

**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 9, 14 and 21, and the Mortgage Brokers and Agents Licensing Regulation, SOR 409/07 (the “Regulation”), in particular, section 10;

**AND IN THE MATTER OF** the Superintendent’s Notice of Proposal to Refuse to Issue a Mortgage Agent’s Licence to Mr. Robert Kostrubiec, dated August 25, 2008;

**AND IN THE MATTER OF** Mr. Kostrubiec’s Request for a Hearing before the Financial Services Tribunal (the “Tribunal”) pursuant to subsection 21(3) of the Act.

**BETWEEN:**

**ROBERT KOSTRUBIEC**

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

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

Mr. John Solursh  
Chair of the Tribunal and Member of the Panel

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

**APPEARANCES:**

Mr. Robert Kostrubiec, the Applicant, in person  
Mr. Robert Conway for the Superintendent of Financial Services

**HEARD:**

November 10, 2008

**REASONS FOR DECISION**

## A. BACKGROUND

Robert Kostrubiec (the “Applicant”) has been employed by Money Business Inc. o/a The Mortgage Store (“MB/MS”) since the summer of 2005 as a mortgage agent. The mortgage broker under whose authority the Applicant has been carrying on the business of dealing in mortgages since 2005 is Mr. Jonathan Askew.

Prior to July 1<sup>st</sup>, 2008, the date on which the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”) came into effect, mortgage agents were not required to be licensed in order to deal in mortgages in Ontario for remuneration. However, pursuant to regulations made under the previous *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, mortgage brokers such as Mr. Askew were required to notify the Superintendent of Financial Services (the “Superintendent”) of the name of every person employed or authorized to arrange or deal in mortgages on behalf of the mortgage broker: R.R.O. 1990, Reg. 798, s. 3(9). Accordingly, on July 25, 2005, a Notification Form was sent to the Superintendent listing the Applicant as a new authorised agent for Mr. Askew. In this form, the Applicant was asked whether he had been convicted of any offences under the law. He answered “no”.

On June 25, 2008, the Applicant submitted an application in electronic form to the Superintendent, pursuant to the new Act, for a mortgage agent’s licence to work for the brokerage MB/MS. 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?” Once again, the Applicant answered “no” to this question.

On July 9, 2008, a representative of the Financial Services Commission of Ontario (the “Commission”) sent a letter to the Applicant. In this letter, the representative stated that, in the process of reviewing his licence application, it had come to the attention of the Commission that the Applicant had previously been convicted of four criminal offences, including two convictions of possession of property obtained by crime on January 21, 2005. The representative asked the Applicant to confirm whether or not these convictions applied to him and, if so, to provide an explanation for the offences and for the statement in his application that he had not been found guilty of any offences in the past.

On July 21, 2008, the Applicant sent a letter of explanation to the Commission. In this letter, he acknowledged the four offences for which he was convicted and provided some factual circumstances surrounding said convictions. The Applicant also apologised for the “honest mistake” made in his electronic application, stating that his criminal attorney, back in 2005, had assured him that his convictions would be removed from his record.

Unsatisfied with these explanations, the Superintendent issued a Notice of Proposal (the “NOP”) on August 25, 2008, to refuse the Applicant’s licence application. On September 9, 2008, the Applicant requested a hearing before the Financial Services Tribunal (the “Tribunal”) pursuant to s. 21(3) of the Act – a request that had to be resubmitted on September 30, 2008, using the appropriate Tribunal form for that purpose.

## B. STATUTORY FRAMEWORK

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 in the *Exemptions from the Requirements to be Licensed Regulation*, Ont. Reg. 407/07.

