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Financial Services Tribunal

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FST Judicial Review Update

FST Appeal Case 08:040
GET Acceptance Corporation and Keith Bryan Westergaard v. Registrar of Mortgage Brokers

This Financial Services Tribunal decision was **quashed** and the appeal from the Registrar's decision was sent back to the Tribunal for reconsideration in accordance with the reasons of BC Supreme Court Justice, the Honourable Mr. Justice Pitfield, in his decision dated June 29, 2010.

Three notices of appeal to the British Columbia Court of Appeal were filed from the Supreme Court's Judgment: (1) July 27, 2010 Notice of Appeal of Keith Bryan Westergaard and GET Acceptance Corp.; and (2) two July 29, 2010 Notices of Appeal of the Registrar of Mortgage Brokers. These matters were considered by the Court of Appeal and adecision issued August 11, 2011.

The BC Court of Appeal overturned the BCSC judgement, quashed the decision of the FST, determined it was not necessary to remit the matter for redetermination by the FST, and restored the orginal decision of the Registrar.

For more information, please see the Active Appeals, Decisions and Judicial Reviews on the FST's website at www.fst.gov.bc.ca or search for the decision by name on the BC Supreme Court decisions website at www.courts.gov.bc.ca/sc/sc-jdbwk.asp

FST-08-040

FINANCIAL SERVICES TRIBUNAL

In the matter of *Mortgage Brokers Act* R.S.B.C. 1996, C. 313

BETWEEN:

KEITH BRYAN WESTERGAARD and
GET ACCEPTANCE CORPORATION

APPELLANT

AND:

FRANK IANTORNO AND EVERGREEN MORTGAGE CORPORATION
DBA GET ACCEPTANCE-BRITISH COLUMBIA

APPELLANT

AND:

REGISTRAR OF MORTGAGE BROKERS

RESPONDENT

APPEAL DECISION

Chair: Stanley W. Hamilton, member of the Financial Services Tribunal

Counsel: Duncan Manson, for Keith Bryan Westergaard and Get Acceptance Corporation

Gordon Phillips, for Frank Iantorno and
Evergreen Mortgage Corporation dba Get Acceptance-British Columbia

Neema Sharma and Stephanie Jackson, for the Staff of the Registrar of Mortgage Brokers

Date of Decision: September 5, 2009

INTRODUCTION

This is an appeal ("Appeal") of the January 25, 2008 decision ("Decision") of the Registrar's designate, Lynda A. Wrigley ("Registrar") pursuant to section 9(1) of the *Mortgage Brokers Act, R.S.B.C. 1996,* c. 313 ("Act") and the subsequent penalty decision dated February 18, 2008 ("Decision on Penalty").

On February 19, 2008 GET Acceptance Corporation ("GET") and Keith Brian Westergaard ("Westergaard") filed a Notice of Appeal with respect to the Decision and the Decision on Penalty. On February 20, 2008 Evergreen Mortgage Corporation dba Get Acceptance – British Columbia ("Get-BC") and Frank Iantorno ("Iantorno") filed a Notice of Appeal in relation to the same decisions. Although the appellants have challenged different aspects of the decisions, there are common issues to both appeals. As the matters were heard together at first instance, there is only one decision on the merits and one penalty decision.

By order dated March 6, 2008 the Financial Services Tribunal ("FST") determined that the appeals of GET and Westergaard and Get-BC and Iantorno would be combined pursuant to section 37(1) (a) of the *Administrative Tribunals Act,* SBC 2004, c. 45.

BACKGROUND

Westergaard had been a registered submortgage broker to various mortgage broker companies in B.C., almost continuously since January 12, 1972. Westergaard voluntarily relinquished his registration between December 6, 1984 and December 6, 1985. On January 29, 1986 Westergaard became registered as a submortgage broker and the designated individual for Aaron Acceptance Corporation ("Aaron BC"), a company registered as a mortgage broker under the Act, With the exception of a brief 21 day period of suspension in 1994, he remained with Aaron BC until June 16, 1998.

Westergaard was the sole officer and director of Aaron BC which was owned by Westergaard Holdings Ltd., another company owned and controlled by Westergaard. Westergaard Holdings Ltd advanced funds to Aaron BC to capitalize the company for its operations and for the funding of mortgages. Westergaard is the president of Westergaard Holdings Ltd.

On June 16, 1998, Westergaard terminated his registration and that of Aaron BC and its submortgage broker employees. The reasons that Westergaard terminated Aaron BC's registration is not entirely clear, but evidence will be considered in a subsequent part of the Appeal.

Westergaard next carried on mortgage broker business with his Alberta Company, Aaron Acceptance Corporation ("Aaron Alta"), which is also owned by Westergaard Holdings Ltd. While working in Alberta, Westergaard carried on business with investors in Alberta and British Columbia in respect of mortgages registered against properties in Alberta. This came to the attention of the Registrar's staff through an investor "Newsletter" published by Aaron Alta and signed by Westergaard as president. By letter

dated May 7, 2001, the Registrar's staff advised Westergaard that the Act in British Columbia had changed on September 1, 2000 and he would have to be registered in British Columbia if he wanted to sell mortgages in this province regardless of the location of the land to be secured. He was also advised that he would have to cease his mortgage broker activity with investors resident in British Columbia until he was registered.

On June 1, 2001 Westergaard applied for registration as a submortgage broker in British Columbia with Aaron Alta. The Registrar's staff completed an investigation and recommended that Westergaard not be registered as a submortgage broker due to the fact that he was not suitable for registration and the proposed registration was objectionable. A Notice of Hearing was issued on April 11, 2002 and a suitability hearing was scheduled to commence on September 14, 2003. In the meantime Westergaard purchased a British Columbia registered broker company called Norwest Capital Corporation in 2002 and changed its name to Get Acceptance Corporation ("GET") on May 21, 2003. On June 16, 2003 GET was registered as a mortgage broker in British Columbia and Westergaard was, and continues to be, the sole director and Designated Individual at GET.

Following negotiations between Westergaard and the staff at the Registrar's office, a written agreement pertaining to registration was reached on August 22, 2003. The agreement provided in paragraph 3(b) that the Registrar would " immediately approve Mr. Westergaard's Application for Registration as a sub-mortgage broker in British Columbia upon the terms set out in Schedule A hereto" and that Mr. Westergaard would " pay $10,000 to the Registrar on account of investigation costs." Westergaard waived his right to a formal hearing. The hearing scheduled to commence on September 14, 2003 was cancelled without an agreed statement of facts or consent order, as is usual when a matter settles without hearing after the notice of hearing is issued.

On August 29, 2003 the Registrar issued a Certificate of Registration to Westergaard as a submortgage broker employed by GET with conditions of registration attached as Schedule "A". Condition 1 of Schedule "A" specified that: "Westergaard's initial registration as a submortgage broker to be restricted to a period of one year. The first renewal period was also to be restricted to a period of one year."[1] The first renewal of Westergaard's registration was granted on August 29, 2004, also subject to the same conditions of registration in Schedule "A". The renewal was for a one year period as provided in Condition 1 of Schedule "A".

Sometime in April - May 2004, GET entered into a consulting contract with Iantorno. Iantorno and his wife are the sole shareholders of Evergreen Mortgage Corporation, a mortgage broker first registered in British Columbia on December 18, 2003. Evergreen Mortgage Corporation registered a new trade name as Get Acceptance-British Columbia (Get-BC) on September 24, 2004. Iantorno is the Designated Individual for Get-BC. Iantorno was first registered as a submortgage broker in British Columbia in December, 1992. On May 13, 1993 Iantorno became registered as a submortgage broker with Aaron BC and with minor interruptions he continued with Aaron BC until April 17, 1998. His

[1] The normal period of renewal is two years.

registration with Aaron BC was necessarily suspended during the period of Aaron BC's suspension in 1994. Between 1998 and December 18, 2003 he was registered as a submortgage broker with various firms in British Columbia.

In or about October 2004, Iantorno began working with GET on a part-time basis as the general manager. Starting sometime in late 2004 Iantorno and Westergaard began discussions concerning Iantorno becoming a shareholder of GET. By November 2005 lawyers began drafting a shareholders agreement pursuant to which Iantorno could become a shareholder in GET. The agreement was finalized in November 2006 and Iantorno became a 30% shareholder in GET.

Westergaard applied for renewal of his registration on July 28, 2005 and at that time he requested the removal of the conditions of registration contained in Schedule "A" which had first been placed on his registration of August 29, 2003. By letter dated September 26, 2005, the Deputy Registrar advised Westergaard that the Registrar was not prepared to remove the conditions. Westergaard's Certificate of Registration accompanied by Schedule "A", exclusive of Condition 1 relating to the term of renewals, was issued on August 29, 2005. The new Certificate was for a two-year term ending August 28, 2007.

Westergaard applied for a hearing before the FST appealing the decision of the Registrar to renew the submortgage broker registration of Westergaard with conditions of registration (FST 05-017). The conditions in schedule "A" affects him as submortgage broker, as well as GET, in its capacity as the employer of the Westergaard. Following the FST hearing, the FST referred the application back to the Registrar under s. 242.2(11) of the *Financial Institutions Act* for investigation, determination and hearings as determined appropriate pursuant to the Act and Regulations. The FST observed at page 10 that:

> I am of the view that the procedures which should have been followed were not in fact followed in this case. … [t]he [two year] extension granted by the Registrar subject to the Conditions of Registration set out in Schedule "A" may continue temporarily to apply until such time as the Appellant has made application for its sub-mortgage broker registration whether - at the choice of the Appellant - by way of renewal or fresh application and the Registrar has rendered his decision with respect to that application.

Counsel for Westergaard filed an Application for Renewal of his submortgage mortgage broker registration on April 6, 2006. The staff at the Registrar's office commenced an investigation following receipt of the application. On January 15, 2007, the Registrar issued a Notice of Opportunity to Be Heard. On March 20, 2007, the Registrar issued a Notice of Hearing. An Amended Notice of Hearing was issued on June 15, 2007 pursuant to ss. 4 and 8 of the Act. The Hearing commenced on September 10, 2007. The Amended Notice of Hearing contained 12, allegations, but only six were proven.

THE REGISTRAR'S DECISION

Following the conclusion of the hearing, the Registrar held that:

(i) I conclude that allegation #1 has been proven. Iantorno and Get-BC have made a statement provided under the Act - on the Lender/Investor Information Statement Form 9 [required pursuant to s.17.1 of the Act]- that in light of the circumstances under which the statement was made, was misleading with respect to a material fact – that material fact being the existence of prior arrears which impacts the risk of the mortgage investments he was selling [to the four named investors[2]];

(ii) Iantorno, as Designated Individual, was conducting business in a manner prejudicial to the public interest by causing Get-BC to be in breach of section 17.1 of the Act [linked to point (i) above];

(iii) Get-BC carried on business as a mortgage broker elsewhere than at or from Get-BC's registered address, contrary to s. 21(1)(b) of the Act;

(iv) Iantorno, as the Designated Individual for Get-BC, allowed Get-BC to carry on business as a mortgage broker elsewhere than at or from Get-BC's registered address, and thereby conducted business in a manner prejudicial to the public interest [linked to point (iii) above];

(v) GET, and Westergaard as the Designated Individual, employed Iantorno as a submortgage broker although Iantorno was not registered as a submortgage broker with GET, contrary to s. 21(1)(d) of the Act[3]; and

(vi) Westergaard is not suitable for registration and his proposed registration would be objectionable.

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[2] The four named investors actually included one company that purchased three GET mortgages and three instances where more than one person (generally family members) was involved in the purchase of a single mortgage. For purposes of the hearing these were treated as four investors.

[3] The Registrar held that GET and Westergaard as the Designated Individual employed Iantorno as a submortgage broker. The allegation was not made against Iantorno. As a result, Iantorno did not have the right to make any submissions to the Registrar regarding this allegation. Counsel for Get-BC and Iantorno submits that "decisions of the Registrar are available on the internet and many readers would probably incorrectly assume, from the fact that Iantorno is shown as a party, that this finding about him was made after he had been given an opportunity to defend himself. We therefore ask this Tribunal to note specifically in its reasons that he [Iantorno] had no opportunity as regards this particular point because it was not made against him." This fact is so noted.

On February 18, 2008, the Registrar issued the Decision on Penalty which imposed the following penalties:

(i) a reprimand noted against Get-BC in relation to the findings that Get-BC have made a statement on the Lender/Investor Information Statement Form 9 that was misleading with respect to a material fact [Decision, point (i) above];

(ii) a reprimand against Iantorno, as the Designated Individual for Get-BC, for conducting business in a manner prejudicial to the public interest by causing Get-BC to be in breach of section 17.1 of the Act [Decision, point (ii) above];

(iii) a suspension of the registration for Get-BC for 30 days, effective February 29, 2008, in relation to the findings that Get-BC carried on business as a mortgage broker elsewhere than at or from its registered address [Decision, point (iii) above];

(iv) a suspension of the registration for Iantorno, as the Designated Individual for Get-BC, for conducting business in a manner prejudicial to the public interest [Decision, point (iv) above];

(v) an administrative penalty of $20,000 against GET to be paid on or before February 29, 2008 for employing Iantorno as a submortgage broker although Iantorno was not registered as a submortgage broker with GET and directed that failure to pay the penalty as directed would result in immediate suspension of GET's registration pending full payment[4] [Decision, point (v) above];

(vi) cancellation of Westergaard's registration effective February 29, 2008 with a condition that Westergaard could not apply for registration until February 18, 2013 in relation to the finding that Westergaard was not suitable for registration and his proposed registration was objectionable and required that GET immediately identify a new Designated Individual to the satisfaction of the Registrar [Decision (vi) above]; and

(vii) an order for 75% of assessed costs at Scale B under the Supreme Court Rules, allocated one-third to Get-BC and Iantorno jointly and severally and two-thirds to GET and Westergaard jointly and severally.

[4] The Registrar also determined that, in respect of the finding that Westergaard as the Designated Individual, allowed GET to employ Iantorno as a submortgage broker although Iantorno was not registered as a submortgage broker with GET, contrary to s. 21(1)(d) of the Act, Westergaard's registration would have been suspended for 60 days. However, as his registration was not renewed, the Registrar observed that the matter of the 60 days suspension "is somewhat academic."

THE RECORD

The Record in this appeal consists of the Decision, the Decision on Penalty, the transcript of the 13 days of hearings *Proceedings before Registrar Wrigley*, volumes 1 through 13, and *the Record of Proceedings Before the Registrar Exhibits*, volumes 1 through 3.

ISSUES ON APPEAL

The Appellants Iantorno and Get-BC raise the following issues for consideration on the Appeal:

(a) Whether the Registrar erred in finding that Get-BC had disclosed to four investors 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 Act that, at the time and in light of the circumstances under which the statement was made, was misleading with respect to a material fact?

(b) Whether the Registrar erred in finding that Iantorno, as the Designated Individual for Get-BC, failed to ensure that the four investors were provided with accurate disclosure pursuant to s. 17.1 of the Act, and thereby conducted business in a manner prejudicial to the public interest?

(c) Whether the reprimands directed to Get-BC and Iantorno in respect to (a) and (b) above should be set aside in the event the appeals of (a) and (b) above are granted?

(d) Whether the Registrar erred in finding that Get-BC carried on business as a mortgage broker elsewhere than at or from Get-BC's registered address contrary to s. 21(1)(b) of the Act?

(e) Whether the Registrar erred in finding that Iantorno, as the Designated Individual for Get-BC, allowed Get-BC to carry on business as a mortgage broker elsewhere than at or from Get-BC's registered address and thereby conducted business in a manner prejudicial to the public interest?

(f) Whether the 30 day suspensions imposed on Get-BC and Iantorno in respect of (d) and (e) were appropriate penalties?

The Appellants Westergaard and GET raise the following additional issues for consideration:

(g) Whether the Registrar erred in her finding that GET and Westergaard had employed Iantorno as a submortgage broker and that Iantorno was not registered as a submortgage broker with GET contrary to s. 21(1)(d) of the Act?

(h) Whether the administrative penalty of $20,000 against GET was an appropriate penalty?

(i) Whether the Registrar erred in her interpretation of s. 22(7) of the Act when considering facts which first came to the knowledge of the Registrar more than two years prior to the commencement of the proceedings?

(j) Whether, based on the facts which the Registrar was entitled to consider, she erred in determining Westergaard was not suitable for registration as a submortgage broker in British Columbia and his registration was objectionable? [This is a summary of five closely linked matters and they will be dealt with separately under the analysis of Issue (j)]

(k) Whether Westergaard's suspension was an appropriate penalty?

I will address the issues in the order [a through k] presented above.

STANDARD OF REVIEW

Counsel for Get-BC and Iantorno submits that the issues he raises relating to liability are issues of statutory interpretation, and hence purely legal, and that issues of law-and statutory interpretation are matters of law and the standard of review is one of correctness. Counsel for GET and Westergaard submits that correctness is the appropriate standard of review to be applied in a case of interpreting a limitation provision in a statute which is a pure question of law which does not require specialized expertise that falls within the jurisdiction of the Registrar. Counsel for Staff submits that only upon palpable errors can the Registrar's findings be over-turned.

I will rely upon reasonableness as the standard of review to be applied in those instances before the Tribunal which involve combined facts and law, and apply the standard of correctness to specific issues in the Appeal relating to interpretation of the Act.

ANALYSIS

Issue (a): ***Whether the Registrar erred in finding that GET-BC had disclosed to four 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 Act that, at the time and in light of the circumstances under which the statement was made, was misleading with respect to a material fact?***

Background-Issue (a)

The material facts relating to Issues (a) and Issue (b) are not in dispute. Counsel for Get-BC and Iantorno contend that the Registrar erred in finding that they had made a statement that, at the time and in light of the circumstances under which the statement was made, was misleading with respect to a material fact provided to the four named investors This issue centers on the interpretation of one specific question contained in the *Investor/Lender Information Statement* Form 9, a form prescribed under the regulations of the Act, and the implications that flow from completing this question incorrectly. The specific question is in Part E(1) and asks: "Have there been any arrears? [] Yes [] No." Counsel for Get-BC and Iantorno submits this question applies to arrears on the mortgages actually sold while Counsel for Staff and the Registrar concluded it applied not only to arrears on the mortgages actually sold, but also to previous mortgages that had since been discharged.

