

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER of the *Mortgage Brokers Act*, R.S.O. 1990, Chapter M. 39
(the "Act");

AND IN THE MATTER OF the Registration of 894182 Ontario Limited c.o.b.
as VR Mortgages ("Applicant")

AND IN THE MATTER OF a Hearing pursuant to subsection 7 (2) of the Act

BETWEEN:

VR MORTGAGES

Appellant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin H. H. McNairn,
Vice Chair of the Tribunal and Chair of the Panel

Ms. Martha Milczynski,
Chair of the Tribunal and Member of the Panel

Ms. Kathryn M. Bush
Vice Chair of the Tribunal and Member of the Panel

APPEARANCES: For the Appellant:

Mr. Al Ladha
with written submissions by Mr. Jack S. Lambert

For the Respondent:

Mr. Joe Nemet

HEARING DATE: March 7, 2001

MAJORITY REASONS FOR DECISION

Nature of Application

The Applicant is a corporation: 894182 Ontario Limited c.o.b. VR Mortgages (the "Applicant") which applied to the Superintendent of Financial Services (the "Superintendent") in June, 2000 for registration as a mortgage broker under the provisions of the *Mortgage Brokers Act*, R.S.O. 1990, c. M. 39 (the "Act").

By Notice of Proposal dated November 27, 2000 (the "Notice of Proposal"), the Director of the Licensing and Enforcement Division of the Financial Services Commission of Ontario, acting by way of delegated authority from the Superintendent, proposed to refuse to register the Applicant on the grounds that the Applicant's sole active officer and director did not meet the educational and work experience requirements set out in section 4 of Regulation 798 under the *Act*.

The Applicant requested a hearing before the Financial Services Tribunal (the "Tribunal") and sought an Order directing the Superintendent to register the Applicant. For reasons set out below, the Application is dismissed.

Facts

The Applicant submitted its application for registration as a mortgage broker dated June 25, 2000 listing Amin Haji and Fatima Haji as the two shareholders, directors and officers of the Applicant. Fatima Haji is not involved in the business; Amin Haji is the only active officer and director of the Applicant.

In March of 1990, Mr. Haji had successfully completed the examination for the educational course sponsored by the Ontario Mortgage Brokers Association. The Applicant was registered as a mortgage broker from 1990 to 1995. The last registration of the Applicant, however, expired in June of 1995. Mr. Haji left the mortgage brokering business in 1995 and did not renew the registration of the Applicant as a mortgage broker. Neither the Applicant nor Mr. Haji has been registered as a mortgage broker since June of 1995.

During the five years that the Applicant was registered as the mortgage broker, the Ministry of Finance, which was responsible for the regulation of mortgage brokers at the time, received no complaints regarding the Applicant or Mr Haji with respect to any aspect of the mortgage brokering business they carried on.

Since April, 2000, Mr. Haji has been working with CYR Mortgages and Investments Corporation, a registered mortgage broker. In that capacity, he has successfully arranged

a number of mortgages. Subsequently, in June, 2000 Mr Haji sought to register the Applicant company as a mortgage broker.

The Notice of Proposal in respect of the Application to register the Applicant proposed to refuse to register the Applicant as a mortgage broker on the grounds that none of the Applicant's active officers or directors met the educational or work experience requirements set out in section 4 of Regulation 798 under the Act.

Section 4 of Regulation 798 provides as follows:

4. (1) An application for registration or renewal of registration shall not be granted unless,

- (a) In the case of an individual applicant, he or she has successfully completed an educational program approved by the Superintendent relating to the business of mortgage brokers during the two years preceding the application;

...

- (c) In the case of a corporate applicant, every active officer and director of the corporation has successfully completed an educational program referred to in clause (a) during the two years preceding the application;

4. (2) Subsection (1) does not apply in respect of an individual applicant ... or an officer or director of a corporate applicant if the individual applicant ..., [or corporate] officer or director,

- (a) has successfully completed an educational program referred to in clause (1)(a) at any time preceding the application; and
- (b) in the two years preceding the application,
 - (i) actively engaged in business as a mortgage broker or as an ... officer or director of a mortgage broker, or
 - (ii) was employed or authorized to arrange or deal in mortgages on behalf of a mortgage broker

...

