FST07-036

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*,
R.S.B.C. 1996, c. 141 as amended (the "Act")

BETWEEN

FRANK IANTORNO AND EVERGREEN MORTGAGE CORPORATION dba GET ACCEPTANCE BC

APPELLANT

AND

THE STAFF OF THE REGISTRAR OF MORTGAGE BROKERS

RESPONDENT

APPEAL DECISION

BEFORE:	JOHN E. D. SAVAGE, Presiding Member
APPEARANCES:	GORDON PHILLIPS, for the Appellant KAREN HORSMAN, for the Respondent
DATE OF DECISION:	JUNE 15, 2007

I. Introduction

[1] By a letter dated April 19, 2007 Frank Iantorno ("Iantorno") and Evergreen Mortgage Corporation d.b.a. Get Acceptance BC ("Evergreen") initiated an appeal (the "Appeal") to the Financial Services Tribunal ("Tribunal") from decisions of the Registrar of Mortgage Brokers (the "Registrar").

[2] The decisions appealed are (1) the decision by the Registrar to publish a notice of hearing against Iantorno and Evergreen on the Financial Institutions Commission's web site (the "Notice of Hearing") which posting took place on March 21, 2007, (2) decisions made March 23, 2007[1] and April 11, 2007 not to publish with equal prominence, or at all, Iantorno and Evergreen's defences to the allegations.

[3] Iantorno and Evergreen (the "Appellants") seek orders that the posting of the Notice of Hearing be stopped or alternatively that their defence be posted with the Notice of Hearing and with equal prominence. Iantorno and Evergreen also requested that the hearing of this appeal proceed with the "greatest possible speed" as the publication of these allegations did or could involve damage to the reputation of the Appellants.

[4] In light of positions taken through a preliminary exchange of correspondence, the Tribunal invited the parties to make submissions concerning the standing of the staff of the Registrar to make submissions in the hearing of this appeal and the jurisdiction of the Tribunal to make the orders requested. The Tribunal invited the parties to make concurrent submissions on all of the issues in consideration of the Appellant's request that the matter proceed with all due dispatch. The Tribunal received the Appellants reply submission June 6, 2007.

II. Jurisdiction of the Tribunal

[5] The Registrar's staff originally objected to the appeal being heard on jurisdictional grounds. In its written submission of May 30, 2007 it withdrew its objection. Of course a statutory jurisdiction cannot be expanded by agreement or acquiescence: *Re Merry and City of Trail*, (1962) 34 D.L.R. (2d) 594.

[6] The fount of a statutory tribunal's jurisdiction is its governing statute and, in the case of the Financial Services Tribunal, the other statutes that expressly confer jurisdiction upon the Tribunal.

[7] The general jurisdiction of the Tribunal is set out in section 242.3 of the *Financial Institutions Act*, R.S.B.C. 1996, Chap. 141:

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[1] In the original letter of appeal the dates May 20, 2007 and May 23, 2007 appear but these date references are errors.

> 242.3 (1) In respect of this Act or any other Act that confers jurisdiction on the tribunal, the tribunal has exclusive jurisdiction to
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> (a) inquire into, hear and determine all those matters and questions of fact and law arising or requiring determination, and
> (b) make any order permitted to be made.

[8] The specific jurisdiction as it relates to this appeal is found in section 9 of the *Mortgage Brokers Act*, R.S.B.C. 1996, Chap. 313 which provides:

> 9(1) A person affected by a direction, decision or order of the registrar under this Act may appeal it to the tribunal, and, unless otherwise provided for in this Act, sections 242.2 and 242.3 of the Financial Institutions Act apply.

[9] The "registrar" under the *Mortgage Brokers Act* is the Registrar and the "tribunal" is this Tribunal: see section 1, definitions of "registrar" and "tribunal". Under the *Mortgage Brokers Act* the Registrar licenses mortgage brokers, receives and investigates complaints, and after giving an opportunity to be heard, can suspend or cancel a mortgage broker's registration. In that context, there are a variety of potentially appealable determinations that might be made.

[10] It is a requirement of section 9(1) that there be a "direction, decision or order" of the Registrar. The phrase "direction, decision or order" is broad language and not restrictive. The *Mortgage Brokers Act* refers to these terms in different contexts[2]. In my opinion, by using the conjunction "or" the legislature has indicated that more than, for example, an order of the Registrar finally determining a disciplinary matter can be appealed.

[11] I agree with the submission that as general rule interlocutory appeals on issues of process should not be entertained separately from an appeal on the merits. In most cases this will restrict what might properly be appealed: *Assessment Commissioner of British Columbia v. Assessment Appeal Board* (1997) BC Stated Case 400, BCSC #3147/97, Victoria Registry.