By way of background, it is helpful to understand the fundamentals of the business model used by GET. GET engages in the business of lending money to owners that have positive equity in their property and who otherwise meet GET's lending criteria. GET bases its lending criteria primarily on the type and location of the property and the equity that potential borrowers have in their property. Little or no attention is paid either to the potential borrower's credit history or ability to make monthly payments[5]. If a borrower falls into arrears on a GET mortgage, and still meets GET's criteria, he or she may apply to GET to have the mortgage "refinanced", such refinancing typically involves discharging the existing mortgage and creating a new mortgage. However, it is not a necessary condition for the existing mortgage to be in arrears before a borrower may apply to GET for a new (and/or larger) mortgage. Once mortgages are registered against title to the property, GET then generally sells them to investors. The sale of these GET mortgages to investors frequently occurs within a few days of the creation of the mortgages.

[5] Iantorno also testified that GET investors are provided with a statement created by GET called *Mortgage Investor Acknowledgement and Assumption of Risk* outlining its fundamental lending criterion and the investors are required to sign the statement acknowledging that they have read the statement and understand the contents. Included in the statement is the following point: "GET's typical mortgage practice is to source prospective borrowers based on equity in their real estate, with little weight given to the prospective borrower's employment/income situation or credit history. GET's fundamental lending criteria is the borrower's equity in the mortgaged property."

Beginning on or about November, 2005, Get-BC and Iantorno, as the submortgage broker with Get-BC, sold six GET's mortgages to the four named investors. One of the requirements of the Act and Regulations relating to transactions such as the sale of each of the mortgages owned by GET to investors stipulates that the mortgage broker must provide a written information statement to the investor/lender (s.17(1)(1)). The *Lender/Investor Information Statement*, Form 9, described below meets this requirement.

Given the nature of the appeal on this matter, it is instructive to first consider the original allegation [allegation #1] contained in the Amended Notice of Hearing of June 15, 2007 which stated:

> That Get-BC disclosed to lenders [investors] 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 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. [The four named investors or set of investors, were identified.[6]]

The Registrar states that:

> The question to decide is: When disclosing the 'Details of Mortgage Investment' on Form 9 to the four investors, was Get-BC required to answer 'Yes' to the question in Part E of Form 9 'Have there been any prior arrears?' so that third party investors who took assignment of the mortgages from GET, were made aware that their borrowers had been in arrears on their earlier loans – that is, the ones which had been granted to these borrowers before GET refinance, registered, and then sold them? [Decision, p 8.]

The Registrar determined that Iantorno and Get-BC should have completed Form 9, Part E (1) (Have there been any prior arrears?) as "yes" rather than "no" since there were prior arrears on earlier mortgages granted by GET to the same borrowers and registered on the same title, earlier mortgages that had been discharged before the creation and sale of the actual mortgage for which Form 9 was completed. As a consequence, the Registrar found that:

> Iantorno and Get-BC have made a statement provided under this Act - on the Lender/Investor Information Statement Form 9- that in light of the circumstances under which the statement was made, was misleading with respect to a material fact – that material fact being the existence of prior arrears which impacts the risk of the mortgage investment he was selling. [Decision p 15]

[6] The term lender and investor are frequently used throughout the Record to describe the four purchasers of the mortgages. Form 9 is called "Investor/Lender Information Statement." Except for direct quotes, I will use the term investor rather than lender to describe the purchasers of the mortgages.

Legislation –Issue (a)

The relevant provisions of the Act provide as follows:

8(1) After giving a person registered under this Act an opportunity to be heard, the registrar may suspend or cancel the person's registration if, in the opinion of the registrar, any of the following paragraphs apply: …

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

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

17.1(1) A mortgage broker who

(a) arranges a mortgage in which another person is to be the mortgagee,

(b) arranges the sale of a mortgagee's interest in a mortgage from one person to another, or

(c) sells the mortgage broker's own interest as mortgagee under a mortgage to another person,

must provide to the other person a written information statement that meets the requirements of subsection (3). …

17.1(3) The information statement referred to in subsection (1) must

(a) be in the prescribed form, include the prescribed contents and be accompanied by any documents that are prescribed,

(b) be dated and signed by the mortgage broker,

(c) contain disclosure that is true, plain and not misleading of the matters in the prescribed contents referred to in paragraph (a), and

(d) have printed or stamped in conspicuous type on its first page the following words: …

Section 1.1 of the Mortgage Brokers Act Regulation, B.C. Reg. 187/2006 prescribes the *Investor/Lender Information Statement*-Form 9 as the written information statement that must be provided to investors/lenders under s. 17.1 of the Act. Form 9 is a two page document which is comprised of nine parts (A through I): Parts A, B, E and H contain the key parts relating to the Appeal. Part H will be introduced in the context of the submission from Counsel for Get-BC and Iantorno.

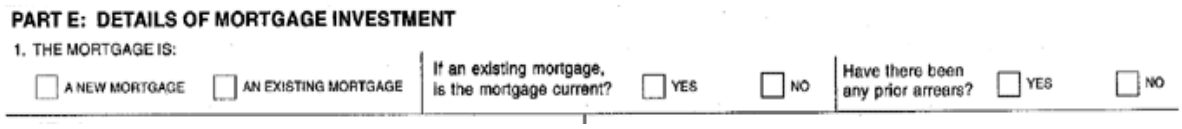
"*Part A-Cautions*" provides general cautions concerning mortgage investments. Two points mentioned in "Part A-Cautions" are of particular importance to this aspect of the Appeal. These include:

> *5.* You should be satisfied with the borrower's ability to meet the payments required under the terms of this mortgage.
>
> 7. This Investor/Lender Information Statement and the attached documents are not intended to provide a comprehensive list of factors to consider in making a decision concerning this investment. You should satisfy yourself regarding all factors relevant to this investment before you commit to invest.

"*Part B- Risk Factors*" states: "There are risks associated with this mortgage investment. These risks include, but are not limited to, the following*:"* Risks (a) through (g) are listed. Risk factor (a) is of particular importance to this aspect of the Appeal:

> a) Repayment of the mortgage is dependent on the borrower's ability to make payments under the mortgage and on the financial strength of any person offering a personal covenant, guarantee or financial commitment; there is no assurance that the obligation will be satisfied and therefore you may not receive any return from your investment, including any initial amount invested."

"*Part E - Details of the Mortgage Investment"* is central in terms of this aspect of the Appeal. Part E (1) sets out three questions as shown in the copy shown below.


PART E: DETAILS OF MORTGAGE INVESTMENT

1. THE MORTGAGE IS:

☐ A NEW MORTGAGE ☐ AN EXISTING MORTGAGE | If an existing mortgage, is the mortgage current? ☐ YES ☐ NO | Have there been any prior arrears? ☐ YES ☐ NO

The evidence-Issue (a)

The evidence indicates that, in all cases involving the six mortgages actually sold to the four named investors, the question in Part E (1) "Have there been any prior arrears?" was answered as "no". Moreover, in all six cases Iantorno, as a submortgage broker of Get-BC signed the Form 9. These facts are not in dispute.

The evidence also establishes that none of the six specific mortgages actually sold to the four named investors was in arrears at any time prior to being purchased by the four investors[7]. These specific mortgages were all created shortly before they were sold to the investors. In at least one case, the mortgage was created the same day it was sold. The evidence also shows that in four cases a previous mortgage, also provided by GET, to the same borrower and registered against the title to the same property, had been in arrears immediately prior to the creation of the new mortgage that was actually sold to the investors. In one other case the evidence indicates there was a prior GET mortgage to the same borrower and registered against the title to the same property that had been in arrears at some point, but the payments on the mortgage appeared to have been brought up-to-date before the mortgage actually sold to the investor was created. In the final case the evidence indicates there was no arrears on a prior GET mortgage to the same borrower and registered against the title of the same property. In all six cases the previous GET mortgage was discharged and the newly created mortgage was registered against title and sold to the four investors. These facts are not in dispute.

Submissions – Issue (a)

Counsel for Get-BC and Iantorno submits that the actual allegation was that Iantorno "made a statement provided under the Act …that was, at the time and in light of the circumstances under which [it] was made, was false or misleading as to a material fact." Counsel submits that checking "no" in response to the question concerning prior arrears on Form 9 does not constitute "a statement" for the purposes of s. 22(1)(d) of the Act[8] and was not, at the time and in the circumstances, false as to a material fact or misleading. Counsel submits that Iantorno honestly and reasonably believed that there had been no prior arrears because of his reasonable interpretation of Form 9 and that he never intended to convey there had never been any arrears on any previously discharged mortgages that had been granted to GET. Counsel submits that the statement that Iantorno made was the statement contained in Part H of Form 9.

Counsel for Get-BC and Iantorno further submits that there was no evidence that any of the four investors were mislead or interpreted the Form 9 as meaning that there had never been any arrears on the previously discharged mortgages and that the Registrar's staff had to prove that the statement in light of the circumstances, was "false or misleading in relation to a material fact" – and failed to do so as the three investor who gave evidence did not indicate that this was a material point to them.

Counsel for Get-BC and Iantorno also submits that the Registrar interpreted Part E(1) incorrectly and that in the circumstances checking "no" was the correct answer.

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[7] Counsel agreed that allegations that gave rise to Issues (a) and (b) only relate to the four named investors. Three of the investors testified at the Hearing. .

[8] As noted on page 7 of the Decision, "the matter is being brought pursuant to section 8(1)(d) & (c) of the Act….The matter could also be proceeded on as an offense in Provincial Court,…under section 22(1)(d) of the Act."

Iantorno testified that it was important for an investor to know about prior arrears on a mortgage because that is a factor the investor may consider in determining the risk involved in investing in the mortgage [Transcript, v 9, p 1610]. He also stated that: "…investors should be cognizant of the ability to repay the debt and that the borrower's ability to repay the debt is important [Transcript, v 9, pp 1590-91].

Iantorno stated that he responded "no" to the question of whether there have been any prior arrears because he believed that it only referred to the specific mortgages he was selling rather than previously discharged mortgages, even previously discharged mortgages involving the same lender, the same parties and the same properties. Iantorno also stated he would tell potential investors of arrears on the previous mortgage if he was aware of any such arrears and, to the extent he was aware of arrears on the previous mortgage that existed at the time the mortgage was discharged and the new mortgage created, he would try to ensure that the borrower's loan application contained reference to these prior arrears in the "Comments" section of the loan application.

GET and Westergaard were not a party to this particular issue of the Decision but did appeal the Registrar's finding as the outcome on Issue (a) may impact the issue of Westergaard's suitability. Counsel for GET and Westergaard submits that the Registrar erred in her interpretation of Part E of Form 9 that the requirement to disclose prior arrears included disclosure of prior arrears of a previous mortgage that had been discharged. He contends that the Registrar's interpretation requires insertion of extra words in Part E (1) to include prior arrears on previous, but since discharged, mortgages and that this is inconsistent with the proper approach to statutory interpretation as summarized by the Supreme Court of Canada in *Markevich v. Canada* 2003 SCC 9 that states:

> 12. The noted author E.A. Dreidger in Construction of Statutes (2nd ed. 1983), at p.87 stated that the modern approach to statutory interpretation requires the words of the Act '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…
>
> 15. … It is ' a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording.' see *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 27.

Counsel for Westergaard and GET also submits that the definition of "instrument" as incorporated in the definition of "mortgage" in the Act uses the singular form, just as the Form 9 uses the singular for mortgage. Counsel submits that: "the grammatical and ordinary sense of the terms used in Part E of Form 9 indicates that the questions relate to the single mortgage or mortgage investment being sold. Counsel submits that the answer to the Registrar's question about whether 'no' or 'yes' is the correct answer to Part E (1) of Form 9, on a plain wording of Form 9, must be 'no'.

Counsel for Westergaard and GET further submits that s. 17.1(3)(c) of the Act imposes an obligation on the mortgage broker to make true, plain and not misleading disclosure, but the section expressly limits that obligation to the prescribed content of the forms that must be used. He submits that it would be unreasonable to expect persons completing prescribed forms to disclose information on the form which is not requested. (Re *Rachfall and Specogna v. Real Estate Council of B.C*., 2003 BCCO No.1, Appeal Case No. CAC-0205 where the Commission noted at par 47: "In our view, the appellant was not obliged to answer questions that were never put to him in the application form.")

Counsel for Staff submits that the Act is clear in requiring that information disclosed must be "true, plain and not misleading" s.17.1(3)(c). Even if the mortgage actually being sold has no arrears, failure to disclose the fact that the mortgage was only a few days old and that there was a previous mortgage on title to the same property, involving the same borrower and from the same lender that had been in arrears does not meet the test of providing "true, plain and not misleading" information [emphasis added]. Moreover, Counsel submits that the Appellants' narrow and technical interpretation of the phrase "prior arrears" in the prescribed form is not consistent with the modern approach to legislation, namely that:

> …the words of an Act are to be read in their entire context and in their grammatical sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27 at p. 2.

Similarly the Registrar observes that:

> It would defeat the purpose of full disclosure and therefore the objective of the Act and s. 17.1 in particular, if "any prior arrears" in Part E did not include the initial mortgage which was in arrears prior to being refinanced and immediately sold. Lenders must be able to rely on the submortgage broker's information, as they have no contact with borrower. … I believe that in these circumstances, it was misleading to inform the investor on Form 9 that there had been no prior arrears. Whether investor A considers such information material and investor B doesn't, does not matter. Under the regulatory scheme, the mortgage brokers have the obligation to disclose these prior arrears to their investors. [Decision, p 14]

Analysis –Issue (a)

The first point that should be noted is that the original allegation (Allegation #1) relating to Issue (a) was specific to the mortgages actually sold. Allegation #1 states: "that Get-BC disclosed to lenders [investors] that the mortgages they were purchasing from GET were current and that there had been no prior arrears…" [Emphasis added] The Registrar concluded that allegation #1 has been proven, but the facts (which are not in dispute) are clear that there were no prior arrears on the mortgages the investors were purchasing. The actual decision giving rise to Issue (a) relates to the Registrar's conclusion that the

prior arrears referred to in Form 9, Part E(1) should include disclosure of prior arrears on earlier mortgages that were discharged prior to the date mortgage being sold was created.

Counsel for Get-BC and Iantorno and for GET and Westergaard both submit that the Registrar's interpretation of Form 9 is incorrect; therefore I will address this issue first. The alternative positions are clear: The Appellants submit that the reference to "prior arrears" in Part E (1) refers only to arrears on the mortgages actually being sold to investors; and Counsel for Staff submits that "prior arrears" must be interpreted more broadly to include arrears on prior mortgages, at least prior mortgages involving the same property taken by the same borrower from the same lender, that have recently been discharged.

.

As Form 9 is a prescribed form with prescribed content established in accordance with the Act and regulations, it must be read in the context of the regulation and the enabling Act as a whole. I accept the general proposition the proper approach to statutory interpretation requires that the words of the Act and regulations are to be read in their entire context and in their grammatical and ordinary sense in a manner that is consistent with the scheme and object of the Act and the intention of the legislature. I also accept that the overall purpose of the Act is to provide a general framework to ensure the efficient operation of the marketplace while protecting the public: *Cooper v. Hobart,* [2001] S.C.J. No. 76, but note that the reference is to "a general framework."

If proper statutory interpretation requires the words of an act to be read in their entire context, then I believe it logically follows that the words of a mandatory form required under the regulations of the Act, such as Form 9, must also be read in the context of the entire Form and the Act. "*Part A-Caution*" (of Form 9) provides general cautions concerning a mortgage investment including:

> 5. You should be satisfied with the borrower's ability to meet the payments required under the terms of this mortgage….
>
> 7. This Investor/Lender Information Statement and the attached documents are <u>not intended to provide a comprehensive list of factors</u> to consider in making a decision concerning this investment. You should satisfy yourself regarding all factors relevant to this investment before you commit to invest. [Emphasis added.]

"*Part B - Risk Factors*", states:

> There are risks associated with this mortgage investment. These risks include, but are not limited to, the following; a) Repayment of the mortgage is dependent on the borrower's ability to make payments under the mortgage and on the financial strength of any person offering a personal covenant, guarantee or financial commitment…."

The remaining risk factors in "Part B" are not central to Issue (a).

Part A of Form 9 makes it very clear that the *Investor/Lender Information Statement* – Form 9 is not even intended to include a comprehensive list of factors to be considered in making a decision concerning this investment. Moreover, the qualification in Part B that states: 'the risks include, but are not limited to...", when combined with the wording from Part A, makes it clear that the contents of Form 9 are, by design, incomplete [emphasis added]. On these grounds alone, Form 9 does not intend to provide the "full disclosure" noted by the Registrar above. Moreover, "*Part A*" and "*Part B*" contain repeated references to the "mortgage", "investment" and "mortgage investment" in the singular

The questions in Part E (1) of Form 9 read across the page as: "The mortgage is: [] A New Mortgage [] An Existing Mortgage"; "If an existing mortgage, is the mortgage current [] YES [] NO" and "Have there been any prior arrears? [] YES [] NO" The first two questions reading left to right on the page refer to "mortgage" in the singular and the central question is whether the same interpretation was intended to be applied to the third question regarding prior arrears.

The Registrar notes that simple linguistic analysis of Part E (1) is useful and notes that the tense used in the question "… have there been any prior arrears?*"* includes unspecified times up to and including the present and "any" speaks for itself. I accept this as correct, but it applies equally well if the Registrar's comment is restricted to the specific mortgage being sold and does not necessarily require that arrears on prior mortgages that have been discharged be included.

The Registrar stated that: "Part E is entitled 'Details of Mortgage Investment.' This is broader than *details of mortgage* in my view. A mortgage investment encompasses many factors. It has a history. It involves people. It involves property." [Decision, p. 14] I accept all of this, but Form 9 also explicitly acknowledges that it does not contain, nor is it intended to contain, all of the information or risk factors needed to make an investment decision relating to the mortgage being sold. Moreover, "Part E: Details of Mortgage Investment" includes seven prescribed sub-sections and nowhere does it ask questions about people (other than name and address of borrower and covenantor) or history (except for the sub-section detailing prior financial encumbrances that will remain on title.)

