FST07-036

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*,
R.S.B.C. 1996, c. 141 as amended (the "Act")

BETWEEN

FRANK IANTORNO AND EVERGREEN MORTGAGE CORPORATION dba GET ACCEPTANCE BC

APPELLANT

AND

THE STAFF OF THE REGISTRAR OF MORTGAGE BROKERS

RESPONDENT

APPEAL DECISION

BEFORE:	JOHN E. D. SAVAGE, Presiding Member
APPEARANCES:	GORDON PHILLIPS, for the Appellant KAREN HORSMAN, for the Respondent
DATE OF DECISION:	JUNE 15, 2007

I. Introduction

[1] By a letter dated April 19, 2007 Frank Iantorno ("Iantorno") and Evergreen Mortgage Corporation d.b.a. Get Acceptance BC ("Evergreen") initiated an appeal (the "Appeal") to the Financial Services Tribunal ("Tribunal") from decisions of the Registrar of Mortgage Brokers (the "Registrar").

[2] The decisions appealed are (1) the decision by the Registrar to publish a notice of hearing against Iantorno and Evergreen on the Financial Institutions Commission's web site (the "Notice of Hearing") which posting took place on March 21, 2007, (2) decisions made March 23, 2007[1] and April 11, 2007 not to publish with equal prominence, or at all, Iantorno and Evergreen's defences to the allegations.

[3] Iantorno and Evergreen (the "Appellants") seek orders that the posting of the Notice of Hearing be stopped or alternatively that their defence be posted with the Notice of Hearing and with equal prominence. Iantorno and Evergreen also requested that the hearing of this appeal proceed with the "greatest possible speed" as the publication of these allegations did or could involve damage to the reputation of the Appellants.

[4] In light of positions taken through a preliminary exchange of correspondence, the Tribunal invited the parties to make submissions concerning the standing of the staff of the Registrar to make submissions in the hearing of this appeal and the jurisdiction of the Tribunal to make the orders requested. The Tribunal invited the parties to make concurrent submissions on all of the issues in consideration of the Appellant's request that the matter proceed with all due dispatch. The Tribunal received the Appellants reply submission June 6, 2007.

II. Jurisdiction of the Tribunal

[5] The Registrar's staff originally objected to the appeal being heard on jurisdictional grounds. In its written submission of May 30, 2007 it withdrew its objection. Of course a statutory jurisdiction cannot be expanded by agreement or acquiescence: *Re Merry and City of Trail*, (1962) 34 D.L.R. (2d) 594.

[6] The fount of a statutory tribunal's jurisdiction is its governing statute and, in the case of the Financial Services Tribunal, the other statutes that expressly confer jurisdiction upon the Tribunal.

[7] The general jurisdiction of the Tribunal is set out in section 242.3 of the *Financial Institutions Act*, R.S.B.C. 1996, Chap. 141:

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[1] In the original letter of appeal the dates May 20, 2007 and May 23, 2007 appear but these date references are errors.

> 242.3 (1) In respect of this Act or any other Act that confers jurisdiction on the tribunal, the tribunal has exclusive jurisdiction to
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> (a) inquire into, hear and determine all those matters and questions of fact and law arising or requiring determination, and
> (b) make any order permitted to be made.

[8] The specific jurisdiction as it relates to this appeal is found in section 9 of the *Mortgage Brokers Act*, R.S.B.C. 1996, Chap. 313 which provides:

> 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.

[9] The "registrar" under the *Mortgage Brokers Act* is the Registrar and the "tribunal" is this Tribunal: see section 1, definitions of "registrar" and "tribunal". Under the *Mortgage Brokers Act* the Registrar licenses mortgage brokers, receives and investigates complaints, and after giving an opportunity to be heard, can suspend or cancel a mortgage broker's registration. In that context, there are a variety of potentially appealable determinations that might be made.

[10] It is a requirement of section 9(1) that there be a "direction, decision or order" of the Registrar. The phrase "direction, decision or order" is broad language and not restrictive. The *Mortgage Brokers Act* refers to these terms in different contexts[2]. In my opinion, by using the conjunction "or" the legislature has indicated that more than, for example, an order of the Registrar finally determining a disciplinary matter can be appealed.

