

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”), in particular sections 8, 14 and 21, and the Mortgage Brokers and Agents Licensing Regulation, R. Ont. 409/07 (the “Regulation”), in particular, section 10;

AND IN THE MATTER OF Mr. Alexandre Jose Alves;

AND IN THE MATTER OF a request for hearing before the Financial Services Tribunal (the “Tribunal”) pursuant to subsection 21(3) of the Act.

BETWEEN:

ALEXANDRE JOSE ALVES

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Denis Boivin
Member of the Tribunal and Chair of the Panel

Ms. Lily Harmer
Member of the Tribunal and Member of the Panel

Mr. Shiraz Bharmal
Member of the Tribunal and Member of the Panel

APPEARANCES:

Mr. Arun Maini, for the Applicant
Ms. Larissa Easson, for the Superintendent of Financial Services

HEARD:

September 17, 2008

REASONS FOR DECISION

A. The Background

On July 26, 2007, the Applicant, Mr. Alexandre Jose Alves, was arrested at his workplace and charged with 7 offences under the *Criminal Code*, R.S.C. 1985, c. C-46 (the “Code”). These accusations stemmed from events that occurred on April 14, 2007, and July 25, 2007. The charges laid against the Applicant were: assault causing bodily harm, assault, forcible confinement, theft under \$5,000, two counts of mischief in relation to property under \$5,000, and criminal harassment.

On March 26, 2008, the Applicant submitted an application in electronic form to the Superintendent of Financial Services (the “Superintendent”), pursuant to the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the “Act”), for a mortgage broker’s licence, in particular, to work as a Principal Broker for the brokerage 2102602 Ontario Corp. One of the questions in Step V of the application asked the following: “Have you ever pleaded guilty or been found guilty of an offence under any law of any province, territory, state or country, or are you currently the subject of any charges?” The Applicant answered “no” to this question.

On April 14, 2008, a representative of the Financial Services Commission of Ontario (the “Commission”) sent a letter to the Applicant asking for explanations regarding the July 2007 charges and for explanations for his failure to disclose them in his “application for licensing under the MBLAA”.

The Applicant sent a brief response on May 8, 2008 but did not provide the information requested. Five days later, on May 13, 2008, the Applicant pled guilty and was convicted of three offences: assault, criminal harassment and mischief. Following a joint submission from the Crown and the Applicant’s defence attorney, Mr. Maini, the presiding judge imposed a sentence that included a two-month custodial sentence in his residence (“house arrest”) and probation for a 22-month period. On June 19, 2008, the Applicant sent a second letter to the Commission in which he provided further details in response to the April 14, 2008 letter from the Commission.

On June 24, 2008, the Superintendent issued a Notice of Proposal (the “NOP”), pursuant to sections 14(2) and 21 of the Act, to refuse the Applicant’s mortgage broker’s application. The Reasons for Proposal (the “Reasons”) attached to the NOP give two grounds for the Superintendent’s belief that the Applicant is not suitable to be licensed under the Act:

- (a) His past conduct affords reasonable grounds for the belief that he will not deal or trade in mortgages in accordance with the law and with integrity and honesty.
- (b) He made a false statement or provided false information to the Superintendent in his application for a licence.

These grounds correspond to “prescribed circumstances” 1 and 3, respectively, as they are enumerated in section 10 of the Mortgage Brokers and Agents Licensing Regulation, 409/07 (the “Regulation”). According to this provision, the Superintendent is “required” to consider these circumstances in determining whether an individual is “not suitable to be licensed” as a mortgage broker or agent.

On July 4, 2008, the Applicant requested a hearing before the Tribunal pursuant to subsection 21(3) of the Act. In his “Request for Hearing” form, the relief sought by the Applicant is twofold: 1) an order directing the Superintendent to refrain from carrying out its NOP; and 2) an order granting him a licence as a mortgage broker, in particular as Principal Broker for the corporation listed in his March 2008 application.

During the Hearing, held on September 17, 2008, counsel for the Applicant requested a subsidiary form of relief, namely, a “suspension” of the licence for a period that the Tribunal considers appropriate in view of the circumstances. However, the Tribunal cannot suspend the Applicant’s licence, as he has been unlicensed since July 1st, 2008. Properly characterised, the subsidiary relief requested by his counsel is an order granting the Applicant’s licence “as of” a future date fixed by the Tribunal.

