

**FST Judicial Review Update: Court of Appeal Decision: FST Appeal
Case 06:024: Mr. Eugenio Pugliese**

This FST decision was **upheld** by the Court of Appeal for British Columbia in a decision dated March 27, 2008.

For more information, please see the Active Appeals, Decisions and Judicial Reviews on the FST's website at www.fic.gov.bc.ca/fst or search for the decision by name on the BC Court of Appeal decisions website at <http://www.courts.gov.bc.ca/ca/>

**FST Judicial Review Update: FST Appeal Case 06:024: Mr. Eugenio
Pugliese**

This FST decision was **upheld** by BC Supreme Court Justice, the Honourable Mr. Justice R.B.T. Goepel, in his decision dated March 21, 2007.

On April 18, 2007, Mr. Pugliese appealed Justice Goepel's BC Supreme Court decision to the BC Court of Appeal. A decision on this matter is pending.

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

FST-06-024

FINANCIAL SERVICES TRIBUNAL

In the matter of *The Mortgage Brokers Act*, R.S.B.C. 1996, c. 313
Appeal Pursuant to s. 9 of *The Mortgage Brokers Act*

BETWEEN:

EUGENIO PUGLIESE

APPELLANT

AND:

W. ALAN CLARK
REGISTRAR OF MORTGAGE BROKERS

RESPONDENT

APPEAL DECISION

BEFORE: DALE R. DOAN, Presiding Member

APPEARANCES: EWEN J. CAMERON, for the Appellant
RICHARD FERNYHOUGH, for the Respondent

DATE OF LAST SUBMISSION: August 16, 2006

DATE OF DECISION: September 5, 2006

INTRODUCTION

This appeal (the “**Appeal**”) to the Financial Services Tribunal (the “**FST**”) is by virtue of Notice of Appeal dated May 18, 2006 filed with the FST by the solicitor for the Appellant. The decision under Appeal is that of the Respondent, Registrar of Mortgage Brokers, dated April 19, 2006, which decision found that the Appellant, Eugenio Pugliese, having been convicted of a serious criminal offence and having reviewed all of the circumstances, which I believe, having carefully reviewed the Record, means all of the relevant circumstances surrounding the events as well as Mr. Pugliese’s personal and business affairs, was unsuitable to be registered as a sub-mortgage broker. The Decision goes on to state that the reputation of the Appellant also resulted in his being unsuitable to be registered and that the proposed registration would be objectionable as it would negatively impact the public and industry confidence in the financial services sector. Although the Respondent points out in its decision that an individual convicted of a “white collar crime” will not be considered for licensing (or in this case registration) until at least five years from the date of completion of sentence, parole and/or probation, the Respondent did not determine a length of time during which the Appellant would be restricted from applying for registration. Rather, the Registrar made the following rulings:

- A. The Appellant is not eligible for registration under *The Mortgage Brokers Act* as he is unsuitable and his proposed registration is objectionable;
- B. The Respondent Registrar will not consider an application for registration under *The Mortgage Brokers Act* until five years after completion of his sentence, which would be July 2014; and
- C. The Respondent Registrar will not consider an application at that time unless the Appellant can clearly demonstrate he has rehabilitated himself and re-established his suitability.

As the grounds for appeal set out in the Notice of Appeal accurately describe the main issues in this Appeal, I will recite them in their entirety:

1. The Respondent Registrar exceeded his jurisdiction by refusing the Application for Registration of the Appellant based solely on the Appellant’s past drug trafficking conviction, a factor irrelevant under section 4 of *The Mortgage Brokers Act*;
2. The Respondent Registrar exceeded his jurisdiction by imposing a period of ineligibility on the Appellant before he could reapply to become a sub-mortgage broker without statutory authority for doing so; and
3. The Respondent Registrar breached the duty of fairness owing to the Appellant by failing to give proper and adequate reasons addressing the substantial points raised in the Appellant’s written submissions both in respect to jurisdiction and facts.

