

FINANCIAL SERVICES TRIBUNAL

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

BETWEEN:

ROBERT MATICK

APPELLANT

AND:

THE REGISTRAR OF MORTGAGE BROKERS

RESPONDENT

APPEAL DECISION

BEFORE

ROBERT J. HOBART

PRESIDING MEMBER

**DATE OF LAST
SUBMISSION:**

SEPTEMBER 8, 2006

APPEARING:

DEREK A. BRINDLE, Q.C.

FOR THE APPELLANT

LYNDA WRIGLEY

FOR THE RESPONDENT

INTRODUCTION

On June 1 2006, the Registrar of Mortgage Brokers (“Registrar”) released his decision in the matter of Mr. Robert Matick (“Matick”). The decision of the Registrar was the result of a hearing on November 17, 2005 and a number of written submissions from the respective Counsels for Matick and the Registrar received in December, 2006.

The matters under review were outlined in the Amended Notice of Recommended Orders and Opportunity to be Heard under Section 8 of the Mortgage Brokers Act that was issued on June 21, 2005. The amended Notice reported the following findings:

1. That Matick between February 5, 2003 and June 30, 2004 failed to provide conflict of interest disclosure statements in the prescribed form to his client borrowers and to their lenders, with respect to referrals made to him by his wife, Kim Matick, an employee of TD Canada Trust Group, as required by section 17.3 and 17.4 of the Act and section 13(1) of the Act’s regulations.
2. That Matick between February 2 and March 18, 2003 provided misleading Conflict of Interest Disclosure Statements ((FORM 10) to four (4) of his client borrowers, by listing Mortgage Intelligence as the mortgage broker when in fact Matick was registered as a sub-mortgage broker with mortgage broker Argus Estates (1983) Ltd.
3. That Matick, between March 19, 2003 and the present, was improperly registered as a sub-mortgage broker and employee of Mortgage Intelligence Inc., as his stated relationship with Mortgage Intelligence Inc. was that of an independent contractor and such registration is inconsistent with the definition of sub-mortgage broker in section 1 of the Act.
4. That Matick accepted and acted upon documents containing personal information from Canada Trust employees on several occasions during 2003 which he was not entitled to receive.
5. That Matick from on or about January 5, 2004 and the present, incorrectly represented to the Registrar of Mortgage Brokers that he was an employee of Mortgage Intelligence Inc. and was thus properly registered with the Registrar of Mortgage Brokers as a sub-mortgage broker when he was not an employee of Mortgage Intelligence Inc. and thus not properly registered with the Registrar of Mortgage Brokers.

It is noted that the Registrar did not proceed with findings 3 and 5 at the Hearing.

The amended Notice proposed the following orders:

1. Under section 8(1.1) of the Act, that Matick pay an administrative penalty of \$1,000 to be paid within 30 days.
2. Under section 6(9) of the Act, that Matick pay partial costs of the investigation in the amount of \$4,525 to be paid within 30 days.

3. Payment in accordance with the terms set out in this order is a condition of continued licensing. Failure to make the required payments will operate as a suspension of registration until such time as payment is made in full.
4. That Matick complete an ethics course which is acceptable to the Registrar of Mortgage Brokers within one (1) year of the date of this Order.

In his Decision, the Registrar found that Matick had breached Section 17.3 of the Act for failure to provide conflict of interest statements in the prescribed manner disclosing that Kim Matick had a direct or indirect interest in the transaction in a number of transactions with clients who had been referrals of Kim Matick (finding 1). The Registrar also found that Matick received confidential information which he was not entitled to receive and therefore conducted business in a manner prejudicial to the public interest (finding 4). The allegation with respect to misleading conflict of interest statements due to disclosing the incorrect mortgage broker (finding 2) was dismissed.

It was noted in the Decision that Matick had left the mortgage broker industry. In light of this information, the Registrar imposed the following penalties:

1. That Matick pay an administrative penalty of \$1,500; and,
2. Before being re-registered, Matick be required to take and pass the mortgage brokers course and an ethics course which is acceptable to the Registrar.