B. The Issues

The parties participated in a Prehearing Teleconference on July 25, 2008 (the “PHC”). During this PHC, two general issues were identified:

- (a) Are there reasonable grounds to believe that the Applicant is not suitable to be licensed as a mortgage broker within the meaning of section 14 of the Act and section 10 of the Regulation, having regard to:
 - i. The Applicant’s past conduct, in particular his conviction of three offences under the *Criminal Code* on May 13, 2008?
 - ii. A false statement made or false information provided to the Superintendent with respect to the Applicant’s application for a mortgage broker licence, in particular a statement to the effect that he was not the subject of criminal charges at the time of the application?
- (b) If the Applicant is suitable to be licensed, should any conditions be imposed by the Tribunal on said licence?

For reasons that follow, the Tribunal concludes that the past conduct of the Applicant, coupled with the false statement made in his application, provide reasonable grounds to believe he is unsuitable to be licensed as a mortgage broker at this point in time.

C. The Evidence

At the commencement of the Hearing, the parties submitted a three-page Agreed Statement of Facts (the “ASF”) and an Agreed Book of Documents (the “ABD”)

containing 34 documents. Counsel for the Superintendent called one witness, Detective Latter of the Toronto Police. Mr. Maini called one witness, the Applicant.

The documentary and viva-voce evidence before the Tribunal falls under three categories, namely, evidence pertaining to the past conduct of the Applicant, evidence pertaining to the false statement made on his application for a mortgage broker's licence, and evidence of his good character and competence.

1. Past Conduct

The circumstances surrounding the offences for which the Applicant was charged on July 26, 2007, and convicted on May 13, 2008, are described as follows in the ASF:

Alves and his then-girlfriend, LR, began dating in the summer of 2006. The relationship was a rocky one. On April 14, 2007, Alves and LR attended a wedding. During the course of the evening, Alves became jealous when his girlfriend spoke to some other men. The two left the wedding. An argument ensued in the car and he pushed her head toward the door. LR struck out at Alves and he forced her head down to her feet while telling her to stop. She struck out [at] him again and he shoved her down into the dashboard, causing her nose to bleed profusely. They continued arguing and fighting and the accused then grabbed her by the back of the head and rammed her head several times into the passenger's side window with enough force that the victim was afraid that the glass would break. He then stopped the car and let her out; he threw her purse on the ground and drove away. She suffered from a sore neck, and sustained some bruising on her nose that lasted for a week.

On July 25, 2007, they met in order to talk. He picked her up and an argument began when she revealed that she was still going on a trip to Spain the next day. (Following the resumption of their relationship two months earlier, she had agreed to cancel the trip which she had booked while they were broken up). Alves became very angry and began driving to [his] house while she was in the car. He threatened to kidnap her and keep her so that she would miss her flight. When he said this to her she laughed because she did not take him seriously at first. However, when they arrived at his apartment LR became scared and tried to leave; but Alves grabbed her arm and prevented her. He swore [at] her and told her to get inside his house. When inside the house, the complainant sat on the couch while Alves continued to shout obscenities at her. He took her cell phone from her purse and smashed [it] against the wall until it broke. He then removed her credit cards from her purse and cut them up. He then told her to get out and she fled the apartment and got into a cab. While in the cab, she observed Alves in his car beside her, honking and yelling obscenities at the cab driver for a short while.

Subsequently, LR became aware that Alves had sent vulgar messages about her to at least two contacts stored in her cell phone, as he now had her phone's SIM card. One of the contacts who received a vulgar message was her boss. He called the police out of concern for her safety.

Detective Latter testified over the objection of counsel for the Applicant. He testified that, on July 26, 2007, he telephoned the Applicant on two occasions in order to determine whether the Applicant would voluntarily turn himself in, or whether the police had to arrest him. The decision to lay charges against the Applicant had already been made prior to these calls. The person at the receiving end of the phone-call hung up on both occasions. Accordingly, Detective Latter instructed police officers to attend the

Applicant's workplace in order to arrest him. Detective Latter testified that, as a general rule, he recommends the detention of an accused in cases involving domestic violence. Detective Latter also testified that, in this specific case, he considered the seriousness of the charges and the span of time involved between both incidents in making this recommendation. As noted in the ASF, the Applicant was detained overnight and released on bail conditions that included residing with his parents, being out only in the company of one of his parents, and a curfew.