The Respondent is of the view that the issues outlined by the Appellant in effect direct the analysis of the FST towards two narrower issues, those being:

- i. Whether the Respondent Registrar erred by not indicating expressly in his reasons that all relevant considerations had been taken into account in arriving at his decision; and
- ii. Whether the Respondent Registrar erred by imposing a period of ineligibility before another application from the Appellant for registration would be considered after finding the Appellant unsuitable for registration and finding that the Appellant's proposed registration was objectionable.

As the Appeal is brought by the Appellant, Mr. Pugliese, I defer to his legal counsel's outline of the issues to be considered, however, in so considering those issues, a review of the specific points raised by counsel for the Respondent will by necessity occur.

REGISTRAR'S ORDERS

As has been set out above the Respondent Registrar of Mortgage Brokers made the following findings in its decision dated April 19, 2006:

- A. The Appellant is not eligible for registration under *The Mortgage Brokers Act* as he is unsuitable and his proposed registration is objectionable;
- B. The Respondent Registrar will not consider an application for registration under *The Mortgage Brokers Act* until five years after completion of his sentence, which would be July 2014; and
- C. The Respondent Registrar will not consider an application at that time unless the Appellant can clearly demonstrate he has rehabilitated himself and re-established his suitability.

An investigation into the sub-mortgage registration application of the Appellant by the Financial Institutions Commission of British Columbia took place while the Appellant was serving a five year sentence at the Ferndale Institution. At that time, the Appellant was on day parole from that institution after serving 14 months of the five year sentence. The investigative report described the Appellant's criminal history dating back to his conviction of Conspiracy to Traffic in a Controlled Substance (Cocaine) and Possession of Cocaine related to charges laid in 1998 and the sentencing which occurred in 2001. It also described the Appellant's request for a hearing to deal with the issue of reputation and suitability to be registered under *The Mortgage Brokers Act*. Elements of the investigative report will be referred to below.

ISSUES ON APPEAL

Again, the issues on Appeal are described earlier in this Appeal Decision. For clarity purposes I will repeat the issues as set out by the Appellant:

1. The Respondent Registrar exceeded his jurisdiction by refusing the Application for Registration of the Appellant based solely on the Appellant's past drug trafficking conviction, a factor irrelevant under section 4 of *The Mortgage Brokers Act*;
2. The Respondent Registrar exceeded his jurisdiction by imposing a period of ineligibility on the Appellant before he could reapply to become a sub-mortgage broker without statutory authority for doing so;
3. The Respondent Registrar breached the duty of fairness owing to the Appellant by failing to give proper and adequate reasons addressing the substantial points raised in the Appellant's written submissions both in respect to jurisdiction and facts.

BACKGROUND AND CHRONOLOGY

The Appellant, Mr. Pugliese, was charged with certain drug offences in 1998 resulting in a criminal convictions of Conspiracy to Traffic in a Controlled Substance (Cocaine) and Possession of Cocaine in 2001. He was sentenced to five years imprisonment. Having served a portion of his sentence the Appellant is now on parole. While serving his sentence, in November 2005, the Appellant submitted an application for registration as a sub-mortgage broker, which application was provided to the Respondent, Registrar of Mortgage Brokers. The Appellant's intended employer, Absolute Rate Mortgages Inc., through its representative Donald Estrada, witnessed the Appellant's application for registration.

The application included questions inquiring about charges, indictments, convictions and bankruptcy proceedings. To these questions, the Appellant answered "yes" indicating that he had been charged with a criminal offence, had been convicted without pardon and had been subject to bankruptcy proceedings. The application was referred to the Investigative Branch of the Financial Institutions Commission of British Columbia and an investigative report was prepared and submitted to the Respondent, Registrar of Mortgage Brokers.