[11] I agree with the submission that as general rule interlocutory appeals on issues of process should not be entertained separately from an appeal on the merits. In most cases this will restrict what might properly be appealed: *Assessment Commissioner of British Columbia v. Assessment Appeal Board* (1997) BC Stated Case 400, BCSC #3147/97, Victoria Registry.

[12] It is clearly not every direction or decision that should be subject to an interlocutory appeal, as the Registrar must be master of his own process and interlocutory proceedings can be disruptive and time consuming. Most such issues can be determined through an appeal in the ordinary course. In a case such as this, however, the subject matter of the appeal would become moot once a decision on the merits had been issued. Moreover, the issue is a novel one of general importance to registrants and the public, so it is appropriate that it be dealt with on a timely basis.

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[2] See, for example, section 7(1)(d), (e) and (f) for instances of the use of the term "direction" and section 6(2.1) and section 8(1.1) for examples of the use of the term "order".

[13] The Registrar has generally required that notices of hearing be published on the FICOM website. That requirement is, in ordinary parlance, a direction. That general direction was applied specifically to the Appellants. A copy of that direction was filed and forms part of the record[3] in this appeal (the "Direction"). There are also specific determinations of the Registrar that decline to remove the Notice of Hearing from the website and decline to publish the defence of the Appellants. Again, in ordinary parlance those are decisions of the Registrar (the "Decisions"). Those Decisions also form part of the record in this appeal.

[14] The other requirement of section 9(1) is that the person appealing be a "person affected" by the direction or decision. In my opinion Iantorno and Evergreen, being persons subject to the Direction and their applications being the subject matter of the Decisions, are persons affected by the Direction and the Decisions.

[15] The term "person affected" with reference to appeal rights has been interpreted broadly by our Court of Appeal, albeit in another context, but in my view similar reasoning would apply here: *Morguard Investments Limited et. al. v. Assessor of Coquitlam*, 2006 BCCA 26.

[16] While the matter here in issue might be considered interlocutory, because the point would become mute were the matter not to be decided now, I am persuaded that in the circumstances of this case an appeal lies and this Tribunal has jurisdiction to hear the appeal.

[17] III. Standing of the Staff of the Registrar

[18] A preliminary issue related to the hearing of the appeal is the standing of the staff of the Registrar (the "Staff") to make submissions in the appeal. Iantorno and Evergreen objected to the standing of the Staff to make submissions on the merits of the issues before me. The standing of the Staff to make submissions arises because of the principles enunciated by the Supreme Court of Canada in *Northwestern Utilities Limited v. City of Edmonton*, [1979] 1 S.C.R. 684.

[19] In *Northwestern Utilities* there was an appeal from a decision of the Alberta Public Utilities Board which, by the constitutive statute, was itself to be heard "upon the argument of any appeal".

[20] Estey J. distinguished between the party appealing and Board in holding that the right of the Board to be heard on an appeal from its own decision was necessarily a limited right, more in the nature of an appearance as *amicus curiae* but not as a full-fledged party. To find otherwise would "...place an unfair burden on an appellant who, in the nature of things, must on another day and in another cause

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[3] I have taken as the 'record' in this appeal the various documents referred to by the parties in their submissions. Neither party objected to documentary references in the submissions. While this is not the same as a normal record, it satisfies the requirements of section 242.2(6) as it collectively includes documentary evidence (the submissions), the decision and written reasons.

submit itself to the rate fixing activities of the Board" (p. 708). Of course, in this matter, the Registrar would hear the appeal on the merits in the same matter.

[21] The decision maker is, of course, given a clear opportunity in its reasons for decision to make the points it needs to make and "....it abuses one's notion of propriety to countenance its participation as a full-fledged litigant...in complete adversarial confrontation with one of its principals in the contest before the Board in the first instance" (p.709).

