

FINANCIAL SERVICES TRIBUNAL

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

BETWEEN:

JOHN WINSTON CARSON

APPELLANT

AND:

THE STAFF OF THE REGISTRAR OF MORTGAGE BROKERS

RESPONDENT

DECISION

BEFORE:	JOHN B. HALL, Presiding Member
DATE OF LAST SUBMISSION:	MARCH 16, 2006
APPEARANCES:	RICHARD FERNYHOUGH, for the Respondent JOHN CARSON, on his own behalf
DATE OF DECISION:	May 10, 2006

INTRODUCTION

Mr. Carson appeals from a decision dated July 25, 2005 by W. Alan Clark, Registrar of Mortgage Brokers (the Registrar). The decision followed a hearing under Section 4(b) of the *Mortgage Brokers Act* (the Act) to determine whether Mr. Carson was suitable for registration as a submortgage broker and whether the proposed registration was not objectionable. Mr. Carson admitted before the Registrar:

- (a) that he had contravened Section 22(1) (d) of the Act by making Statements in numerous applications filed under the Act knowing that, at the time and in light of the circumstances under which the statements were made, the statements were false and misleading with respect to material facts;
- (b) that he had contravened Section 21(1) (a) of the Act by carrying on business as a mortgage broker or submortgage broker when he was not registered under the Act;
- (c) that he had contravened Section 21(1) (b) of the Act by carrying on business as a mortgage broker in a name other than his registered name; and
- (d) that he currently had a number of outstanding judgments rendered against him and was avoiding his creditors to preserve his assets.

Mr. Carson waived his right of appeal under Section 9 of the Act regarding the correctness of these admissions, as well as the correctness of certain facts set out below.

The Registrar determined Mr. Carson was not eligible for registration under the Act because he was unsuitable and his proposed registration was objectionable. The Registrar further determined that an application for registration by Mr. Carson would not be considered for a period of five years from the date of his last application; that is, not until December 21, 2009. He additionally determined that an application will not be considered until Mr. Carson can clearly demonstrate he has rehabilitated himself and re-established his suitability.

ISSUE

Mr. Carson appeals to this Tribunal under the *Financial Services Act* on the ground that “the Registrar imposed a suspension period that is excessive”. Thus, the central issue is whether there is any basis to interfere with the five-year period of ineligibility for registration imposed by the Registrar.

BACKGROUND

The following points are taken from the Agreed Statement of Facts placed before the Registrar:

1. Mr. Carson was initially registered as a submortgage broker under the Act on February 2, 1983. He has been intermittently registered under the Act since that time.

2. Between 1997 and 2005, Mr. Carson submitted a number of applications for registration as a submortgage broker to the Registrar which contained false or misleading statements:
 - (i) in an application dated December 15, 1998 Mr. Carson failed to disclose an unsatisfied judgment rendered against him;
 - (ii) in an application dated October 13, 2000 Mr. Carson failed to disclose three foreclosure proceedings and four unsatisfied judgments rendered against him;
 - (iii) in an application dated June 4, 2002 Mr. Carson failed to disclose one foreclosure proceeding and eight unsatisfied judgments rendered against him;
 - (iv) in an application dated February 13, 2004 Mr. Carson failed to disclose seven unsatisfied judgments rendered against him; and
 - (v) in an application dated September 15, 2004 Mr. Carson failed to fully disclose four unsatisfied judgments rendered against him.

Schedule “A”, attached to and forming part of the admissions, detailed the unsatisfied

- judgments rendered against Mr. Carson referred to above. The foreclosure proceedings referred to above are in relation to the foreclosure on property owned by Mr. Carson personally.
3. Mr. Carson knowingly carried on business as a mortgage broker and submortgage broker without being registered under the Act from May 8, 2002 to March 1, 2004 and from September 14, 2004 to October 5, 2004, despite five warnings from the staff of the Registrar.
 4. Mr. Carson knowingly carried on mortgage broker business using the name First Valley, which was not the name under which he was registered, between March 2 and September 8, 2004, despite two warnings from the staff of the Registrar.
 5. Mr. Carson has failed to satisfy at least ten judgments rendered against him which arose out of personal real estate and mortgage transactions and other business dealing between 1997 and 2005.