The Respondent's office provided the Appellant an opportunity to be heard at a hearing before the Respondent Registrar and a hearing in the form of written submissions was chosen by the Appellant. Exhibits before the Respondent for the purposes of that hearing included the following:

1. Application for registration as a submortgage broker by Appellant
2. Consent for Suitability Investigation
3. Evidence of Real Estate Trading Services Licensing Examination completion
4. Explanation for answers to question 7(a) and (b) of Pugliese's submortgage broker application
5. Correctional Plan Progress Report
6. Assessment for Decision, Abbotsford Area Parole Office
7. Reference letters for Appellant
8. Certificate of Discharge of Bankruptcy for Appellant
9. Credit Bureau Report for Appellant

10. Oral ruling of Mr. Justice Collver, September 18, 2000
11. Reasons for Sentencing, Mr. Justice Collver, January 3, 2001
12. Justice J. Collver's November 14, 2000 judgement regarding Appellant
13. Submissions by Richard Fernhough

The decision of the Respondent was rendered April 19, 2006 which decision is the subject matter of the Notice of Appeal dated May 18, 2006 and filed with the FST by legal counsel on behalf of the Appellant, Mr. Pugliese.

FACTS AND EVIDENCE

The facts in this Appeal are not disputed. As has been set out above, the Appellant committed the drug offences in 1998 and was convicted in 2001 of Conspiracy to Traffic in a Controlled Substance (Cocaine) and Possession of Cocaine. He was sentenced to five years incarceration, served a certain period of that time in jail which was followed by day parole and finally full parole. The submissions of the Appellant undeniably illustrate the Appellant, Mr. Pugliese, as an intelligent, resourceful, self-motivated individual who would by all means be expected to be a positive contributor to his family, community and workplace.

In the mid 1990's, the Appellant experienced financial difficulties and declared bankruptcy. He received a discharge from bankruptcy in December 1995, the same year as his divorce from a marriage that had lasted for approximately two years. Although these events are unfortunate experiences, they would not in normal circumstances cause an irreparable distortion in personal or work records when looking back over a longer period of time if it were not for the events that followed.

In 1998 and at the age of 30 years, the Appellant participated in significant criminal activity. The materials in the investigative report and the descriptions of his activities have not been denied and form part of the Record for the purposes of this Appeal. It must be noted that in an application to court for a judicial stay of the charges against him, in an oral ruling on September 18, 2000, Mr. Justice Collver stated that the Appellant played a role in what at that time was an alleged conspiracy to possess and traffic drugs valued in the neighborhood of \$3,100,000.00 and comprising substantial quantities of cocaine, marijuana, hashish and methamphetamine. The application for a judicial stay was refused. Later, at sentencing, Mr. Justice Collver, on January 3, 2001, stated that a sentence in excess of two years was "obviously called for in this case" given the gravity of the offences and the degree of responsibility of the Appellant and another. In addition, in describing the Appellant's criminal activity, Mr. Justice Collver stated:

"....Notwithstanding Gino Pugliese's expressions of remorse, his involvement in cocaine distribution was hardly peripheral or fleeting, and on the charge of Conspiracy to Traffic in Cocaine which is Count 4 of the indictment I impose a sentence of five years, on the charge of Possession of Cocaine for the purposes of trafficking, a sentence of two years is imposed to be served at the same time as the sentence imposed in Count 4"

All indications are that the Appellant then worked tenaciously to bring his life back on track. Businesses were pursued successfully, relationships responsibly developed, education including

mortgage broker courses successfully completed and an application for registration as a sub-mortgage broker duly submitted to the office of the Respondent. Each of these steps were self-motivated and self-implemented.

This latter step, however, did not involve unilateral business decisions or judgement calls on the part of the Appellant. All of the prior activities which clearly assisted the Appellant in becoming a productive member of society were of his own volition only. The application for registration as a sub-mortgage broker involves a regulatory approval process which is subject to a series of third party considerations administered by the Respondent Registrar.

The submissions of the Respondent accept for the most part the outline of facts and circumstances described in the Appellant's submissions. However, when it comes to the descriptions of the circumstances surrounding the criminal activities of the Appellant and the conviction that followed, there is clear disagreement. The Appellant is of the view that the Appellant's conduct leading to his conviction is "anomalous to all other aspects of his life". The Respondent, on the other hand, points out that the Appellant was found guilty of theft on April 30, 1986, of Possession of Stolen Property on May 16, 1986 and of Possession of Narcotics for the Purposes of Trafficking as well as Conspiracy to Traffic in Cocaine a number of years later. Although the Respondent Registrar does not take issue with certain of the submissions of the Appellant that are not found in evidence presented to the Registrar leading up to the Registrar's decision, the Respondent's submission is that all materials contained in the Appellant's original submissions were considered by the Registrar prior to his decision.

