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Financial Services Tribunal

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DECISION NO. 2011-MBA-001(a)

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

BETWEEN:	KEITH ALLAN COOK	**APPELLANT**
AND:	THE REGISTRAR OF MORTGAGE BROKERS	**RESPONDENT**
BEFORE:	Paula Barnsley, Panel Chair	
DATE:	Conducted by way of written submissions concluding on November 22, 2011	
APPEARING:	For the Appellant: Johannes H. Schenk, Counsel For the Respondent: Stephanie Jackson, Counsel	

PRELIMINARY ISSUE OF JURISDICTION

INTRODUCTION

[1] The Appellant is a registered mortgage broker who is under investigation by the Registrar of Mortgage Brokers. In June 2011, the Appellant appeared before investigators in response to a summons issued under the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, s. 6(3). The questioning pursuant to that summons was not completed within the scheduled time. On October 12, 2011, the Registrar issued a further summons requiring the Appellant to appear for questioning from November 8-10, 2011 (the "Summons").

[2] On November 7, 2011, the day before the Summons required him to appear for continuation of questioning, the Appellant filed an appeal to the Financial Services Tribunal ("FST"), under s. 9(1) of the *Mortgage Brokers Act*, to set aside the Summons. That same day, Staff of the Registrar of Mortgage Brokers ("Staff") applied pursuant to s. 31(1) of the *Administrative Tribunals Act* to have the FST summarily dismiss the appeal on several grounds, including the ground that the FST has no jurisdiction to hear the matter.

[3] The issue on this preliminary application is whether the FST has authority to hear the appeal from the Summons.

[4] The Staff argues that the FST lacks jurisdiction to hear an appeal of the Summons because a summons is not among the matters that may be appealed to the FST under s. 9(1) of the *Mortgage Brokers Act*. In addition, the Staff says that the Appellant's application to set aside the Summons raises constitutional questions, which the FST is barred from hearing pursuant to s. 44 of the *Administrative Tribunals Act*.

[5] In addition to responding to Staff's application, the Appellant submits the summary dismissal application should be rejected on the general ground that "Staff of the Registrar", as opposed to the Registrar herself, has no right even to make this application, as they have no status in this proceeding separate from the Registrar, and are not acting under instructions from the Registrar.

ARGUMENTS, DISCUSSION AND ANALYSIS

A. Does the Staff of the Registrar have standing in this proceeding?

[6] The Appellant's argument that the summary dismissal application should be rejected because Staff has no standing on this appeal is appropriately addressed at the outset.

[7] Citing *British Columbia (Securities Commission) v. Pacific International Securities Inc.* 2002 BCCA 421, counsel for Staff replies that the appearance of "staff" rather than the Registrar is intended to ensure impartiality in the hearing process. Staff argues that their appearance separate from the Registrar is justified as a matter of necessity arising from the Registrar's party status, and is in any event permissible under s. 242(10)(c) of the *Financial Institutions Act* which gives the FST the power to grant standing to non-parties. Staff argues that this very issue has been decided in their favour in a previous Tribunal decision: *Iatorno and Evergreen Mortgage Corporation dba GET Acceptance BC v. The Staff of the Registrar of Mortgage Brokers* FST 07-036 at paras. 25-29.

[8] The Appellant says in reply that (a) the *Iatorno* decision does not have precedential value; (b) there is no reason on the authorities why the Registrar herself may not appear to argue about issues of jurisdiction, (c) the Registrar "should not be allowed to distance herself from staff", and (d) case law from Alberta and Ontario stand for the proposition that the Registrar and staff are one and the same and that self-imposed internal divisions have no effect on the statutory scheme under appeal (*Bahcheli v. Alberta Securities Commission*, [2007] A.J. No. 520 and *Watson v. Catney, the Chief of the Peel Police Service*, 84 O.R. (3d) 374). The Appellant emphasizes that there have been several cases where present counsel for staff have represented the Registrar before the FST and before the Court.