During the month of December 2007, the Applicant was assessed by Dr. Rauf Sirman, a psychiatrist retained by Mr. Maini in the context of the criminal proceedings involving his client. In his written report, dated January 14, 2008 (ABD – T6), Dr. Sirman reviews the Crown synopsis given to him as well as the answers provided by the Applicant during their preliminary and follow-up interviews. In his expert opinion, the Applicant suffers from "Chronic Anxiety and Panic Disorder", a condition that began as early as May 2004 and for which the Applicant had been prescribed the medication Paxil. Dr. Sirman notes that it is not uncommon for individuals suffering from anxiety to be "vulnerable to fluctuations in interpersonal relationships which they may experience as being toxic" (p. 6). On this basis, Dr. Sirman expresses the clinical opinion that the Applicant's "anger and aggression emerged in the setting of the hostile and codependent, ambivalent and highly unpredictable relationship with the complainant" (p. 6). The anger expressed by the Applicant, according to Dr. Sirman, was "isolated and characteristic to their particular relationship" (p. 6). In conclusion, Dr. Sirman expresses the clinical opinion that the Applicant does not pose a risk to the complainant or to anyone in society at this time. He recommends ongoing treatment with Paxil at a daily dose of 20 mg.

On May 13, 2008, the Applicant pled guilty and was convicted of three offences: assault, criminal harassment and mischief (ABD – Tabs 12 & 14). The other four charges were withdrawn by the Crown in exchange for the guilty plea. Following a joint submission by the prosecutor and the Applicant's attorney, the presiding judge imposed the following sentence for each of the convictions, to run concurrently: 1) a two-month custodial sentence to be served in his residence (i.e. "house arrest"); 2) an order to not associate or communicate directly or indirectly with the complainant or her son, and to not come within 100 metres of certain addresses, including her residence and place of work; 3) a 22-month probation order, to begin after the custodial sentence and with certain conditions, including the completion of counselling with an accredited spousal abuse intervention program; 4) an order under section 487.051 of the Code to provide DNA samples; 5) an order under section 109 of the Code to abstain from possessing firearms or weapons for 10 years; and 6) an order to perform 50 hours of community service.

During sentencing, the presiding judge observed that the Applicant had apologised to the victim, that he was sincere in his apologies, and that he appeared to understand the seriousness of the matter. Likewise, during his testimony before the Tribunal, the Applicant expressed remorse for his past conduct and said he accepted the consequences of his actions.

The Applicant's house arrest ended on July 13, 2008. His period of probation will expire in May 2010. There is no evidence that the Applicant has breached any of the terms or conditions of his sentence.

2. *False Statement*

On March 26, 2008, eight months after the charges had been laid against the Applicant and approximately six weeks before entering his guilty plea, he submitted an application in electronic form to the Superintendent for a mortgage broker's licence under the Act (ABD – Tab 7). During the Hearing, he testified that his life was “upside down” during this period. One of the questions in Step V of the application asked the following:

Have you ever pleaded guilty or been found guilty of an offence under any law of any province, territory, state or country, or are you currently the subject of any charges?

The Applicant answered “no” to this question. In Step VII of the electronic application process, the Applicant was asked to confirm the information provided throughout the application, including the answers given in Step V. The seven questions of Step V are reproduced again, in their entirety, along with the “no” answers provided by the Applicant. At the end of Step VII, there is a confirmation button that the Applicant clicked in order to submit his application. Above this button, the following statements appear in bold character:

Providing false, misleading or incomplete information in this application and/or any attachments requested may be sufficient grounds to reject the application or to revoke a licence, or to result in your prosecution.

By clicking the “Confirmed” button below, you swear that you have truthfully answered all questions contained within this electronic application.

On April 14, 2008, a representative of the Commission (Peter Burston) sent a two-page letter to the Applicant (ABD – Tab 8). This letter begins as follows: “Your application for a Licence as a Mortgage Broker is under review and it has come to our attention that you may have been charged with, or convicted of, one or more offences described below”. This opening sentence does not specifically refer to the Applicant's electronic application of March 26. However, the third paragraph is more explicit in this respect:

Your application to be licensed under the Mortgage Brokerages, Lenders and Administrators Act (MBLAA), and any application for renewal under the Mortgage Brokers Act, requires you to disclose whether you are the subject of charges or whether you have been convicted of any offences. **Your application for licensing under the MBLAA indicated a negative response to the following question...** [emphasis added]

Following this paragraph, Mr. Burston asks for a “full explanation” regarding the offences, “including specific details of the circumstances surrounding the offence, location and date of the findings, the police force involved and the court disposition if applicable”. The Applicant is also asked to provide reasons for his failure to disclose the offences “on [his] application”. In the final paragraphs of his letter, Mr. Burston informs the Applicant that the Superintendent is required “by the *Mortgage Brokerages, Lenders*

and Administrators Act, 2006” to inquire into the Applicant’s past conduct, and that providing false or misleading information “is an offence under section 48 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*”.

