of the Appellant to lack merit. As previously stated in these reasons the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament. A straightforward interpretation of the words used in section 6(9) of the MBA, "*contravention of this Act",* recognizes that a breach of any provision of the MBA, including section 8(1)(i), is a contravention of the MBA for purposes of making a costs order. The

Appellant's submission in effect calls for a reading of section 6(9) as saying "contravention of this Act if found under section 8(1)(f) of this Act". Section 6(9) is not so limited.

[208] The MBA must be given such fair, large and liberal construction and interpretation as to best ensure the attainment of its objects. The Appellant's proposed interpretation of section 6(9) is clearly inconsistent with the public protection purpose of the MBA considered in harmony with an ordinary, grammatical reading of the provisions of section 6(9) and 8(1) of the MBA.

[209] The Appellant again refers to *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2011 SCC 53, at para. 38 and relies on the presumption against tautology in support of his argument.

[210] I agree with the Respondent that the presumption against tautology does not support the Appellant's argument. The Appellant's interpretation would result in an absurdity because any finding against a registrant made pursuant to section 8(1) that did not include a finding under section 8(1)(f) would not be considered a breach of the MBA under section 6(9). Such a result cannot be the intent of the Legislature. The Designate's interpretation does not result in the MBA including superfluous or meaningless words.

[211] The Appellant further refers to decisions interpreting sections 161 and 162 of the *Securities Act,* RSBC 1996, c 418 (the "*Securities Act*"), being *Cartaway Resources Corp. (Re),* 2004 SCC 26 ("*Cartaway"*), and *Re Wood,* 2015 BCSECCOM 169 ("*Wood*"). The Appellant argues by analogy that under section 6(9) the Designate lacks jurisdiction to make a costs order for contravention of section 8(1)(i) of the MBA and that the Designate erred in law in so ruling.

[212] I agree with the Respondent that *Cartaway* and *Wood* do not assist the Appellant in his submission. These cases are distinguishable because they offer an interpretation of a different statutory regime with entirely different public interest and costs provisions. Under the *Securities Act* the Securities Commission is empowered to make a variety of orders that it considers to be in the public interest. However, unlike the MBA, the *Securities Act* does not contain a provision empowering a finding that a particular registrant has conducted his or her business in a manner prejudicial to the public interest.

[213] I find that the Designate's interpretation of section 6(9) was correct. This ground of appeal is dismissed.

ii. Was the penalty ordered by the Designate overly harsh and unreasonable in all of the circumstances?

Designate's findings

[214] The December 14, 2017 Penalty Decision included the following orders (Penalty Decision at p 9-10):

1. Pursuant to section 8(1)(a) of the *Mortgage Brokers Act*, Mr. Arman Kia will be suspended for two years from the date of the Decision on Penalty for conducting his business in a manner that is otherwise prejudicial to the public interest contrary to section 8(1)(i) of the *Mortgage Brokers Act*.

2. Pursuant to section 8(1)(d) of the *Mortgage Brokers Act*:

   i. As a condition of registration as a submortgage broker, Mr. Arman Kia will successfully complete the "Mortgage Brokerage in British Columbia Course";

   ii. For a two year period following Mr. Kia's registration as a submortgage broker, he will consent and cooperate with any audit by the registrar's staff for compliance with his duties and responsibilities as a registrant and he shall bear all the costs of these audits (at a rate of $80/hour);

   iii. Mr. Arman Kia will not be eligible to be a designated individual for any mortgage broker, including any mortgage broker business operated by him, for a period of seven years from the date of the Decision on Penalty and Costs;

[215] Prior to reaching his decision on penalty the Designate conducted an analysis of the relevant facts, submissions of counsel, the law dealing with penalty considerations and prior sentencing decisions.

Standard of review

[216] I have applied the less deferential reasonableness standard set out in *FICOM* to determine whether the penalty imposed by the Designate was overly harsh and unreasonable in all of the circumstances.