[12] It is clearly not every direction or decision that should be subject to an interlocutory appeal, as the Registrar must be master of his own process and interlocutory proceedings can be disruptive and time consuming. Most such issues can be determined through an appeal in the ordinary course. In a case such as this, however, the subject matter of the appeal would become moot once a decision on the merits had been issued. Moreover, the issue is a novel one of general importance to registrants and the public, so it is appropriate that it be dealt with on a timely basis.

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[2] See, for example, section 7(1)(d), (e) and (f) for instances of the use of the term "direction" and section 6(2.1) and section 8(1.1) for examples of the use of the term "order".

[13] The Registrar has generally required that notices of hearing be published on the FICOM website. That requirement is, in ordinary parlance, a direction. That general direction was applied specifically to the Appellants. A copy of that direction was filed and forms part of the record[3] in this appeal (the "Direction"). There are also specific determinations of the Registrar that decline to remove the Notice of Hearing from the website and decline to publish the defence of the Appellants. Again, in ordinary parlance those are decisions of the Registrar (the "Decisions"). Those Decisions also form part of the record in this appeal.

[14] The other requirement of section 9(1) is that the person appealing be a "person affected" by the direction or decision. In my opinion Iantorno and Evergreen, being persons subject to the Direction and their applications being the subject matter of the Decisions, are persons affected by the Direction and the Decisions.

[15] The term "person affected" with reference to appeal rights has been interpreted broadly by our Court of Appeal, albeit in another context, but in my view similar reasoning would apply here: *Morguard Investments Limited et. al. v. Assessor of Coquitlam*, 2006 BCCA 26.

[16] While the matter here in issue might be considered interlocutory, because the point would become mute were the matter not to be decided now, I am persuaded that in the circumstances of this case an appeal lies and this Tribunal has jurisdiction to hear the appeal.

[17] III. Standing of the Staff of the Registrar

[18] A preliminary issue related to the hearing of the appeal is the standing of the staff of the Registrar (the "Staff") to make submissions in the appeal. Iantorno and Evergreen objected to the standing of the Staff to make submissions on the merits of the issues before me. The standing of the Staff to make submissions arises because of the principles enunciated by the Supreme Court of Canada in *Northwestern Utilities Limited v. City of Edmonton*, [1979] 1 S.C.R. 684.

[19] In *Northwestern Utilities* there was an appeal from a decision of the Alberta Public Utilities Board which, by the constitutive statute, was itself to be heard "upon the argument of any appeal".

[20] Estey J. distinguished between the party appealing and Board in holding that the right of the Board to be heard on an appeal from its own decision was necessarily a limited right, more in the nature of an appearance as *amicus curiae* but not as a full-fledged party. To find otherwise would "...place an unfair burden on an appellant who, in the nature of things, must on another day and in another cause

[3] I have taken as the 'record' in this appeal the various documents referred to by the parties in their submissions. Neither party objected to documentary references in the submissions. While this is not the same as a normal record, it satisfies the requirements of section 242.2(6) as it collectively includes documentary evidence (the submissions), the decision and written reasons.

submit itself to the rate fixing activities of the Board" (p. 708). Of course, in this matter, the Registrar would hear the appeal on the merits in the same matter.

[21] The decision maker is, of course, given a clear opportunity in its reasons for decision to make the points it needs to make and "....it abuses one's notion of propriety to countenance its participation as a full-fledged litigant...in complete adversarial confrontation with one of its principals in the contest before the Board in the first instance" (p.709).

[22] The principles in *Northwestern Utilities* were recently applied by the B.C. Court of Appeal in *British Columbia (Securities Commission) v. Pacific International Securities Inc.*(2002), 2 B.C.L.R. (4th) 114 (C.A.), 2002 BCCA 421. The case arose because the Securities Commission made an order for particulars that was argued to be insufficient by Pacific International.

[23] The Securities Commission appeared on the appeal and Pacific International contended that the Commission was not entitled to appear on the appeal to defend the merits of its own decision. Although successful, the Court deprived the Securities Commission of its costs, finding that it "...ought not to have appeared before us to defend the merits of its decision" (paragraph 47).

[24] In finding against Pacific International, however, the Court found that it had not been prejudiced by the appearance of the Securities Commission. That is because the Executive Director or Chief Administrative Officer could have appeared and made the arguments that were made by the Securities Commission:

> "This conclusion does not mean that the Commissioner's decisions cannot be defended on their merits on appeal. Section 9 of the Act provides for the Commission to appoint an Executive Director as its chief administrative officer. In reality, it is the Executive Director that is the appellant's protagonist in this matter. That officer is a party to hearings under s. 161 (Policy Doc. No. 15-601, s. 2.1) and is the officer upon whom the Commission cast the duty of making full disclosure (s. 2.5(b)). As the Executive Director could have appeared on this appeal and made the arguments that were made by the Commission, the appellants have suffered no prejudice by the Commission's action..."(paragraph 48).