On May 8, 2008, the Applicant sent a response to the Commission’s request for information. In this short letter, the Applicant refers to a “Mortgage Broker renewal application” which he made in June, 2007 on three occasions, but there is no reference to the application submitted on March 26, 2008, pursuant to the Act. The Applicant acknowledges the charges that were listed in Mr. Burston’s April letter, but states that the answer given in his “renewal application” was true at the time of completion (June 21, 2007), because the charges were only laid on July 26, 2007.

During the Hearing, the Applicant testified that he reviewed the letter of April 14 quickly before replying to it, and that he was not focussing on the new Act, but rather on his 2007 renewal application under the old statute. According to his testimony, his mind was also focussed on the criminal proceedings during this period. In cross-examination, he agreed that no other licence applications were, in fact, pending in March 2008, other than his electronic application for a mortgage broker’s licence.

The Applicant also testified to making many attempts to telephone the Commission in the weeks that followed his first letter. He left messages for Mr. Burston on May 16 (three days after his conviction), on May 22 and on May 26. He spoke to Mr. Burston on May 30, and was told that Shonna Neil was now responsible for his file. Another call was placed with the Commission on June 11, but there is no evidence regarding the contents of this call. In fact, there is little evidence before the Tribunal with respect to the object of the telephone calls placed by the Applicant, other than his testimony that he wanted an update regarding his application. In cross-examination, the Applicant acknowledged that during his conversation with Mr. Burston, on May 30, he did not say anything about having made a mistake in his application.

On June 19, 2008, the Applicant sent a second letter to the Commission (ABD – Tab 13). The letter is addressed to Shonna Neil and begins as follows: “Upon further review of the online mortgage broker application submitted to FSCO on March 26th, 2008, I was shocked to realize that I did answer incorrectly in Step V of the application” the question regarding past convictions and charges. In terms of an explanation for this mistake, the Applicant simply states that he “must have focused on the first half of the question only” which dealt with past convictions and that, on the day of the March 2008 application, “the answer to that question, as I mistakenly read it, was no”. He acknowledges the mistake and concedes that he was careless in this respect, but there is no mention of the guilty plea entered on May 13, 2008, or of the sentence imposed in this respect. The Applicant also clarifies his May 8 response in his second letter. He states that he was unaware that the Commission’s representative was asking for clarifications about his electronic application of March 2008. In closing, the Applicant states he had no intention of misleading the Commission and that he has “always acted with impeccable honesty and professionalism as a Mortgage Broker and Real Estate Broker”. He also stresses the urgency of the matter, given the upcoming July 1st deadline.

During the Hearing, the Applicant did not contest the fact that the statement made in his electronic application was incorrect. However, he testified that this misstatement was an inadvertent one; a mistake provoked by the stress under which he was living at the time.

3. Good Character and Competence

The Applicant is 31 years old and has worked in banking, real estate and mortgages for more than ten years. In the banking industry, he worked for CIBC and occupied many positions including teller, head teller, personal banker, and assistant manager. He attended university with partial funding from CIBC and graduated in 2001 from Ryerson with a Bachelor of Commerce. Over the years, he received certificates for taking specialised courses in investment funds, securities, and financial planning. He has a real estate licence and is the broker of record for his uncle's real estate company. In the mortgage industry, the applicant worked as a mortgage consultant with CIBC/Home Loans Canada (from 2001) and eventually Premiere Mortgage Centre (from 2007). Recently, he started his own company, CGMC Financial Services – the brokerage listed in his electronic application as 2102602 Ontario Corp.

During the Hearing, the Applicant testified that he has never received any complaints from clients, and has never been the object of investigation with respect to his dealings in mortgages or real estate. He also testified that his mortgage business accounts for approximately 75% of his current yearly income, and that his real estate practice is an “aside” in comparison.

The ABD contains many letters of reference written on behalf of the Applicant. As noted by Mr. Maini, these letters fall into three categories. First, there are general letters attesting to the Applicant's competence, character, loyalty, and honesty, written from friends, family members, clients and colleagues (T15, T18, T21, T22, T29, T30, T32). Second, there are letters from his current girlfriend (T16) and former girlfriends (T19, T20, and T24) attesting to the caring, loving and non-violent nature of the Applicant. Third, there are letters describing the Applicant's specific work as a mortgage broker and attesting to his sincerity, integrity and professionalism in this respect (T17, T23, T25, T26, T27, T28, T31, T33, and T34).