Analysis

[217] I note at the outset that the Penalty Decision has not yet been implemented. This is by operation of the section 9(2) stay pending this appeal under section 9(1) of the MBA.

[218] I also note at the outset that in written submissions on penalty the Respondent asserts that the grounds advanced in the Appellant's written submissions on penalty amounted to new grounds of appeal not listed in the Notice of Appeal, and that I should not consider them on this basis. In reply, the Appellant asserts that his submissions are in support of his ground of appeal that the Penalty Decision was overly harsh and unreasonable. The Appellant asserts that no "new" grounds of appeal have been advanced in his submissions.

[219] Based on the decision of this Tribunal in *Parsons v Real Estate Council of British Columbia,* Decision No. 2015-RSA-002(d), the Appellant asserts that it is in the interests of justice that these grounds should be considered by me on this appeal even if considered to be "new" grounds of appeal.

[220] In the circumstances of this case, I agree that the interests of justice dictate that I hear the Appellant's submissions on penalty.

[221] On this appeal, the Appellant submits that the appropriate penalty is that Mr. Kia should pay an administrative penalty of not more than $25,000 and he should be prohibited from acting as a designated individual for three years. This is the same penalty as the Appellant proposed to the Designate. The Respondent submits that the penalty as ordered by the Designate should be confirmed.

[222] While a penalty decision is discretionary, I am guided, when considering the reasonableness of the Designate's decision, by principles accepted in sanctioning regulated industry participants for breaches of conduct including: denunciation, deterrence and maintaining the public confidence in the integrity and regulation of the industry in question.

[223] In deciding upon the appropriate penalty, the Designate referred to deterrence, rehabilitation, a consideration of punishment or denunciation, and the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of registrants under the MBA. The Designate considered both specific and general deterrence.

[224] In addressing specific deterrence the Designate stated (Penalty Decision at p 5):

> A proper penalty needs to specifically deter Mr. Kia from considering like conduct in the future. A financial penalty can act as a specific deterrent to improper conduct but it can also be viewed as a cost of doing business…

[225] In addressing general deterrence the Designate stated (Penalty Decision at p 5):

> The mortgage marketplace, the mortgage broker industry and the public interest demand that the registrar have zero tolerance for this type conduct… A penalty must reflect the need to ensure the public confidence in the integrity of mortgage broker regulation.

[226] As previously observed in this decision, the primary object and purpose of the MBA is the protection of the public in the mortgage marketplace. The Designate referred to this point at the outset of his penalty analysis (Penalty Decision at p 4):

> Given that the primary focus of the *Act* is the protection of the public interest, it follows that the sentencing process must ensure the public is protected…I must consider what steps might be necessary to ensure that the public is protected, while taking into account the risk of allowing Mr. Arman Kia to continue as a submortgage broker.

[227] He further held (Penalty Decision at p 5-6):

> An analysis of penalty requires me to consider whether I should order an administrative penalty or a suspension. In this case I found Mr. Arman Kia on multiple occasions knowingly failed to fully disclose borrowers' current or prospective financing, current or prospective property ownership, and income particulars. A factor which militates against an administrative penalty but in favour of a suspension is an element of dishonesty. In this case there were multiple contraventions. Another factor is that Mr. Arman Kia, as designated individual and a director, was entrusted with an elevated level of responsibility when he breached that duty. A sentence that includes a suspension that allows a registrant to reflect on his conduct will usually have a greater general and specific deterrent effect than a financial penalty alone. The range of penalties imposed in similar cases must also be considered. I have considered the case law provided by both counsel.

[228] The Designate made the following findings which he considered as mitigating factors in determining the appropriate penalty (Penalty Decision at p 5):

a. In his favour are the facts that he has been registered as a submortgage broker for almost 18 years and that the Findings did not, for the most part, relate to Mr. Kia in his supervisory role as a designated individual.

b. The Findings relate to his first offences committed over roughly a one and one half year period, seven to eight years ago.

c. [As to] the impact of Mr. Kia's conduct on stakeholders … [a]lthough the loans which were actually funded may be under secured and a higher risk than they should be, there is no evidence that any of the loans are or will be non-performing.