It is also clear that the authors of Form 9 were mindful of arrears on "other mortgages", but limited the questions to arrears on other mortgages that will remain on title to the property. Form 9, Part E(5) states: "List below prior financial encumbrances (in order of priority) on the property to be mortgaged that will remain:" [emphasis added] and one of the elements of this question asks "in arrears [] YES [] NO" on each financial encumbrance that remains. However, Form 9 does not have any prescribed section to disclose information on prior mortgages that has been discharged. Form 9 makes reference repeatedly to "mortgage" and/or "investment" in the singular in Part E (1), (2), (3), (4), (6) and (7). With the exception of Part E (5) relating to other prior financial encumbrances that will remain on title, Form 9 consistently refers to "mortgage", "investment" and "mortgage investment" in the singular form.

Accepting the position of the Staff of the Registrar and the Registrar's interpretation would seem to require that additional words be read into the question regarding "prior arrears" in Part E (1) of Form 9 to encompass any previously discharged mortgages. In these particular circumstances I believe this proposition runs contrary to the basic principle of interpretation. In *Markevich v. Canada,* [2003] S.C.R. 94, the Court observed:

> It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra words where there is another acceptable interpretation which does not require any additional wording: see *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 27.

It is helpful to ask whether answering "no' to the question about previous arrears, when in fact there were no previous arrears on the specific mortgage being sold to investors, provides an "acceptable interpretation" as suggested in *Markevich*. I believe it does. If information concerning prior arrears on previous (and discharged) mortgages is important, then I believe it follows that information concerning prior arrears on the mortgage actually being sold is at least as important, and arguably more important. On these grounds it does not appear that inserting extra words would, in this instance, be consistent with *Markevich* since there is an acceptable (and meaningful) interpretation without adding words.

Additionally, the Supreme Court of British Columbia said in *British Columbia (Ministry of Forests and Range) v. Forest Appeals Commission* 2007 BCSC 696 at para. 80:

> The plain meaning of statutory language, when read in its grammatical context, should govern unless it leads to an absurd result.

It is my view that interpreting "prior arrears" to apply only to the mortgage being sold does not lead to an "absurd result" since that information is relevant to investors.

Some further guidance on interpretation is found in *Registrar of Mortgage Brokers v. Financial Services Tribunal*, [2007] B.C.J. No. 1670 (S.C.) where the Court rejected an argument that the reference to "mortgage broker" in s. 17.3 of the Act should be read to include "submortgage broker". Rice J. observed that the contextual approach to statutory interpretation "does not legitimize reaching for meanings plainly not provided in the statute" (para. 15). His Lordship noted at para. 35:

> … The section provides for a mortgage broker but not a submortgage broker to disclose its associates. In my view, the legislature despite the seeming inconsistency has definitely placed the legal disclosure requirement in s. 17.3 only upon mortgage brokers and not upon submortgage brokers. It is not a gap to be filled under the power of the Registrar.

Concluding that the correct interpretation of Part E(1) refers only to prior arrears on the mortgage actually being sold does not fully address the submission of Counsel for Staff relating to disclosure of "true, plain and not misleading information":[s.17.1(3)(c), Emphasis added.] Counsel for Staff submits that even if the correct interpretation concerning Form 9, Part E(1) is that it only refers to prior arrears on the mortgage being sold; answering "no" in the circumstances is misleading. But in the circumstances answering "no" would be the correct and honest answer, an answer that provides meaningful and not absurd results. Form 9 is a prescribed form with prescribed content, which has no "comment section" and the question "Have there been any prior arrears" allows for a simple "yes" "no" answer. Clearly Counsel for Staff is not suggesting that Iantorno reply "yes", which would be false in the circumstances. Therefore they must be suggesting Iantorno alter the prescribed form to add a response to a question that has not been asked or alternatively, provide the information in another format. If this is the case, I suggest it is unreasonable to expect Iantorno to alter the prescribed Form 9. If answering "no" in these circumstances is misleading, I believe it is because the form has failed to ask for some important information. Therefore I conclude that given my interpretation of that prior arrears in Part E (1), answering "no" in the circumstance is correct answer, and to the extent it is misleading, the fault, if fault is to be assigned, does not rest with Iantorno (see *Specogna v. Real Estate Council of BC*, s*upra*, where the Court held that it would be unreasonable to expect persons completing statutory forms to disclose information which is not requested on the form and there is no duty to do so.) As for providing the information in another format, Iantorno testified he did tell investors if there were prior arrears on a previous mortgage if he had knowledge of this fact.

Based on a plain reading of the question in the overall context of Form 9 in which: "mortgage," "investment" and "mortgage investment" are repeatedly referenced in the singular form; and where Part A provides a clear statement that the Form is not intended to provide a comprehensive list of factors; and where Part B makes it clear that the risks are not limited to those stated in Part B, my impression is that concluding that "prior arrears" in Part E (1) refers to the actual mortgage being sold to the investor is a correct interpretation. Combining this impression with the fact that answering this particular question concerning previous arrears in reference to the specific mortgage being sold provides meaningful information to investors further reinforces my view that the question concerning previous arrears in Part E(1) should be interpreted as only applying to the specific mortgage being sold. Moreover, the fact this interpretation does not lead to absurd results reinforces my view on this issue.

My comments should not be taken to suggest that information concerning arrears on discharged mortgages involving the same borrower, the same property and the same lender is not important. Indeed both the Staff and the Registrar are to be commended for addressing this matter.[9] However, I find that seeking to impose a requirement to provide such information in response to the prescribed question in Part E(1) regarding prior arrears goes beyond an interpretation that the language in Part E (1) of Form 9 can

[9] As the Registrar noted in the Decision on Penalty, in circumstances such as existed in Issue (a), Form 9 has been amended to require that prior arrears on previous mortgages that have been discharged must be disclosed.

reasonably bear, and effectively removes one valid question and substitutes another potentially valid question. It would be much clearer to elicit additional information concerning prior arrears on previous mortgages that have been discharged (including those involving mortgages on the same property with the same borrower and lender) through a separate set of questions that could have been included in Form 9 but are not. It is not for the Registrar, or the Tribunal, to fill that gap (*Registrar of Mortgage Brokers*, supra*)* or to substitute one question for another.

The Registrar's Decision referenced only the fact that Get-BC and Iantorno made a statement -on the *Lender/Investor Information Statement* Form 9- that <u>was misleading</u> <u>[emphasis added]</u>. The Registrar did not find the statement to be false (although reference to "false and misleading" is contained in the Decision on Penalty. I do not accept that answering "no" to the question on arrears was false (or indeed misleading) in these particular circumstances. The answer was true as it applied to the specific mortgages sold to the four investors, and given I have determined that this is the correct interpretation to be applied, Iantorno did not make a false statement. In these circumstances an accurate and honest answer cannot be considered misleading when the correct answer conveys meaningful information that is not absurd and where both the form and the content are prescribed. The Act clearly states the information statement <u>must</u> be in the prescribed form and include the prescribed contents. The prescribed content is a simple "yes-no" question. There is no space for comments. The fact that potentially important (material) information concerning prior arrears was not disclosed on Form 9 does not, of and by itself, establish that the person completing the prescribed form and prescribed content provided misleading information.

Counsel for Get-BC and Iantorno submits other reasons in the Appeal, namely the Staff of the Registrar did not prove Iantorno had made: a "statement"; a statement that was "false and misleading"; or a statement that was false and misleading that related to a "material" fact. While it is not essential that I address these other submissions given my determination on the meaning of "prior arrears", some brief comment is warranted. I do not accept that Iantorno has not made a statement. The entire issue concerns the completion of one question in Form 9 and Iantorno completed and signed the form. As such, it seems reasonable to conclude that Form 9 represents the statement referred to by the Registrar. Counsel also submits that *Part H: Certification* in Form 9 must be considered since this is what Iantorno certified. *Part H: Certification* states that:

> I certify that I am the mortgage broker or an authorized representative of the mortgage broker in this transaction and based on my knowledge, belief and information provided by third parties, this Information Statement contains no untrue statement and does not omit to state a fact that is required to be stated or that is necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

Counsel for Get-BC and Iantorno submits that the Registrar held that an incorrect statement made by the person completing Form 9 is always guilty of an offense since making a "false and misleading statement" is an absolute liability offense, one to which

the exercise of due diligence and care are no defense. Counsel submits this is an interpretation of last resort. The Registrar addressed this point in the Decision and acknowledged this is a regulatory offense and chose to rely on this point, but did note this may be relevant for the penalty.

Counsel for Get-BC and Iantorno also submits that the Registrar failed to properly consider the "circumstances" in which the statement was made and failed to prove it was "material". Counsel submits that there is no evidence that any of the investors understood the Form 9 to imply there had been no prior arrears on previous mortgages. The Registrar addressed this point and concluded that the requirements under the Act cannot be contingent on the circumstances and opinions of whoever completes the Form 9 and whoever reads it. I accept the position of the Registrar in this regard. Form 9 is used by a variety of investors and the "circumstances" have a broader scope, namely the general circumstances surrounding the selling mortgages to all investors. Counsel also submits that none of the investors who gave evidence say that Form 9 misleading. I believe the Registrar correctly addressed this point in noting that the information on prior arrears is material to investors in that it impacts the risk of the investment. The fact it is not material to [three of the four named] investors does not detract from the fact it is material to the broader set of investors who rely on this form for such information.

Decision-Issue (a)

Based on the foregoing analysis, I conclude that the Registrar erred in interpreting the question relating to prior arrears in Part E(1) of Form 9 to include arrears under previous mortgages that did not remain on the title of the property at the time the current mortgage was sold to investors. On a correct (or even reasonable) interpretation, this question should be applied to prior arrears in relation to the specific mortgage being sold. As none of the six mortgages sold to investors had prior arrears, there was no basis for finding that Get-BC had made a statement that, at the time and in light of the circumstances under which the statement was made, was false with respect to a material fact. Given the statement was true, when combined with the prescribed nature of the form and content, coupled with the fact that the answer given to Part E(1) provided meaningful information and did not produce absurd results, I conclude that Get-BC and Iantorno did not provide misleading information.

The appeal on Issue (a) is granted and the finding of the Registrar in respect of Issue (a) is set aside.

Issue (b): ***Whether the Registrar erred in finding that Iantorno, as the Designated Individual for Get-BC, failed to ensure that the four investors were provided with accurate disclosure pursuant to s. 17.1 of the Act, and thereby conducted business in a manner prejudicial to the public interest?***

Counsel for Get-BC and Iantorno submits there is no basis for the finding that Iantorno's checking the box was prejudicial to the public interest and the Registrar's view that

whenever any section of the Act is violated by a corporate mortgage broker, its 'designated individual' has necessarily been acting in a manner prejudicial to the public interest, does not accord with the Act.

The Registrar observed that Iantorno is the President and sole director of Get-BC and he is also the only submortgage broker and the designated individual. In these circumstances there is no one else to be held accountable for the actions of Get-BC. Neither Counsel for Staff nor the Registrar cited any evidence, other than those relating to the correct interpretation and completion of Form 9, on which to conclude Iantorno failed to provide accurate disclosure pursuant to s. 17.1 of the Act. Nor did the Registrar or Counsel for Staff present any other basis on which to conclude Iantorno's actions were prejudicial to the public interest other that to state that because Issue (a) had been proven, it follows that Iantorno's actions were prejudicial to the public interest.

Since I have concluded in Issue (a) that Get-BC correctly interpreted and completed the Form 9 for the four named investors and by so doing did not provide misleading information under the circumstance cited above, I find that the Registrar erred in finding that Iantorno, as the Designated Individual for Get-BC failed to ensure that the four investors were provided with accurate disclosure pursuant to s. 17.1 of the Act, and therefore erred in concluding Iantorno conducted business in a manner prejudicial to the public interest.

The appeal on Issue (b) is granted and the finding of the Registrar in respect of Issue (b) is set aside.

Issue (c): ***Whether the Registrar erred in finding that Get-BC carried on business as a mortgage broker elsewhere than at or from Get-BC's registered address contrary to s. 21(1)(b) of the Act?***

Background Issue (c)

The Registrar concluded that Get-BC was carrying on the business as a mortgage broker at or from GET's registered office instead of its own registered office. The reasons cited by the Registrar are brief:

> The evidence is that Iantorno had his own office within GET's office; that he spends about 50% of his time there; and he kept a copy of Get-BC's registration there. Various lenders he [Iantorno] dealt with in his role as a submortgage broker [of Get-BC] buying or selling GET's mortgages, testified that they met with Iantorno at the GET offices or contacted him on GET's phone number. They sent faxes to GET's office. They [investors] also did business with him at other locations such as a restaurant, their home, or at their own offices. It is clear that Iantorno was conducting mortgage broker activity *at* or *from* the offices of GET,

> which was not the registered office of Get-BC. [10] It was in the offices of another mortgage broker. The business of GET was conducted at - or from – its' Kingsway Office [registered office] and Iantorno brokered the sale of GET's mortgages from GET's registered office, not from his own registered address on Jasmine Court. He may well have been carrying on other mortgage broker business unrelated to GET, at or from the registered Jasmine Court address, and he may well carry on business "on the road, but the evidence discloses that when he was brokering fore GET, he was doing it from GET's placed of business and registered address. [Decision, p. 27].

Counsel for Get-BC and Iantorno submits that the Registrar erred in finding that Get-BC carried on business as a mortgage broker elsewhere than at or from Get-BC's registered address contrary to s. 21(1)(b) of the Act.

Legislation Issue (c)

The definitions of "mortgage broker" and "submortgage broker" under the Act are as follows:

> mortgage broker" means a person who does any of the following:
>
> (a) carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker's own or that of another person;
>
> (b) holds himself or herself out as, or by an advertisement, notice or sign indicates that he or she is, a mortgage broker;
>
> (c) carries on a business of buying and selling mortgages or agreements for sale;
>
> (d) in anyone year, receives an amount of $1, 000 or more in fees or other consideration, excluding legal fees for arranging mortgages for other persons;
>
> (e) during anyone year, lends money on the security of 10 or more mortgages.
>
> (f) carries on a business of collecting money secured by mortgages;
>
> submortgage broker" means any person who, in British Columbia, actively engages in any of the things referred to in the definition of mortgage broker and is employed, either generally or in a particular case, by, or is a director or a partner of, a mortgage broker.

[10] It should be noted that the Registrar makes reference to buying and selling GET's mortgages, but there is no evidence that GET, Get-BC or Iantorno bought any mortgages nor is this fact in dispute.

Section 21(l) (b) of the Act provides as follows:

> **21 (1) unless exempted under section 11, a person must not do any of the following: …**
>
> **(b) carry on business as a mortgage broker otherwise than in the person's registered name or elsewhere than at or from the person's registered address.** [Emphasis added[11]]

The Evidence Issue (c)

The evidence is that Get-BC stored all of its mortgage records at its registered address at Jasmine Court. Communications to Get-BC were also addressed to its registered address. The evidence establishes that Get-BC conducts its banking from its registered address and keeps its banking records there as well. Get-BC also keeps its original registration certificate - as well as Iantorno's registration certificate – at that location. All of its documents show Jasmine Court [its registered address] as its address. Iantorno's cell phone was also the registered phone for Get-BC at Jasmine Court. These facts are not in dispute.

The evidence also indicates that, at the relevant times, Iantorno worked on a part time basis as general manager for GET and he had his own office at the location of and within GET's registered office address and that he spent approximately one-half of his time there. This includes the time he devoted to his role as general manager for GET. Iantorno indicates he spent approximately 20%-30% of his time at the registered address of Get-BC, 20% -30% working outside the office, including time working in Alberta and 50% of his time at GET's office. Iantorno also maintained a copy of Get-BC's registration at GET's office. These facts are not in dispute.

The Registrar made reference to the fact various lenders [investors] Iantorno dealt with in his role as submortgage broker buying or selling GET's mortgages met him at the GET office, contacted him on the GET phone number or sent him faxes at the GET fax number. Only three investors testified on this matter. One investor stated he met Iantorno at GET's office on one occasion to pick up a promotional gift (umbrella) and stated: "But it was more of a social visit as opposed to anything to do with the purchase of a mortgage." The investor also stated he would call Iantorno at the GET phone number and fax to the GET fax number [Transcript v.9, p1636-1637]. A second investor testified he met Iantorno at GET's office on one occasion following a luncheon meeting, but could not recall whether they discussed business. However, the investor did state most of the time he met with Iantorno he did discuss business, but also stated "I think all of that activity [mortgage business] happened either by e-mail or over the phone." The investor testified he occasionally contacted Iantorno at GET's phone number and called Iantorno's

[11] Just to be clear, there is no exemption under s. 11 affecting Issue (c).

cell many times, but also state he mainly used e-mail [Transcript v. 9, p1666-1667] A third investor testified he met Iantorno at GET's office on at least two occasions in order to review GET files. The investor was also asked where Iantorno's office was located and he said it was on Kingsway which is where GET's registered office is located [Transcript v. 5, p 853]. The evidence also indicates Iantorno made some calls to potential investors from the GET phone [Transcript, v.8, p. 1390].

The evidence indicates that when Iantorno was present at GET's office and a call came in, the receptionist would direct the call to Iantorno if no other submortgage broker was available. On these occasions, if the call concerned a mortgage application, Iantorno would always identify himself as a submortgage broker with Get-BC, a "sister company." The evidence also indicates that on occasion, ending in August 2005, Get-BC acted as a mortgage broker in the granting of loans by GET, the lender, to borrowers. This occurred in approximately 2% of Get's mortgages. There were 22 occasions where Get-BC took an application for a loan and in 21 cases the loan was granted. At least one of these loans was brokered from GET's office. [Transcript v. 9, pp. 1674-1676].

Mr. Wallace, a FICOM compliance analyst, testified that Iantorno had made enquiries seeking to have Get-BC's registered address at the same location as GET's registered address, but the Registrar's office would not allow it, based in part on the concern that it would be confusing to the public as to which company they were dealing with given the similarity of the names. Mr. Wallace also testified, in response to specific questions, that is would be acceptable to meet clients at a restaurant, at their offices or at their homes [Transcript, v 10, pp1812-1814]. He also testified that doing mortgage broker business on the phone is acceptable (and common). Mr. Wallace also responded "no" to a question as to whether he had ever suggested to a broker that they were "offside" because they met people outside the registered office. Mr. Wallace was also asked about a particular situation where an application was received from a person who applied to be registered as a submortgage broker with a mortgage broker in British Columbia, but who planned to work in Calgary. Counsel for Get-BC and Iantorno asked why this was not turned down automatically. Mr. Wallace responded that:

> It's common. Very often brokers will work from their homes, for example, and they'll be registered to a head office, if you will. And their homes won't be registered, they won't be meeting clients at their homes; they'll be meeting them at, you know, restaurants or whatever. But they're not—the idea is they won't be meeting clients at their homes. because it's not a registered location. [Transcript v. 10, p1866]

There are essentially no facts in dispute in Issue (c). The issue centers on when mortgage brokerage activities conducted <u>at</u> a place other that the registered address are no longer considered "at or <u>from</u>" a persons registered address.