[9] In my view, the Appellant's objection to the status of the Staff should be dismissed on this application, which concerns the FST's jurisdiction. The narrow reason for this is that the standing of Staff has nothing to do with whether the FST has jurisdiction to hear this appeal. The FST either has jurisdiction or it does not. An appeal body's jurisdiction cannot be expanded by agreement or

acquiescence: see *Iatorno and Evergreen Mortgage Corporation dba GET Acceptance BC v. The Staff of the Registrar of Mortgage Brokers* FST 07-036, para. 5. The FST would have to address its jurisdiction even if there was no party making the objection.

[10] In view of the Tribunal's prior decision in *Iatorno and Evergreen Mortgage Corporation dba GET Acceptance BC v. The Staff of the Registrar of Mortgage Brokers* FST 07-036 (see paras. 18-29), it is understandable that Staff responded to the appeal. If the Registrar declines to appear because she believes the law prevents her from doing so, someone has to appear. The Tribunal has the authority to allow "a person who is not a party to the appeal to make submissions" if those submissions would substantially assist in the determination of the appeal: *Financial Institutions Act*, s. 242.2(10)(c). In the circumstances here, the submissions advanced by the Attorney General on behalf of Staff on the jurisdiction issue are received as they are of assistance on that important issue.

[11] The larger question is whether the proper respondent to an appeal to the FST is "Staff" as opposed to the Registrar. I respectfully suggest that this issue does indeed need to be revisited.

[12] Section 242.2(10)(g) of the *Financial Institutions Act* expressly provides that "(g) the original decision maker is a party to an appeal of a decision of the original decision maker to the tribunal." (emphasis added)

[13] Unlike the *Securities Act*, the *Mortgage Brokers Act* does not create two statutory officers who are part of a statutory prosecution and adjudication process. The legislative structure under the *Mortgage Brokers Act* involves a single Registrar, issuing orders after conducting an investigation. There is no standing officer like the Executive Director under the *Securities Act* whose statutory office is expressly recognized in ss. 1 and 8 of the *Securities Act*, and whose functions are distinct from those of the adjudicator.

[14] As noted in *Bahchelli v. Alberta Securities Commission*, [2007] A.J. No. 520, the mere creation of intra-organizational divisions does not give those divisions a separate legal personality. Just as those internal divisions cannot be used to manufacture a separate right of appeal unless such a right is expressly given, they do not create a separate personality known as "Staff" (if that were even a person) who can act in place of the Registrar as the Respondent to an appeal to the Tribunal.

[15] I have reviewed the *Mortgage Brokers Act* to determine whether some other "staff" position might be recognized as constituting a second statutory office. The definition of "registrar" in the *Mortgage Brokers Act* (s. 1) does allow the registrar to authorize a person "to perform the registrar's duties under this Act", but that person is still acting as *registrar* when so authorized. The registrar also has the power to issue an order appointing a person "to conduct an investigation, examination and inquiry" (s. 6(2.1)), but that person's mandate is subject to the terms and conditions set by the Registrar. Such a person is not a standing statutory office holder. Besides the Registrar, there is no other legal entity in the *Mortgage Brokers Act* who could act as a respondent to an appeal.

[16] The common law "impartiality" concerns arising from *Northwestern Utilities Ltd v Edmonton (City),* [1979] 1 S.C.R. 684 and other cases are acknowledged. However, the common law of impartiality is subject to modification by statute. One example of that takes place where, as here, a single regulatory decision-maker is authorized to exercise a multiplicity of functions. Thus, while the common law of impartiality does not allow the mixing of investigatory and adjudicative functions, it is well established that this principle may be modified by regulatory legislation designed to protect the public interest: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301:

> Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.