D. The Analysis

1. Preliminary Observations

Subsection 2(3) of the Act prohibits an individual from dealing in mortgages in Ontario for remuneration unless he or she has a mortgage broker's or agent's licence and is acting on behalf of a mortgage brokerage. Some individuals are exempted from this requirement, but the Applicant has not claimed to fall within any of the exemptions listed in section 6 of the Act or Ontario Regulation 407/07. Section 8 of the Act provides that an individual may apply for a mortgage broker's licence, and that such licence “is subject

to such conditions as may be imposed by the Superintendent or by the Tribunal”. When an application is submitted, subsection 14(1) directs the Superintendent as follows:

14. (1) The Superintendent shall issue a licence to an applicant who satisfies the prescribed requirements for the licence unless the Superintendent believes, on reasonable grounds, that the applicant is not suitable to be licensed having regard to such circumstances as may be prescribed and such other matters as the Superintendent considers appropriate.

In this case, the Superintendent has not alleged that the Applicant has failed to satisfy the “prescribed requirements for the licence”. Rather, the Superintendent has formed a belief that the Applicant is not suitable to be licensed having regard to the circumstances prescribed by Regulation 409/07, which reads as follows:

10. In determining whether an individual is not suitable to be licensed as a mortgage broker or agent, the Superintendent is required by subsection 14(1) and 16(4) of the Act to have regard to the following prescribed circumstances:

1. Whether an individual’s past conduct affords reasonable grounds for belief that he or she will not deal or trade in mortgages in accordance with the law and with integrity and honesty.
2. Whether the individual is carrying on activities that contravene or will contravene the Act or the regulations if he or she is licensed.
3. Whether the individual has made a false statement or has provided false information to the Superintendent with respect to the application for the licence.

As stated in the Reasons attached to the NOP, the Superintendent’s belief in the Applicant’s unsuitability rests on prescribed circumstance 1 and 3. However, in order for the Superintendent’s belief to be based on reasonable grounds, within the meaning of subsection 14(1) of the Act, it is not necessary to view each prescribed circumstance invoked in isolation. Rather, based on a plain reading of subsection 14(1) of the Act and section 10 of the Regulation, the grounds invoked by the Superintendent can be **combined** to form a reasonable belief in whether or not the Applicant is suitable to be licensed as mortgage broker. Accordingly, in response to the first issue outlined above, four distinct answers are possible in a case such as the present one:

- (a) The Applicant’s past conduct, in itself, provides reasonable grounds to believe that he is unsuitable to be licensed as a mortgage broker.
- (b) The Applicant’s false statement, in itself, provides reasonable grounds to believe that he is unsuitable to be licensed as a mortgage broker.
- (c) The Applicant’s past conduct and false statement, in combination, provide reasonable grounds to believe that he is unsuitable to be licensed as a mortgage broker.

- (d) The Applicant's past conduct and false statement, in combination, do not provide reasonable grounds to believe that he is unsuitable to be licensed as a mortgage broker.

On September 26, 2008, the Tribunal released its reasons for decision in *Ian Douglas Henderson v. Superintendent of Financial Services* (FST File No. M0319-2008, Decision No. M0319-2008-1) (*Henderson*). This was the Tribunal's first decision involving sections 14 and 21 of the new Act, and section 10 of the Regulation. On September 29, 2008, counsel for the Applicant and counsel for the Superintendent were sent a copy of this decision, and they were given the opportunity to make written submissions with respect to the decision's application to the present case. On October 3, 2008, both parties filed electronic submissions with the Registrar. These submissions are considered below, in the subsection of these reasons dealing with the Applicant's past conduct. Indeed, the *Henderson* decision did not analyse the alleged false statements made by Mr. Henderson, because the Tribunal reached the conclusion that his past conduct, in itself, provided reasonable grounds to believe that he was unsuitable to be licensed as a mortgage agent.

In *Henderson*, the Tribunal concluded that, in the context of a hearing held pursuant to subsection 21(3) of the Act, no deference need be shown to the opinion of the Superintendent about the unsuitability of the Applicant as reflected in his NOP: (at p. 8)

Rather, the Tribunal must look afresh, as a matter of first impression, at the question of whether there are reasonable grounds to believe that the Applicant is not suitable to be licensed as a mortgage agent having regard to its assessment of his past conduct and of the accuracy of the information he provided in his licence application.

As noted in *Henderson*, The Tribunal must be mindful of two overriding considerations in making its assessment of the reasonableness of the grounds relied upon by the Superintendent: 1) the Act and Regulation are designed to protect the public interest and enhance public confidence in the mortgage industry; 2) a decision to deny, revoke or suspend a licence under the Act can have severe financial consequences for the applicant or licensee. Naturally, the weight given to each of these considerations will vary depending on the circumstances. For example, with respect to the financial consequences on the applicant, it should be noted that, according to subsections 4(1) and 8(1) of Regulation 409/07, an individual whose mortgage broker's or agent's licence has been revoked, or whose application for a licence or for renewal of such a licence has been refused, cannot apply for a new licence unless twelve months have passed since the revocation or refusal and the individual satisfies the Superintendent that "new or other evidence" is available or "that material circumstances have changed".