Submissions Issue (c)

Counsel for Get-BC and Iantorno focused his submissions relating to the sale of GET mortgages to investors since this was the evidence cited in the Decision. The Decision did not specifically mention the brokering of mortgages to borrowers although this was cited in the Decision on Penalty. Counsel submits that the use of the word "means" in the definition of "mortgage broker" is exhaustive in the sense that a person is acting as a mortgage broker if, and only if, they do one or more of the things set out in the definition (*Regina v. West* (1975), 26 C.C.C. (2d) 551.) This is so because the definition uses the word 'means' rather than "includes." Although there is no definition of "carrying on business as a mortgage broker" in the Act, Counsel submits that the words must be construed as limited to doing some one or more of the things specified in the clauses giving the definitions of mortgage brokers.

Counsel for Get-BC and Iantorno submits that the only possible portion of the definition of "mortgage broker" that might apply to Get-BC's activities is found in the definition section of the Act that states: "*mortgage broker means a person who does any of the following: ... (c) carries on a business of buying and selling mortgages or agreements for sale...*" [Emphasis added]. Consequently selling GET mortgages is not sufficient to conclude that Get-BC was operating as a mortgage broker as defined by the Act.

Counsel for Staff submits that the Registrar relied on subsection (b) of the definition of mortgage broker that states: "(b) holds himself or herself out as, or by an advertisement, notice or sign indicates that he or she is, a mortgage broker." to conclude that Get-BC was conducting business as a mortgage broker elsewhere than at or from Get-BC's registered address [emphasis added.] Counsel for Staff submits that Iantorno held himself "out as … a mortgage broker" with Get-BC when working at GET's office within the meaning of subsection (b) of that definition. Counsel for Staff refers to the following evidence in support of the submission that Get-BC held itself out to be a mortgage broker:

- If a telephone call came in to GET's office and another submortgage broker was unavailable to take it, Iantorno would take the call and when discussing a mortgage, would do so as a submortgage broker of Get-BC.

- Get-BC brokered 22 mortgages where the money was loaned by GET to borrowers; some of these deals were brokered from GET's office.

- Iantorno confirmed that one of the mortgages he brokered was transacted at GET's office.

Counsel for Get-BC and Iantorno acknowledges that there was evidence which showed that on a few rare occasions prior to September 2005, Get-BC, through Iantorno, acted as a mortgage broker in brokering the granting of a loan from GET as a lender to a borrower. However, he points out that in holding that Get-BC was carrying on business 'elsewhere than at or from' its registered office, the Registrar relied solely on his dealings with investors. Counsel further submits that meeting an investor on two occasions and receiving telephone calls on the land line and faxes from investors at GET's office does

not constitute "carrying on a business as a mortgage broker elsewhere than at or from the registered office."

Analysis – Issue (c)

The first point to address is whether Get-BC was a mortgage broker when selling GET mortgages. Counsel for Get-BC and Iantorno submits selling mortgages does not meet the definition of "buying and selling" as set out in the definition of mortgage broker. However, Counsel for Staff relied upon a different part of the definition [b] that relates to holding oneself out as a mortgage broker. I concur with Counsel for Staff that based on the definition of mortgage broker under (b); Get-BC was a mortgage broker when selling the GET mortgages. Moreover, Iantorno, much to his credit, informed investors and borrowers that he communicated with that he was brokering the GET mortgages as a submortgage broker of Get-BC.

The Registrar indicated that Iantorno kept a copy of his registration at GET's office, but the Act and regulations do not prohibit or restrict keeping copies of this registration at locations other than the registered office of Get-BC.

The Registrar stated that Iantorno had his own office within GET's office and spent approximately 50% of his time there. This is not in dispute. But it must be noted that at the relevant times, Iantorno was initially a consultant to, and subsequently the general manager for, GET and as general manager, he had the office within GET's office. Iantorno testified that the majority of his time at the offices of GET was devoted to his role as general manager.

The evidence also clearly indicates that Get-BC met with three investors at the offices of GET and one investor clearly indicated the purpose was related to mortgage business. The evidence also indicates all three investors communicated with Iantorno at GET's office using, at least on occasion, GET's phone line or fax.

The Act is very specific in that it specifies a person must not <u>carry on business</u> as a mortgage broker elsewhere than at or from the person's registered address [emphasis added]. The Act does not say "carry on <u>a</u> business…" but rather "carry on business…" and the Act sets out no minimum level of activity that might be permitted before this requirement takes effect. Therefore I conclude that any level of activity, not matter how limited, is in violation of the Act if it is carried on elsewhere "than at or from" the person's registered address. I believe that the definition of mortgage broker is such that it is clear that Get-BC carried on business as a mortgage broker. The remaining question is whether the business was "at or from" Get-BC's registered address.

It is important to note that there was no "bulletin" in the Record that sets out the requirements of "at or from" that would assist a registered person. Counsel for Get-BC and Iantorno submit that he was unable to find any cases, bulletins or research to assist and indicated this issue is one of first impression. Mr. Wallace did provide some helpful insights, but not sufficient in my view to resolve this issue.

It is clear that Get-BC carried on mortgage broker activities at GET's office but at the same time Get-BC maintained its office at Jasmine Court, its registered address and carried on business from that office. Hence the question becomes whether the mortgage brokerage activities conducted at GET's office would still meet the requirements of being "from" Get-BC's office in the context of the Act. This implies some interpretation of "at or from" in the context of the Act is required. The use of the phrase "…at or from…" could be as innocent as letting mortgage brokers know it is permissible to undertake mortgage brokerage activities away from the registered office. I do not find this satisfactory since the same outcome could have been achieved by simply omitting the phase altogether.

As a starting point, I find it helpful to first ask why there is a provision that a mortgage broker must have a registered office. Clearly one important reason is so that regulators can locate the mortgage broker and reasonably expect to find official records maintained at the registered office [in addition to the required service address] and so other professionals and the public may reasonably expect to find the mortgage broker. In this sense it is the "head office" for business purposes [Mr. Wallace made reference to the "head office, Transcript, v. 10, p.1866]. A second reason might be to assist in differentiating one broker from another by ensuring they have separate addresses. This would seem to be part of the motivation for the staff not allowing Get-BC to relocate to GET's office address.

The concept of "from" must involve some sense of a connection (or linkage) back to a place of origin, and in this instance the place of origin is the registered office of Get-BC. Mr. Wallace made a somewhat similar point when he discussed a broker working at home, but having a separate registered office elsewhere, and stated it was acceptable to be working from home, but not acceptable to meet clients there because it was not the registered address. Mr. Wallace was also asked about phone calls, faxes and mail from or to the registered office; phone calls to or from a cell phone that is the phone number of the registered office; meeting possible investors or borrowers in their homes or offices, and meeting investors and borrowers at a public place such as a restaurant or a golf course. Mr. Wallace indicated these activities do occur and he was not aware of any instance where these activities were found to be in conflict with the "…at or from…" provision. I believe that in such circumstances relating to phone calls, faxes and e-mails, clients would have no reason to doubt that they were dealing with the registered office; hence the connection to the registered office is preserved. Meeting the mortgage broker in public places is not likely to create a sense that the broker's registered office is the restaurant or golf course. Meeting clients at the client's home or office is not likely to create any confusion as to any connection with the broker's registered office. A strong connection, or linkage, back to the registered office remains, in which case I suggest that, in terms of the Act and based on the illustrations provided by Mr. Wallace, the broker is working from the registered office and would not be perceived as working at another place. On the other hand, if investors or borrowers contact (or expect to contact) a person at another mortgage broker's office, whether by phone, fax or e-mail, or meet the broker at another mortgage brokers offices to conduct business, this could seriously weaken the

perceived connection back to the registered place of origin [registered office] and increase the chances of creating a (false) impression that the broker worked for the other mortgage broker at which he was actually located when contacted by the clients.

Clearly modern technology has made the requirement of "to or from" much more of a challenge. Incoming phone calls or faxes can now be easily forwarded from one number to another or to a mobile phone or Blackberry and it would be almost impossible to verify the receiver is at the registered address. Similarly incoming e-mails may be forwarded to other addresses. There is evidence that if GET's receptionist received a phone enquiry and no other submortgage broker was available, the call would be directed to Iantorno on his phone at his GET's office. This call could just as easily been forwarded to Iantorno's mobile phone, the phone registered to Get-BC, independent of Iantorno's actual location. These comments are not intended to suggest that the activities of Get-BC identified above meet the standard for carrying on business at or from its registered office, but rather to suggest the lines are becoming blurred.

In the absence of a more helpful definition of "from", and in an effort to reconcile the fact that it is permitted to do mortgage brokerage business <u>from</u> the registered office and <u>at</u> some locations, but not others, I will use the concept of a connection to the registered office (the place of origin) as described above. Based on this criteria or similar logic, I am inclined to conclude that Get-BC's mortgage brokerage activities at the offices of GET do not maintain an acceptable level of connection back to its place of origin (registered office of Get-BC.) Iantorno was told he could not relocate the offices of Get-BC to the same location as GET (and he did not relocate the office, he only relocated some limited mortgage broker activities for a limited period of time) because being in the same location may cause confusion given the similarity of names. Under these circumstances one might reasonably expected a heightened sensitivity in terms of the activities undertake by Get-BC at the offices of GET.

Counsel for Get-BC and Iantorno submits that the Registrar relied solely on the evidence concerning the sale of mortgages to investors in reaching her decision. While it is true that the Registrar did not mention in the Decision that Get-BC brokered some loans from GET to borrowers and that some of these activities were conducted the offices of GET, these activities were mentioned in the Decision on Penalty. Counsel volunteered that these activities, albeit limited in number and duration, occurred. However, I do not accept that failure to reference the brokering of to these loans in the Decision implies the Registrar had insufficient reasons for finding Get-BC conducted business <u>a</u>t the offices of GET and <u>not from</u> the registered office of Get-BC. I accept that the activities relating to the sale of the GET mortgages to investors mentioned in the Decision is sufficient for the Registrar to reasonably have reached her decision.

Decision Issue (c)

I conclude that doing business at the offices of another mortgage broker does not meet the standard of "at or from" one's own registered office. On the reasonableness standard

applicable to findings of fact, I am satisfied that there was evidence to support the Registrar's findings that Get-BC and Iantorno conducted mortgage broker business while at the office of GET and, in doing so crossed the line between being "at or from" Get-BC's registered office and being "at" another registered mortgage brokers address. In doing so, Get-BC failed to meet the requirements of conducting business "at or from" the registered office of Get-BC.

It follows that I cannot accede to the Appellants' arguments. I confirm the Registrar's finding that Get-BC carried on business as a mortgage broker elsewhere than at or from Get-BC's registered address.

Issue (d): ***Whether the Registrar erred in finding that Iantorno, as the Designated Individual for Get-BC, allowed Get-BC to carry on business as a mortgage broker elsewhere than at or from Get-BC's registered address and thereby conducted business in a manner prejudicial to the public interest?***

As the Registrar concluded that Get-BC had carried on business as a mortgage broker elsewhere than at or from Get-BC's registered address contrary to s. 21(1)(b) of the Act, she also held that the related allegation that Iantorno had permitted Get-BC to carry on business as a mortgage broker elsewhere than at or from Get-BC's registered address had also been proven. She concluded that Iantorno's failure to comply with the requirements of the Act established that he was conducting business in a manner prejudicial to the public interest.

Counsel for Get-BC and Iantorno submits that the Registrar carried out no analysis. She seems to have held simply that anyone who violated the 'elsewhere than at or from' section was *ipso facto* acting in a manner 'prejudicial to the public interest.''

In the context of the allegation against Iantorno in his capacity as the Designated Individual of Get-BC, the Registrar referred back to her analysis on Issue (b) and observed:

> …Iantorno is the president and sole director of Get-BC. He is the sole registered submortgage broker for Get-BC. He has been the Designated Individual for Get-BC since it was first registered. The term 'Designated Individual' is used by the Registrar and his staff as a way of knowing which officer or director of a corporation is designated as the responsible person for the mortgage broker business. It is common ground by counsel that directors and officers of a corporate mortgage broker may be held responsible for its actions, by virtue of the duties and obligations of company officers and directors imposed by legislation and common law. I concur with the respondents' counsel that the term 'Designated Individual' cannot impose any additional obligations. [Decision, pp 15-16].

The Registrar further observed at page 16 of the Decision:

> As the controlling mind of his company and Designated Individual, Iantorno has the responsibility for carrying out the duties and obligations of his mortgage broker company, Get-BC. As I have decided that allegation #1 has been proven against Get-BC, it follows that Iantorno, as Designated Individual, was conducting business in a manner prejudicial to the public interest by causing Get-BC to be in breach of section 17.1 of the Act.

I do not accept the submission of Counsel for Get-BC and Iantorno that the Registrar did not undertake any analysis in reaching the conclusion that Iantorno had conducted business in a manner prejudicial to the public interest. She concluded that there is no other person in Get-BC that could be held accountable for the contravention of the Act: Iantorno is not simply "anyone who violated" the Act; he is the registered submortgage broker for Get-BC. The Act itself establishes the requirement that a person cannot carry on business elsewhere that "at or from" the person's registered address. Given that this is provided in the Act and not in some interpretation bulletin, and relates to important information that the public and the regulators rely upon, I accept that a breach would be prejudicial to the public interest. I am satisfied that the Registrar carried out appropriate analysis to conclude that Iantorno was carrying on business in a manner prejudicial to the public interest.

It follows that I cannot accede to the Appellants' arguments. I confirm the Registrar's finding that Iantorno, as the Designated Individual for Get-BC, allowed Get-BC to carry on business as a mortgage broker elsewhere than at or from Get-BC's registered address and thereby conducted business in a manner prejudicial to the public interest.

Issue (e) ***Whether the reprimand directed to Get-BC and Iantorno should be set aside in the event the appeals on Issues (a) and (b) are granted?***

Counsel for Get-BC and Iantorno made no submission on this issue other than to note that the reprimand should be set aside in the event the appeals on Issues (a) and (b) are granted. Counsel for Staff submits that Iantorno made a mistake in law which, although not a defense, was not unreasonable. The Registrar notes that there was no evidence at the hearing that anyone was mislead to their economic detriment. Counsel for Get-BC and Iantorno submits that there is no evidence that anyone was mislead-period.

In view of my findings that the Registrar erred: (a) in finding that Get-BC had made a statement which was false and misleading with respect to a material fact; and (b) in finding that Iantorno as the Designated Individual had failed to ensure that the four investors were provided with accurate disclosure, the Registrar's decision to impose a reprimand on Get-BC and Iantorno in relation to each of these findings is set aside.

Issue (f): ***Whether the issuance of a 30 day suspension on Get-BC and Iantorno was an appropriate penalty?***

The Registrar imposed a 30 day suspension in relation to her finding that Get-BC carried on, and Iantorno permitted Get-BC to carry on, business as a mortgage broker elsewhere than at or from its registered address. Counsel for Get-BC and Iantorno submits that the 30 day suspension is not an appropriate penalty and that the Registrar should have only imposed a reprimand, or alternatively, a reasonable administrative penalty. At the hearing before the Registrar, Counsel relied on the administrative penalties accepted in two Consent Orders as an appropriate penalty.

Counsel for staff sought a 60 day suspension at the Hearing and referred the Registrar to a Consent Order involving numerous breaches of the Act which resulted in a three month suspension, a $10,000 administrative penalty, and costs. Although the Registrar noted the Consent Orders had limited use as precedents, she found them of some assistance.

It is helpful to first consider the evidence presented at the Hearing. Counsel for Staff cited one consent order, *Ralph Collins and Brokers Financial Services Ltd*. dated February 23, 2005 signed by the Registrar. *Brokers Financial Services Ltd.* operated three registered offices and Collins was the President and a submortgage broker. The consent order revealed that, in the case of *Brokers Financial Services Ltd.*, two of its submortgage brokers carried on business from their residences which were not the registered addresses of the firm (contrary to s. 21(1)(d)). In addition Brokers Financial Services Ltd. failed to keep proper records as it was unable to produce four files for the Registrar; 23 of 30 files examined either did not contain the required disclosure statements or contained misleading disclosure statements; in 18 of the files reviewed by investigators, employees of Brokers arranged mortgages and received fees without disclosing the fees to the borrowers; and improperly handled trust funds in three instances. Brokers Financial Services Ltd. and Collins failed to notify the Registrar promptly of a change in address for one of the offices. Collins submitted applications to the Registrar that contained false or misleading information concerning a director of the company and in his application for renewal Collins made a false or misleading statement concerning pending legal proceedings. Registration for Collins and Brokers Financial Services Ltd. were suspended for three months, jointly and severally assessed a penalty of $10,000 and investigative costs of $6,925.

Counsel for Get-BC and Iantorno submitted two consent orders at the Hearing.

- In *Clover Holdings Ltd. and Sharel Diane Wordman* (July 20, 2005) the Registrar imposed a penalty of $3,000 and assigned costs of $5,050 jointly and severally on Clover (mortgage broker) and Sharel Wordman (submortgage broker) for failure to notify the Registrar of a change in address of the firm; for carrying on business

at an address that was not the registered address; for administering certain mortgages without the necessary written agreements; for failure to keep certain funds in a trust account; for failure to provide lender/investors with the prescribed written disclosure statements; and for failure to provide borrowers with the prescribed disclosure statements disclosing the direct or indirect interest Clover had or may have acquired in mortgage transactions.