For the purposes of this Appeal, I note that the Respondent does not dispute the fact that the Appellant has taken many significant and important steps towards rehabilitation and adding normalcy to his life. The Respondent focuses the thrust of its submissions on the magnitude of the offences for which the Appellant was charged and convicted. The emphasis may be summarized as follows:

- Two convictions emerged, one for Conspiracy to Traffic in Cocaine and the other for Possession of Cocaine for the Purposes of Trafficking, both indictable offences.
- He was convicted to a total of five years imprisonment.
- Incarceration commenced on September 22, 2004 after conviction appeals were exhausted.
- His sentence terminates on July 11, 2009 although the Appellant currently enjoys full parole.
- The magnitude of the criminal activity is notable: The Conspiracy which was the subject matter of the first conviction related to the seizure of 69 kilograms of cocaine, 33.5 pounds of marijuana, 1.5 pounds of hashish, 13 pounds of psilocybin and 9.5 pounds methamphetamine with a value estimated at \$3,000,000.00.
- Three kilograms of cocaine were seized from the residence of the Appellant.
- The sentencing judge noted that: "notwithstanding Gino Pugliese's expressions of remorse, his involvement in cocaine distribution was hardly peripheral or fleeting."
- The Appellant was motivated to engage in the cocaine distribution by the opportunity for financial gain.

In essence we are left with the situation where on the surface the Respondent Registrar is faced with an apparently intelligent, educated, resourceful, responsible, self-motivated, individual applying for registration as a sub-mortgage broker in a regulated industry that is governed by a series of rules and requirements that if met then registration must be granted. Under this surface the Registrar is faced with an individual who made a number of errors twenty years ago and significant and material errors of judgement followed by a series of serious and intentional criminal acts ten years ago that have resulted in criminal convictions, time served in jail and a sentence that is not yet officially expired, again seeking registration in the said regulated field of sub-mortgage brokerage.

ANALYSIS

In his reply submissions, the Appellant points to a number of historical and social values that speak directly to the Appellant's personal situation at this time. I accept most of those submissions. Society does embrace those who have made mistakes and then rehabilitate themselves and productively re-integrate themselves into society as responsible, contributing citizens. Also a person has a right to earn a livelihood and many social safety nets exist to assist those who are unable to do so. Many other aids are provided by society to assist capable persons of becoming productive in an economic sense. However, unfortunately for the Appellant, when an individual seeks employment and licensing in a regulated field of endeavor, society empowers its governors, namely its elected officials, to offer reasonable protections to the public through the regulatory system of laws. Mortgage brokerage is a regulated area of endeavor. It involves large sums of money, sophisticated transactions, direct interaction with financial institutions - also highly regulated - and advisory and trust relationships with members of the public and business worlds. Rather than seeking employment or business opportunities generally, the Appellant has sought registration in a regulated field.

The Appellant raises a number of concerns regarding the jurisdiction of the Respondent Registrar. These are outlined in the three grounds for Appeal contained in the Notice of Appeal filed by the Appellant. They are also referred to as "Errors In Judgement" in the Appellant's Submissions with respect to the first two grounds of Appeal, namely, the Registrar basing his decision to refuse the application solely upon the Appellant's past criminal convictions, and exceeding his jurisdiction by imposing a period of ineligibility on the Appellant before he may reapply to become a sub-mortgage broker.

Section 4 of *The Mortgage Brokers Act* (the "Act") provides the circumstance under which the Registrar must register a suitable applicant:

"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.