[22] The principles in *Northwestern Utilities* were recently applied by the B.C. Court of Appeal in *British Columbia (Securities Commission) v. Pacific International Securities Inc.*(2002), 2 B.C.L.R. (4th) 114 (C.A.), 2002 BCCA 421. The case arose because the Securities Commission made an order for particulars that was argued to be insufficient by Pacific International.

[23] The Securities Commission appeared on the appeal and Pacific International contended that the Commission was not entitled to appear on the appeal to defend the merits of its own decision. Although successful, the Court deprived the Securities Commission of its costs, finding that it "...ought not to have appeared before us to defend the merits of its decision" (paragraph 47).

[24] In finding against Pacific International, however, the Court found that it had not been prejudiced by the appearance of the Securities Commission. That is because the Executive Director or Chief Administrative Officer could have appeared and made the arguments that were made by the Securities Commission:

> "This conclusion does not mean that the Commissioner's decisions cannot be defended on their merits on appeal. Section 9 of the Act provides for the Commission to appoint an Executive Director as its chief administrative officer. In reality, it is the Executive Director that is the appellant's protagonist in this matter. That officer is a party to hearings under s. 161 (Policy Doc. No. 15-601, s. 2.1) and is the officer upon whom the Commission cast the duty of making full disclosure (s. 2.5(b)). As the Executive Director could have appeared on this appeal and made the arguments that were made by the Commission, the appellants have suffered no prejudice by the Commission's action..."(paragraph 48).

[25] In this case the foundation of the objection of Iantorno and Evergreen is that there is no standing for the staff to appear and argue the merits. In my opinion, however, the *Northwestern Utilities* and *British Columbia (Securities Commission)* cases provide such justification.

[26] Contrary to the submission of Iantorno and Evergreen, section 167(5) of the *Securities Act*, R.S.B.C. 1996, Chap. 418 made the Commission a respondent in an appeal in the *British Columbia (Securities Commission)* case as did the constitutive statute of the Alberta Public Utilities Board in the *Northwest Utilities*

case. The same applies here by virtue of section 242.2(10)(g) of the *Financial Institutions Act*. In none of these cases are the staff of these adjudicating officials parties to an appeal, yet the cases are authority for the proposition that while the officials may have party standing the staff, not the officials, should be addressing the merits.

[27] The matter for determination in those cases was, as here that, notwithstanding such statutory authorized presence in an appeal, whether the role of the decision maker is to be circumscribed by the common law principles enunciated by the Supreme Court of Canada in the *Northwest Utilities* case. Should the decision maker's role be limited and the role of defending the merits of an appeal be borne by administrative staff to avoid the unfair burden of Iantorno and Evergreen appearing as both an adversary to and the appellant before the Registrar in the same or related causes?

[28] Interestingly enough, in this case the submission of Iantorno and Evergreen is that they would have no objection to there being submissions from the Registrar. In such case, it is difficult to understand the objection to the submissions from the Staff, since there could be no prejudice in such case, to me receiving the submission from Staff as opposed to one from the Registrar. Iantorno and Evergreen will be appearing before the Registrar in the hearing on the merits, receiving the submission from the Staff rather than the Registrar prevents them from appearing as an adversary with the Registrar at this interlocutory stage.

[29] In the circumstances I find no merit to the objection of Iantorno and Evergreen to there being a submission from the Staff of the Registrar before me, based on the principles outlined in the *Northwest Utilities* and *British Columbia (Securities Commission)* cases.

IV. Is the Registrar Entitled to Publish Notices of Hearing?

[30] After briefly describing the sequence of events leading up to the appeal I will deal with the issues in sequence as ordered in the submissions of counsel.

A. The Notices of Hearing

[31] According to the record, in the ordinary course the Registrar determined to go forward with a hearing into the conduct of, inter alia, Iantorno and Evergreen. To that end a Notice of Hearing was prepared.

[32] The Notice of Hearing sets forth allegations made against Iantorno and Evergreen in some detail. It is comprised of 12 numbered paragraphs and on its face contains sufficient particulars to enable the parties to understand the complaints made against them. A copy of the Notice of Hearing is attached to this decision and marked as Schedule "A".