Section 9 of the Act provides that an individual may apply for a mortgage agent'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 the present case, the Superintendent has not alleged that the Applicant has failed to satisfy the "prescribed requirements for the licence". Rather, the reasons attached to the NOP reveal that the Superintendent has formed a belief that the Applicant is not suitable to be licensed having regard to the circumstances prescribed by the *Mortgage Brokers and Agents Licensing Regulation*, Ont. Reg. 409/07 (the "Regulation"). Section 10 of the Regulation 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 explained in the reasons attached to the NOP, the Superintendent's belief in the Applicant's unsuitability rests on the circumstances prescribed by sections 10¶1 and 10¶3 of the Regulation, namely: 1) the Applicant's conviction of four criminal offences (one on April 15, 1992, one on March 24, 2003, and two on January 21, 2005) and 2) the Applicant's statement on his June 25, 2008, licence application that he had not been convicted of any offences in the past.

Section 21(4) of the Act provides that if an applicant requests a hearing before the Tribunal, in order to contest a proposal to refuse his or her licence application, the

Tribunal has the authority to “direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent” and “may impose such conditions as it considers appropriate in the circumstances”.

### **C. ISSUES**

The parties participated in a Pre-hearing Teleconference on October 6, 2008 (the “PHC”). During this PHC, two issues were identified for the purposes of the Hearing:

- a. Whether there are reasonable grounds to believe the Applicant is not suitable to be licensed as a mortgage agent, having regard to:
  - i. his past conduct, namely, his convictions for four criminal offences;
  - ii. the false statement made on his application dated June 25, 2008, regarding those convictions.
- b. If the Tribunal believes the Applicant is suitable to be licensed as a mortgage agent, whether any conditions should be attached to his licence?

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

### **D. EVIDENCE**

At the commencement of the Hearing, the parties submitted an Agreed Book of Documents (the “ABD”) containing 10 documents. During the October PHC, the Applicant had acknowledged the veracity of the facts contained in the NOP and its accompanying reasons (*viz.* his "past conduct" and "false statement"). Given this concession, Counsel for the Superintendent did not call any witnesses during the Hearing. Instead, he relied on the documentary evidence contained in the ABD and on his cross-examination of the Applicant, who testified himself, and of the witness called by the Applicant, Mr. Askew, the mortgage broker under whose authority the Applicant has been working since 2005. During the Hearing, the Applicant confirmed that he was not denying any of the facts outlined in the NOP and accompanying reasons.

The documentary and oral evidence before the Tribunal can be summarised under three headings: 1) evidence pertaining to the past conduct of the Applicant; 2) evidence pertaining to the false statement made on his application for a mortgage agent’s licence; and 3) evidence of his good character and competence.

#### ***a. Past Conduct***

On April 15, 1992, the Applicant was convicted of assault and received a suspended sentence and probation for twelve months. As explained in his testimony and in his letter

dated July 21, 2008 (ABD – Tab 4), this conviction relates to an incidence of domestic violence involving his former wife. There is little evidence regarding this episode and, as noted below, Counsel for the Superintendent is not relying on this conviction for the purpose of justifying the denial of the Applicant's licence under s. 109(1) of the Regulation, but rather for the purpose of challenging the credibility of his explanation for falsely stating that he had no prior convictions. Accordingly, with respect to this conviction, it is sufficient to note that the conviction has indeed been established by the evidence.

In essence, the other three convictions stem from the same series of events. What follows is a summary of the evidence describing these events, taken from the letter dated July 21, 2008, and from the Applicant's testimony and cross-examination. In September of 2001, at a time when the Applicant owned and operated a small automobile repair garage, a man approached him for the stated purpose of storing his vehicle for the winter. The Applicant had previously met this man, known as "Rocky" and "Mike", at a car auction. The vehicle in question was a relatively new convertible Corvette and there were also parts in the trunk, including an engine and a transmission not coming from said Corvette. No documents were signed and Rocky agreed to pay the Applicant \$50 per month for a period of 6 months in order to store the vehicle and parts. This was the only vehicle the Applicant agreed to keep at the relevant time, because his garage was relatively small.