[17] As reflected in ss. 4-8 of the *Mortgage Brokers Act*, the Registrar's functions are a mix of investigation, inquiry and decision-making. The Legislature's decision in s. 242.2(10)(g) of the *Financial Institutions Act* to make the Registrar the opposing party to the appeal is an integral part of the larger legislative intent to identify a single decision-maker and to give that decision-maker a multiplicity of functions. That intent, which must be respected, extends from the investigation all the way to the appeal. To put it another way, if the Registrar is allowed to act as investigator and adjudicator, surely it cannot be impermissible for the Registrar to act as a full party to a subsequent appeal to the Tribunal.

[18] All this is reinforced by reference to the administrative law doctrine of necessity. Where a statute like the *Mortgage Brokers Act* that has created only one statutory officer, there is no other legal person who can appear. The Tribunal's power under s. 242.2(10)(c) of the *Financial Institutions Act* to appoint third parties to make *submissions* does not answer this concern, because "submissions" does not extend to evidence and cross-examination of witnesses: see *Berg v. Police Complaint Commissioner*, 2006 BCCA 225. The power to allow "interveners" in s. 33 of the *Administrative Tribunals Act* has not been included in the Tribunal's appeal powers: *Financial Institutions Act*, s. 242.1(7).

[19] In a recent case (*Westergaard v. Registrar of Mortgage Brokers*, 2011 BCCA 256), the Court limited the FST's role on the appeal, but expressed no concern in accepting the Registrar's full participation on all issues.

[20] As noted above, while the Registrar did not appear in this proceeding, she should appear in future proceedings before the FST. For present purposes, the submissions made by the Attorney General as counsel for "Staff" will be accepted on that basis, as being helpful to the disposition of this jurisdictional issue.

B. Is the Summons a "decision, order or direction"?

[21] The Summons was issued pursuant to s. 6(3) of the *Mortgage Brokers Act*:

> 6(3) The registrar under this section has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce records, property, assets or things, as the court has for the trial of civil actions.

[22] The right to appeal to the FST is defined by s. 9(1) of the *Mortgage Brokers Act*:

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

[23] Counsel for Staff (Attorney General) submits that the FST has no jurisdiction to hear this appeal because a Summons is not, within the meaning of s. 9(1) of the *Mortgage Broker's Act*, a "direction, decision or order of the Registrar". Counsel submits that a Summons is an "evidentiary collection tool which is a component of the investigation and hearing process". Citing *Doman v. British Columbia Securities Commission* (1995), 10 B.C.L.R. (3d) 295 (B.C.S.C.), counsel submits that the summons power "is process oriented, evidentiary and interlocutory" and is therefore not subject to appeal or even review under the *Judicial Review Procedure Act*. Counsel submits that the Appellant's remedy to set aside a Summons is to apply to the issuing body - the Registrar – in a timely manner, as set out in *De Sousa v. Kuntz* (1988), 24 B.C.L.R. (2d) 206 and *Sinclair v. Roy* (1985) 20 D.L.R. (4th) 748. For the proposition that not everything done by the Registrar in the course of performing his duties cannot be a "direction, decision or order" of the Registrar, counsel relies on *Get Acceptance Corp. v. British Columbia (Financial Institutions Commission)*, 2008 BCCA 404.

[24] Counsel for the Appellant responds that a summons "is no less than an order of a Court or tribunal directing an individual to act in a particular way." Counsel asks: "On what possible basis would a contempt be found on something other than an order of an empowered body?" Counsel for the Appellant argues that the case of *B.C. Securities Commission v. Branch* (1990), 43 B.C.L.R. (2d) 286 confirms that the Summons in this case would be open to challenge under the *Judicial Review Procedure Act* (there being no equivalent to the Rules of Court which allows B.C. Supreme Court subpoenas to be challenged), but if the Appellant were to try that, he would have to contend with the principle that judicial review will not lie if there is a specialized appeal process available: *Bussey v. British Columbia (Registrar of Mortgage Brokers)*, [2007] B.C.J. No. 1974 (S.C.). Counsel for the Appellant says that the *Get Acceptance* case supports the Appellant's and not Staff's (Attorney General's) position. At paragraph 26 of the *Get Acceptance* case, the BC Court of Appeal emphasized that if an appeal is properly before a tribunal, the tribunal does not have the discretion to say it will not hear the appeal. On the coercive nature of a summons, Appellant's Counsel also refers to the discussion in *Get Acceptance* at paragraph 31.