Schedule "A" to the Agreed Facts listed 13 debt obligations; some of them were included in a single judgment, resulting in nine orders. The outstanding obligations were calculated to be \$196,788.60 in total. One judgment in the amount of \$553.00 was dated March 25, 1999. Oral testimony before the Registrar established Mr. Carson had been interviewed by an Investigator from the Financial Institutions Commission (FICOM) on September 8, 2004. He advised her of five outstanding judgments, and replied in the negative when asked if there were other outstanding obligations. Later investigations revealed the remaining four judgments. The majority of Mr. Carson's business was described as "equity take-outs"; i.e. debt consolidation.

Mr. Carson admitted the accusations against him before the Registrar. He explained he had not put enough importance on the disclosure process; had not put enough importance on the fact he used an unregistered name and conducted unregistered activity; and had not remembered how

many judgments were outstanding when interviewed by the Investigator. He asked the Registrar for a “second chance”.

The determinations made by the Registrar have been summarized already, and were supported by reasons found at pages 6-9 of the decision. Portions of those reasons will be set out below.

THE APPEAL PROCESS

Mr. Carson’s appeal was received by the Tribunal on October 3, 2005 and his appeal submissions were received on December 15, 2005. The latter describe his “overriding concern” as the “disparity between the recommended order handed down on March 5, 2005 and the final order handed down on September 7, 2005”. The earlier order is in fact a Notice of Recommended Order issued by the Deputy Registrar of Mortgage Brokers. Among other things, the Deputy Registrar proposed that an application from Mr. Carson for registration not be considered for a minimum of two years.

The Respondent objected to the Notice of Recommended Order being considered in this appeal as it was not part of the record. Nor was it formally before the Registrar, although the recommendation was made through counsel at the hearing. In light of this objection, Mr. Carson was given an opportunity to file an Application to Submit New Evidence.

There was a further delay after Mr. Carson requested an extension to obtain information regarding his record of prior complaints. This was also opposed by the Respondent, but the Tribunal’s Deputy Registrar set a deadline for Mr. Carson to file his Application to Submit New Evidence on this point. Mr. Carson filed a document prepared by the FICOM detailing his complaint history on the day of the deadline. This led to a further objection by the Respondent. However, before any of those outstanding questions could be addressed, Mr. Carson wrote to withdraw the new evidence he had submitted, and asked that “a decision be [made] on this matter”. The Deputy Registrar then called for further submissions in accordance with the

Tribunal's Directives and Practice Guidelines.

Therefore, in determining this appeal, I have considered: Mr. Carson's Notice of Appeal received October 3, 2005; the Book of Record received November 17, 2005; Mr. Carson's appeal submissions received December 15, 2005; the Respondent's submissions and authorities received March 2, 2006; and Mr. Carson's final response received March 16, 2006. For the sake of clarity, the Notice of Recommended Order signed by the Deputy Registrar and the complaint history prepared by the Financial Institutions Commission have not been accepted as "new evidence" under Section 242.2(8) of the *Financial Institutions Act*.

ANALYSIS

As indicated, Mr. Carson's primary ground of appeal concerns the period of ineligibility set by the Registrar. He points to the "huge discrepancy" between the proposal in the Notice of Recommended Order and the five years found in the Registrar's decision. Mr. Carson complains that the longer period has the very distinct implication of effectively banning him into retirement as he will be 65 years of age in April 2010. He additionally notes that the prior cases considered by the Registrar where similar periods were imposed followed undisclosed criminal convictions.

The period selected by the Registrar involved an exercise of discretion. Therefore, his decision is entitled to a reasonable degree of deference, especially as the Registrar was in a better position than the Tribunal to assess any expression of remorse by Mr. Carson, to ascertain the need for individual deterrence, and to evaluate other evidentiary considerations applicable to the imposition of professional discipline. The Tribunal should be reluctant to intervene if the Registrar turned his mind to the relevant factors and the penalty falls within an acceptable range, unless there are extenuating circumstances to support a contrary outcome. See *Kenneth Scott Spong* (unreported), January 13, 2006 (FST 05-007).