The evidence was largely agreed to in this case. It is the conclusions to be drawn from that evidence which are in issue. The ultimate question is whether this evidence provides reasonable grounds for a belief in the Applicant's unsuitability, considering the public interest and financial consequences associated with such an assessment.

2. *Past Conduct*

The first set of circumstances invoked by the Superintendent relate to the past conduct of the Applicant, namely, his conviction of three criminal offences on May 13, 2008. Pursuant to section 10 of the regulation, paragraph 1, the issue is whether this conduct provides reasonable grounds to believe that the Applicant “will not deal or trade in mortgages in accordance with the law and with integrity and honesty”.

In *Henderson*, the Tribunal held that a number of circumstances should be taken into account in determining whether the past conduct of an applicant meets the threshold established by section 10, paragraph 1, of the Regulation. A non-exhaustive and non-prioritised list of nine circumstances was identified by the Tribunal:

- 1) the time that has elapsed since the conduct occurred;
- 2) the prolonged or repetitive nature of the conduct;
- 3) the advertent or inadvertent nature of the conduct;
- 4) the extent to which the conduct can be taken to call into question the integrity, honesty and law abiding nature of the individual;
- 5) the closeness of the context of the conduct to the context of activities in which the individual would be engaged as a mortgage agent or broker;
- 6) the fairness of the process followed in the disciplinary proceeding;
- 7) the seriousness with which the disciplinary body treated the conduct as reflected in the severity of the sanction it imposed;
- 8) any unusual and severe pressure the individual was under at the time of the conduct that would explain the conduct but is unlikely to reoccur;
- 9) any consistent and prolonged pattern or reformed or redeeming behaviour on the part of the individual since the conduct occurred.

In his oral and written submissions on behalf of the Applicant, Mr. Maini has focussed primarily on circumstances 2, 5 and 8. He emphasised that the conduct of his client was restricted to one relationship during a period of a few months, that there was no rational connection between the offences for which his client was charged and convicted and the mortgage industry, and that the offences stemmed from a “toxic relationship” that caused his client to lose his temper on two isolated occasions. Mr. Maini distinguished these circumstances from those involved in *Henderson*, where the applicant was found by a Law Society of Upper Canada disciplinary body to have “knowingly assisted in dishonest and fraudulent conduct to obtain mortgage funds under false pretences” and to have “failed to be honest and candid, in various respects, when advising his lender clients” (at p. 10 of *Henderson*). By contrast, as noted by Mr. Maini, there is no evidence that the Applicant has ever been the subject of any complaint or reproach with respect to his dealings in mortgages.

In her oral and written submissions on behalf of the Superintendent, Ms. Easson has focused primarily on circumstances 1, 2, 4, 7 and 9. She notes that only 15 months have elapsed between the incident of July 25, 2007, that there were two distinct incidents of violence involving the Applicant, that the nature of these offences call into question his

ability to abide by the most basic code of conduct imposed on citizens (*viz.* the Criminal Code), that the sentence imposed on the Applicant reflects the seriousness of his conduct, and that little time has passed since the conduct occurred. In addition, counsel for the Superintendent distinguished the *Henderson* case by observing that the case involved a previous disciplinary proceeding against the applicant, rather than a criminal one. In a criminal context, counsel for the Superintendent proposed an additional factor that must be weighed in making a determination under section 10, paragraph 1, of the Regulation: the period of time that has passed “since the convictions took place and the applicant’s debt to society has been paid”. She notes that the custodial sentence (house arrest) imposed on the Applicant ended on July 13, 2008, and that his probationary period will only expire in April 2010.

In weighing the circumstances outlined in *Henderson*, it is important to keep in mind the exact wording of section 10, paragraph 1, of the Regulation: "Whether an individual’s past conduct affords reasonable grounds for belief that he or she **will not deal or trade in mortgages** in accordance with the law and with integrity and honesty" [emphasis added]. In a case such as this, the Superintendent's mandate under the Act is not to reproduce or supplement the punishment already imposed on the Applicant by the criminal proceedings taken against him. In deciding whether an individual is suitable to be licensed under the Act, the Superintendent's mandate is to protect the public interest and enhance public confidence in the mortgage industry. In this context, the circumstance that weighs most in favour of the Applicant is the fact that the past conduct relied upon by the Superintendent is not directly related to his dealings in mortgages, in that there was no financial component to the conduct, no financial advantage to be gained by the Applicant as a result, and no record-keeping or similar issues involved. Nonetheless, as noted by counsel for the Superintendent, the offences for which he was convicted were serious and involved an actual victim – they were not victimless crimes.