[25] In this case the foundation of the objection of Iantorno and Evergreen is that there is no standing for the staff to appear and argue the merits. In my opinion, however, the *Northwestern Utilities* and *British Columbia (Securities Commission)* cases provide such justification.

[26] Contrary to the submission of Iantorno and Evergreen, section 167(5) of the *Securities Act*, R.S.B.C. 1996, Chap. 418 made the Commission a respondent in an appeal in the *British Columbia (Securities Commission)* case as did the constitutive statute of the Alberta Public Utilities Board in the *Northwest Utilities*

case. The same applies here by virtue of section 242.2(10)(g) of the *Financial Institutions Act*. In none of these cases are the staff of these adjudicating officials parties to an appeal, yet the cases are authority for the proposition that while the officials may have party standing the staff, not the officials, should be addressing the merits.

[27] The matter for determination in those cases was, as here that, notwithstanding such statutory authorized presence in an appeal, whether the role of the decision maker is to be circumscribed by the common law principles enunciated by the Supreme Court of Canada in the *Northwest Utilities* case. Should the decision maker's role be limited and the role of defending the merits of an appeal be borne by administrative staff to avoid the unfair burden of Iantorno and Evergreen appearing as both an adversary to and the appellant before the Registrar in the same or related causes?

[28] Interestingly enough, in this case the submission of Iantorno and Evergreen is that they would have no objection to there being submissions from the Registrar. In such case, it is difficult to understand the objection to the submissions from the Staff, since there could be no prejudice in such case, to me receiving the submission from Staff as opposed to one from the Registrar. Iantorno and Evergreen will be appearing before the Registrar in the hearing on the merits, receiving the submission from the Staff rather than the Registrar prevents them from appearing as an adversary with the Registrar at this interlocutory stage.

[29] In the circumstances I find no merit to the objection of Iantorno and Evergreen to there being a submission from the Staff of the Registrar before me, based on the principles outlined in the *Northwest Utilities* and *British Columbia (Securities Commission)* cases.

IV. Is the Registrar Entitled to Publish Notices of Hearing?

[30] After briefly describing the sequence of events leading up to the appeal I will deal with the issues in sequence as ordered in the submissions of counsel.

A. The Notices of Hearing

[31] According to the record, in the ordinary course the Registrar determined to go forward with a hearing into the conduct of, inter alia, Iantorno and Evergreen. To that end a Notice of Hearing was prepared.

[32] The Notice of Hearing sets forth allegations made against Iantorno and Evergreen in some detail. It is comprised of 12 numbered paragraphs and on its face contains sufficient particulars to enable the parties to understand the complaints made against them. A copy of the Notice of Hearing is attached to this decision and marked as Schedule "A".

[33] Although the Notice of Hearing particularizes the complaints, the names of the complainants and other personal information are redacted from the document. The document is posted on the website of the Financial Institutions Commission. The Notice of Hearing was posted during an exchange of correspondence between the Appellants and legal counsel.

[34] The Appellants requested that the Notice of Hearing be removed or alternatively that a six point response be given equal prominence. Following the posting of the Notice of Hearing an appeal was launched against the Determination and Decisions noted above.

[35] It is apparent that the Appellants deny the allegations contained in the Notice of Hearing. A copy of counsel's letter requesting that their response be posted as well is attached to this decision and marked as Schedule "B". The letter contains a summary of the Appellant's defence to the allegations. Staff declined to post the Appellants summary of their defence.

[36] In the exchange of correspondence and submissions of counsel the Appellants say that their reputations are tarnished by the publication of the Notice of Hearing. There is nothing in the legislation that requires publication of the allegations made in this case. This can only be remedied by either the Notice of Hearing being removed from public purview or the Registrar publishing their defence.

[37] The Staff argue that the process is public and one starts from the premise that Registrars hearings are open to the public. Ultimately it follows from this, it is argued, that the Notices of Hearing are appropriately posted on the website.

B. Are Hearings before the Registrar Public Hearings?

1. The Open Court Principle

[38] The Staff argue that hearings before the Registrar are public hearings based on the basis of the "open court principle". To give the public access to such hearings it is a necessary corollary that they understand in some meaningful way the nature of the case before the Registrar. That function is served by publication of the Notice of Hearing that particularizes the complaint.

[39] The Supreme Court of Canada has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *Re Vancouver Sun*, [2004] 2 S.C.R. 332, 2004 SCC 43, at paragraph 23; *Attorney General of Nova Scotia v. MacIntyre*, [1982 1 S.C.R. 175, at page 187. It is a cornerstone of the common law, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paragraphs 21-22.