[229] The Designate made the following findings which he considered as aggravating factors in determining the appropriate penalty (Penalty Decision at p 6):

a. On multiple occasions Mr. Kia was found to have knowingly failed to fully disclose borrowers' current or prospective financings, current or prospective property ownership, and income particulars. This finding involves an element of dishonesty. Mr. Kia committed these acts with the knowledge he would receive remuneration that would otherwise not be payable, and he did so on multiple occasions.

b. Even though the contraventions were committed by Mr. Kia as a submortgage broker, he was the designated individual with an elevated level of responsibility at YesPros for most of the transactions until April 11, 2012. Mr. Kia was also at all times a director ("controlling mind") of the mortgage broker YesPros.

Finding of an element of dishonesty

[230] The Appellant disputes that there was a finding in the Merits Decision that Mr. Kia had engaged in any dishonest conduct. I disagree. The Designate held that Mr. Kia "knowingly" submitted incomplete or misleading mortgage applications to lenders in twelve separate contraventions relating to five sets of borrowers over approximately eighteen months. The Designate also reasonably concluded that Mr. Kia was influenced in doing so by the resulting personal financial gain. It was completely reasonable for the Designate to hold that his findings in the Merits Decision involved an element of dishonesty.

Finding that being a designated individual was an aggravating factor

[231] The Appellant also challenges the Designate's finding that as a designated individual with YesPros he was entrusted with an elevated level of responsibility that must be taken into account in assessing penalty.

[232] In finding that because Mr. Kia was a designated individual he had an elevated level of responsibility for his conduct as a submortgage broker, the Designate stated (Penalty Decision at p 5):

> While the Findings relate to him in his role as a submortgage broker, the fact he was the designated individual for all relevant times until April 11, 2012 cannot be ignored. In this case not only mortgage brokers and submortgage brokers, but designated individuals must have no option but to follow prudent practice and they must be strongly discouraged from considering the short term benefits that may be achieved by cutting corners. Submortgage brokers who also act as designated individuals must set a high ethical standard. [underlining added]

[233] The Appellant's argument on this issue is contradicted by the *Information Bulletin MB 11-008* referred to in the Appellants submissions but more importantly by the testimony of Mr. Kia at the hearing. Mr. Kia, on cross-examination, admitted that being a designated individual meant he had greater responsibility than a submortgage broker *per se,* including the responsibility of ensuring YesPros, (and its submortgage brokers), complied with the MBA and Regulations and ethical standards. The Designate's finding in this regard was reasonable.

Appellant's submission that a two year suspension will effectively end his career

[234] The Appellant argues that given Mr. Kia's age, (roughly 54), the two year suspension ordered by the Designate will, in practical terms, result in the end of his almost two decade long career as a submortgage broker. He asserts that the suspension would negatively impact his relationship with lenders and that it would be extraordinarily difficult for him to rebuild his career after two years away from the industry.

[235] I note that if the Appellant's assertion in this regard is to be taken as correct, it would be the same for any submortgage broker, regardless of age. I further note that Mr. Kia's age is not particularly close to typical retirement age.

[236] The Appellant further submits that the practical effect of the two year suspension is that Mr. Kia will not have a career to return to which would be inconsistent with the Designate's findings (Penalty Decision at p 8):

> …that Mr. Arman Kia should be permitted to show he can, with the passage of time and further training, both rehabilitate himself and remediate his practice.
>
> …This term recognizes that Mr. Arman Kia, with a reasonable passage of time, should be able to demonstrate his efforts towards rehabilitation. …

[237] The Penalty Decision makes no reference to this argument having been advanced by Mr. Kia before the Designate. In his summary of the submissions made on Mr. Kia's behalf the Designate observed only that counsel for the Appellant had referred to "*Mr. Arman Kia's personal and occupational circumstances*". Whether this argument was advanced before the Designate or not, it is before me on this appeal. I will consider the issue in the context of whether the two year suspension was reasonable as a matter of general deterrence or otherwise inconsistent with the Designate's stated objective of providing the Appellant with an opportunity for rehabilitation.