[25] The essence of the Appellant's position is that a Summons, which requires a person to attend before an investigator on pain of contempt, must be a "direction, decision or order of the Registrar". The essence of the Attorney General's argument in response is that whatever the terms "direction, decision or order" mean in the *Mortgage Brokers Act*, they cannot be so broad as to include an evidentiary collection tool that is being used while the investigation is ongoing.

[26] As both parties rely on *Get Acceptance Corp. v. British Columbia (Financial Institutions Commission)*, 2008 BCCA 404, it is useful to commence with a review of that decision.

[27] In *Get Acceptance,* two mortgage brokers were facing a hearing before the Registrar of Mortgage Brokers. Before the hearing, they sued the Registrar in BC Supreme Court, seeking remedies that included a declaration that the Registrar had no jurisdiction to publish notices of the hearing before the plaintiffs had the opportunity to defend themselves. The Court struck out the plaintiffs' action on the basis that the Registrar's "decision" to publish the notices was appealable to the Tribunal, and it was therefore an abuse of process to by-pass that statutory appeal remedy in a lawsuit. On appeal, the BC Court of Appeal asked the parties to make submissions about whether the Registrar's practice of publishing hearing notices was in fact a "direction, decision, or order" within the meaning of s. 9(1) of the *Mortgage Broker's Act*. The Registrar argued that "decision" should be interpreted broadly, and should include "a decision under statute that is of significant impact on the party's interests, and there are sufficient compelling reasons to hear it on an interlocutory basis." (para. 23) The Court of Appeal rejected this argument, holding that the question of whether something is appealable cannot depend on a tribunal's discretion as to its importance. (para. 26)

[28] The Court of Appeal's analysis of whether the Registrar's posting of hearing notices constituted a "direction, decision, or under" under s. 9(1) of the *Mortgage Broker's Act* (paras. 27-32) does not address the precise issue now before the FST, but it does narrow the focus. Not everything that might, "in ordinary parlance", be described as a "direction, decision or order" is subject to appeal. The right of appeal, found in Part 1 of the *Mortgage Brokers Act*, is tied directly to the directions, decisions and orders that are provided for in Part 1 of the *Act*.

[29] The Registrar's power to issue a Summons is found in Part 1 of the *Act*. Furthermore, it cannot be denied that a Summons is an order that has to be complied with on pain of contempt. Is this conclusive? *Get Acceptance* provides room for conflicting arguments on this point. One reading would emphasize that the Court at paragraph 29 offered a list of "directions, decisions and orders", and this list omits mention of the Summons power:

> [29] Part 1 of the *Act* – "Registration" – contains all of the adjudicative and coercive powers given to the Registrar for the purpose of carrying out his mandate. Section 4 gives him the power to decide whether to register a mortgage broker. He has the power to "order" that a person be appointed to conduct an investigation (s. 6(2.1.)), and the power to "order" a person to pay costs (s. 6(9)). By virtue of s. 7(1), he can issue a "direction" for the purpose of freezing funds. Under s. 8(1), the Registrar can decide to suspend or cancel a person's

> registration. Of note is that in s. 7(1)(b), the suspension or cancellation of a broker's registration is referred to as "a direction, decision, order, or ruling". In addition, as recognized in *Pugliese*, the Registrar has implied power to do such things that are necessary in order for him to carry out his duties in an efficient and effective manner. In *Pugliese*, the Registrar, acting under s. 4 of the *Act*, declined to grant registration to Mr. Pugliese, who was on parole, serving a five year sentence. In his written reasons, the Registrar indicated that he would not consider another application from Mr. Pugliese until five years after completion of the sentence. This Court held that the Registrar had implicit jurisdiction to do so under s. 4 of the *Act*: para. 38.