[40] The open court principle turns "not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), at page 438. Moreover:

> "Openness is necessary to maintain the independence and impartiality of courts. It is integral to the public confidence in the justice system and the public's understanding of the administration of justice....openness is a principal component of the legitimacy of the judicial process and why the parties at large abide the decisions of courts": *Re Vancouver Sun*, supra, paragraph 25.

[41] The principles underlying the open court principle have application to administrative tribunals exercising statutory powers where those powers affect the public interest. Few would argue that the pubic interest is not generally served by ensuring that government process is transparent, and therefore effective and fair.

[42] As noted in the submission of the Staff, some statutes speak directly to the issue of whether a hearing process is to be public or private. If a statute is silent it is a matter of interpreting the legislative intent from the statute as a whole.

2. The Presumption of Public Proceedings

[43] In *R. v. Tarnopolsky, ex parte Bell*, [1970] 2 O.R. 672 the Ontario Court of Appeal held that as a general rule if the statute is silent then the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them in camera. Although reversed on other grounds ([1971] S.C.R. 756), the Supreme Court of Canada did not impugn this statement of the general rule which has other support: Blake, *Administrative Law in Canada*, 4th Ed., 2006 (Butterworths) at page 48.

[44] In *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R. (4th) 438 (B.C.C.A.), the B.C. Court of Appeal interpreted the public nature of assessment together with statutory silence in the *Assessment Act* to mean that the Assessment Appeal Board has no jurisdiction to hold proceedings in camera, especially in the face of express provisions in many British Columbia statutes at that time such that "... where the legislature has seen fit to permit boards to hold proceedings in camera, it has expressly conferred the power..." (paragraph 45).

[45] In my opinion, the open court principle together with statutory silence raise the presumption that hearings are to open to the public, subject only to any necessary inference to be derived from the governing legislation.

3. The *Mortgage Brokers Act*

[46] The provisions of the *Mortgage Brokers Act* are described in detail, albeit in another context, in *Cooper v. British Columbia*, [2001] 3 S.C.R. 537, 2001 SCC 79.

[47] In determining that the Registrar of Mortgage Brokers did not owe a duty of care to investors, but to the public as a whole, the Supreme Court of Canada reviewed the provisions of the *Mortgage Brokers Act*. In summarizing the general provisions of the Act I can do no better than quote from this decision:

> 45 A brief review of the relevant powers and duties of the Registrar under the Act confirms this conclusion. Part 1 sets out the Registrar's regulatory powers with respect to the operation of mortgage brokers and submortgage brokers in British Columbia. Specifically, s. 4 provides that the Registrar must grant registration or renewal of registration to an applicant if, in his opinion, the applicant is "suitable" for registration and the proposed registration is "not objectionable". He may also attach such conditions and restrictions to the registration as he considers necessary. Once registered, a mortgage broker must comply with s. 6 of the Regulations which mandates that registrants maintain proper books and records and file annual financial statements with the Registrar.
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> 46 Sections 5 and 6 of the Act cover the investigatory powers of the Registrar. Pursuant to s. 5, the Registrar may, and on receipt of a sworn complaint must, investigate any matter arising out of the Act or Regulations. In pursuit of this purpose, the Registrar may examine any records and documents of the person being investigated. He may summon witnesses and compel them to give evidence on oath or otherwise and to produce records, property, assets or things in the same manner as the court does for the trial of civil actions. Section 7 allows the Registrar to "freeze" funds or securities where he has made or is about to make a direction, decision, order or ruling suspending or cancelling the registration of a person under the Act. He may also apply to the court for an appointment of a receiver, or a receiver and manager, or trustee of the property of the person.
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> 47 Under s. 8, the Registrar may, after giving a person registered under the Act an opportunity to be heard, suspend or cancel any registration if, in his opinion, any of the following or other conditions apply: the person would be disentitled to registration if the person were an applicant under s. 4; the person is in breach of a condition of registration; the person is a party to a mortgage transaction which is harsh and unconscionable or otherwise inequitable; or the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest. Section 14 prohibits a broker from making any false, misleading or deceptive statements in any advertisement, circular or similar material. Part 2 of the Act is directed towards the protection of borrowers, investors and lenders, mandating in part specific disclosure requirements by mortgage lenders and their agents. Section 8 of the Regulations provides that every direction, decision, order or ruling of the Registrar refusing

registration, refusing to renew registration, suspending registration or cancelling registration shall be made in writing and shall be open to public inspection.

48 Finally, s. 20 exempts the Registrar or any person acting under his authority from any action brought for anything done in the performance of duties under the Act or Regulations, or in pursuance or intended or supposed pursuance of the Act or Regulations, unless it was done in bad faith.