[238] The Appellant refers to the BC Securities Commission decision in *Investment Industry Regulatory Organization of Canada (Re),* 2013 BCSECCOM

308, and the recent decision of the BC Court of Appeal in *Davis v British Columbia (Securities Commission),* 2018 BCCA 149 ("*Davis*"), both of which address the impact of suspensions on a securities broker's ability to carry on in their trade following the suspension.

[239] In *Davis* the Court of Appeal was dealing with the regulator's practice of imposing permanent market bans in all cases of fraud, regardless of the circumstances of the offence or the offender. The Court of Appeal found that it was incumbent upon the tribunal to consider whether measures short of a permanent market ban would protect the investing public where a person's livelihood is at stake. The tribunal had failed to consider the broker's previously unblemished record and the principle of proportionality. The Court remitted the matter of sanction back to the Commission for reconsideration.

[240] The Respondent asserts that the potential "career ending" effect of the two year suspension on the Appellant's career prospects is reasonable and appropriate in light of the Designate's findings of misconduct. The Respondent asserts that the Designate appropriately placed protection of the public as his overarching consideration.

[241] The Respondent refers to authorities including *British Columbia (Securities Commission) v Pacific International Securities Inc.,* 2002 BCCA 421 ("*Pacific*"), wherein the Court of Appeal held (at para 13) "*while the importance to the appellants of the result of the hearing is a factor to be weighed, it is not an overarching factor in this case.*" In support, the Court quoted from an earlier decision of the Ontario Court of Appeal as follows[11]:

> A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest. I have no doubt the Commission will, on proper occasions, give consideration to the possible serious consequences of taking away a man's livelihood, and of making the business of a broker or salesman a precarious occupation. Such considerations may have their proper place in determining what is in the public interest. It is, however, the public interest that is to be served by the Commission, and no private interests or the interest of any profession or business, in the exercise of the Commission's powers of suspension or cancellation of the registration of any broker or salesman.

[242] The Designate did not, in fact, impose a permanent suspension on Mr. Kia. The Designate imposed the two year suspension after considering Mr. Kia's personal and occupational circumstances raised by counsel for the Appellant. These facts are very different from those present in *Davis* where a permanent market ban was imposed in all cases of fraud, regardless of the circumstances of the offence or the offender.

[243] I have considered whether the two year suspension imposed by the Designate would put Mr. Kia's livelihood at stake, and have balanced that possible impact against the overarching objective of protecting the public. While I

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[11] *Pacific* at para 12 citing *Re the Securities Act and Morton*, 1946 CanLII 97 (ON SC), [1946] O.R. 492 at 494.

accept that Mr. Kia's business may well be harmed by a suspension of any length, I do not accept as fact that the two year suspension will effectively end his career. I also cannot find that the two year suspension imposed by the Designate was unreasonable.

[244] In the context of the Appellant's submission that the two year suspension would be inconsistent with Designate's stated objective of affording the Appellant with an opportunity for rehabilitation, I note that in declining to adopt the Respondent's submission for a five year suspension, the Designate stated that Mr. Kia should be permitted to show he can, with the passage of time and further training, both rehabilitate himself and remediate his practice. I find that the Designate reasonably considered the length of the suspension in the context of affording Mr. Kia an opportunity for rehabilitation.

Review of penalty decisions and the parity principle

[245] The Designate referred to the December 22, 2015 Consent Order *Re: Kambiz (Kam) Ali Mahinsa* ("*Mahinsa*") and the November 9, 2015 Consent Order *Re: Mehrdad Nevis aka Rod Nevis* ("*Nevis*"), both of which arose from the same investigation into YesPros as led to the allegations against Mr. Kia.