A few weeks later, the Applicant received a visit from local police officers. They informed him that the Corvette and parts were stolen – they had found the vehicle using a "Boomerang" tracking device installed by the owner. The Applicant denied knowledge of this fact, but he was nonetheless charged with possession of property obtained by crime (with respect to the parts) and possession of property obtained by crime over \$5,000 (with respect to the vehicle). The Applicant was released on his own recognizance and a condition was attached to his release, namely, that he refrain from coming into contact with another man named JC, whom the police also suspected of being involved in the crimes. Because this man had a business near the Applicant's garage, the Applicant moved his business to another location in or about October 2001. However, in March of 2003, JC came to this new location and was followed by undercover police officers. Accordingly, on March 24, 2003, the Applicant was convicted of having failed to comply with his recognizance and was fined \$100.

Despite many unsuccessful efforts to find Rocky, the Applicant decided to plead guilty to the two possession charges in January of 2005 in order to move-on with his life. The situation had exhausted and embarrassed him, and had also caused a lot of stress for him and his family. On a positive note, he attributes this whole episode as providing him with motivation to leave the repair garage business and to look for other employment opportunities, a motivation which eventually led him to the mortgage industry.

During the Hearing, in the context of the Applicant's cross-examination, the Tribunal also heard evidence with respect to past conduct not specifically mentioned in the NOP or accompanying reasons, that is, with respect to conduct not directly related to the four convictions on the Applicant's criminal record. The Tribunal will address the weight that

must be given to this evidence in its analysis below. At this junction, it is sufficient to give a brief outline of this additional evidence.

Although the Applicant's 2003 and 2005 convictions relate to dealings conducted in the course of his repair garage business, he has worked in the automotive industry in other capacities as well. He began in 1998 selling cars for a London dealership named Valca Sales – a registered dealership under the *Motor Vehicles Dealers Act*, R.S.O. 1990, c. M.42 (the "MVD Act"). The Applicant testified that he was registered as a salesperson for Valca pursuant to this statute, although he had no recollection of when he had applied for said registration. He left this dealership in 1999 or 2000, and opened his own repair shop. The Applicant acknowledged that, even though he was no longer employed by a registered dealership and was not himself registered as a dealer, he nonetheless privately sold between 5 and 10 automobiles following his departure from Valca. He would purchase these cars at auctions and using AutoTrader. Some of them were imported from the United States. He did not dispute the allegation made by Counsel for the Superintendent that he sold cars illegally, as a "curbsider", but emphasised instead that he was just trying to make a living and that these sales were occasional and were an aside to his repair garage business. The Applicant also acknowledged that, following the criminal charges laid in the Fall of 2001, he had decided not to apply for registration as a dealer with the Ontario Motor Vehicle Industry Council (the body responsible for implementing the MVD Act) because he knew his chances of success would not be good.

Lastly, with respect to his work as a mechanic in his repair garage, the Applicant admitted that he had not received much formal training and that he was not a licensed mechanic. He did, however, employ a licensed mechanic on a part-time basis. In the Applicant's own words, this part-time employee would review the Applicant's repair work, inspect the vehicles and sign the appropriate documents before the cars were released to their owners.

***b. False Statement***

On June 25, 2008, approximately 3½ years after his last two convictions, the Applicant submitted an application in electronic form to the Superintendent for a mortgage agent's licence under the Act (ABD – Tab 2). 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 were reproduced again, in their entirety, along with the "no" answers provided by the Applicant. At the end of Step VII, there was a confirmation button that the Applicant clicked in order to submit his application. Immediately above this button, in bold characters, applicants were warned that providing false or misleading information may provide sufficient grounds for rejecting their application and may also lead to their prosecution. Applicants were also warned that by clicking the "Confirmed" button, they swore to have truthfully answered all of the questions on the application form.

On July 9, 2008, a representative of the Commission (Jeannette Arles Oyco) sent a two-page letter to the Applicant (ABD – Tab 3). This letter began as follows: “Your application for a Licence as a Mortgage Agent 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”. Ms. Oyco outlined the four convictions in question and requested a confirmation from the Applicant that he was the subject of these convictions. She also asked for a “full explanation” regarding said offences and regarding his denial of these offences on his application. In the final paragraphs of her letter, Ms. Oyco informed the Applicant that the Superintendent was legally required to inquire into the Applicant’s past conduct, and that providing false or misleading information was an offence.