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

[48] Thus, as can be seen from this summary, paramount throughout the Act is the public interest. This characterization is not seriously disputed by the Appellants, although they draw a different conclusion, saying that if the Registrar's duty is to the public as a whole, and not to any individual investor, then no individual investor could attend the hearing, only the public as a whole, which is absurd.

[49] In my opinion this argument conflates the notion of the public nature of the duty of the Registrar with the characterization of who can attend the hearing.

[50] The fact that the duty of the Registrar under the Act is to the public as a whole, and not any individual investor, does not imply that any individual investor might not attend a hearing. As a member of the public, if the Staff are correct, they have a right to attend the hearing. As a person affected they have a further right, the right to be heard at such hearing.

[51] The Appellants also argue that the effect of section 8 of the *Mortgage Brokers Act Regulations*, B.C. Regulation 100/73, is that only the described directions, decisions and orders are to be open for public inspection. Section 8 reads as follows:

> 8. Every direction, decision, order or ruling of the registrar refusing registration, refusing to renew registration, suspending registration or cancelling registration shall be made in writing and shall be open to public

> inspection, and a copy of any such reasons shall be supplied by the registrar to any person who applies therefor, or who, in the opinion of the registrar, may be affected thereby.

[52] The Staff respond by saying that the Regulation is inferior legislation and cannot be interpreted as limiting the requirement of openness imposed by implication by the scheme of the Act. While that is so, contrary to the Appellants' submission, it simply does not follow from the fact that hearing decisions must be made public that notices of such hearings must be secret or uninformative or the hearings themselves held in camera.

[53] The Staff further argue that it would be unthinkable if an administrative order made by the Registrar could be made an order of the BC Supreme Court, as it may under section 8.1 of the Act, and the underlying hearing not be open to the public. The Appellants provide some counter-examples, such as orders under the *Enforcement of Canadian Judgments and Decrees Act*, orders made in reciprocating jurisdictions under the Part 2 of the *Court Order Enforcement Act*, and the enforcement or arbitral decisions under section 29 of the *Commercial Arbitration Act*. Notwithstanding these limited examples, the general proposition is certainly correct, that the proceedings which are the genesis of court orders are generally open to the public.

[54] Despite the able arguments of counsel, I am not persuaded that the scheme of the *Mortgage Brokers Act* implies a requirement for secrecy in its proceedings. As discussed above, the open court principle coupled with the public interest in these proceedings and the absence of any requirement that hearings be held in camera persuade me that it was intended that hearings before the Registrar be public. In doing so I find the words of the Ontario Securities Commission, in a decision affirmed by the Ontario Divisional Court, apt to proceedings before the Registrar:

> "Openness" is important for the Securities Commission which is charged with the responsibility of helping to ensure the integrity of the capital markets in Ontario. Disclosure is particularly important for a body which itself uses disclosure as one of its principal techniques for ensuring compliance with the law by others. Investors, those being regulated, and the general public all have a strong interest in knowing what the Commission is doing and why it is doing it. Why has a penalty been imposed on the four persons who reached a settlement with the Commission? What did they actually do? Was the penalty too light? Too heavy? In the absence of disclosure there will often be speculation and rumour about the true facts....
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> *Gaudet v. Ontario (Securities Commission)* (1990), 13 OSCB 1405, aff'd [1990] O.J. No. 3252 (Ont. Div. Ct.).

[55] In my opinion, the same considerations apply to proceedings before the Registrar. The general public has a strong interest in knowing what the Registrar is doing and why he is doing it. Are the decisions of the Registrar reasonable and in accordance with the weight of the evidence? Do the decisions adequately protect the public interest? Can the public have confidence in a regulatory scheme designed to protect their interests where the proceedings are conducted in secret and only the decisions disclosed? In my opinion it cannot. In the absence of a clear direction in the legislation, the open court principle has proper application.

C Advance Notice of Hearings

[56] While I have found that the open court principle applies to hearings before the Registrar, does it follow that notices of such hearings should be public? There is nothing in the statute or regulations that speak to public notice. The inference from that, argues the Appellants, is that there should not be public notice, and the Registrar, being a statutory official, lacks the authority to provide public notice, as "Everything he does in his official capacity 'must find its ultimate legal foundation in statutory authority'": *Cooper v. Hobart* (2000) BCCA 151 at paragraph 61.

[57] The Staff say that the public nature of the hearing process creates a consequent necessity for some form of public notice, indeed, the "public's right to observe the Registrar's regulatory processes would be meaningless if the public was not aware of pending hearings, and the matters at issue in those hearings". In determining how this might be done the Registrar evidently adopted a form of notice that was consistent with that provided by the Law Society and Securities Commission. A copy of these forms of notice was provided as part of the record furnished by the Staff.