[246] The Appellant argues that the Designate unreasonably distinguished the *Mahinsa* and *Nevis* penalty decisions in formulating a penalty for Mr. Kia and that the disparity between the penalties offends the principle of parity which requires as a matter of fairness that like cases be treated alike.

[247] From the *Mahinsa* Consent Order we know the following:

a. Mr. Mahinsa had been registered as a submortgage broker with YesPros from April 2009 to June 2014 and was the designated individual for YesPros from May 2012 until April 2014 and now works at another mortgage brokerage.

b. Mr. Mahinsa fully cooperated with the investigation.

c. No prior contraventions were alleged.

d. Very similar to Mr. Kia's conduct, Mr. Mahinsa admitted to contraventions of section 8(1)(i) in relation to six borrowers. Mr. Mahinsa admitted that "he knew or ought to have known" that the information submitted to lenders was incomplete or misleading.

e. Mr. Mahinsa was ordered to pay an administrative penalty of $13,000 under section 8(1.1), investigation costs of $1,000 under section 6(9) and was ordered to carry out specified actions under section 8(1)(d) of the Act.

[248] From the *Nevis* Consent Order we know the following:

a. Mr. Nevis had been registered as a submortgage broker with YesPros from October 2005 to June 2012 and from October 2012 to present. He had been responsible for training new and existing submortgage brokers at YesPros.

b. Mr. Nevis fully cooperated with the investigation.

c. No prior contraventions were alleged.

d. Very similar to Mr. Kia's conduct, Mr. Nevis admitted to contraventions of section 8(1)(i) in relation to four borrowers. Mr. Nevis admitted that "he knew or ought to have known" that the information submitted to lenders was incomplete or misleading.

e. Mr. Nevis was ordered to pay an administrative penalty of $10,000 under section 8(1.1), investigation costs of $1,500 under section 6(9) and was ordered to carry out specified actions under section 8(1)(d) of the MBA.

[249] The Designate compared Mr. Kia's conduct to that in *Mahinsa* and *Nevis* and held (Penalty Decision at p 6):

> I find Mr. Arman Kia's conduct, while displaying similar misconduct themes to those involving Mr. Mahinsa and Mr. Nevis, involved more aggravating factors. The Registrar's procedures required that Mr. Mahinsa and Mr. Nevis' conduct be overseen by their designated individual. Mr. Arman Kia, on the other hand, knew that in his case there was no such oversight. He was also at all times a Director, a controlling mind, of the mortgage brokerage. He should be held to a higher standard as he was, for the most part, his own designated individual with no brokerage oversight.

[250] The Designate further distinguished *Mahinsa* and *Nevis* on the basis that they both fully cooperated with the investigation and had admitted their wrongdoing by Consent Order. In contrast, the Designate stated (Penalty Decision at p 6):

> The same cannot be said of Mr. Arman Kia, who I noted in the Decision on Merits was uncooperative, unreliable, and evasive. Mr. Arman Kia had every right to expect the Staff to prove their allegations and having done so, he has the right not to have that approach treated as an aggravating factor. I have not done so.

[251] I find that the Designate's determination that Mr. Kia's conduct involved "more aggravating factors" than in *Mahinsa* and *Nevis* to be reasonable based on a comparison of the particulars in each case.

[252] The contraventions admitted to by Mr. Mahinsa and Mr. Nevis involved admissions that they "knew or ought to have known" that the information they submitted to lenders was incomplete or misleading, while the Designate reasonably found in the Merits Decision that Mr. Kia did so "knowingly". The latter calls for a higher level of culpability than the former.