- In *Alpine Credits Limited*, a consent order dated May 28, 2007 and signed by the Registrar, an administrative penalty of $10,000 was imposed on Alpine and four named individuals jointly and severally, and ordered them to pay costs of $2,000. The consent order revealed that one individual advised the staff of the Registrar that he would erect some signage reflecting his mortgage company's name on the front entrance to the shared offices of Alpine and failed to do so; Alpine carried on a business as a mortgage broker at an office which was elsewhere than at Alpine's registered address; two individuals, including the designated individual for Alpine submitted three applications for renewal of registration that incorrectly stated Alpine had not changed its address; Alpine did not properly disclose interest rates on its web site; the designated individual for Alpine failed to ensure Alpine complied with the provisions of the BCCPA; and Alpine and one individual brokered a mortgage transaction and failed to disclose Alpine was the lender and intended to sale the mortgage.

Submissions – Issue (f)

Counsel for Staff submits four cases in support of their position that a 30 day suspension is appropriate:

- *Norman Juraski* (December 7, 2006.) A decision of the registrar involving a broker who admitted wrong-doing in altering a genuine document and submitting it to a lending institution in the hope of getting the application approved. The registrar mentioned numerous mitigating circumstances and a lighter 30 day suspension and a $1,000 penalty were imposed. In addition, Juraski was required to pay costs of $3,500 and complete a course on ethics. The mitigating circumstances included: Juraski's previous good reputation; his coming forward admitting his actions; the fact there were no actual losses; and the fact the client mislead Juraski.

- *David Ford* (February 5, 2002). A Financial Institution Commission decision that imposed a penalty of four months and $1,000 with costs awarded of $2,300 on David Ford, a submortgage broker, for providing a client with a false gift letter where the broker admitted he conducted business in a manner not in the best interests of the public. The "gift letter" concerned assets to be used in support of a mortgage application. In the decision it was noted that: "I concur with the submission that the elements of misconduct show Ford was prepared to be deceitful and dishonest."

- *Cascade Pacific Mortgage Corporation* (December 20, 2002) A Financial Institution Commission that imposed a one month suspension and $2,500 in costs against Cascade for late filing of its financial statements. The filing was three months late and similar late filings had occurred in four previous years.

- *Dwayne Englesman* (July, 2001) A decision of FICOM suspending Engelesman, a mortgage broker, for three months because he altered a financial institution's commitment letter to prevent the borrower from knowing the identity of the lender. He admitted his wrong-doing.

Counsel for Get-BC and Iantorno submits that no one has ever complained about this matter and it arose only because the staff investigator, when reviewing GET's files for the purpose of investigating Westergaard, decided to address this matter of "elsewhere than at or from". Counsel submits no one was financially harmed and that there was no clear evidence of confusion about the differences between GET and Get-BC. Further, staff did not tell Iantorno that what he was doing was wrong, but staff did refused Get-BC's request to move its registered address to be the same as GET's. Iantorno testified that staff told him that: "this refusal should not trouble him because he need not restrict his activities to the Get-BC office." Counsel submits this statement was not challenged by staff.

Counsel for Get-BC and Iantorno also submits they found no decision in which a suspension of any length has been imposed for anything remotely like this. Counsel cites *Commonwealth Mortgage Corp. v. British Columbia (Registrar of Mortgage Brokers*) [2000] B.C.C.O. No. 14 where the predecessor of this Tribunal overturned a three-day suspension imposed for publication of a false advertisement since the violation was "relatively minor" and not preceded by any warning. Counsel submits that a reprimand or a small administrative penalty would be appropriate.

Analysis – Issue (f)

The Registrar noted that Iantorno was advised by the staff he could not have Get-BC's registered office at the same location as GET's office. I accept that under such circumstances one might reasonably have expected a greater level of caution in undertaking activities at GET's office. In addition to the activities cited in the Decision, Get-BC admitted acting as a mortgage broker in brokering GET loans with borrowers on a limited number of occasions and some of these loans were brokered from GET's office. While not part of the Decision, this fact can be considered in assessing the penalty.

The Registrar did not specifically mention any mitigating circumstances and I believe there are some to be considered. The evidence indicates that there have been no complaints concerning either Get-BC or Iantorno prior to the Hearing nor have there been any violations of the Act prior to the Hearing. Indeed there appears to have been no complaints against Iantorno since he first became registered in 1992. The evidence also

indicates that Iantorno attempted on several occasions to get additional information concerning the reasons why he was not allowed to relocate Get-BC's office to the same location as GET's office. The fact there is so little official information to help interpret the "at or from" provision is a consideration in determining the penalty.

As noted by the Registrar, assessment of penalties should have regard to the objectives of specific and general deterrence. I do not accept that a 30 day penalty is necessary in terms of specific deterrence in this instance as Iantorno testified he tried to get additional information to help him understand the reasons for not allowing Get-BC's office to be relocated to GET's office. I believe this demonstrates his concern that he works within the Act and consequently I do not believe there is no need for a significant penalty to encourage him to correct his business conduct.

I have considered the cases and consent orders submitted on this matter. There are two consent orders (*Clover Holdings Ltd and Alpine Credits Limited*, supra) where the mortgage broker actually relocated the office and failed to inform the Registrar's office. This was in addition to other violations of the Act and regulations and in each case the penalty involved an administrative penalty of less than $10, 000. *Ralph Collins and Brokers Financial Ltd.* involved two submortgage brokers carrying on business at a place other than their registered office and where the Designated Individual failed to notify the Registrar's office promptly of a change in address for the firm. Unfortunately there were so many other issues in this case that I conclude it provides very limited helpful insights concerning the appropriate penalty for Get-BC and Iantorno. The remaining cases and consent orders do not involve issues relating to the "at or from" violation at hand, but do provide some sense of the scope of penalties generally. I accept the Registrar's observation that she was not bound by consent orders, but found them of some assistance.

Decision on penalty- Issue (f)

Given Iantorno's previous unblemished record and the cases and consent orders provided, I am of the opinion that the 30 day suspension is unreasonable in the circumstances of the appeal. In my opinion it goes beyond the penalty needed to provide specific and general deterrence. I accept that the Registrar has the advantage of hearing directly from Iantorno and the other witnesses and that a high degree of deference is required. I am not objecting to any finding of fact or interpretation of the facts. My concern centers on two elements of the Decision on Penalty: the absence of any mention of possible mitigating circumstances for Issue (d), (and I believe the evidence provides some important mitigating circumstances as noted above); and the range of penalties for similar breaches as evidenced from the cases and consent orders considered by the Registrar. These considerations lead me to conclude the 30 day suspension is unreasonable in the circumstances.

I set aside the 30 day suspension of Get-BC and Iantorno and substitute in its place and administrative penalty of $6,000 allocated jointly and severally to Get-BC and Iantorno and direct that failure to pay the penalty within 45 days of the receipt of this decision will

result in immediate suspension of Get-BC's registration as a mortgage broker and Iantorno's suspension as a submortgage broker until the penalty is paid.

Issue (g) Whether the Registrar erred in her finding that GET and Westergaard had employed Iantorno as a submortgage broker and that Iantorno was not registered as a submortgage broker with GET contrary to s. 21(1)(d)?

Counsel for GET and Westergaard initially appealed the Registrar's finding on Issue (g) but abandoned the appeal. Counsel submits that: "however, the Registrar found that 'Iantorno was involved in many essential ways on a daily basis, in arranging mortgages for GET, and should have been registered with GET. The appellants do not challenge that finding on this appeal." [Submission, para. 76.]

Issue (h) ***Whether the administrative penalty of $20,000 against GET was an appropriate penalty?***

Background – Issue (h)

Get and Westergaard were found to be in breach of s. 21(1)(d) of the Act by employing a submortgage broker [Iantorno] who was not properly registered. The Registrar concluded that Iantorno should have been registered with GET as he was found to be involved in an essential way on a daily basis in arranging mortgages for his employer, GET. In addition to brokering GET's mortgages to investors as a submortgage broker of Get-BC, he made decisions on fees and interest rates for GET, and he had ultimate authority as to whether he mortgage loans to borrowers, being handled by other submortgage brokers, would be approved or denied. The Registrar did note that Iantorno was a qualified submortgage broker, but to his own company, Get-BC. Westergaard submitted he believed that Iantorno was performing duties which did not require registration.

Westergaard and his company, Aaron BC, were disciplined for a breach of the same section of the Act in 1994 and the circumstances were very similar to those in the Appeal. Westergaard was suspended for 21 days and Aaron BC was suspended for nine days. Westergaard advanced the same defense in 1994 – that the unregistered person was performing duties which did not require registration.

Submissions - Issue (h)

During the hearings Counsel for Staff submitted that an administrative penalty of $20,000 in lieu of suspension should be imposed on GET. Counsel for GET and Westergaard submitted a reprimand would be appropriate.

Counsel for GET and Westergaard submits that the failure to register Iantorno with GET was a "technical failure" so sufficiently trifling that the Registrar did not even allege it against Iantorno. Counsel submits that a reprimand should be substituted for the $20,000 penalty. Counsel for Staff submits that the nature of the breach is significant; as it demonstrates a flagrant violation of the Act and that it is important that the Registrar's findings in this regard be carefully considered.

Decision on Penalty- Issue (h)

I am of the view that the $20,000 administrative penalty imposed on GET by the Registrar is reasonable and appropriate given the significance of registration in the overall context of the Act and given that a similar breach occurred previously. My view is reinforced by the characterization of this breach as "sufficiently trifling" by Counsel for GET and Westergaard, a characterization that suggests GET and Westergaard may not yet appreciate the significance of the breach.

The appeal is denied. The administrative penalty, and associated conditions, that the Registrar imposed remains.

The Registrar also made a determination that Westergaard's registration be suspended for 60 days, but in light of the decision to suspend his registration, this was deemed to be "academic". I will address this matter later under Issue (k).

Issue (i) ***Whether the Registrar erred in her interpretation of s. 22(7) of the Act when considering facts which first came to the knowledge of the Registrar more than two years prior to the commencement of the proceeding?***

Background-Issue (i)

During the Hearing the Registrar received submissions concerning the proper interpretation of s. 22(7) and whether it applied to suitability hearings under s. 4. The Registrar determined that section 22(7) did not apply to suitability hearings under s. 4 of the Act:

> Although I am not bound by these decisions [*Re Charko* 1992 LNON) SC 239 and *Re Vilas-Boas* 2002 LNONOSC 571 as submitted by staff], I do concur with the staff's position. It could not have been the intention of the legislature to have s. 22(7) apply to suitability hearing, as to do so would defeat the ability of the registrar to properly determine suitability. If section 22(7) applied, the Registrar would be restricted to only consider behaviour and/or disciplinary history which occurred or came to the knowledge of the Registrar during the two years prior to

> application. This could lead to a situation where an applicant could have a lengthy disciplinary-or even criminal history-would escape censure, and have to be registered…. Further s. 22 (7) envisages a proceeding being commenced by the Registrar. It is the applicant who applies to be registered and the Registrar has no control of the timing of that. [Decision, page 30.]
>
> …The pre-August 2003 allegations had never been proven. There was no hearing, no agreed statement of facts, no admission, [and] no consent order. For whatever unspecified reasons or circumstances, of which there could be many, a settlement was reached between Mr. Westergaard's counsel, Mr. Mason, and the Registrar for Westergaard to be registered initially for one year (the usual period is two years) and only renewable for a further year, a list of conditions attached, which provided for some monitoring by the staff… There was [sic] clearly a lot of concerns about his suitability then, so he was registered on a provisional basis… I believe I would be remiss in my duty in determining suitability and objectionability, not to consider the issues which gave rise to those allegations as well as to more recent ones. [Decision, pp.30-31.]

The Appellants argue that the Registrar erred in concluding that the two year limitation in s. 22(7) of the Act has no application to a suitability proceeding under s. 4 of the Act and, if she had confined herself to facts that she was entitled to consider, she would have found Westergaard suitable for registration. .

Legislation – Issue (i)

The relevant provisions of the Act provide in part as follows:

> Granting of registration by registrar
>
> 4 The registrar
>
> (a) must grant registration or renewal of registration to an applicant if in the opinion of the registrar the applicant is suitable for registration and the proposed registration is not objectionable,
>
> (b) must not refuse to grant or refuse to renew registration without giving the applicant an opportunity to be heard, and
>
> (c) may, in the registrar's discretion, attach to the registration or renewal of registration terms, conditions or restrictions the registrar considers necessary.
>
> Suspension or cancellation of registration
>
> 8(1) After giving a person registered under this Act an opportunity to be heard, the registrar may suspend or cancel the person's registration if, in the opinion of the registrar, any of the following paragraphs apply:

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

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

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

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

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

…

Penalties

22(1) A person commits an offence who …

(2) A person who commits an offence under subsection (1) (a), (c) or (d) is liable …

(3) A person who commits an offence under subsection (1) (b) is liable…

(4) If a corporation commits an offender under this Act, an officer or director of the corporation who authorizes, permits or acquiesces in the offence commits the same offence whether or not the corporation is convicted of the offence.

(5) In addition to the penalties provided in this section, the registrar may take any other action or proceeding against the person or corporation provided by laws.

(6) In proceedings for an offence under this Act, it is a defense if the person charged proves that the commission of the offence was due to a mistake of fact, or to an accident, and that the person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself, herself or itself or any person under his, her or its control.

(7) **A proceeding under this Act may not be commenced more than 2 years after the facts on which the proceeding is based first came to the knowledge of the registrar.** (Emphasis added)

(8) Section 5 of the Offence Act does not apply to this Act or to the regulation.

Evidence – Issue (i)

This issue relates to the interpretation of s. 22(7).

The following evidence is presented here since it is referred to in whole or in part in a number of the submissions:

Reference is made in the Decision and in the submissions to the appeal to "pre-2003 facts." It is generally agreed that this refers to facts that came to the knowledge of the registrar prior to August 22, 2003; the date a written agreement was reached providing that the registrar would immediately approve Westergaard's registration with his new company, GET. On June 1, 2001 Westergaard applied to be registered as a submortgage broker with Aaron Alta. The registrar's staff completed an investigation and recommended that Westergaard not be registered due to the fact that he was not suitable for registration and the proposed registration was objectionable. A Notice of Hearing was issued on April 11, 2002 and a suitability hearing was scheduled to commence September 14, 2003. Following negotiations with the staff at the registrar's office Westergaard was registered as per the August 22, 2003 agreement, The Hearing scheduled for September 14, 2003 was cancelled. There was no agreed statement of facts or consent order, as is usual in such circumstances.

The agreement dated August 22, 2003 between Westergaard and the registrar's office states that Westergaard's registration as a submortgage broker with GET was subject to Conditions set out in Schedule "A" attached to the registration. One of the conditions in Schedule "A" was that the initial registration would be for one year and the first renewal for one year. On August 29, 2004 the first renewal was granted, without holding a hearing, and Westergaard was registered for one more year, subject to the same conditions as originally set out in Schedule 'A'.

On July 28, 2005 Westergaard applied for renewal of his registration. By letter dated September 26, 2006 the Deputy Registrar advised Westergaard that his registration was issued effective August 29, 2005 for a period of two years and subject to the conditions in Schedule 'A', exclusive of Condition 1 (the one year period.) No hearing was held. Westergaard sought to have the conditions removed and the Deputy Registrar advised by letter that he had reviewed the request for removal of the conditions with the registrar and it was the registrar's view that the conditions should continue to apply, exclusive of Condition 1 concerning the term of renewals.

Westergaard applied to the Financial Services Tribunal for a hearing concerning the continuation of the conditions. The Tribunal determined that the conditions attached to Westergaard's registration:

> Were intended to last for the first year of the Certificate, the first renewal of a further one year period should the Appellant continue to act as a submortgage

> broker following the first year, and thereafter would be subject to further review, The further review would bring section 4 of the Mortgage Broker Act into effect and the "opportunity to be heard" in sub-paragraph 4(b) of that Act would again be operative. [*FST 05-017*, at p 8].

In reaching its conclusion, the FST also held that the right to an "opportunity to be heard" [s. 4(b)] should be extended to include an opportunity to be heard under 4(c) relating to conditions attached to registration.

Westergaard was given an option to apply as a new applicant or apply for renewal. He elected to apply for renewal of his registration on April 6, 2005. Staff of the Registrar's office conducted an investigation, issued a Notice of Opportunity to be Heard and Notice of Hearing. On June 15, 2007 the Amended Notice of Hearing was issued. The Hearing commenced on January 15, 2007, concluding with the Decision and the Decision on Penalty.

Many, if not all, of the facts included in the June 15, 2007 Amended Notice of Hearing are the same as the "pre-August 2003 facts" referenced above. These facts will be analyzed in the section *Evidence-Issue (j*) that follows.

Submissions – Issue (i)

Counsel for Westergaard's submits that Registrar erred in stating that: "they [many of the facts] can't be considered as they occurred or came to the knowledge of the Registrar more than two years prior to this proceeding being initiated by a Notice of Hearing issued on January 15, 2007." [Emphasis added.] Counsel submits that s. 22(7) does not use the term "occurred" but rather "…after the facts on which the proceeding is based first came to the knowledge of the registrar." [Emphasis added.] Counsel also references the Registrar's statement that: "The pre-August 2003 allegations had never been proven." and submits there is no requirement in the Act that the facts referred to in s. 22(7) must be proven. Counsel also submits that if the registrar decided not to "prove" facts at a previously scheduled hearing in a different proceeding which he cancels, he cannot thereby avoid the effect of the two year limitation period when a subsequent proceeding is commenced.

Counsel for Westergaard submits that this Appeal raises questions of the correct interpretation of s. 22(7) of the Act and cites ***Markevich*** (supra) for the proper approach to statutory interpretation:

> 15 …It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording.

Counsel for Westergaard submits that this appears to be a case of first impression so he relies upon the principles of statutory interpretation, *Romanshenko v. Real Estate Council of British Columbia*, 1998 BCCO14 (British Columbia Commercial Appeal Commission), on nearly

identical wording to s.22(7), and *British Columbia Securities Commission v. Bapty*, 2006 BCSC 638 which discusses the discoverability principle in the context of a limitation provisions of the *Securities Act*, RSBC 1966, c. 418. Counsel references *Romanshenko,* where the *Real Estate Act* has a limitation provision [s. 40(2)] almost identical to s. 22(7) of the Act, and the presiding officer found that s. 40(2) makes it clear that a proceeding cannot be initiated more than two years after the facts on which the proceeding is based first came to the knowledge of the Superintendent. Counsel also cites *British Columbia Securities Commission v. Bapty*, where Justice Burnyeat held that notwithstanding the potential veracity of the allegations against a defendant, s. 159 [limitation period] of the *Securities Act* preclude an action.