The Applicant replied to the Commission’s request for information on July 21, 2008 (ABD – Tab 4). As noted in the previous section of these reasons, in his three-page letter, he acknowledged the offences and provided some explanations of the factual circumstances surrounding his four convictions. With respect to the false statement made on his electronic application, the Applicant provided the following explanation (at p. 2):

In conclusion, I would like to apologize to the Superintendent of Financial Services for my incorrect answer to one of the questions in the application. After my previous conversation with my lawyer (Jack Hardy) in 2005, he assured that all those offences will be removed from my record (he promised me that he would take care of it and not to worry about it). Definitely that was my mistake. Before sending the application to you I should have checked myself those if there were still offences showing on my criminal record. Honestly, I am feeling very embarrassed, naive and stupid for this whole situation. If I would known that those offences were still on my record I would write you the whole explanation at the time when I was submitting the application.

I am truly sorry for the honest mistake and I hope that the Superintendent of Financial Services will give me a chance to work as mortgage consultant.

The Applicant also gave a written explanation for his false statement in the Request for Hearing (Form 1) filed with the Registrar of the Tribunal on September 30, 2008 (ABD – Tab 9). In Attachment B, under the heading “Reasons for Relief Sought”, the Applicant made the following statements (excerpts):

I have explained why I failed to disclose the convictions. [...] None of these explanations have changed. I should have been up front with the information but the embarrassment of it was very great and I am trying to build a new life and want to just leave the past behind me. It was a very difficult time in my life and I have felt the last 3 years that I have put it behind me. [...]

The electronic application form submitted on June 25, 2008, was not the only occasion on which the Applicant had incorrectly answered a question regarding his prior convictions in a document submitted to the Commission. As noted at the beginning of these reasons, under the previous statutory regime, mortgage brokers such as Mr. Askew were required to notify the Superintendent of the name of every person employed or authorized to arrange or deal in mortgages on behalf of the mortgage broker. On July 25, 2005, approximately five months after the Applicant’s last two convictions, a Notification Form was sent to the Superintendent listing the Applicant as a new authorised agent for Mr. Askew (ABD – Tab 1). In this form, signed by both the Applicant and by Mr. Askew, the

Applicant was specifically asked whether he had been convicted of any offences in the past. He answered “no” to this question, an answer that was not only given to the Commission, but also to his supervisor Mr. Askew who signed the form. At the end of the form, the Applicant also signed a separate “Consent and Notification” section, in which he consented to let the Commission collect additional information about himself as may be necessary from various sources, including “police forces”, and in which he acknowledged that this information could be used by the Commission to determine his suitability.

During his oral testimony, the Applicant gave the following evidence with respect to the false statement made in his 2008 electronic application – and with respect to the false statement made in the 2005 written notification. He testified that he assumed that his convictions were not on his record, in both 2005 and 2008, because of conversations held with his lawyer back in January of 2005. He testified that he knew it was probably too short a period of time in July of 2005, but he “did not let it get to [his] mind” that the convictions were on his record because of his sense of embarrassment. With respect to the notification of 2005, he also added that there was a “50/50 chance” that the Commission would discover his criminal record if they were to conduct a check.

In cross-examination, the Applicant acknowledged that he was in a “tough spot” when he completed the notification form in 2005. He also conceded that his lawyer had only discussed the matter with him in January of 2005 and that he had not given the Applicant any specific timeframe for the alleged removal of convictions from his record. In addition, he was unsure whether his lawyer told him about the actual pardon process, although he is now aware of this process. When asked by Counsel for the Superintendent whether it was fair to say that the Applicant thought he could “maybe get away with it again” in 2008 because he “got away with it” in 2005, the Applicant agreed without any qualification whatsoever.