[253] I also agree with the Respondent that a plain reading of the Penalty Decision makes it clear that the Designate did not treat the Appellant's conduct of his defense as an aggravating factor in assessing penalty. The Designate expressly stated he did not do so. All the Designate said was that Mr. Mahinsa and Mr. Nevis could point to their admission of wrongdoing as a mitigating factor, while Mr. Kia could not. By his reference to Mr. Kia having been "uncooperative, unreliable, and evasive" the Designate was reinforcing the point that Mr. Kia could not claim the benefit of an admission of wrongdoing as a mitigating factor.

[254] The Designate referred to the August 24, 2011 Consent Order *Re: Yogendra Kumar Nagpal,* and found the conduct of Mr. Kia to be more serious than the conduct that was in issue in that matter in which Mr. Nagpal consented to an administrative penalty of $25,000, a costs order of $5000 and conditions.

[255] The Designate further considered and found instructive the March 13, 2006 decision *Re: Gurdip Chand,* and the May 22, 2015 Consent Order *Re: Margaret Schulz and W. I. Mortgage Pros Ltd.* Both of those cases involved findings of dishonest conduct.

[256] Mr. Chand had failed to disclose judgments against him on his registration application, prepared a false employment letter that he submitted to a lender seeking credit, and had misled a lender as to a borrower's indebtedness. The Registrar considered, amongst other concerns, Mr. Chand's "*lack of remorse, his evasiveness and his total lack of credibility*" and suspended Mr. Chand for five years, and imposed a costs order and conditions on his future registration.

[257] Ms. Shulz had been a submortgage broker for 10 years. Unlike Mr. Kia, Ms. Shulz had a disciplinary history under section 8(1)(i) of the MBA for which she had consented to an administrative penalty and a costs order in 2011. The contraventions of section 8(1)(i) of the MBA admitted to in the May 22, 2015 Consent Order included conduct very similar to Mr. Kia's conduct. Ms. Shulz admitted that she knew or ought to have known that the information submitted to lenders was incomplete or misleading. Ms. Shulz was suspended for five years under section 8(1), ordered to pay costs under section 6(9) and was ordered to pay an administrative penalty of $37,500 under section 8(1.1) of the MBA.

[258] After completing his review of previous penalty decisions dealing with contraventions of section 8(1)(i) of the MBA the Designate held (Penalty Decision at p 7-8):

> An analysis of the sentencing factors in light of my findings leads me to the inevitable conclusion that a suspension is not excessive but rather is warranted. I have not followed the submissions of Ms. Glen to suspend Mr. Arman Kia for a full five years given that Mr. Arman Kia should be permitted to show he can, with the passage of time and further training, both rehabilitate himself and remediate his practice.
>
> Considering all the relevant factors discussed above, I have concluded that an appropriate sanction is not an administrative penalty as suggested by Mr. Ahmed but a suspension of two years, at the lower end of the suspension range suggested by Ms. Glen. This term recognizes that Mr. Arman Kia, with a reasonable passage of time, should be able to demonstrate his efforts towards rehabilitation.

[259] In formulating a penalty for Mr. Kia I find that the Designate reasonably considered the relevant penalty decisions and that the penalty imposed did not offend the principle of parity.

[260] I find the Designate's decision that a two year suspension, as opposed to an administrative penalty, is the appropriate penalty to be assessed in the circumstances of this case to be both reasonable and well-reasoned.

[261] I find that the penalty ordered by the Designate was not overly harsh or unreasonable in all of the circumstances, and, accordingly, this ground of appeal is dismissed.

DECISION

[262] 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 referred to in these reasons.

[263] Following on my conclusions above that each ground of appeal advanced by the Appellant fails, I dismiss those appeals in totality and hereby confirm each of the Search Decision, Merits Decision and Penalty Decision.

[264] Both the Respondent and Appellant have sought costs against the other. Either party shall be entitled to make submissions regarding costs by **September 28, 2018**, to which the other party will have a right of reply until **October 05**, **2018.** 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.

"Michael Tourigny"

Michael Tourigny
Panel Chair

September 14, 2018