I am satisfied the Registrar considered factors relevant to determining the period of ineligibility

for registration as a submortgage broker. The factors included: public confidence in the Province's financial services sector, particularly the mortgage broker industry; the reputation and status of registrants in that industry generally; and the protection of consumers. With respect to the latter, the Registrar made the following observations:

Mortgage transactions are complicated areas for most consumers, and as a result, an information imbalance exists between the broker and the consumer. The legislation recognizes this and, in order to ensure consumers are protected, the financial services professional is required to provide stringent disclosure to consumers. Carson has admitted to not making disclosure in five separate applications for registration. His excuse for doing so is that he did not place importance on the disclosure process. The public needs protection from individuals who do not think the disclosure process is important.

The registration system under the Act is designed to protect consumers in the following ways:

- Ensuring the registrant is properly qualified to broker mortgages;
- Ensuring that proper books and records are kept by the mortgage broker and available for inspection by the Registrar; and
- Ensuring rules are in place to ensure consumers are dealt with appropriately.

Carson has admitted to conducting unregistered mortgage broker business and using an unregistered name in violation of the Act. His excuse for doing so was that he didn't place importance on complying.

The public needs protection from individuals who display such a callous attitude toward regulatory rules. (pp. 8-9)

The Registrar also concluded Mr. Carson was not in a position to advise consumers on mortgage transactions -- "especially for debt consolidation" (the majority of his business) -- given his personal financial situation.

I agree with the concerns expressed by the Registrar, and note that emphasis in determining professional discipline should be placed on protecting the public: *Administrative Law in Canada*,

Sara Blake (Butterworths, Third Edition), at pages 115-116.

In order to be eligible for registration in the future, Mr. Carson must demonstrate he has rehabilitated himself and is suitable for registration: see Section 4(b) of the Act. A similar requirement in the *Real Estate Act* was examined by the former Commercial Appeals Commission in *Khosla v. Real Estate Council of British Columbia*, [2000] B.C.C.O. No. 11 (Appeal No. CAC9904):

...[T]he suitability required by the statute refers to the qualities or attributes that a person should have in order to be licensed. The qualities that make a person suitable for licensing include such things as honesty, reliability, integrity and professionalism. Where an applicant's conduct has shown an absence of one or more of these qualities, the applicant is not suitable and should not be licensed. *These qualities are questions of character which are often enduring.*

That the respondent has decided that it will reassess an applicant's suitability after a period of time shows that the respondent is willing to consider that a person may change their ways or be rehabilitated, and this is only fair. However, quite properly, given that there has been conduct which impugns the applicant's suitability, *the onus will be on the applicant to reestablish themselves and, apart from simply asserting their rehabilitation, the only way that an applicant can reestablish their suitability is by their conduct, and that can only be shown over a period of time.*

The minimum period of ineligibility that the respondent prescribes in a given case is a reflection of the degree of unsuitability displayed and is commensurate with the time required to establish that a person who has not been suitable may be suitable. ... (paras. 27-29; emphasis added)

The five year period selected by the Registrar may well be on the upper end of the scale, but I am not prepared to say it was unreasonable in all circumstances of the case. In addition to the points noted already, Mr. Carson conducted unregistered mortgage (or submortgage) broker business despite numerous warnings; failed to fully disclose his outstanding judgments to FICOM's Investigator; and admitted avoiding creditors to preserve his assets. His actions reveal a lack of honesty and integrity which are vital to the role he seeks to occupy. As explained in *Dirk Allen Rachfall* (unreported), Registrar of Mortgage Brokers (November 4, 2003):

Mortgage brokers - even those acting as strict intermediaries - are in a position of trust. Lenders rely on mortgage brokers to ensure that documents are complete and accurate. Borrowers rely on mortgage brokers for knowledgeable and impartial advice. As a whole, the industry relies on maintaining public confidence. If either lenders or borrowers did not have confidence in mortgage brokers to act as intermediaries the industry would not exist. (p. 10)