[58] The Appellants argue that it is a non-sequitur to hold that because hearings must be open to the public the Registrar has a duty to post the detailed allegations that comprise the Notice of Hearing. In making this argument, the appellants rely on a decision of the Ontario Divisional Court in *Canadian Newspapers Ltd. v. Law Society of Upper Canada* (1986), 19 O.A.C. 361.

[59] In the *Canadian Newspapers* case the newspaper sought an order requiring advance notice of hearings before the Law Society that, under the governing legislation, are open to the public. As an ancillary matter, the Law Society Discipline Committee had made an order banning publication of proceedings before it and banning publication of the fact that it had made such an order.

[60] With respect to the application for notice, the Court held as follows:

> The applicants ask for a declaration that the Law Society provide to them and to the public in general notice of disciplinary hearings not later than seven clear days prior to the hearing containing the name of the member

involved, the geographical location in which the member practises or practised, a full description of the complaint and charges made against the member, and the date and place of the hearing.

In our view, neither the provision for hearings open to the public in section 9(1) of the Statutory Powers Procedure Act ("SPPA") nor the freedom of expression, including freedom of the press and other media of communication, guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms imports the requirement of such a notice as the applicants seek upon these applications, nor is either section infringed by reason of the failure to give such a notice.

[61] The Court, in a short decision that cites no authority, found further that the Discipline Committee was without authority to make the non-publication orders, and that such did not fall within the ambit of the "plenary jurisdiction" of the Tribunal.

[62] In my view the *Canadian Newspapers* case stands only for the proposition that neither the *Statutory Powers Procedure Act* nor the *Canadian Charter of Rights and Freedoms* could found a *requirement* that the tribunal publish advance notice of its proceedings. It does not apply conversely, namely, that absent such an inference, there is no jurisdiction in the Tribunal or official to publish advance notice of a public hearing.

[63] The interpretation of the *Mortgage Brokers Act* should be based on a purposive approach: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342; *United Taxi Driver's Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19.

[64] Under the *Mortgage Brokers Act* the Registrar is authorized to conduct investigations, hold hearings, subpoena witnesses, and adjudicate on the fitness of registrants. As noted earlier, where the legislature has seen fit to allow for hearings in camera, it has frequently provided the express jurisdiction to do so. Under this legislation there is no express jurisdiction to hold in camera hearings and I have concluded that there is no implied jurisdiction to do so.

[65] Through regulation the legislature has expressly required that every direction, decision, order or ruling of the Registrar be made available to the public. Since I have held that hearings must be held in public, it makes no sense, in my opinion that in holding such public hearings the Registrar is not, by necessary implication, authorized to publish advance notice of such hearings.

[66] The open court principle and the overarching public interest in these proceedings entail that the Registrar has jurisdiction to publish notices advising the public of the time scheduled for hearings within its jurisdiction and the nature of such hearings.

D. Publication of Rejoinder

[67] In the alternative, the Appellants seek an order requiring the Registrar to publish with equal prominence their defence to the allegations. The Appellants' submission relies on case law in the defamation context for support.

[68] The submission of the Staff resists this part of the application arguing that it would allow the Registrar to lose control of its website. Moreover, there is no requirement that a person in the position of the Appellants file a defence at all.

[69] In my opinion the law of defamation has no application in determining the question of what is lawfully required of the Registrar in publishing notice of a hearing. The Registrar's processes are not concerned with adjudicating the rights of private persons, but rather with the enforcement of regulatory powers by statute against regulated persons.

[70] In posting a notice the Registrar is advising members of the public of the nature of the allegations and the upcoming hearing. This does not invite a contest of allegations which is for the hearing itself, provided it is made clear that, at this stage, the matter only involves unproven allegations. That said, it is appropriate that the Registrar make it clear that the matters at this stage involve only unproven allegations.

[71] In this regard, the Staff as part of the record included an extract from the Law Society of British Columbia website. The Document is called a "Citation" and prominently includes this statement in a rectangular box:

> "Citations are issued by the Law Society of BC's Discipline Committee and list charges against a lawyer which will be considered at a discipline hearing. Please note that charges in a citation are unproven allegations until a discipline hearing panel has determined their validity".

[72] There is nothing before me regarding the context of the website publication of the Registrar's Notice of Hearing other than the Notice of Hearing itself. The Notice of Hearing does refer to the fact that the matter concerns allegations, however, the Law Society statement in my view accords appropriate and reasonable prominence to this fact.

[73] If the Registrar's website does not contain a similar disclaimer regarding its notices of hearing it should.

V. Summary

[74] The Financial Services Tribunal has jurisdiction to hear this appeal regarding the Direction and Decisions of the Registrar. The Staff has standing to make submissions on the merits in place of the Registrar.