The Applicant filed a Request for Hearing dated December 7, 2000 with the Tribunal. At the hearing before the Tribunal pursuant to that Request, the representative for the Applicant conceded that Mr. Haji, as the sole active officer and director of the Applicant, had not in the two years preceding the application, completed any educational program approved by the Superintendent relating to the business of mortgage brokers. It was also undisputed that Mr. Haji had not been employed or authorized to arrange or deal in mortgages on behalf of a mortgage broker in the two years preceding the application. The representative for the Applicant, however, argued that the Applicant was in substantial compliance with the requirements for registration as a mortgage broker and that it would not be inconsistent with the object of those requirements to register the Applicant given the experience and clean record of the Applicant and Mr. Haji in their conduct of the mortgage brokering business in the past.

Counsel for the Superintendent maintained that the Superintendent had no discretion to register the Applicant because full compliance with section 4 of Regulation 798 could not be established.

At the conclusion of the hearing, the Tribunal invited the parties to make further submissions, in writing, on the following questions:

- Is the Applicant entitled to be registered as a mortgage broker by virtue of subsection 5(1) of the Act, notwithstanding any failure to comply with section 4 of Regulation 798?
- Is section 4 of Regulation 798 *intra vires* or *ultra vires*, ie. is it within or outside the powers of the Lieutenant Governor in Council to make Regulations under the Act

Analysis and Determination

The test for whether or not a regulation is valid was set out in the written submissions of counsel for the Superintendent. In the case of *Re: Metropolitan Toronto School Board et al and the Minister of Education et al* (1986) 54 O.R. (2d) 458 (H.C.), Mr. Justice Steele sets out the test for determining the validity of a regulation as follows:

1. Authority must be found within the enabling statute;
2. If it is one that is reasonably within the objects and purposes of the statute, it cannot be struck down as invalid unless it conflicts with an explicit provision of any applicable statute;
3. It cannot amend or alter the statute.

In a recent decision of the Ontario Divisional Court, *Alpha Laboratories v. Ontario*, [1999] O.J. No. 552, the court held that one must consider the following criteria:

1. the enabling statute must authorize or grant clear regulation making power that is wide enough to encompass the subject of the regulations;
2. the wording of the regulations themselves must be clear and unambiguous;
3. the intent of the enabling statute determines the extent of the regulation making power and that power may only be exercised within the limits as set by statute.

In our view, on plain reading of the statute and regulation, and having regard to the purposes of the Act, section 4 of Regulation 798 is *intra vires* the Act. The provisions of the Act relating to registration (section 5) and the Act's regulation making authority (section 33) both expressly and clearly provide that the Lieutenant Governor in Council may make regulations that prescribe the terms, conditions and requirements of becoming a registered mortgage broker in Ontario. The purpose of the Act is to protect the public (both lenders and borrowers in a mortgage transaction) and set certain standards for registration for those persons engaged in the business of mortgage brokering. Prescribing educational and work experience requirements that must be satisfied before an application for registration is approved by the Superintendent fall squarely within these purposes.

Section 5 of the Act sets out as follows:

5. (1) An Applicant is entitled to registration or renewal of registration by the Superintendent except where,
 - (a) having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of the business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business or,

- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations; or
- (e) the applicant fails to comply with sections 8 or 9, as the case may be. [sections 8 and 9 impose Canadian residency requirements on the owners of a mortgage brokering business]

Subsection 5(1) of the Act must be read in conjunction with subsection 5(2) of the Act, which provides:

5. (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or Superintendent or prescribed by the regulations. [emphasis added].

Section 33 of the Act enables the Lieutenant Governor in Council to make regulations, including regulations:

- (b) governing applications for registration or renewal of registration and prescribing terms and conditions of registration.

An applicant cannot be registered as a mortgage broker under the Act unless the requirements of subsections 5(1) and 5(2) of the Act are met or satisfied. Any entitlement to registration referenced in subsection 5(1) of the Act is thereby, pursuant to subsection 5(2) of the Act, expressly “subject to” or conditional upon any terms and conditions prescribed or set out in the regulations. We reject the contention that subsection 5(2) of the Act is intended to authorize only the imposition of “conditions subsequent” to registration. Nothing in subsection 5(2) expressly limits its application to conditions subsequent. Further, a distinction between conditions precedent and subsequent would not advance the purposes of the Act. The educational and work experience requirements prescribed by section 4 of Regulation 798 are terms and conditions of registration which the Lieutenant Governor in Council is expressly authorized to promulgate by way of regulation, as long as they come within the terms of subsection 5(2) of the Act. In our view, there can be no doubt that they do.