Counsel for Westergaard submits that there is no definition of "proceeding" in the Act that would limit the meaning of s.22 (7) in the manner proposed by the Registrar's statement that:"…Further, s.22 (7) envisages a proceeding being commenced by the Registrar. It's the applicant who applies to be registered and the Registrar has no control of the timing of that." [Emphasis added] Counsel cites *Black's Law Dictionary*, 7th ed. and *Markevich* (supra) at para. 24 which states:

> Although the word proceeding is often used in the context of an action in court, its definition is more expansive… the word "proceeding" has a very wide meaning and includes steps or measures which are not in any way connected to actions or suits…

Counsel for Westergaard further submits that the Registrar's interpretation concerning who initiates a proceeding leads to a result which is contrary to one of the basic principles of statutory interpretation, namely the presumption against absurdity. Counsel submits that, under the Registrar's interpretation, if the Registrar became aware of misconduct that could justify a suspension or termination of registration and commenced a proceeding under s. 8, the Registrar would be limited to considering only facts which came to his or her knowledge within two years of the commencement of the proceedings. However, the Registrar could avoid this by waiting until the mortgage broker or submortgage broker submitted an application for renewal, initiate an opportunity to be heard pursuit to s. 4(b) and thereby avoid the two years limitation period.

Counsel for Westergaard argues that two identical mortgage brokers (or submortgage brokers) with identical histories could end up being treated differently depending upon whether it was the Registrar who initiated a proceeding under s. 8 or the mortgage broker (or submortgage broker) who did so under s.4. Counsel submits that the purposes of ss. 4 and 8 are identical, and that it would be internally incoherent and contrary to principles of natural justice to have different rules applied in those two circumstances. Counsel submits that there is no reason to infer that the legislature intended the application of s. 22(7) to depend upon the technical question of whether the registrar or the applicant initiated the proceeding when the object of s. 4 and s. 8 is the same, namely to ensure that the mortgage broker and submortgage brokers are suitable for registration and the proposed registration is not objectionable as provided in s. 4(a) and s. 8(1)(a). He contends that s. 22(7) reflects an appropriate balance between the Registrar's requirement for sufficient time to conduct investigations and the commercial need for finality.

Counsel for Westergaard further submits that: "The certainty, evidentiary and diligence rationales that support the application of limitation provisions to Crown proceedings apply

equally to both the court and non-court proceedings at issue here." [*Markevich* at para. 25]. Counsel submits this reasoning is equally applicable to the facts of the Appeal.

Major J. held that:

> It would be incongruous to find that s. 32 of the CLPA was intended to apply to court action but not to the statutory collection procedure that serves an identical purpose. The certainty, evidentiary, and diligence rationales that support the application of limitation provisions to Crown proceedings apply equally to both the court and non-court proceedings…. There is no reason to infer that Parliament intended for s.32's application to turn solely upon the technicality of whether the relevant proceeding took place in court.

Counsel for Westergaard also submits that the Registrar misapplied the concept of legislative paramountcy when she relied on *Re Charko* 1992 *LNONOSC* 239, a decision of the Ontario Securities Commission as being directly on point. The Registrar noted that: "Like Mr. Westergaard, Mr. Charko was re-applying for registration under the Ontario Securities Act and was refused after a suitability hearing - same test and criteria as set out in the Act." Counsel for Westergaard submits that both the Registrar (and the decision maker in *Charko*) failed to appreciate that the statute, and not the regulation (or forms) governed with respect to the two year limitation period. Counsel acknowledges the Registrar is clearly entitled to request information relating to events occurring earlier, such as on Form 1 and 2, but that does not entitle her to base a proceeding on facts which have been expressly proscribed by legislation.

Counsel for Staff submits that the meaning of s. 22(7) must be guided by the modern approach to statutory interpretation and that it would be antithetical to the purpose of the Act to suggest that suitability can only be measured by information within the last two years of the Registrar's knowledge. Counsel submits that on a proper interpretation, s. 22(7) only applies to criminal proceedings that may be commenced in provincial court to enforce the Act, or enforcement proceedings that may be initiated by the Registrar under s. 8.1 of the Act.

Counsel for Staff submits it is important to recognize that the two year limitation period at issue in this appeal is contained in a provision of the Act which governs penalties. Section 22(1) sets out the actions that constitute offences under the Act. Sections 22(2) and (3) set out the potential penalties for such offences. Section 22(4) sets out the potential liability of officers or directors of a corporation. Section 22(5) provides that, in addition to the penalties outlined in s. 22, the registrar may take any other action or proceeding against the person or corporation provided by law. Section 22(6) sets out the possible defenses in a proceeding for an offence under the Act. Section 22(8) provides that the *Offence Act* does not apply to this Act or to the regulations.

Counsel for Staff submits that s. 22(7) cannot reasonably be applied to suitability hearings under s. 4, otherwise s. 22(5) would be unnecessary if it was contemplated that any decision of the Registrar constituted a "proceeding" under the Act within the meaning of s. 22(7).

Counsel for Staff also submits that the Registrar did not commence a proceeding under the Act against Westergaard, but rather that it was Westergaard who asked for the conditions to be removed and the FTS ordered that Westergaard be granted an opportunity to be heard.

Counsel for Staff also submits that the conditions attached to his registration came from an agreed resolution of a suitability hearing in 2003, hence for the sake of argument there was a proceeding commenced within two years of the time the registrar became aware of the facts and the registrar did deal with the information in the appropriate time limit.

Counsel for Staff submits that the submissions on paramountcy are irrelevant because the Registrar did not rely on Form 1 and 2 as the basis of interpretation of s. 22(7).

Counsel for Staff submits *Markevich* (supra) is not helpful since the main issue was collection of taxes, an issue far removed from the Registrar's ability to consider a person's history to determine suitability. Counsel also cites Justice Binnie's statement for the majority (para. 20) that: "In light of the significant effect that collection of tax debt has upon the financial security of Canadian citizens, it is contrary to the public interest for the department to sleep on its right in enforcing collection." Counsel then submits that: "… that it is contrary to the public interest in maintaining public confidence in the mortgage industry and the protection of the public interest if the Registrar is precluded from considering the complete compliance history of a registrant when assessing that registrant's application to alter the terms of his registration.

In Reply, Counsel submits that: the fact that "the Registrar did not commence a proceeding under the Act" is not relevant since s. 22(7) only refers to "A proceeding under the Act" and does not refer to "A proceeding commenced by the Registrar"; the Registrar's expressed finding is that proceedings commenced January 15, 2007; while Staff submits the Registrar did not rely on Forms 1 and 2 as a basis of her interpretation of s. 22(7), pages 29-30 of the Decision clearly show she did so; the fact that Staff submits that *Markevich* (supra) is not helpful ignores the fact that Major J's statement of principle concerning the rationale for limitation periods are broad statements of principle in general and are not restricted to taxation matters as Staff submits.

Analysis-Issue (i)

In the Decision, and throughout the submissions by Counsel, reference is made to the term "suitability hearing." There appears to be agreement that this refers to "an opportunity to be heard" as provided in s. 4(b) and s. 8. The FST determined [FST 05-017] that this "opportunity to be heard" extended to s. 4(c). Just to ensure there is no misunderstanding, I have interpreted the term "suitability hearing" to mean the "opportunity to be heard" as set out in ss. 4 and 8, and as extended by the FST in FST-05-017.

The first matter I will address is the wording in the Decision and the submissions concerning the applicability of s. 22(7) to s. 8 and what appear to be some differences in the specific wording. In the Decision, the Registrar clearly states that: "The staff say that section 22(7) only applies <u>to disciplinary proceedings initiated by the Registrar under s. 8 of the Act</u> or the prosecutions of offenses under sections 21 and 22 and cannot reasonably apply to suitability hearings under s. 4." [Decision, p. 28, emphasis added] The Registrar concurred with the staff's position: "It could not have been the intention of the legislature to have section 22(7) apply to suitability hearings..." [Decision, p. 30]. This is consistent with the submissions of staff during the Hearing where Counsel stated:

> And again, it's our submission that Section 22(7) does not apply to a suitability hearing. That only applies to a hearing that's prosecuted by an offense and possibly a disciplinary hearing under section 8. But it doesn't apply to section 4. And all the allegations in paragraphs 1 to 11 and Allegations 1 to 11 [in the Amended Notice of Hearing], they are initiated and prosecuted pursuant to section 8 of the Act. In my submission, all those allegations are within the two-year limitation period under Section 22(7)…." [Transcript, v.13, p. 2406]

As I read section 8, it appears that the disciplinary proceedings and disciplinary hearings under section 8 are contained in s. 8(1) of the Act.

In his submission for the Appeal, Counsel for Staff states that:

> …on a proper interpretation, s. 22(7) only applies to criminal proceedings that may be commenced in provincial court to enforce the Act, or <u>enforcement proceedings that may be initiated by the Registrar under s. 8.1 of the Act</u>. [Submission of Staff, p. 50, Emphasis added]

My reading of the Decision and the submissions of staff at the Hearing, coupled with my reading of the Act, lead me to conclude the Registrar meant s. 8(1) was subject to s. 22(7), not s. 8.1 as submitted on Appeal by Counsel for Staff. Section 8.1 relates to enforcement of administrative penalties, this occurs after the opportunity to be heard, as provided in s. 8(1) and the administrative penalty is determined. In my view, a submission on the Appeal is not the proper place for Counsel for Staff to alter his or her view on a major point that the Registrar has imbedded in the Decision, particularly when the point being made at the Appeal is so significantly different than the original point made at the Hearing.

I would next like to address two specific points raised in the Appeal. First, the submission by Counsel for Westergaard that the Registrar erred in using the terminology "occurred or came to the knowledge of the Registrar…" in reference to s. 22(7). I concur that s. 22(7) does not use the word "occurred." Second, Counsel submits there is no requirement that the facts envisaged in s. 22(7) must be proven. Counsel for Staff made no submission to the contrary on these two issues. On each point I concur with the submissions of Counsel for Westergaard. I believe these additional words-"occurred" and/or "proven"- fundamentally alter the limitation provision in s. 22(7) and do so beyond any reasonable statutory interpretation.

I find the submissions of Counsel for Westergaard relating to absurd outcomes that could arise if s. 22(7) applied to s. 4(a) and not 8.1(a) are compelling and the basic principles taken from R. Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at p, 236 helpful. I cannot accept that the legislation would intentionally allow two fundamentally different processes that address essentially identical circumstances to co-exist in the Act [*Markevich*, para. 25 quoted previously]. Counsel for Staff did not dispute this particular submission relating to the absurd outcomes. The absurdity that would arise is further reinforced by the wording of s. 8(1)(a) that states: "the person would be disentitled to registration if the person were an applicant under section 4; …" Hence s. 8(1)(a) of the Act provides for suspension or cancelation of the person's registration for the same reasoning that s. 4 would refuse to grant or renew a registration. The difference rests solely with the fact s. 8(1)(a) relates to persons currently registered whereas s. 4 applies to

new applicants or renewals. This submission concerning the absurd outcome rests on the wording in the Decision and submissions of Counsel for Staff discussed above.

The next matter requiring analysis relates to the submission on legislative paramountcy raised by Counsel for Westergaard. The point made by Counsel is that the Registrar and the decision maker in *Charko* (supra), both failed to appreciate that the statute, and not the regulations (or forms) governs. This point is directed at the decision in *Charka* quoted earlier that states:

> and (ii) be inconsistent with the general nature of the questions in the Form 4 application which asks about an individual's past …without any time limitation at all.

Counsel for Staff does not dispute that subordinate legislation cannot conflict with its parent legislation, but submits that the Registrar did not rely on the form [1 and 2] to interpret s. 22(7). Unfortunately precision implied in this submission is less clear upon reading the Decision where the Registrar points out that:

> … [*Charka*] is directly on point" and "I note that the application for registration under the Act also asks about an applicant's past in several areas: A five year employment history is requested… [Decision, p.29]

The Registrar thought enough of this point to then reference, and comment on, the forms used under the Act. However, in the final analysis the Registrar noted:

> Although I'm not bound by those decisions, I do concur with the staff's position. It could not have been the intention of the legislature to have s. 22(7) apply to suitability hearings. [Decision, p. 30.]

The only other direct reference to the staff's position in the Decision that relates to the interpretation of s. 22(7) is found at page 28 and is not directly stated that it relies upon *Charka* decision.

I am left with the discomfort of a Decision that devotes considerable space to the relevance of forms immediately following the discussion of *Charka* in the Decision, but where the Registrar states" "Although I am not bound by those decisions [*Charka*] I do concur with the staff's position." In the absence of any information as to the weight the Registrar assigned to the fact that forms ask questions about history going back beyond five year, I rely upon a simple reading from the Decision that the Registrar concurred with the position of staff and that the position of staff contained in the decision is not clearly stated to rest upon the *Charka* decision.

The submission by Counsel for Staff relating to the usefulness of *Markevich* (supra) requires some consideration since Counsel for Westergaard does rely upon it as part throughout his submissions. Counsel states the main issue in *Markevich* was the collection of past due taxes, an issue far removed from the suitability determination under the Act. Counsel for Westergaard submits the portion of *Markevich* quoted in this regard was a broad statement of principle and not limited to tax matters. While I would not accept that *Markevich* provides the final word on this matter, I do accept that the principles stated are very helpful in the Appeal.

Counsel for Staff made a further point concerning *Markevich* when he quotes Justice Binnie at para. 20 that:

> In light of the significant effect that collection of tax debt has upon the financial security of Canadian citizens, it is contrary to the public interest for the department to sleep on its right in enforcing collection.

Counsel then submits that:

> … that it is contrary to the public interest in maintaining public confidence in the mortgage industry and the protection of the public interest if the Registrar is precluded from considering the complete compliance history of a registrant when assessing that registrant's application to alter the terms of his registration.

I do not accept that Counsel's analogy flows naturally from the quote from Justice Binnie: But to the extent it is helpful to draw such analogies, I observe that Counsel refers to the significance of limitations on information that may be relied up whereas Justice Binnie refers to the significance of acting on the information in a timely manner.

Counsel for Staff raised a further issue relating to *Markevich* that related to the interpretation of "proceeding," namely the interpretation of "proceedings" in *Markevich* was significantly influenced by the corresponding French text of the federal taxation statute which does not exist in this Appeal. I accept Counsel's position on this matter, but suggest his submission is not sufficient to cause me to ignore *Markevich* on the interpretation of "proceedings", but rather to be mindful of the weight attached to it.

Counsel directed me to considerations concerning the correct interpretation of s. 22(7). On a simple reading of s. 22(7), I find that without additional words being added, the section makes a clear and precise statement that is consistent with the limitation provision in other statutes (*Romanshenko v. Real Estate Council of British Columbia* (supra); *British Columbia Securities Commission v. Bapty* (supra)). Counsel for Staff submits that it is necessary to interpret s. 22(7) within the overall context of the wording in s. 22. Sub-section 22(1) refers to a person committing an offense; ss. 22(2)(a, b and c) and s. 22(3) specifies penalties for committing an offense. Sub-section 22(4) refers to corporations committing an offense; sub-section 22(6) refers to a proceeding for an offense and s. 22(8) states section 5 of the *Offense Act* does not apply to the Act or the regulations of the Act [Emphasis added]. Only two sub-sections - s. 22(5) and s. 22(7) - do not either reference an offense or relate directly to penalties for an offense. Counsel for Staff also submits that it would be unnecessary to have s. 22(5) if any decision of the registrar was also a proceeding under that Act to which 22(7) applied. I disagree with this point in the submission from Counsel since s. 22(5) does not appear to be clearly contingent upon having no statutory limitation period, and if it is contingent, Counsel has not presented a convincing line of reasoning. Ultimately the interpretation to be made is whether s. 22(7), couched within seven other sub-sections of s. 22, at least six of which relate to offenses, should be read to be limited to offenses rather than suitability hearings. Is the weight of the neighboring sub-sections sufficient to conclude that s. 22(7) only applies to offenses? As an alternative, the careful wording and restrictions on other sub-sections of s. 22 may well support the view that the legislature may have been equally careful when omitting any such limitation on s. 22(7). On balance, I am drawn to the

view that s. 22(7) must be read as stated, without any limitation on applicability to any particular proceedings.

I was invited to consider s. 22(7) in the overall context of the Act and the purpose of the Act. I noted that s. 7(1) states that:

> If (a) the registrar is about to examine, or is examining, or has examined a person under this Act, …

And s. 7(6) states that:

> In any of the circumstances mentioned in subsections (1) (a), (b) or (c), the registrar may make and file in the office of a land title district a certificate that proceedings have been, or are about to be, taken. [Emphasis added]

I believe that a suitability hearing involves examining a person under the Act and I observe that s. 7(1)(a), read in combination with s. 7(6), implies that a suitability hearing is a proceeding under the Act since the essential purpose of a suitability hearing is to examine the person applying for registration or renewal of registration.

The Registrar raised some very serious concerns in the Decision concerning what might occur if s. 22(70 were to apply to suitability hearings.

> If section 22(7) applied [to suitability hearings], the Registrar would be restricted to only considering behaviour and/or disciplinary history which occurred or came to the knowledge of the Registrar during the two years prior to application. This could lead to a situation where an applicant could have a lengthy disciplinary-or even criminal history – would escape censure, and have to be registered.

The first point I note is that I have already determined that the two years runs from the date the facts first came to the knowledge of the registrar, not from the date they occur. This should remove one element of the concerns raised by the Registrar. Second, in the case of a new applicant, the Registrar has no facts until the person applies. Hence all facts, without time limit, would be addressed at the initial suitability hearing under s. 4. In the normal course of events, the successful applicant would be registered and two years later apply for renewal of registration. Once again any new facts that came to the knowledge of the registrar covering the prior two years would be dealt with prior to [under s. 8], or at the time of, application for renewal [under s. 4]. Hence in the normal course of the registration process, the registrar has a new two year limitation to address new facts that first come to the knowledge to the registrar and, to paraphrase Justice Binnie, as quoted earlier, the registrar should then take action on these new facts in a timely manner to protect the public interest.