[75] Hearings before the Registrar are public hearings. It is appropriate to publish notices of such hearings. There is no requirement to publish rejoinders or

responses from persons who are subject to such hearings, however, in my opinion a prominent disclaimer should be published noting that the allegations in such notices are unproven similar to that found on the Law Society website.

VI. Costs

[76] The matter before me is one of first impression on an important matter of public interest concerning the practices of the Registrar. I am beholden to counsel for their able submissions.

[77] In the circumstances I consider it appropriate that the parties bear their own costs.

John Savage
Member
Financial Services Tribunal

SCHEDULE A

IN THE MATTER OF THE MORTGAGE BROKERS ACT
R.S.B.C. 1996, c. 313

and

GET ACCEPTANCE CORPORATION and
EVERGREEN MORTGAGE CORPORATION dba
GET ACCEPTANCE – BRITISH COLUMBIA and
KEITH WESTERGAARD and
FRANK IANTORNO

NOTICE OF HEARING

(Section 8 of the Mortgage Brokers Act)

TO: GET Acceptance Corporation
#112-5021 Kingsway
Burnaby, B.C. V5H 4A5

TO: Keith Westergaard
8111 Ash Street
Vancouver, B.C. V6P 3L8

TO: Evergreen Mortgage Corporation
dba GET Acceptance – British Columbia
2538 Jasmine Court
Coquitlam, B.C. V3A 2G6

TO: Frank Iantorno
2538 Jasmine Court
Coquitlam, B.C. V3A 2G6

TAKE NOTICE that a hearing will be held at the offices of the Financial Institutions Commission, #1200 – 13450 – 102nd Avenue, Surrey, B.C., commencing at **10:00 a.m. on Monday, September 10, 2007 and continuing through Friday, September 21, 2007**, before the Registrar of Mortgage Brokers to allow GET Acceptance Corporation ("GET"), Keith Westergaard ("Westergaard"), Evergreen Mortgage Corporation dba GET Acceptance – British Columbia ("GET B.C.") and Frank Iantorno ("Iantorno") an opportunity to be heard.

AND TAKE NOTICE that it will be alleged:

1. That GET B.C. disclosed to lenders that the mortgages they were purchasing from GET were current and that there had been no prior arrears, when in fact the mortgages were not current and had prior arrears, and thereby made a statement provided under the *Mortgage Brokers Act* ("the *Act*") that, at the time and in the

light of the circumstances under which the statement was made, was false or misleading with respect to a material fact. Those lenders were [redacted]

2. That Iantorno, as the Designated Individual for GET B.C., failed to ensure that the lenders referred to in paragraph #1 were provided with accurate disclosure pursuant to section 17.1 of the *Act*, and thereby conducted business in a manner prejudicial to the public interest;

3. That GET B.C. failed to disclose to lenders in the prescribed disclosure statement that Iantorno, a related or associated party, had or would likely acquire a direct or indirect interest in the mortgage transaction for which the disclosure statement was provided, contrary to section 17.4 of the *Act*. Those lenders were [redacted]

4. That Iantorno, as the Designated Individual for GET B.C., failed to ensure that the lenders referred to in paragraph #3 were provided with accurate disclosure pursuant to section 17.4 of the *Act*, and thereby conducted business in a manner prejudicial to the public interest;

5. That GET failed to disclose to borrowers in the prescribed disclosure statement that Iantorno, a related or associated party, had or would likely acquire a direct or indirect interest in the mortgage transaction for which the disclosure statement was provided, contrary to section 17.3 of the *Act*. Those borrowers were [redacted]

6. That Westergaard, as the Designated Individual for GET, failed to ensure that the borrowers referred to in paragraph #5 were provided with accurate disclosure pursuant to section 17.3 of the *Act*, and thereby conducted business in a manner prejudicial to the public interest;

7. That GET B.C. failed to disclose to borrowers in the prescribed disclosure statement that Iantorno, a related or associated party, had or would likely acquire a direct or indirect interest in the mortgage transaction for which the disclosure statement was provided, contrary to section 17.3 of the *Act*. Those borrowers were [redacted]

8. That Iantorno, as the Designated Individual for GET B.C., failed to ensure that the borrowers referred to in paragraph #7 were provided with accurate disclosure pursuant to section 17.3 of the *Act*, and thereby conducted business in a manner prejudicial to the public interest;

9. That GET, and Westergaard as the Designated Individual, employed Iantorno as a submortgage broker. Iantorno was not registered as a submortgage broker with GET, contrary to section 21(1) (d) of the *Act*;

10. That GET B.C. carried on business as a mortgage broker elsewhere than at or from GET B.C.'s registered address, contrary to section 21(1) (b) of the *Act*;

11. That Iantorno, as the Designated Individual for GET B.C., allowed GET B.C. to carry on business as a mortgage broker elsewhere than at or from GET B.C.'s registered address, and thereby conducted business in a manner prejudicial to the public interest;

12. That Westergaard is not suitable for registration and his proposed registration is objectionable for the following reasons:

- He was the sole director and officer of Aaron Acceptance Corporation ("Aaron"), which was a registered mortgage broker, and was a registered submortgage broker with Aaron. Aaron had three monetary judgments awarded against it which remain outstanding. Two of those judgments related to mortgages brokered by Aaron which were found to be unconscionable. Westergaard has indicated that he is not willing to pay those judgments, as he feels he has no personal liability with respect to them.