The first and the central issue in this Appeal focuses on the exercise of the Respondent Registrar's discretion in determining whether the Appellant was suitable for registration and that the registration of the Appellant as a sub-mortgage broker would not be objectionable. The Act rests with the Respondent Registrar the responsibility to so determine those two matters. Inherent in that responsibility is a degree of discretion provided the Registrar acts both within his statutory jurisdiction and reasonably in the application of the duties imposed upon him.

The Record in this Appeal clearly indicates that a reasonably complete snapshot of the situation and circumstances of the Appellant was before the Registrar in the form of the exhibits and submissions. The decision of the Registrar indicates that considerable weight was given to the 2001 criminal convictions. However, the decision of the Registrar also clearly indicates that the Registrar reviewed all circumstances involving the Appellant. In fact, in determining that the Appellant was personally unsuitable to be registered as a sub-mortgage broker, the Registrar stated as much:

“After reviewing all of the circumstances, I am of the opinion that Pugliese is personally unsuitable to be registered as a sub-mortgage broker.”

The Registrar in his decision points out that the Appellant was thirty years of age and a mature adult when he engaged in the criminal conspiracy. The Registrar stated:

“Such consequences include the effect on future employment.”

This view echoes the finding of the Court when rendering sentence at the time of the criminal conviction. Mr. Justice Collver stated that:

“Notwithstanding Gino Pugliese's expressions of remorse, his involvement in cocaine distribution was hardly peripheral or fleeting.”

The criminal activity in which the Appellant participated was serious and must reasonably be expected to have a serious impact upon other aspects of his life, including applications for employment in a regulated field where a public official is mandated by law to determine issues of suitability and possible objectionable circumstances in the protection of the public.

I disagree with the Appellant's submission that the Registrar refused the application of the Appellant based solely on his past drug trafficking conviction. Rather, the decision under Appeal indicates that the Registrar considered all circumstances before him in the context of a process where the Appellant was granted the right to a hearing and chose a hearing by way of written submissions and the presentation of documentary materials.

With respect to the imposition of a period of ineligibility on the Appellant before he may reapply to become a sub-mortgage broker, it must be noted that the Registrar first determined that the Appellant's being under parole after conviction for a serious offence has a negative effect on his

personal and business reputation that results in his being unsuitable to be registered. The Registrar goes on to state:

“In addition, it is my belief that his proposed registration is objectionable because to register Pugliese would negatively impact the public and industry confidence in the Financial Services Sector.”

Having said that, a determination of whether to simply deny the application altogether or to offer some guidance as to when an application may be suitable becomes necessary. In this case, the Registrar chose to provide this guidance. There is, in my view, plenty of latitude for the Registrar in this regard, including precedent. A good example is the decision of the Commercial Appeals Commission’s decision in *Khosla v. Real Estate Council of British Columbia* [2000] B.C.C.O. No. 11 at Page 5 where the said Commission stated:

“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 would be on the applicant to reestablish themselves and, apart from simply ascertaining 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.”

Other authority, notably *In The Matter Of Dirk Rachfall* (a decision of the Registrar of Mortgage Brokers, hearing held November 4, 2003), the acting Registrar stated that:

“Similarly an applicant can not show that he is no danger to the public while he or she is still subject to a sentence. The applicant’s lack of transgression may be the result of state supervision rather than inherent suitability.”

I am in agreement with this view. It is another factor that must be considered by the regulatory body when determining suitability.

In the FST decision *Thomson v. The Superintendent of Real Estate* [2005] FST No. 05-011 at Page 5, the FST determined that a suspension, in that case, may not be lifted until at least five years from the date of the completion of a sentence, parole and/or probation and that the decision of the Superintendent, in that case, fit within the regulator’s discretionary powers. Clearly, in the exercise of his discretion in the case under Appeal, the Registrar could determine a time frame during which an applicant may not bring an application for registration as a sub-mortgage broker. This discretion fits within section 4 of the Act as well as the Guidelines for the mortgage broker industry in British Columbia referred to as a “good common sense document” by the Registrar in terms of assessing such things as suitability, objectionable characteristics and, in my view, time limits.