Not all applications for initial registration or renewal of registration necessarily follow such a clear path. If the applicant failed to reveal some required facts, or provided some incorrect facts, at the time of the initial application or any subsequent application for renewal, and these subsequently come to the knowledge the registrar, the two year limitation would again run from the date the new or corrected facts become known to the registrar. So once again I am satisfied that the concerns raised by the Registrar can be properly addressed even if s.

22(7) applied. The Registrar raised other concerns in the Decision and I will address them in a subsequent section dealing with the Issue (j) in the Appeal.

Decision-Issue (i)

I conclude that a "suitability hearing" under s. 4 of the Act is a "proceeding" under the Act. I also find that s. 22(7) applies to proceedings under s. 4. As a consequence, a proceeding under this Act may not be commenced more than two years after the facts on which the proceeding is based first came to the knowledge of the registrar and I am satisfied the evidence support the fact that this Hearing commenced on January 15, 2007. I base my decision on the analysis stated above, but I apply the greatest weight to two considerations: an overall reading of s. 22 as the context for s. 22(7); and to the submission that applying s. 22(7) to s. 8(1)(a) disciplinary hearing, but not s. 4, could result in absurd outcomes. In my overall reading of s. 22 I find the careful limitations placed on other sub-sections of s. 22 references an "offense" lead me to conclude the same careful consideration was applied to s. 22(7) where no qualification was attached to "proceedings." I find this reinforced by s. 7(1)(a) coupled with s. 7(6) of the Act.

I find that the Registrar erred in her interpretation of s. 22(7) of the Act when considering facts which first came to the knowledge of the Registrar more than two years prior to the commencement of the proceedings. The next issue is what facts can be considered if s. 22(7) applies to suitability hearings.

Issue (j) ***Whether, based on the facts which the Registrar was entitled to consider, she erred in determining Westergaard was not suitable for registration as a submortgage broker in British Columbia and his registration was objectionable?*** [This is a summary of five closely linked matters and they will be dealt with separately under the analysis of Issue (j)]

Background-Issue (j)

The Registrar found that:

> As I have concluded that [Westergaard] is not credible, I have no difficulty in finding that he deliberately attempted to mislead the [registrar] with respect to unsatisfied judgments on his June 1, 2001 application for registration, "updated" on August 22, 2003, which still contained inaccurate statements about these judgments. So the registration that was granted on August 29, 2003, and in effect today, was at least partially based on misinformation. He has also attempted to mislead this tribunal [Hearing] about the status of unsatisfied judgments against his company Aaron [BC]. [Decision, p. 36]

Having reviewed and analyzed further evidence, the Registrar concluded that:

> I am of the opinion that [Westergaard] is not suitable to be registered under the Act as the above described behaviour demonstrates his lack of sufficient honesty, integrity and professionalism. He has accepted secret commissions. He has not complied with

> the requirements of the Act by employing an unregistered submortgage broker for a second time. He has circumvented the Act's registration and disclosure requirements. He was less than forthright in his testimony during the tribunal [Hearing] on several matters. Disclosure is a fundamental requirement of the Act and [Westergaard] has on numerous occasions misstated the facts and/or failed to disclose what he should have disclosed not only to the public but to his regulator. His outright refusal to satisfy judgments in the circumstances outlined and in particular his deliberate attempt to mislead this tribunal [Hearing] and falsely allege malpractice of his former lawyer for his own benefit, leaves me little alternative but to conclude that his registration would be objectionable. [Decision, p.41-42]

Issue (j) as stated above reflects a number of closely related matters raised by Counsel for Westergaard on Appeal. The specific details included the fact the Registrar erred:

> [Issue j.1] by finding Westergaard was not suitable for registration as a submortgage broker with conditions based on the pre-2003 facts known to the registrar when registering Westergaard as a submortgage broker with conditions on August 29, 2003;
>
> [Issue j.2] in finding that the post-2003 facts found by the Registrar were sufficient a basis on which to find Westergaard was not suitable for registration as a submortgage broker with or without conditions;
>
> [Issue j.3] in holding that it was a relevant consideration when considering Westergaard's suitability that Westergaard was not prepared to pay liabilities which he was not personally liable to pay as a matter of law;
>
> [Issue j.4] in holding it was a relevant consideration when considering Westergaard's suitability that 22 years earlier he had pled guilty to a criminal offense for which he had been pardoned; and
>
> [Issue j.5] in finding that GET and Westergaard were responsible for the activities of a submortgage broker [Iantorno] employed by another mortgage broker [Get-BC] when the submortgage broker was performing the function of the other mortgage broker.

Counsel for Westergaard submits "…all of the pre- August 2003 facts discussed in the Decision were known to the Registrar prior to Westergaard being granted registration with conditions on August 29, 2003. The April 11, 2002 Notice of Hearing was based on those facts (and others not pursued at this hearing)." He contends that if the Registrar had confined herself to the facts that she was entitled to consider, she would have found that Westergaard was suitable for registration as a submortgage broker in British Columbia and that his registration would not have been objectionable.

Legislation-Issue (j)

The relevant provisions of the Act provide as follows:

Granting of registration by registrar

4 The registrar

(a) must grant registration or renewal of registration to an applicant if in the opinion of the registrar the applicant is suitable for registration and the proposed registration is not objectionable,

(c) must not refuse to grant or refuse to renew registration without giving the applicant an opportunity to be heard, and

(c) may, in the registrar's discretion, attach to the registration or renewal of registration terms, conditions or restrictions the registrar considers necessary.

22 (7) A proceeding under this Act may not be commenced more than 2 years after the facts on which the proceeding is based first came to the knowledge of the registrar.

Evidence-Issue (j)

There are essentially no facts that are in dispute in relation to Issue (j). The Amended Notice of Hearing dated June 15, 2007 sets out the allegations in three essential paragraphs which, for convenience I will number as 12(a), 12(b) and 12(c). Allegation 12 provides that:

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

12(a) 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.

12(b) 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. … At the

> time of this application, there was at least one pending legal proceeding against Westergaard: *White* v. *Aaron Acceptance Corporation et al [*amended on September 13, 2007 by Order of the Registrar to add *Thomassen v. Aaron Acceptance Corp., et al*]. In addition, there were three unsatisfied judgments outstanding against Aaron [BC], a company at which time Westergaard was both an officer and director.
>
> 12(c) 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.

It is helpful to expand on the key facts on which these three paragraphs are based.

Paragraph 12(a)
Paragraph 12(a) references three monetary judgments, two related to unconscionable mortgages brokered by Aaron BC. All three of the judgments are against Aaron BC, not Westergaard. These included:

- *May v Dunster et al*, [Dunster]Vancouver A951783 (BCSC), October 24, 1996 (unconscionable mortgage)

- *John Eusanio v Janolino,et al*, [Janolino] Vancouver H950419 (BCSC), May 25, 1997 (unconscionable mortgage)

- An October 16, 1998 BC Provincial Small Claims Court case with a default judgment issued June 23, 1999 (Headworth v Aaron [BC]).

Paragraph 12(b) references one pending legal case (White v. Aaron [BC]) and three unsatisfied judgments. The three unsatisfied judgments are the same as identified in paragraph 12(a). Paragraph 12(c) refers to an event after 2003 and it will be addressed later.

The registrar was aware of these three judgments against Aaron BC when the August, 2003 agreement with Westergaard was finalized and his registration granted in August 2003. The April 11, 2002 Notice of Hearing [Exhibit 8, Tab 15, para. 9(b) and 9(c)] to consider Westergaard's application for registration mentioned these judgments, but not by name: "9(b) Some actions are outstanding and there are unsatisfied judgments against Aaron BC in two matters; (c) Two of the mortgages brokered by Aaron BC, …due to their unconscionability, namely Janolino and Dunster mortgages:…" In the Agreed Statement of Facts, dated September 24, 2007 [Exhibit 24], Counsel agreed that paragraph 9(b) in the 2002 Notice of Hearing referred to Headworth and Dunster.

The fact these judgments against Aaron BC remain unpaid is not in dispute nor is the fact Westergaard has refused to pay these because they are judgments, as he stated, are against Aaron BC, not against himself personally. Westergaard made it clear to the registrar in a letter dated August 8, 2003 relating to the wording of the conditions that would be attached to his registration [Exhibit 8, tab 18] that he would not personally pay either the Dunster or Headworth judgments. Westergaard also made it clear during the Hearing that he would not personally pay the unsatisfied judgments against Aaron BC.

The facts also indicate that in Westergaard's June 1, 2000 application for registration he stated 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 reasons whatsoever.

In a "Update to June 1, 2001 Application for Registration as Sub-mortgage Broker," dated August 22, 2003, [Exhibit 1, Tab 33] Westergaard wrote that "since the June 1, 2001 application was submitted, the following actions, which were pending, have now been disposed of,…" and this included White: "…the Defendants offered to settle the action on the basis of a consent dismissal order dated February 24, 2003, without costs. This offer was accepted. The plaintiffs did not receive any payment on account of the claims. In para. (d) of the same letter, under the question: "Has any judgment, which is unsatisfied, ever been rendered against you personally or against any business of which you were at the time an officer, director or partner, in any civil court in British Columbia, or elsewhere, for any reason whatsoever" Westergaard stated "yes." Three judgments (Dunster, Headworth and Janolino are listed. In the case of Dunster, Westergaard states that:

> So far as I am aware, Mrs. Dunster never took any steps to enforce the Order against Aaron [BC]; and on June 16, 1998, Aaron [BC] ceased carrying on its mortgage brokerage business in British Columbia.

In the case of Headworth, Westergaard states that:

> So far as I am aware. Mr. Headworth has never taken any steps to enforce that default judgment against Aaron [BC].

And in the case of *Eusanio v.* Janolino, Westergaard states that:

> So far as I am aware, the Plaintiff never taxed his bill of costs, made a demand payment, or took any steps concerning payment of the same, before or after June 16, 1998 when Aaron [BC] ceased carrying on its mortgage brokerage business in British Columbia.

While not mentioned in the Amended Notice of Hearing, the Registrar relied on facts giving rise to the suspension of Westergaard's registration from December 5, 1994 to

December 5, 1985 and Westergaard's criminal conviction and pardon in 1998 [Decision, pp. 31-32]. This is Issue (j.4) in the Appeal. While also not mentioned in the Amended Notice of Hearing, the Registrar relied upon the fact that Westergaard was suspended for 21 days in 1994 because he employed an unregistered submortgage broker to do submortgage broker work [Decision, p. 32]. These facts were known by the registrar prior to the agreement regarding conditions of registration of August 22, 2003 and Westergaard's registration as a submortgage broker on August 29, 2003 with conditions in Schedule "A" attached.

The above mentioned evidence is covered in the Decision [pp. 31-36] under headings "Previous Disciplinary History", "False Statements" and Failure to Satisfy Judgments."

Post August-2003 Evidence (Within two years of the Hearing)

The registrar relied upon the following post-August. 2003 facts and all came to the knowledge of the Registrar within a two year period of the Hearing. The first fact that the Registrar relied upon relates to Paragraph 12(c) in the Amended Notice of Hearing: that GET and Westergaard as the Designated Individual, employed Iantorno as a submortgage broker when Iantorno was not registered as a submortgage broker with GET. This is Issue (g) in the Appeal. The second post-August, 2003 fact that the Registrar relied upon is that she had determined that Get-BC had carried on business as a mortgage broker elsewhere than "at or from" Get-BC's registered address (Issue (d)). The third post-August 2003 fact that the Registrar relied upon is her finding that Get-BC, and Iantorno as the Designated Individual of Get-BC, had disclosed to investors that the mortgages they were purchasing had no prior arrears [(Issues (a) and (b).] The fourth post-August, 2003 fact the Registrar relied upon is that Westergaard once again confirmed he would not pay the unsatisfied monetary judgments against Aaron BC.

A further post-August, 2003 allegation that the Registrar considered in the Decision [p. 39-40] was that Westergaard had failed to comply with the 2003 conditions of his registration. This was not alleged in the Amended Notice of Hearing; however staff submitted at the Hearing that Westergaard did not comply because he abdicated his responsibilities as the Designated Individual by delegating those responsibilities to Iantorno. The Registrar concluded that there is no bar to delegating such tasks as long as Westergaard made sure they were carried out and she concluded this was not a factor to be considered in determining suitability. The Registrar also reviewed evidence concerning GET's promotional materials, but concluded she could not make any finding relating to condition (a) attached to Westergaard's registration (concerning promotional materials and advertising). Similarly the Registrar reviewed evidence relating to condition (b) attached to Westergaard's registration relating to providing independent legal advice to borrowers, but concluded Westergaard met the requirements of condition (b).

The Registrar also relied upon facts arising during the Hearing concerning the three monetary judgments referred to in the pre-August, 2003 facts, including:

- A letter dated May 4, 1998 from Westergaard's lawyer faxed to Westergaard's attention in which the lawyer states that: "Further to our letter to you dated May 4, 1998, we write to acknowledge the conversation that I had with you a few moments ago instructing us to accept Mr. Balwin's offer of $36,000 with respect to costs in the Dunster matter." [Exhibit 31]
- A letter dated May 29, 1998 from Westergaard's lawyer to the attention of Westergaard in which he states: "As you are aware, the amount of costs that are required to be paid by Aaron was agreed upon in the sum of $36,000.00. This amount will be required to be deposited in a solicitor's trust account…. At the same time we take the liberty of enclosing our statement of account for work done…." [Exhibit 31]
- Two letters from Westergaard to the Small Claims Court, one dated July 19, 1999 and one dated July 23, 1999 concerning a Summons to a Payment Hearing to be heard on July 26, 1999 relating to Headworth [Exhibit 1, Tabs 43 and 44.]

Subnissions-Issue (j)

Counsel for Westergaard submits that the Registrar erred when she said some of the allegations which were included in the April 11, 2002 Notice of Hearing are also in the current Amended Notice of Hearing issued on June 15, 2007. Counsel submits that the registrar had knowledge of the underlying facts concerning the allegations contained in the April 11, 2002 Notice of Hearing when registration was granted to Westergaard on August 29, 2003, so Westergaard should not have to face the same complaints twice. Counsel further submits that all of the facts discussed in the Decision from "Previous Disciplinary History [pages 31 to mid-page 38] were known to the registrar prior to Westergaard being granted registration on August 29, 2003.

Counsel for Westergaard submits that the Registrar's finding must be set aside because it is based on conclusions drawn from facts which she was not entitled to consider and those facts and conclusions are so inextricably intertwined as to constitute the Registrar's opinion a wholly unreliable assessment of Westergaard's suitability. Further it cannot be said that the Registrar's appreciation of Westergaard's evidence concerning his communications with [his former lawyer] was not tainted by her improperly taking into account facts which she was not entitled to consider. [12]

Counsel for Westergaard submits that the allegations the Registrar was entitled to consider include the following:

- Westergaard employed an unregistered submortgage broker, Iantorno, to work for GET as its general manager [Issue (g)];

[12] I found no evidence to suggest that the Registrar's appreciation of Westergaard's evidence concerning his communications with [his former lawyer] was tainted by her improperly taking into account facts which she was not entitled to consider.

- Westergaard failed to ensure that clients of GET receive proper disclosure with respect to conflict of interest; and

- Westergaard failed to ensure that clients of GET receive proper disclosure with respect to whether the mortgages being sold to lenders have previously been in arrears [Issue (a).]

Counsel's submissions under the first allegation are covered under Issue (g) and his submissions for the third allegation are covered under Issue (a). These need not be repeated here. The Registrar dismissed the second allegation

Counsel for Staff submits that only upon demonstrating palpable errors can the Registrar's findings be over-turned [*Housen v. Nikolisen*, 2002 SCC 33 at paras. 8-18] and that administrative agencies are better placed to assess facts and apply statutory definitions to facts when it comes to regulation of financial markets [*Pezim v. British Columbia (Superintendent of Brokers*), 1994 2 S.C.R. 557 at para. 72.] Counsel further submits that the Tribunal only needs to be assured that there is a basis in the evidence for the registrar's opinion, and if so, the exercise of the registrar's discretion should not be disturbed [*Danh Vanh Nguyen and Express Mortgage*, FTS Appeal Decision, July 20, 2005 at p. 9.]

Counsel for Staff submits the Registrar had abundant evidence before her that illustrate Westergaard's lack of suitability and no one event was crucial to the finding. Counsel submits that Westergaard does not meet a public confidence test for honesty given the findings that he misled the Registrar and was found to be not credible in relation to explaining his business history. Counsel also submits Westergaard's lack of integrity and professionalism are demonstrated by his callous attitude towards the legal obligations of his company. Counsel submits that the Registrar's decision on suitability was the result of a global assessment of numerous facts all of which are well established in the evidence including the fact that:

- Westergaard continues to downplay the gravity of the offense committed in 1984;

- he failed to acknowledge the seriousness of the lawsuits, regulatory complaints, and negative press which Aaron BC attracted prior to ceasing its mortgage brokerage activities in June 1998;

- he did not contest Issue (g);

- he lied on his June 1, 2001 application to be registered as a mortgage broker and he lied again in his August 2003 updated application; and

- he demonstrated a callous attitude towards the unsatisfied judgments against Aaron BC;

Analysis-Issue (j)

I will initially focus on the evidence that first came to the knowledge of the Registrar within the two year period envisaged by s. 22(7).

The first matter is Issue (g) where the Registrar determined GET and Westergaard had breached s. 21(1)(d) by employing Iantorno as a submortgage broker when he was not registered as a submortgage broker with GET. I upheld this finding under Issue (g) and this issue should be considering in determining the suitability and objectionability of Westergaard. There was no challenge to the Registrar's finding that GET, and Westergaard as the Designated Individual, employed Iantorno as a submortgage broker although Iantorno was not registered as a submortgage broker with GET contrary to s. 21(1)(d) of the Act. However, Westergaard takes the position that this was a "a technical failure that was sufficiently trifling that the Registrar did not even allege it against Iantorno in the Amended Notice of Hearing or seek any sanction against him."

The second matter concerns failure to ensure proper disclosure of prior arrears and relates to Issues (a) and (b) concerning Part E(1) of Form 9. I concluded the Registrar erred in her findings for Issues (a) and (b), therefore the findings of the Registrar in respect of these two issues should not be considering in determining the suitability and objectionability of Westergaard.