[33] Although the Notice of Hearing particularizes the complaints, the names of the complainants and other personal information are redacted from the document. The document is posted on the website of the Financial Institutions Commission. The Notice of Hearing was posted during an exchange of correspondence between the Appellants and legal counsel.

[34] The Appellants requested that the Notice of Hearing be removed or alternatively that a six point response be given equal prominence. Following the posting of the Notice of Hearing an appeal was launched against the Determination and Decisions noted above.

[35] It is apparent that the Appellants deny the allegations contained in the Notice of Hearing. A copy of counsel's letter requesting that their response be posted as well is attached to this decision and marked as Schedule "B". The letter contains a summary of the Appellant's defence to the allegations. Staff declined to post the Appellants summary of their defence.

[36] In the exchange of correspondence and submissions of counsel the Appellants say that their reputations are tarnished by the publication of the Notice of Hearing. There is nothing in the legislation that requires publication of the allegations made in this case. This can only be remedied by either the Notice of Hearing being removed from public purview or the Registrar publishing their defence.

[37] The Staff argue that the process is public and one starts from the premise that Registrars hearings are open to the public. Ultimately it follows from this, it is argued, that the Notices of Hearing are appropriately posted on the website.

B. Are Hearings before the Registrar Public Hearings?

1. The Open Court Principle

[38] The Staff argue that hearings before the Registrar are public hearings based on the basis of the "open court principle". To give the public access to such hearings it is a necessary corollary that they understand in some meaningful way the nature of the case before the Registrar. That function is served by publication of the Notice of Hearing that particularizes the complaint.

[39] The Supreme Court of Canada has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *Re Vancouver Sun*, [2004] 2 S.C.R. 332, 2004 SCC 43, at paragraph 23; *Attorney General of Nova Scotia v. MacIntyre*, [1982 1 S.C.R. 175, at page 187. It is a cornerstone of the common law, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paragraphs 21-22.

[40] The open court principle turns "not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), at page 438. Moreover:

> "Openness is necessary to maintain the independence and impartiality of courts. It is integral to the public confidence in the justice system and the public's understanding of the administration of justice....openness is a principal component of the legitimacy of the judicial process and why the parties at large abide the decisions of courts": *Re Vancouver Sun*, supra, paragraph 25.

[41] The principles underlying the open court principle have application to administrative tribunals exercising statutory powers where those powers affect the public interest. Few would argue that the pubic interest is not generally served by ensuring that government process is transparent, and therefore effective and fair.

[42] As noted in the submission of the Staff, some statutes speak directly to the issue of whether a hearing process is to be public or private. If a statute is silent it is a matter of interpreting the legislative intent from the statute as a whole.

2. The Presumption of Public Proceedings

[43] In *R. v. Tarnopolsky, ex parte Bell*, [1970] 2 O.R. 672 the Ontario Court of Appeal held that as a general rule if the statute is silent then the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them in camera. Although reversed on other grounds ([1971] S.C.R. 756), the Supreme Court of Canada did not impugn this statement of the general rule which has other support: Blake, *Administrative Law in Canada*, 4th Ed., 2006 (Butterworths) at page 48.

[44] In *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R. (4th) 438 (B.C.C.A.), the B.C. Court of Appeal interpreted the public nature of assessment together with statutory silence in the *Assessment Act* to mean that the Assessment Appeal Board has no jurisdiction to hold proceedings in camera, especially in the face of express provisions in many British Columbia statutes at that time such that "... where the legislature has seen fit to permit boards to hold proceedings in camera, it has expressly conferred the power..." (paragraph 45).

[45] In my opinion, the open court principle together with statutory silence raise the presumption that hearings are to open to the public, subject only to any necessary inference to be derived from the governing legislation.

3. The *Mortgage Brokers Act*

[46] The provisions of the *Mortgage Brokers Act* are described in detail, albeit in another context, in *Cooper v. British Columbia*, [2001] 3 S.C.R. 537, 2001 SCC 79.