THE CHRONOLOGY OF EVENTS FOR THE APPEAL PROCESS

A Notice of Appeal was received by the Financial Services Tribunal ("Tribunal") on June 22, 2006. Two grounds for appeal were put forward:

1. The Respondent's finding that the Appellant breached s. 17.3 of the *Mortgage Brokers Act* by failing to provide to his client borrowers conflict of interest disclosure statements, in Form 10 disclosing that his wife, Kim Matick, had an interest in the client's mortgage transactions is unreasonable, is patently wrong and does not constitute a breach; and
2. The Respondent's finding that the Appellant's receiving documents from a Canada Trust employee and retention of those documents containing personal information which he was not entitled to receive is unreasonable, is patently wrong, and does not constitute a breach of the *Mortgage Brokers Act and Regulations*.

On June 26, 2006 the Registrar of Mortgage Brokers was advised of the appeal and asked to forward the record of the decision to the Tribunal. In a letter dated June 27, 2006, I was advised that I was the Tribunal member assigned to the appeal.

The record for the decision was received on July 10, 2006 and immediately forwarded to Counsel for Matick.

On July 20, 2006, an Amended Notice of Appeal was received from Counsel for Matick.

The amended grounds for appeal were as follows:

1. The Respondent's finding that the Appellant breached s. 17.3 of the *Mortgage Brokers Act* by failing to provide to his client borrowers conflict of interest disclosure statements, in Form 10 disclosing that his wife, Kim Matick, had an interest in the client's mortgage transactions is unreasonable, is patently wrong and constitutes an error in law;
2. The Respondent's finding that the Appellant's receiving documents from a Canada Trust employee containing personal information which he was not entitled to receive and thereby conducted himself in a manner prejudicial to the public interest, contrary to s. 8(1)(e) of the *Mortgage Brokers Act* is unreasonable and patently wrong.

The submission of Matick was received by the Tribunal on July 27, 2006 and immediately forwarded to Counsel of the Registrar.

On August 1, 2006, the Tribunal's Directives and Practice Guidelines were modified with respect to response times for both Appellants and Respondents. In addition, on August 3, 2006, Counsel for Matick advised that he would be on vacation until the end of August and requested an extension to Reply to the Registrar's submission until September 12, 2006. The Respondent's submission was received by the Tribunal on August 16, 2006 and forwarded to the Appellant. The Appellant's reply was received on September 8, 2006.

ANALYSIS

There are two issues to be analyzed in this appeal. Each will be discussed in turn.

(a) Did Matick fail to make proper disclosure to his clients with respect to referrals made to him by Kim Matick?

Section 17.3 of the *Mortgage Brokers Act* requires a mortgage broker to issue a conflict of interest disclosure form designated as Form 10 before completing a transaction with a borrower. In Form 10 the following requirement is imposed:

"Describe any direct or indirect interest that a related party or associate of the mortgage broker, as defined in the Mortgage Brokers Act Regulations has or, as currently contemplated, may acquire in the transaction for which the disclosure statement is provided"

It further implies in the Certification Statement of Form 10 that the disclosure statement is to contain no untrue statement and is not to omit to state a fact that is required to be stated.

The facts surrounding this issue do not appear to be in dispute:

- Kim Matick is the spouse of Robert Matick and is thus an associate of Robert Matick as per Regulation 13;

- Kim Matick is a mortgage lender with TD Canada Trust and on at least three occasions referred mortgage applicants who were not accepted by her employer to Robert Matick, who holds a sub-mortgage broker registration under the Act; and,
- Robert Matick signed the Form 10 Disclosure Statement as an authorized representative of the mortgage broker in all three cases. In none of the cases was it revealed that Kim Matick had any direct or indirect interest in the transaction.

Counsel for Matick argues that disclosure was not necessary for two reasons. First, it is argued that Section 17.3 and Form 10 apply to a mortgage broker and not a sub-mortgage broker. It clearly states that a mortgage broker is required to issue a Form 10 and the wording in Form 10 speaks of an associate or related party to the mortgage broker. Kim Matick is not an associate of the mortgage broker rather she is an associate of the sub-mortgage broker, Robert Matick. Therefore, there was no requirement to make any disclosure in Form 10.

Moreover, it is argued that Section 17.3 was never intended to apply to sub-mortgage brokers. The Act and regulations define and distinguish between a mortgage broker and a sub-mortgage broker assigning different rights and obligations to each. In some sections of the Act and regulations, there are references to “mortgage broker”. In other sections there are references to “sub-mortgage broker”. And finally, in some sections there are references to “mortgage broker and sub-mortgage broker” or references to “mortgage broker or sub-mortgage broker” when concurrent obligations are imposed on both. Section 17.3 is not one of these sections. Therefore, Section 17.3 was purposely intended to apply only to mortgage brokers.