Accordingly, we find no contradiction between the requirements or provisions of the Act and those of the Regulation.

Consequently, the Tribunal finds that:

- (a) the educational and work experience requirements of section 4 of Regulation 798 are *intra vires* the Act and valid; and
- (b) the Applicant does not meet the requirements for registration under the Act and Regulation.

Order

The Tribunal orders that the application be dismissed.

Dated this 5th day of July, 2001.

"Martha Milczynski"
Martha Milczynski
Chair of the Tribunal and Member of the Panel

"Kathryn M. Bush"
Kathryn M. Bush
Vice Chair of the Tribunal and Member of the Panel

DISSENTING REASONS

1. Nature of Application and Facts

I agree with and adopt, for the purposes of these reasons, the description of the nature of the application in this matter and of the relevant facts that are set out in the majority reasons.

2. Analysis

In my view, the determination of whether this Tribunal should direct the Superintendent to carry out her proposal to refuse to register the Applicant as a mortgage broker or should direct her to refrain from carrying out that proposal turns on the answers to the questions that were posed to the parties at the conclusion of the hearing. I will, therefore, deal with those questions in turn.

(a) The Effect of Subsection 5(1) of the Act as Read with Section 4 of Regulation 798

Subsection 5(1) of the Act provides as follows:

5. (1) An applicant is entitled to registration or renewal of registration by the Superintendent except where,
- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

- (c) the applicant is a corporation and,
 - (i) having regard to its financial position it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations; or
- (e) the applicant fails to comply with section 8 or 9 as the case may be. [Sections 8 and 9 impose Canadian residency requirements on the owners of mortgage broker businesses.]

Although subsection 5(1) is not expressly subject to subsection 5(2), the potential application of the latter subsection needs to be considered in the context of this case. It provides as follows:

5. (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or the Superintendent or prescribed by the regulations.

Subsection 6(1) confirms the authority of the Superintendent to refuse to register an applicant where, in her opinion, the applicant is disentitled to registration under section 5.

There was no suggestion in this case that any of the exceptions to the entitlement to registration, contained in clauses (a), (b), (c), (d) or (e) of subsection 5(1), have any application. Although none of those exceptions applies, can subsection 5(2) be taken to add an additional exception from an applicant's entitlement to registration as a mortgage broker under section 5(1)? If the language of subsection 5(2) was intended to have this effect, one would expect to find it in subsection 5(1) in the form of an excepting clause or to find an express qualification in subsection 5(1) to the effect that it is subject to subsection 5(2) (compare subsections 5(3), 6(1), 6(2), 8(1) and 16(2) of the Act, each of which is expressed to be subject to another subsection or section of the Act). In any event, subsection 5(2) relates to terms and conditions to which a registration is subject, which would suggest that it is addressing the attachment of terms and conditions to registration when it is granted or after it is granted, rather than the imposition of pre-conditions to registration. In other words, it deals with conditions subsequent as opposed to conditions

precedent to registration. This interpretation is reinforced by several features of subsection 5(2), namely:

- its extension to terms and conditions consented to by the applicant, which would be redundant if those terms and conditions were to refer to pre-conditions to registration (an applicant for registration could agree to satisfy a pre-condition to registration without any need for statutory authority to that effect, but a statutory basis would be required to ensure that a condition subsequent to registration that was simply consented to by an applicant was enforceable);
- its extension to terms and conditions imposed by the Tribunal given that the relevant authority of the Tribunal, under subsection 7(5) of the Act, is to "attach ... terms and conditions...to the registration" [emphasis added] of a mortgage broker, following a hearing; and
- its extension to terms and conditions imposed by the Superintendent, given that the relevant authority of the Superintendent, under subsections 5(3) and 7(1) of the Act, is to "impose terms and conditions on the registration of an applicant or registrant" [emphasis added], subject to providing the applicant or registrant with the opportunity for a hearing.