[30] The alternative reading, based on the opening sentence of para. 29 (above) and para. 31 (below), would support the view that the right of appeal applies to all the adjudicative and coercive powers in Part 1 of the *Mortgage Brokers Act*.

> [31] Assuming, without deciding, that the Registrar has authority to post notices containing allegations of misconduct, this action is more aptly described as a "practice". Although, in some sense, it can be said that this practice exists as a result of a policy "decision" by the Registrar, or as a result of a "direction" given by him to his staff, <u>such a decision/direction was not made in the exercise of any of the adjudicative or coercive powers in the *Act*</u>. Rather, it falls into the category of an administrative or operational decision. The fact that the Registrar redacted the notice in this case in response to objections from Get Acceptance and Mr. Westergaard does not change the legal character of what was done, as those changes were not made as a result of the exercise of any adjudicative or coercive power. (emphasis added)

[31] Clearly the Registrar has to make a "decision" to issue a summons under s. 6(3). That decision results in an "order" compelling a person to attend before the regulator. The nature of the decision-making and coercive powers conferred by section 6(3) fits squarely within the nature of the powers described by the Court of Appeal in *Get Acceptance*. For the person subject to the Summons, a failure to comply can have dire consequences indeed, as made clear in s. 6(4) of the *Mortgage Brokers Act*:

> 6(4) For the purposes of subsection (3), the failure or refusal of a person to attend, to answer questions or to produce the records, property, assets or things in the person's custody or possession makes the person liable to be committed for contempt by the court as if in breach of an order or judgment of the court.

[32] Does the interlocutory nature of the summons process change the analysis? To put it another way, when we look at the matters that are clearly appealable under Part 1, did the Legislature intend that only final dispositions are subject to appeal?

[33] It does not appear so. For example, the freezing of a trust fund under s. 7(1) is an interlocutory order, but it is clearly open to appeal: *Get Acceptance*, para.29. Indeed, it may also be pointed out that a summons is not always an interlocutory order. A summons will constitute a "final" order when issued to a third party witness who is not subject to investigation: see for example *De Sousa v. Kuntz*, [1988] B.C.J. No. 393 (C.A.). This being so, it is unlikely the legislature intended for only some summonses to be appealable.

[34] For the reasons outlined above, I conclude that a summons issued by the Registrar under s. 6(3) of the *Mortgage Brokers Act* is a "direction, decision or order" that the legislature determined is subject to appeal to the FST under s. 9(1) of the *Act*.

[35] In coming to this conclusion, I have carefully considered the cases relied on by counsel for Staff (Attorney General), including *Doman v. British Columbia Securities Commission*, [1995] B.C.J. No. 1721 (S.C.). While that case is a good example of the Supreme Court exercising its judicial review discretion to decline to interfere with the interim evidentiary rulings of courts and tribunals, it does not say that an order compelling evidence cannot be a "direction, decision or order" for the purpose of an appeal provision. *Doman* is not about the jurisdiction of the court, but about the discretion of the Court.

C. Does the Appellant's application to quash the Summons raise a constitutional question?

[36] The Appellant's Notice of Appeal asks the FST to quash the Summons based on grounds that include the following:

- The Registrar's investigation does not have a predominantly regulatory purpose and constitutes a penal investigation.
- Under these circumstances the Registrar of Mortgage Brokers may not compel the appellant to answer questions and may not exercise a statutory power of compulsion.
- Under these circumstances the Registrar has breached the Appellant's right to protection from self-incrimination by way of questioning and answers obtained from the Appellant on June 8, 2011. Further questioning will constitute a continuation of the breach of the Appellant's right to protection from self-incrimination.
- Under these circumstances, [the] Registrar's exercise of a statutory power of compulsion is:

    (a) A breach of the appellant's right to protection from self-incrimination;
    (b) An improper exercise of the Registrar's statutory power of compulsion; and
    (c) Contrary to sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* and the Appellant's rights thereunder.