The Registrar has implicit jurisdiction to make those determinations provided that the determinations in the end are clear and unequivocal and do not offend a legal principle or rule of

law. In fact, to find otherwise could lead to uncertainty in the application process or to frivolous or repetitive applications by the same applicant.

With respect to the third and final ground for appeal, namely that the Registrar breached the duty of fairness owing to the Appellant by failing to give proper and adequate reasons addressing the substantial points raised in the Appellant's written submissions both in respect to jurisdiction and facts, it is my view that this ground for appeal also must fail. For the reasons stated above, it is clear to me that the Registrar considered all of the relevant circumstances presented to him in the written submissions. It is not necessary for the Registrar to provide exhaustive coverage of each and every exhibit, submission or written document in his decisions. It is, however, necessary for the Registrar to determine which evidence and circumstance he considers to be relevant and that this determination has resulted in a decision that is reasonable in the circumstances. In this case, the Registrar has accomplished that goal.

The FST is governed by the *Financial Institutions Act*. Section 242.2(11) of the *Financial Institutions Act* provides that the FST may: "...confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal."

The Appellant refers to the possible remedy of *certiorari*. A remedy as such as *certiorari* is not contemplated by the *Financial Services Act*. *Certiorari* necessarily involves an appeal body reexamining all or part of the actions of a lower tribunal when determining the jurisdiction of the lower tribunal in the given matter. The FST bases its appeal procedures on the Record, usually in written form, and does not re-hear or re-try the matter.

British Columbia legislation delegates regulatory authority to bodies with special expertise in professional and administrative areas. The Registrar of Mortgage Brokers is one such delegate. When conducting a hearing and making a decision of an administrative and regulatory nature, provided the same is done within the legislation and regulations establishing his authority, deference will be shown by the FST with respect to the findings of fact and determination of that authority. This does not mean that the determination in the form of a decision will not be overturned by the FST if the test for review, being one of reasonableness, is not met. Rather, following a review of the case presented to the Registrar, if the FST determines that the Registrar could not have reasonably made the determinations that he made including the decisions regarding timing for any new application for registration, then the FST is entitled by legislation to reverse or vary the decision or send the matter back for reconsideration as stated above. Numerous decisions of the FST have established this test, including the following: *Financial Institutions Commission v. Insurance Council of British Columbia and Branislav Novko*, FST – 05-008; *Financial Institutions Commission v. Insurance Council of British Columbia and Maria Pavicic*, FST – 05-009; and *Jagjit Singh Cheena v. Insurance Council of British Columbia*, FST – 05-010.

The FST has determined in the *Cheema* decision that the pragmatic and functional approach to judicial review is inapplicable to appeals by the FST under section 242 of the *Financial Services Act*. The requirement for clear and cogent evidence in the first instance is separate from the

standard that is applied on review. This analysis has been accepted by the FST as has the test of reasonableness to the review procedure involving appeals before the FST.

In this Appeal it is clear to me that the Registrar's decision was reasonable given the analysis of the accepted evidence and the determinations of fact set out in the Registrar's decision. It is my view that the Registrar's decision should stand.

CONCLUSION

For the reasons described above, the decision of the Respondent Registrar dated April 19, 2006 is confirmed by the FST.

It is my view that this Appeal has assisted somewhat in the development of the jurisprudence involving the FST appeal procedure, thus there will be no costs awarded in this matter.

Respectfully submitted this 5th day of September, 2006



Dale R. Doan LLB
Member Financial Services Tribunal

CORRECTION:

The FST has amended this decision to correct a typographical error. On page 9, the final sentence in the last full paragraph originally read:

This discretion fits within section 4 of the Act as well as the Guidelines for the mortgage broker industry in British Columbia referred to as a “good common sense document” by the Registrar in terms of assessing such things as suitability, objectionable characteristics and, in my view, time limits.

The decision now reads:

This discretion fits within section 4 of the Act as well as the Guidelines in the Real Estate Practice Manual referred to as a “good common sense document” by the Registrar in terms of assessing such things as suitability, objectionable characteristics and, in my view, time limits.

FST Deputy Registrar
September 7, 2006