There would be no need for a hearing specific to the last two situations if they involved an objection by the applicant to a particular pre-condition to registration. In that case, if the Superintendent were to insist on satisfaction of the pre-condition, she would presumably propose to deny registration and the applicant would then be entitled to challenge the imposition of the pre-condition through the hearing that the Act provides, in section 7, in the event that the Superintendent proposes to deny registration. In other words, there would be no need for the Act to provide for a hearing specific to the imposition of a pre-condition to registration. However, there is a need to provide for a hearing specific to the imposition of a condition subsequent to registration; otherwise the applicant or registrant would be denied the opportunity to challenge any such condition since the Superintendent would not have proposed to refuse to grant registration and, therefore, a hearing requirement would not have been triggered by that event.

Subsections 5(3) and 7(1) of the Act state that the authority of the Superintendent extends to imposing terms and conditions on the registration of a registrant, as well as on the registration of an applicant, thereby indicating that the Superintendent is entitled to impose conditions on a mortgage broker registration after the stage of application for registration or application for renewal of registration.

Since, in my view, subsection 5(2) does not qualify or modify an applicant's entitlement to registration under subsection 5(1), I am then left with a contradiction between subsection

5(1) of the Act and section 4 of Regulation 798. Section 5(1) of the Act gives an applicant an entitlement to registration except in the situations described in clauses (a) to (e), none of which relates to the case of an applicant failing to satisfy any educational or work experience requirements established by regulation. On the other hand, section 4 of Regulation 798 says that an application for registration shall not be granted unless certain educational or work experience requirements established by that section of the Regulation are satisfied.

Ordinarily an Act must prevail over inconsistent or conflicting regulations although, where possible, an interpretation should be preferred that permits reconciliation of the

two (see *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1, at 22-23 (S.C.C.)). As will be evident from the foregoing discussion, I am unable to reconcile subsection 5(1) of the Act with section 4 of Regulation 798 and, therefore, am bound to give precedence to subsection 5(1) of the Act. Consequently, the Applicant is entitled, in my view, to registration as a mortgage broker by virtue of the latter subsection.

(b) The Validity or Invalidity of Section 4 of Regulation 798

Section 33 of the Act enables the Lieutenant Governor in Council, i.e. the Cabinet, to make regulations doing a number of things, including;

- (b) governing applications for registration or renewal of registration and prescribing terms and conditions of registration;

This is the basis, if any, for the provisions of section 4 of Regulation 798.

In order to discern precisely what is meant by "terms and conditions of registration," as used in section 33 of the Act, I look to the context in which the expression is used, in accordance with the principles of statutory interpretation. This takes me to the other provisions of the Act using a similar expression. Subsection 5(2) is particularly instructive because it makes registration as a mortgage broker potentially subject to "terms and conditions," including those "prescribed by the regulations." The "terms and conditions of registration ... prescribed by the regulations" must mean those the terms and conditions prescribed by the regulations made pursuant to clause (b) of section 33 of the Act. As noted above, I would interpret subsection 5(2) as referable to terms and conditions that may be attached to registration when it is granted or after it is granted rather than pre-conditions to registration. To be consistent with subsection 5(2), clause (b) of section 33 should be read as authorizing regulations prescribing the terms and conditions to which a new or existing registration of a mortgage broker may be made subject. Section 4 of Regulation 798 does not fall within that authority as it prescribes pre-conditions to the granting of registration. Section 4 is, therefore, *ultra vires*, or beyond the powers conferred by the enabling legislation, namely those contained in clause (b) of section 33 of the Act, and is without any force or effect.

Consequently, I conclude that even if there were no irreconcilable conflict between subsection 5(1) of the Act and section 4 of Regulation 798, the latter section cannot be invoked by the Superintendent to deny the registration of the Applicant as a mortgage broker since it is invalid.

3. Conclusion

As there is no apparent impediment under section 5(1) of the Act to the registration of the Applicant as a mortgage broker, I would direct the Superintendent to refrain from carrying out the proposal contained in the Notice of Proposal and direct her to register the Applicant as a mortgage broker.

Dated this 5th day of July, 2001.

“Colin H.H. McNairn”

Colin H. H. McNairn

Vice Chair of the Tribunal and Chair of the Panel