[37] Counsel for Staff (Attorney General) submits that even if a summons is a "direction, decision or order of the Registrar", the FST has no jurisdiction to hear this appeal because it is based on *Charter* grounds. Counsel points out that section 44(1) of the *Administrative Tribunals Act*, which applies to the FST by virtue of s. 242.1(7) of the *Financial Institutions Act*, provides that "the tribunal has no jurisdiction over constitutional questions". Counsel notes that the term "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the

Constitutional Question Act". Counsel points out that s. 8 of the *Constitutional Question Act* requires notice to be given to Attorney General in any case where a "constitutional remedy (other than the exclusion of evidence) is sought under s. 24(1) of the *Charter*", and submits that:

> …by suggesting that the Registrar's power to issue a summons breaches his right to protection from self-incrimination and/or is contrary to sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, and by asking this Tribunal to quash the summons issued, the Appellant is raising constitutional questions …

[38] In response, counsel for the Appellant argues that the term "constitutional remedy" excludes a remedy where a party to an administrative hearing, such as a licensing appeal, applies to exclude evidence on *Charter* grounds. Counsel argues that if it is not a "constitutional remedy" to exclude evidence from an illegal investigation in a licensing appeal, it is anomalous to prevent a party from directly challenging the legality of the investigation itself on constitutional grounds - in this case, based on the allegation that the investigation has a primarily criminal purpose.

[39] For the reasons that follow, I find that though the Summons is a "direction, decision or order" that is subject to appeal under s. 9(1) of the Act, this appeal is not properly before the FST because the Appellant's application to quash the Summons relies on constitutional arguments that the FST has no jurisdiction to consider.

[40] The statute law that governs this question, while somewhat complex, is not in dispute. Section 242.1(7) of the *Financial Institutions Act* states that s. 44 of the *Administrative Tribunals Act* applies to Tribunal appeals.

> 44 (1) The tribunal does not have jurisdiction over constitutional questions.
>
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

[41] The *Administrative Tribunals Act* (s. 1) defines "constitutional question" as meaning "any question that requires notice to be given under section 8 of the *Constitutional Question Act".*

[42] Sections 8(1) and 8(2) of the *Constitutional Question Act* provide as follows:

> 8 (1) In this section:
>
> **"constitutional remedy"** means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;
>
> **"law"** includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,

> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section. (emphasis added)

[43] These sections make clear that where *Charter* arguments trigger the notice requirements of s. 8 of the *Constitutional Question Act*, the FST will have no jurisdiction to hear them.

[44] Would the Appellant's *Charter* arguments in this case trigger the notice requirements of section 8? Clearly, s. 8(2)(a) of the *Constitutional Question Act* does not apply. The Appellant is not challenging the constitutional validity of s. 6(3) of the Act. Nor is he arguing that s. 6(3) has no application to him because of some constitutional exemption from its terms. What about s. 8(2)(b)? Is the Appellant making an application for an individual constitutional remedy? In my view, the answer is "yes".

[45] The Appellant's fundamental argument is that the Registrar's decision to issue the Summons in this case should be set aside because the predominant purpose of the Summons, viewed in the context of the investigation at large, is unlawful because it is "penal" rather than "regulatory". He is seeking an individual remedy, based on the *Charter*, for the reasons set out as follows in his November 8, 2011 submission:

> … At the June 8th interrogation, and upon review, and upon the review of a subsequently provided agreed to statement of facts, it became clear that my client's *Charter* rights were at risk and breached and would continue to be further breached by any later interrogation. It became clear that the investigators had turned their minds to a penal process as opposed to a purely regulatory process. One of the investigators himself admitted that the Registrar would consider a prosecution if the questioning of June 8th revealed a matter that could be prosecuted. The investigator then proceeded to spend the day asking my client questions which were well beyond an [sic] regulatory matter, the answers to which would provide the basis for a penal process. That type of compelled information is precisely what *R. v. Jarvis*, [2002] 3 S.C.R. 757 prohibits on the basis of a *Charter* violation. A further review of the record, when provided, will reveal that the questioning was largely looking at fault and *mens rea*….
>
> …. Submission as to penalty that my client ought to face must come after any finding on liability. Given that *mens rea* is irrelevant to a strict liability offence, the Registrar's desire to compel answers as to knowledge, fault and guilt raise a high degree of concern and lead to only one conclusion, that the process that they are considering goes beyond a purely regulatory matter and is contrary to *Jarvis*…
>
> The violation of my client's *Charter* rights according to and based on the analysis in *Jarvis* is not frivolous in any way and should be completely explored before the matter is dismissed summarily and in the absence of a record.