- In an application to the Registrar for registration as a submortgage broker dated June 1, 2001, Westergaard stated that there were no pending legal proceedings against him. He further stated that no judgment, which is unsatisfied, had ever been rendered against him personally or against any business of which at the time he was an officer or director in any civil court in British Columbia for any reason whatsoever. Contained in the application is the following warning:

  > ANY APPLICATION CONTAINING A FALSE STATEMENT MAY RESULT IN THE REFUSAL, SUSPENSION OR CANCELLATION OF ANY LICENCE OR REGISTRATION.

  At the time of this application, there was at least one pending legal proceeding against Westergaard: *White v. Aaron Acceptance Corporation et al.* In addition, there were three unsatisfied judgments outstanding against Aaron, a company at which time Westergaard was both an officer and director.

- Subsequent to his registration on various conditions effective August 29, 2003, Westergaard has employed an unregistered submortgage broker, Iantorno, to work for GET as its general manager. Further, Westergaard has failed to ensure that clients of GET receive proper disclosure with respect to the conflict of interest

of Iantorno and with respect to whether mortgages being sold to lenders have previously been in arrears.

AND TAKE NOTICE that you may be represented by legal counsel at the hearing and may make representations, cross examine witnesses and lead evidence. If you fail to personally appear at the hearing, orders may be made in your absence.

DATED at Surrey, British Columbia, this 20th day of March, 2007.

W. Alan Clark
Registrar of Mortgage Brokers
Province of British Columbia

PHILLIPS & COMPANY

BARRISTERS

April 10, 2007
File No:

BY FAX: 604 953 5252

Ministry of the Attorney General
Legal Services Branch
1200-13450 102 Avenue
Surrey, BC V3T 5X3

Attention: Richard Fernyhough

Dear Sir:

Re: Iantorno and Evergreen Mortgage Corporation

The Registrar of Mortgage Brokers has caused to be posted, on the website of the Financial Institutions Commission, the Notice of Hearing setting out the allegations against my clients (at least, I assume from our prior correspondence that it was the Registrar whose staff caused that Notice to be posted; please advise me if I err and this letter should be directed to someone other than yourself).

I assume that my clients' response to those allegations will also be posted.

So I ask for the following 6-point "Response of Frank Iantorno and Evergreen Mortgage Corp" to be placed on that web site and for the Notice of Hearing on that web site to advise readers of this Response.

The existing contents of the web site have already started to have their inevitable effect of harming my client's business - unfortunately the caveat that those contents are mere allegations does not detract from their effect on readers - but that I hope that equally-prominent publication of this material might partly alleviate that harm.

1. The mortgages that were being purchased were current. There had not been any prior arrears under them.

2. All information that was provided to purchasers was accurate and complete - even more complete than the government requires.

3. Sometimes the borrowers were borrowing money, secured by their mortgage, so as to be able to pay debts that they already owed. Those debts may have been credit card debts, mortgage debts, or any sort of debts, and they may have been in arrears. The Province of British Columbia decided not to require any of that information to be disclosed to potential purchasers. There is not even any space on the government's forms for it to be disclosed. Nonetheless, in keeping with their policy of providing more information than required, and providing more than is usual in the industry, GET BC sought to provide information about such arrears to potential purchasers.

4. As for the complaint that Iantorno has a "direct or indirect interest" in the mortgage transactions, the Registrar has explained that this is just an allegation that Iantorno was a GET employee and its "General Manager". Iantorno was GET's General Manager. Everyone knew that, and the Registrar's only complaint seems to be that although this fact was explained, it was not explained on the right form. But regardless of the form that was used, Iantorno's position as General Manager certainly did not give him an interest, direct or indirect or whatever, in the mortgage transactions. So it did not even have to be disclosed, although it was disclosed in keeping with GET BC's policy of providing more information that the law requires.

5. Iantorno did not act as a sub mortgage broker for GET. He acted as a submortgage broker for GET BC.

6. Finally, GET BC carried on business as a mortgage broker out of its registered address, just the same as every other mortgage broker in BC has done, and continues to do, with the knowledge and approval of the Registrar.

Yours truly,

PHILLIPS & COMPANY

Per:

Gordon Phillips
Personal Law Corporation