It can be fairly said that Mr. Carson consistently disregarded the regulatory scheme in which he was operating for a number of years. There has been no genuine expression of remorse. Mr. Carson attempted before the Registrar to excuse his misconduct by saying he had not “put enough importance” on the disclosure process. His appeal reflects more concern for his personal situation than any heartfelt regret for his past actions. While he has not been found guilty of criminal conduct, he committed repeated offences under the Act. In all the circumstances, it is appropriate to impose a commensurately lengthy period of time for Mr. Carson to demonstrate his prior unsuitable qualities are not enduring.

I am not troubled by the difference between the order proposed by the Deputy Registrar and the Registrar’s final decision. First, the lesser period was put before the Registrar. Counsel argued the Registrar should not consider an application for registration from Mr. Carson “for a minimum of two years” (Transcript of Hearing, p. 39). Second, as just indicated, the proposal was for a *minimum* of two years. Further, the Registrar based his decision on information from the hearing which is not evident on the face of the Notice of Recommended Order. Finally, the Registrar had the considerable advantage of hearing directly from Mr. Carson and assessing his suitability for registration. The Registrar was unquestionably troubled by what he heard. He concluded the proceeding by telling Mr. Carson: “You’ve been warned and warned and warned. ... I clearly want you to understand that you have been found to have breached the *Mortgage Brokers Act* in each and every one of the allegations in the notice of hearing” (p. 40).

Mr. Carson’s Notice of Appeal identified a single ground: namely, the excessive “suspension period” imposed by the Registrar. His later appeal submissions raised as “[a]nother factor of importance” the requirement that the outstanding judgments be satisfied or dealt with in a

satisfactory manner before an application for registration will be considered. He argues in part:

My financial situation since the cancellation of my license has, to say the least, been precarious. Because of my age, jobs have been short lived and poorly paid. My saving grace was that from May 2005 onwards, I have been receiving the Canada Pension Plan. Under these circumstances I cannot begin to satisfy the judgments. If I was to obtain my license again in the near future then I would settle with the creditors over a period of time.

This aspect of the Registrar's decision was not challenged in Mr. Carson's original Notice of Appeal. Nonetheless, I have considered his submission, and I appreciate the potential "Catch-22" scenario presented by the order. However, there are countervailing factors which remove any force which there might otherwise be to Mr. Carson's alternate argument.

A comparable situation arose in *Rachfall, supra*, where the appellant argued he needed to have his mortgage broker's registration before he could be directed to pay an outstanding restitution order. The argument was rejected:

The inability of Rachfall to pay this amount does not make his registration any less objectionable. I believe public confidence would be affected even if he has not yet had an opportunity to pay the Restitution Order. (p. 10)

In contrast, the evidence here indicates Mr. Carson has had ample opportunity to make payments towards his outstanding judgments. He was registered as a submortgage broker until September 2004 and, according to the Respondent's undisputed submission, there was no evidence adduced at the hearing of any attempt to satisfy the outstanding judgments, except for one creditor. Indeed, one judgment in the relatively modest amount of \$553.00 dates back to March 1999. Mr. Carson's plea on this account is simply "too little, too late". In any event, the Registrar did not impose an absolute condition that the judgments be satisfied. The decision adds that they may be "otherwise [dealt with] in manner satisfactory to the Registrar". The steps taken by Mr. Carson in light of his available means will undoubtedly be considered by the Registrar in making that assessment.

CONCLUSION

In the result, Mr. Carson's appeal is dismissed. The Respondent requested costs under Section 47(1) of the *Administrative Tribunals Act*; however, the basis for the request was not specified and no order is made on that account.

DATED AT VANCOUVER, BRITISH COLUMBIA, THIS 10TH DAY OF MAY 2006.

FOR THE FINANCIAL SERVICES TRIBUNAL



JOHN B. HALL
PRESIDING MEMBER