There are many troubling aspects to the past conduct, not the least of which was its violent nature, and the fact that it occurred not once, as an isolated incident, but twice, a number of months apart. We were also troubled by the Applicant’s behaviour in making the vulgar phone calls to his victim’s contacts, chasing after her in his car, and his failure to respond to Detective Latter on the phone the day after the second incident. The conduct was more than a momentary loss of temper, but rather exhibits a level of violence, anger, and disregard for others that is very troubling, particularly since the Applicant’s business activities may involve close relationships with clients.

The portrait these facts paint of the Applicant is squarely at odds with the character of the Applicant attested to by the many letters of support filed on his behalf.. As noted by Dr. Sirman, the anger management issues that arose in relation to the incidents in 2007 that led to the criminal conviction appear to have been triggered by a particular relationship. We accept that it is the criminal justice system which is most directly involved in holding the Applicant accountable for his criminal misconduct through, as the Superintendent said, payment of his debt to society. Nonetheless, we agree with the further submission by the Superintendent that the granting of a licence to act as a mortgage agent or broker is a privilege, with concomitant obligations to act in accordance with the law and with

integrity. The fact that the Applicant did not do so in connection with the victim in this case is relevant to a consideration of his suitability to be licensed as a mortgage broker.

The circumstance that weighs most unfavourably against the Applicant is time. The Applicant was convicted of three serious criminal offences on May 13, 2008, less than two months before the coming into force of the licensing requirements imposed by the new Act. His custodial sentence ended after the July 1st deadline, and he is still under probation until May 2010. In exercising his mandate to enhance public confidence in the mortgage industry, the Superintendent cannot overlook the fact that a licence constitutes a governmental endorsement, to the public, with respect to the licensee's good character and competence. In light of the very close proximity in time between the past conduct and the licence application, and the contemporaneous nature of the criminal sentence imposed on the Applicant, the reasonableness of relying on his past conduct as a ground for denying his application is considerably enhanced.

For the purposes of this Hearing, the Tribunal need not decide conclusively whether the Applicant's past conduct, in and of itself, provides reasonable grounds to support a belief in his unsuitability at the present time. There is another important circumstance in this case, namely, the false statement made by the Applicant. When these two sets of circumstances are combined, they provide reasonable grounds to support this belief.

3. *False Statement*

In performing his mandate to protect the public interest and enhance public confidence in the mortgage industry, the Superintendent must rely on the veracity of the statements and information provided by applicants and licensees. Indeed, without accurate disclosure from applicants and licensees, the Superintendent cannot effectively perform the gate-keeping and supervisory functions inherent in the licensing process established by sections 13 to 22 of the Act. The importance of disclosure is confirmed by a number of statutory provisions. For example, making a false statement or providing false information is not only a prescribed circumstance for denying an application under section 14 of the Act, it also constitutes a relevant circumstance for refusing to renew a licence (s. 16), for suspending a licence (s. 18) and for revoking a licence (s. 20). In addition, the Act prohibits any person from giving false or misleading information or documents to the Superintendent (s. 45), and provides that every person contravening this prohibition is guilty of an offence (s. 48) and, if convicted, is liable to a fine not exceeding \$100,000 and/or to a term of imprisonment of not more than one year (s. 49).

According to section 10, paragraph 3, of the Regulation, making a false statement or providing false information on an application is a circumstance that the Superintendent may consider in determining whether a license should be issued. Neither the Regulation nor the Act mandates the actual weight that must be given to this circumstance by the Superintendent. Surely, this impact will depend on a number of factors. Pursuant to subsection 14(1) of the Act, the ultimate benchmark is whether the false statement or false information provides reasonable grounds to believe that the applicant is not suitable to be licensed.

Echoing the contextual approach adopted by the Tribunal in *Henderson* with respect to past conduct, there are a number of considerations that should be taken into account in determining whether a false statement or false information meets the reasonableness threshold established by subsection 14(1) of the Act, including the following:

- 1) the nature of the false statement or false information;
- 2) the advertent or inadvertent nature of the falsehood;
- 3) the explanations provided by the individual for the falsehood; and
- 4) the circumstances in which the false statement is made, including any unusual and severe pressure the individual was under at the time the false statement was made or false information provided.

In reviewing the evidence adduced during the Hearing in light of these considerations, the Tribunal makes the following findings. First, the false statement made by the Applicant relates to one of the seven questions asked in Step V of the electronic application. Evidently, these questions are all directly relevant with respect to the suitability of an applicant for a licence under the Act. In other words, there is little doubt that the negative answer provided by the Applicant could have played a material role in the issuance of his licence, were the truth not discovered by representatives of the Commission.