Despite these strong arguments, I believe that Counsel for the Registrar has stronger arguments on this point. Counsel for the Registrar has argued that the Act defines sub-mortgage broker as “any person who actively engages in any of the things referred to in the definition of mortgage broker...” Therefore, where there are overlapping roles and obligations between the two, the extent of the overlap must be determined by the Registrar given the specific circumstances at hand.

This becomes a strong argument when the policy intent of Form 10 is considered. It is my opinion that Counsel for Matick has made an overly narrow interpretation of the policy intent of Form 10. He suggests that disclosure is required to inform the borrower about whether the sub-mortgage broker could be influenced by the associated party. This is not the intent of disclosure in this case. Kim Matick referred the borrowers to Matick. Clearly, the intent of Form 10 is to provide sufficient disclosure to borrowers so that they can judge the value of the referral advice they had been given by Kim Matick. If the advice is tainted because Kim Matick is receiving a direct or indirect benefit from the transaction the borrower may have some cause for concern and make alternative arrangements.

It does not seem logical or consistent that the Act and regulations would purposely require that possible conflicts of interest regarding a mortgage broker be subject to full disclosure, while at the same time exempting possible conflicts of interest regarding a sub-mortgage broker from disclosure. This would defeat the intent of Section 17.3 and Form 10.

The second reason why Counsel for Matick indicates that no disclosure was required is that Kim Matick did not have a direct or indirect interest in the transaction. It was argued that she did not receive a finder's fee for her referrals and that the finances of her and her spouse are completely independent of each other. It was submitted by Kim Matick that her and her husband maintain separate bank accounts, that she pays all household expenses, they have separate investments and assets, she has never received payments from her husband with the exception of small sundry items and shared entertainment expenses and that her husbands earnings are exclusively for his own use.

Counsel for the Registrar found this financial arrangement to be "incredible" The Registrar in his decision found the "evidence with respect to their financial arrangements is simply not believable given they have been married for 30 years". Moreover, he indicated that each party in a long term marriage has an interest in the success or failure of their partner. I believe the Registrar's findings in this regard to be reasonable.

Therefore, I am upholding the decision of the Registrar with respect to this finding.

(b) Did Matick accept and act upon documents containing personal information and as a result conduct his business in a manner prejudicial to the public interest?

With respect to this issue the following facts are not in dispute:

- Personal information pertaining to the affairs of Lana Hackl and personal information pertaining to the affairs of Arun Gupta were found in the files of Matick.
- This information was received by Matick from Leah Clark, an employee of Canada Trust.
- Leah Clark submitted that she had a verbal authorization from both Lana Hackl and Arun Gupta to transmit this information to Matick.
- Lana Hackl and Arun Gupta submit that such an authorization was never granted.

In my opinion, the conflicting evidence regarding whether permission was granted to Ms. Clark to forward the information to Matick, is irrelevant with respect to Matick.

The evidence suggests that Matick did not solicit or purposely collect this information, but rather that it was sent by Ms. Clark on her own initiative. Because Matick is in the business of attempting to arrange mortgages, it is logical that information received from Ms. Clark is sent to assist Matick in helping to arrange such mortgages. Because of this, it is reasonable for Matick to believe that all information he received from Ms. Clark would be with the permission of persons attempting to arrange mortgage financing. The fact that Ms. Clark may have erred in sending this unsolicited information has no direct bearing on Matick.

Further, the evidence suggests that Matick did not act on the information that he received. For these reasons, I believe it is not reasonable to conclude that Matick conducted business in a manner prejudicial to the public interest solely because he was in possession of the information in question.

Therefore, I am reversing the decision of the Registrar with respect to this finding.

PENALTY

There have been no submissions regarding penalty. However, as a result of the partial success of this appeal, it may be appropriate to re-examine the penalties that have been imposed by the Registrar.

Therefore, I am inviting Counsel for Matick and Counsel for the Registrar to make a submission on penalties within 10 days of the date of this decision. A further 5 days will be allowed for both Counsels to reply to the respective submissions.

DATED AT SURREY, BRITISH COLUMBIA, THE 13TH DAY OF OCTOBER, 2006.
FOR THE FINANCIAL SERVICES TRIBUNAL

ROBERT J. HOBART

PRESIDING MEMBER