A further matter raised by Counsel for Westergaard concerns Westergaard's failure to ensure that borrowers were provided with accurate disclosure pursuant to s. 17.3 of the Act. The Registrar determined this has not been proven and the Registrar did not consider this in determining the suitability and that his registration would be objectionable.

The Registrar also linked Issues (g) and (d) and (e) to suggest that Westergaard has acquiesced in allowing Get-BC to carry on mortgage broker business at GET's office., which was elsewhere that "at or from" the registered office of Get-BC (Issue (j.5). I must concur with the Registrar that Westergaard is responsible for the activities in GET's office and cannot turn a blind eye simply because the person (Iantorno) performing the activities is registered with another mortgage broker[13].

The Registrar concluded there is no evidence that Westergaard breached any of those conditions attached to his registration, therefore this consideration should not be a factor in determining his suitability. Counsel for Westergaard submits that his client has built GET into a model mortgage brokerage business with high standards of disclosure, standards which are higher than those required by the legislation since 2003.

[13] The Registrar stated that: "He [Westergaard] and Iantorno have defended allegation #9 [Issue (g)] by again claiming that Iantorno was doing 'administrative duties'…" [Decision, p. 38] I would suggest that Iantorno did not defend this issue in the ordinary sense of 'defended'. Iantorno was not named in this Issue and did not have a chance to defend. He may have addressed some or many of the issues in another context, but was not allowed to speak directly to this issue.

The next matter concerns Westergaard's refusal to pay the judgments against Aaron BC, in particular the Dunster, Headworth and Janolino judgments [Issue j(3).] This same matter was known to the registrar as part of the pre-August 2003 facts, but I will consider it here since he stated at the Hearing he still refuses to pay. The Registrar noted that staff submitted that it is not relevant that in law Westergaard has no legal obligation to pay unsatisfied judgments against a company he owns and where he is the Designated Individual and sole director and that this is one reason to consider in determining whether or not Westergaard is objectionable. The staff sited two cases at the Hearing: *Carson v. the Staff of the Registrar of Mortgage Brokers* FST No. 05-018 dated May 10, 2006 which upheld a decision of the registrar that Carson was not eligible for registration and his proposed registration was objectionable, in part because Carson had a number of outstanding judgments rendered against him personally; and *Re Dirk Alan Rachfall* Nov. 4, 2003, a decision of the registrar where it was decided that Mr. Rachfall's failure to satisfy a personal restitution order would make his registration objectionable. The Registrar noted that Westergaard clearly ignored a Supreme Court Order [the Dunster order against Aaron BC] and alleged lack of enforcement proceedings, apparently ignoring the fact the judgments themselves are court orders. Counsel for Staff submits that Westergaard has demonstrated a callous disregard for those who obtained judgments against Aaron BC.

I find Westergaard's refusal to pay judgments against Aaron BC a somewhat challenging matter. The corporate shield has generally been respected in commercial law and one should not lightly ignore this fact in administrative law. Moreover the corporate shield was respected in these three judgments as they are against Aaron BC and not Westergaard. If Aaron BC had multiple ownership and other directors, I would not be willing to allow this issue to be considered. However, in the case of Aaron BC, other than a thin legal corporate shield, it is impossible to divorce Westergaard's actions from the actions of the company. The two cases cited by staff at the Hearing do little to assist me since in each case the judgments were against the person, not the company or firm. In such cases I would not hesitate to consider unsatisfied personal judgments in determining suitability and that his registration would be objectionable.

Counsel for Westergaard submitted at the Hearing that it is not the role of the Registrar to act as a collection agency for judgment collection and cites *Gershman v. Manitoba (Vegetable Producers Marketing Board,* [1976] 4 W.W.R. 406 (Man.CA) and *No. 1 Collision Repair & Painting (19820 Ltd. v. ICBC* 2000 80 BCLR (3rd) 62 which relate to intentional interference, by unlawful means, with contractual relations and economic interests. Counsel did not specifically address this matter in his submissions to the Appeal.

I find some guidance in the Act where s. 6 articulates the "inquire and examine" provisions of the Act. S. 6(2)(b) provides very broad powers to inquire and examine including:

> the financial or other conditions at any time prevailing in or in relation to or in connection with the person, and the relationship that may at any time exist or have existed between the person and any other person by reasons of investments, … interest held or acquired, …interlocking directorates, common control, undue influence or control or any other relationship.

I believe it can be said that Westergaard had "control" of, had a "relationship" with and had "investments" in Aaron BC. In the absence of any other submissions, the scope of s. 6 of the Act provides some useful guidance.

I conclude that the Registrar was correct in the circumstances of the Appeal when considering Westergaard's unwillingness to pay the unsatisfied judgments against Aaron BC and concluding it "reflects negatively on one's integrity and professionalism, qualities that are essential in determining whether a person is suitable to be registered under the Act…" Aaron BC is a company Westergaard continues to support, either directly or through other means, to maintain it's registration in British Columbia, and he was the Designated Individual, sole owner and sole director at the time the judgments were granted. The fact he keeps Aaron BC alive as a company, yet fails to find funds to pay the judgments, speaks to his priorities toward his company's former, and potentially future, clients and to his professionalism.

There were also other new facts that came up during the Hearing concerning the three unsatisfied judgments. In the Headworth matter, the evidence indicates that at the very least Westergaard was aware of the payment hearing which was brought to try to enforce the judgment [Exhibit 1, Tabs 42 and 43.] This contradicts the statement filed with the registrar in August 22, 2003 where Westergaard stated that:

> So far as I am aware. Mr. Headworth has never taken any steps to enforce that default judgment against Aaron [BC]. [Exhibit 1, Tab 33.]

Aaron BC's former lawyer testified concerning, and produced documents directly relating to, the Dunster matter [Exhibit 33]. The lawyer provide two letters[14]: the first letter dated May 4, 1998 indicates he had spoken with Westergaard a few moments earlier about the instructions to accept the offer of $36,000 with respect to costs involved [in the Dunster judgment.] The second letter dated May 29, 1998 to Westergaard indicates the $36,000 as the amount of the costs required to be paid by Aaron BC and discusses the need for timely payment. The letter also includes an attached account for the lawyer's services. The lawyer testified he was paid promptly, suggesting the letter had been received and read. These letters and the testimony of the lawyer contradict the statement filed by Westergaard with the registrar on August 22, 2003 where Westergaard stated that:

[14] During the Hearing Counsel for Westergaard submitted that the lawyer could not waive solicitor client privilege, but the Registrar ruled he could. Counsel did not appeal this matter.

> So far as I am aware, Mrs. Dunster never took any steps to enforce the Order against Aaron [BC]; and on June 16, 1998, Aaron [BC] ceased carrying on its mortgage brokerage business in British Columbia.

In addition, Westergaard testified during the Hearing that he did not know until the Hearing that the costs owing relating to Dunster had been quantified though settlement for $36,000. He said no one asked him to pay the $36,000. He also claimed if the amount had been settled, his lawyer did it without instructions and without informing him. This testimony is in direct conflict with the testimony and documents provided by Aaron BC's lawyer.

There was also testimony concerning the Eusanio v. Janolino judgment, but the evidence did not confirm what Westergaard knew about the judgment or when he received the information.

Based only on the aforementioned "new facts", I am satisfied that the Registrar had reasonable cause to conclude Westergaard is not credible; that his August 22, 2003 revised application contained inaccurate statements and that he mislead the Hearing, as well as the registrar in 2003, about the status of unsatisfied judgments.

The events leading up to the Appeal describe a strongly linked and appropriately sequenced series of events: an application for registration; granting of registration subject to conditions; an appeal to the Financial Services Tribunal concerning the conditions; a decision of the Tribunal giving rise to a hearing under section 4 of the Act; and the subsequent hearing under section 4. These can all be traced to the appeal of the conditions attached to Westergaard's registration. It would seem not only logical, but essential, that a hearing arising so directly from an appeal concerning the conditions attached to a registration should permit questions relating to the initial factors giving rise to the Conditions.

In the course of the Hearing the Registrar was provided an opportunity to receive evidence, some more than two years past the date it became know to the Registrar, but nevertheless essential to her understanding of the roots of the original conditions and Westergaard's attitude towards these issues in order to determine if the conditions should be removed. If one were to conclude the Registrar could not at least question Westergaard in relation to these facts known for more than two years-in this case facts that gave rise to the Conditions Westergaard sought to have removed- then it would be extremely difficult for the Registrar to reach a well-reasoned decision and, I suggest, difficult for Westergaard to receive a fair hearing on the removal of conditions attached to his registration. .

During the Hearing, 13 days in total, the Registrar was able to hear first hand facts that gave rise to the initial Conditions and, at the same time, form an opinion concerning the attitude, integrity and honesty of Westergaard towards the events that gave rise to the Conditions. Hence even when prohibited [by s. 22)7)] from directly considering the facts that came to the knowledge of the Registrar over two years ago, I do not believe it is

necessary to ignore the responses and attitudes demonstrated by Westergaard during the hearing.

The Registrar noted in the Decision that during the hearing Westergaard was cross examined on previous disciplinary hearings and "He minimized his culpability and did not appreciate the gravity of his offense." [Decision, page 31] The Registrar noted that: "it's clear that not only did Westergaard ignore a Supreme Court Order, he has "been blatantly untruthful to this tribunal. He has also effectively alleged malpractice [by his previous lawyer]" [Decision, page 36-37.] The Registrar also states that: "He [Westergaard] has also attempted to mislead this tribunal about the status of unsatisfied judgments against his company Aaron." [Decision, page 36]

These observations, which I believe are reasonable given the testimony of Westergaard, constitute new facts, and I believe to be important information that the Registrar is entitled to rely upon in arriving at her decision concerning Westergaard suitability. But I also note that even in the absence of the responses to these questions, I conclude that the Registrar had reasonable grounds on which to conclude Westergaard was not suitable for registration and that his registration would be objectionable.

The registrar set out rather clearly the standard by which she would determine both his suitability and whether his registration would be objectionable, and concluded that Westergaard is not suitable for registration under the Act because his described behaviour demonstrates a lack of sufficient honesty, integrity and professionalism. In reaching this conclusion the Registrar cited the fact Westergaard had accepted secret commissions, a reference to the conviction in 1984. I would not accept this as a basis for the Decision, but find that even without this fact the Registrar had reasonable grounds for her conclusion.. I accept that the registrar had reasonable grounds to conclude that at least some of Westergaard's testimony at the Hearing was misleading and perhaps deliberately so. Westergaard's comments concerning his lawyer for the Duster judgment matter certainly implied malpractice, and based on the evidence, inappropriately.

Decision-Issue (j)

S. 4 of the Act provides the Registrar with significant discretion as it states she/he may grant registration or renewal of registration…if in the opinion of the Registrar the applicant is suitable…and not objectionable, and may in the registrar's discretion attach conditions. Counsel for Staff submits that deference should be given to the Registrar's interpretation of section 22(7) because administrative bodies such as the Registrar are best placed to assess facts and apply statutory definitions to facts. I accept this position as it applies to facts and the interpretation of facts. I do not accept this position as it applies to the law. I believe the accepted standard as it applies to matters of law for this Tribunal is one of "correctness."

Just to be clear on my decision, I have determined that the Registrar erred in concluding that section 22(7) did not apply to section 4 proceedings. As a consequence it follows

that pre-August 2003 facts known to the Registrar should not be directly considered. But I also determine that Westergaard's responses to questions concerning these pre-August 2003 facts and his demonstrated attitude towards the matters can and should be considered as they speak to the suitability of Westergaard for registration, particularly when the base for the Hearing was Westergaard's appeal to remove the conditions attached to his registration.

I uphold the decision of the Registrar that Westergaard if not suitable for registration and his registration would be objectionable.

Issue k Whether Westergaard's Suspension was an appropriate penalty

Based on my conclusion that the Registrar's decision that Westergaard is not suitable and his registration would be objectionable is upheld, I must now address the issue of penalty. I am satisfied that some significant suspension is required, a suspension beyond the 60 days the registrar stated she would apply under Issue (g) and beyond the conditions that may have applied if no new facts were identified or new allegations proven during the Hearing. However, I cannot conclude that the penalty imposed by the registrar is reasonable or unreasonable since I am provided with limited evidence as to the weights the Registrar applied to each consideration. To the extent the Registrar relied directly upon any facts known to the registrar more than two years prior to the commencement of the proceeding on January 15, 2007, the five year suspension would be inappropriate.

Counsel for Westergaard submitted that if the Tribunal accepts Westergaard and GET's submission with respect to section 22(7), the appropriate remedy may be to send the matter of Westergaard's suitability back to the Registrar for reconsideration with specific direction that the Registrar not consider the pre-August 2003 Facts when reaching her decision in that regard.

While I am hesitant to be the source of further delays in concluding this long series of events, but given the importance of the penalty, not just to Westergaard, but also to the public in terms of establishing a deterrent, I am seeking additional submissions from the Registrar and from Counsel for Westergaard. Immediately prior to his appeal to the FST, Westergaard was considered suitable for registration, albeit with conditions. The finding of the Registrar relating to Issue (g) would add a suspension of 60 days and I accept this as reasonable. The only other considerations that should prompt the Registrar to conclude a longer term suspension is appropriate are the post-August 2003 facts that came to the knowledge of the Registrar at the Hearing, the responses of Westergaard to questions posed at the hearing and the attitude he demonstrated during the hearing as it reflects upon his suitability. As I have determined the pre-August 2003 facts should not be directly considered, I would like to hear from the Registrar whether, in her opinion, the penalty is still appropriate and if not, what penalty she would apply? I also invite Counsel for Westergaard to make a submission on penalty under these same parameters.

COSTS

The Registrar received submissions concerning the costs of the Hearing. She accepted the proposal put forward by Counsel for Get-BC and Iantorno and stated:

> All counsel agree that there should be an order for costs at Scale B under the Supreme Court Rules. Six of the 12 allegations were proven against the various four respondents….There will be an order for 75% of the assessed costs, allocated 1/3 to Get-BC and Iantorno jointly and severally and 2/3 to GET and Westergaard, jointly and severally. …If agreement cannot be reached, a costs assessment hearing may be scheduled before the Registrar.

I believe this ruling provides me with sufficient grounds for making a decision on costs. I see no reason to ask for new submissions at this stage. I will follow the logic underlying the Registrar's decision on Penalty. Since after the Appeal, four of 12 allegations are proven, I would conclude that 50% of the assessed costs is appropriate. Since two of the four allegations originally proven against Get-BC and Iantorno have been set aside on Appeal, I would conclude Get-BC and Iantorno should be allocated 20% of the 50% of the assessed costs and GET and Westergaard be assessed 80% of the 50% of the assessed costs.

Therefore, I determine that there will be an order that 50% of the assessed costs of the Hearing be allocated, 20% to Get-BC and Iantorno jointly and severally and 80% to GET and Westergaard jointly and severally. If agreement cannot be reached, a costs assessment hearing may be scheduled before the Registrar.

Since all parties enjoyed some success on the Appeal, no costs are awarded for the Appeal.

CONCLUSIONS

In summary, I make the following orders:

(a) The Registrar's finding that Get-BC made statements provided under the Act that, at the time and in light of the circumstances under which the statements were made, were false and misleading with respect to a material fact is set aside. The appeal on this issue is granted.

(b) The Registrar's finding that Iantorno, as the Designated Individual for Get-BC, failed to ensure that the four investors were provided with accurate disclosure pursuant to s. 17.1 of the Act and thereby conducted business in a manner prejudicial to the public interest is set aside. The appeal on this issue is granted.

(c) The reprimands imposed directed to Get-BC and Iantorno in relation to the findings in (a) and (b) above are set aside. The appeal on this issue is granted.

(d) The Registrar's finding that Get-BC carried on business as a mortgage broker elsewhere than at or from Get-BC's registered address contrary to s. 21(1)(b) of the Act is upheld. The appeal on this issue is denied.

(e) The Registrar's finding that Iantorno, as the Designated Individual for Get-BC, allowed Get-BC to carry on business as a mortgage broker elsewhere than at or from Get-BC's registered address and thereby conducted business in a manner prejudicial to the public interest is upheld. The appeal on this issue is denied.

(f) The 30 day suspension imposed on Get-BC and Iantorno is set aside and replaced with an administrative penalty of $6,000 allocated jointly and severally to Get-BC and Iantorno, and that failure to pay the penalty within 45 days of the receipt of this decision will result in the immediate suspension of Get-BC's registration as a mortgage broker and Iantorno's registration as a submortgage broker until the penalty is paid in full.

(g) The Registrar's finding that GET and Westergaard had employed Iantorno as a submortgage broker and that Iantorno was not registered as a submortgage broker with GET contrary to s. 21(1)(d) is not contested. This issue was initially appealed but subsequently abandoned in the appeal.

(h) The Registrar's administrative penalty of $20,000 against GET in relation to (g) above and the conditions attached to the payment of this administrative penalty are upheld. The appeal on this issue is denied.

(i) The Registrar erred in her interpretation of s. 22(7) of the Act when considering facts which first came to the knowledge of the Registrar more than two years prior to the commencement of the proceeding and that, on a correct interpretation, s. 22(7) should have applied to the s. 4 suitability hearing for Westergaard.

(j) The Registrar's decision that Westergaard is not suitable for registration and that his registration would be objectionable is upheld. The appeal on this issue is denied.

(k) The matter of the five year suspension of Westergaard is referred back to the Registrar for submission as to the appropriate suspension given I have determined s. 22 (7) applies to suitability hearings. I would ask that the submission be brief and that it be submitted within two weeks of receipt of this Appeal Decision. Westergaard is also granted two weeks from the receipt of the Registrar's submission to file his reply.

(l) 50% of the assessed costs of the Hearing be allocated, 20% to Get-BC and Iantorno jointly and severally and 80% to GET and Westergaard jointly and severally. If agreement cannot be reached, a costs assessment hearing may be scheduled before the Registrar and, since all parties enjoyed some success on the Appeal, no costs are awarded for the Appeal.

DATED AT VANCOUVER, BRITISH COLUMBIA, THIS 5TH DAY OF SEPTEMBER, 2009

FOR THE FINANCIAL SERVICES TRIBUNAL

STANLEY W. HAMILTON
PRESIDING MEMBER