[46] While the Appellant has subsequently said that this "is not strictly a *Charter* issue", his argument is clearly founded on the *Charter* principles discussed in *Jarvis*. All his grounds and arguments flow from and rely on the *Charter*. Even in suggesting that the determination of this issue "does not require any form of *Charter* analysis", he states that "The Registrar's improper exercise of that power may result in a Charter breach". In my view, the inquiry

the Appellant wishes to have the Tribunal make into the nature of the investigation can only be relevant if the characterization the Appellant seeks to impress upon the FST would give rise to a *Charter* breach.

[47] Whether or not the Appellant's *Charter* arguments have merit is not the issue for present purposes. The threshold jurisdiction question for the FST is whether the Appellant's *Charter* arguments are being made in support of an application for a constitutional remedy. As noted above:

> **"constitutional remedy"** means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion.

[48] Section 24(1) of the *Charter* provides as follows:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[49] As discussed above, there is no question that, in this case, the Appellant is asking the FST to exercise its existing remedial powers to set aside a Summons, in vindication of his *Charter* rights, on the ground that the Summons was issued for an improper constitutional purpose. In doing so, the Appellant is clearly seeking a remedy under s. 24(1) of the *Charter*: *R. v. Conway*, [2010] 1 S.C.R. 765 at para. 22. It follows that notice under s. 8 of the *Constitutional Question Act* is required unless the Appellant is seeking a remedy "consisting of the exclusion of evidence or consequential on such exclusion".

[50] Although the Appellant argues otherwise, in my view the Appellant is not seeking a remedy consisting of the exclusion of evidence. An application to quash a summons is not the same as a remedy that seeks to exclude evidence from an ongoing hearing.

[51] While the Appellant asserts that an application to the FST to exclude evidence from a licensing appeal would not require notice under s. 8 of the *Constitutional Question Act*, that is not the situation here. This is an application to have the FST, on appeal, quash a Summons issued by the Registrar in an ongoing Registrar's investigation, and to make findings regarding the nature of that investigation before it has finished.

[52] The Appellant suggests that it is an "anomaly" to distinguish between the two types of proceedings just described for the purpose of s. 8. In my respectful view, there are two answers to this argument. First, it is not anomalous to carve out a notice exception for exclusion of evidence applications made in the midst of ongoing proceedings before a court or tribunal, but to require notice in all other proceedings, such as appeals, where constitutional remedies are sought. Second, anomalous or not, the Legislature has made the distinction, and the Tribunal is required to respect it.

DECISION

[53] Although the Staff does not have party status on an appeal to the FST, Staff is represented by counsel from the Office of the Attorney General and I accept its submissions as helpful to this tribunal on the issue of jurisdiction.

[54] I find that the FST has jurisdiction under s. s. 9(1) of the *Mortgage Brokers* Act to hear an appeal challenging a decision to issue a summons pursuant to s. 6(3) of that *Act*.

[55] The FST has no jurisdiction over constitutional questions. I find that the Appellant's application to quash the Summons falls outside the FST's jurisdiction because it seeks a constitutional remedy for infringement or denial of rights or freedoms guaranteed by the *Charter.*

[56] The appeal is dismissed for lack of jurisdiction.

"Paula Barnsley"

Paula Barnsley
Panel Chair
Financial Services Tribunal

January 18, 2012