Second, although the Applicant claims to have made an honest mistake in his March 26 application, the Tribunal does not find his testimony credible in this respect. At worst, the explanations provided by the Applicant (as they are outlined below), combined with the safeguards built-into Step VII of the application process, support the inference that the Applicant knowingly misrepresented the truth when submitting his application. At best, this evidence supports the inference that he demonstrated a reckless disregard for the truth. If the Applicant had been forthright in his explanations, the alleged inadvertent nature of his falsehood would have been greatly enhanced. However, throughout his communications with the Commission, he attempted to rationalise his initial answer on what in our view are tenuous grounds.

Third, although theoretically possible, the explanations provided by the Applicant are questionable and unsupported by objective evidence. In his initial letter of May 8, 2008, the Applicant does not explain the answer given in his March 2008 application, but an answer allegedly given in the context of a renewal application made in June 2007. Subsequently, he explained this letter by claiming to have misread the Commission's request for information as referring to his renewal application under the old Act. However, the Commission's letter contains five distinct references to the new Act and requests a "full explanation" regarding the offences, "including specific details of the circumstances surrounding the offence, location and date of the findings, the police force involved and the court disposition if applicable". The letter of May 8 makes no attempt whatsoever to address this request for information, even on the assumption that the Applicant misunderstood the context in which the request was being made. Moreover, as admitted by the Applicant during cross-examination, the only application that was, in fact, pending in March of 2008 was his application for a mortgage broker's licence under

the new Act. The Applicant called the Commission on many occasions between May 16 and June 11, but he did not provide additional explanations regarding his false statement. In fact, it was not until June 19, 2008, that the Applicant actually provided some of the information requested by the Commission two months earlier, namely, an explanation for the answer given in his March 2008 application. In this second letter, the Applicant claims to have focussed only on the first part of the question, dealing with convictions, and that his answer was true at that point in time. Although technically possible, such a literal interpretation is not consistent with someone who has worked for more than ten years in banking, real estate and mortgages, and who has demonstrated a high level of competence and attention to detail in this respect. What's more, this explanation does not address the fact that the Applicant confirmed his answer during Step VII of the application process during which the Applicant was asked to review his answers and acknowledge that any false or misleading answer could be the object of prosecution.

Fourth, the Applicant was manifestly under stress and pressure when he submitted his electronic application, in light of the criminal charges pending against him. Had he been forthright in his explanations to the Commission, the Tribunal would have given more weight to this consideration. However, the protracted nature of his explanations diminishes the relative importance of this consideration. Moreover, it should be noted that none of the letters written by the Applicant actually identifies stress and pressure as a reason for not disclosing the charges pending in March 2008.

4. Conclusion

The Tribunal concludes that the Applicant's past conduct and false statement, when viewed together, provide reasonable grounds for a belief that he is not suitable for a mortgage broker's licence at this point in time.

In reaching this difficult conclusion, the Tribunal is mindful of the fact that, pursuant to section 4 of the Regulation, the Applicant cannot apply for a licence under the Act until 12 months have passed since the date of the Superintendent's refusal. In referring to section 4, Mr. Maini attempted to characterise the consequence of denying his client's licence as a twelve-month suspension from the mortgage industry – one of the "worst penalties" contemplated by the Act. However, the language of subsection 14(1) of the Act and section 10 of the Regulation are clear and, if Mr. Maini's submissions were accepted by the Tribunal, the issuance of a licence could be refused by the Superintendent only with respect to the "worst offender". Surely, if the legislature had wanted to limit the powers of the Superintendent in this fashion it would have chosen different language.

This does not mean that the financial consequences on the Applicant are irrelevant in determining his suitability for a licence. In this particular situation, however, given the circumstances surrounding the Applicant's past conduct and false statement, and given the mandate of the Superintendent to protect the public interest and enhance public confidence in the mortgage industry, the Tribunal believes there are sufficiently reasonable grounds to justify a denial of his application.

E. The Order

The Tribunal orders the Superintendent to carry out his notice of proposal to refuse to issue a mortgage broker's licence to the Applicant.

DATED at the City of Toronto, this 10th day of October, 2008.

"Denis Boivin"
Denis Boivin, Member of the Tribunal
and Chair of the Panel

"Lily Harmer"
Lily Harmer, Member of the Tribunal
and Member of the Panel

"Shiraz Bharmal"
Shiraz Bharmal, Member of the Tribunal
and Member of the Panel