### *c. Good Character and Competence*

Jonathan Askew is the mortgage broker under whose authority the Applicant has been carrying on the business of dealing in mortgages since 2005. Mr. Askew wrote two letters in support of the Applicant and also testified at the Hearing on his behalf. In his first letter, dated July 28, 2008 (ABD – Tab 5), Mr. Askew acknowledged that the Applicant had advised him of his four convictions and of the request for information sent by the Commission on July 9, 2008. He said that, after discussing the matter and evaluating his experience with the Applicant, he felt “very confident in continuing” his relationship with the Applicant. He added that his experience with the Applicant had been a positive one and that he had never had any reason to investigate his activities. In his opinion, the Applicant had conducted himself in a very professional manner, following all of the policies and procedures that MB/MS had in place. Mr. Askew also said that, following his discovery of this matter, he had spoken to the Applicant about the importance of disclosing such information and about the consequences it can have on everyone involved. In closing, Mr. Askew expressed the opinion that everyone deserved a second chance and that, in his view, the Applicant had made a concerted effort to change his life since 2005.

In his second letter, dated September 5, 2008 (ABD – Tab 10), Mr. Askew responded to the NOP issued by the Superintendent and argued “strongly” in the defence of the Applicant. Mr. Askew emphasised that MB/MS was his own business, that he had worked in the mortgage industry since 1991, that he was happy with the new regulatory framework put into place by the Act and Regulation, and that he would never put his reputation into question. Mr. Askew expressed the belief that mortgage brokers must ensure that their agents hold themselves to the highest level of integrity and honesty. He also stated that he would have no hesitation in ending his relationship with the Applicant, if he ever had any concerns or suspicions that the Applicant was carrying on business in a way that was detrimental to clients, lenders or the brokerage. In this respect, Mr. Askew emphasised that, in his three years working with MB/MS, the Applicant had never behaved in such a way. Although he agreed that the Applicant should not have “lied” in his application, Mr. Askew reiterated his view that everyone deserves a chance to redeem themselves.

During his testimony before the Tribunal, Mr. Askew echoed the information, opinions, and sentiments expressed in his two letters. With respect to the operations of MB/MS, he added that the Applicant did not currently work in the same office as Mr. Askew: the latter works out of the main branch located in London (Ontario), whereas the former works out of a satellite office located in Mississauga. With respect to his conversation with the Applicant about this matter, Mr. Askew added that the Applicant advised him about his prior convictions in July of 2008, that is, only after the Applicant had received the request for information sent by Ms. Oyco. Mr. Askew also added that his initial reaction was a negative one: he was concerned, upset and initially wanted “to get rid of him” as he had done in the past with other agents and employees who had engaged in questionable business activities. However, according to his testimony, after he heard the Applicant’s explanation for his false statement (*viz.* assurances given from his lawyer), and after he took some time to digest the news, to talk with his spouse, and to look into the Applicant’s files, Mr. Askew decided to give the Applicant another chance. Although he did not condone what the Applicant did, Mr. Askew testified that he worried about whether the Applicant will be able to provide for himself, his wife and young daughter without a mortgage agent’s licence. When asked by the Applicant to rank his work in terms of professionalism, Mr. Askew testified that he would place the Applicant at 9½ on a scale of 10. However, when asked by Counsel for the Superintendent to rank the Applicant in terms of honesty and integrity, Mr. Askew could not provide a definite answer.

Other than the two letters written by Mr. Askew, the Applicant has submitted seven general reference letters (ABD – Tab 10). Four of these letters are written on behalf of local soccer clubs and they thank the Applicant for his support to youth soccer in London and Mississauga over the past three years. The other three letters are written by professionals with whom the Applicant has conducted business in the past, namely, one mortgage agent who worked with the Applicant for approximately one year, and two mortgage lawyers who have been involved in mortgage transactions financed through the assistance of the Applicant. Generally speaking, these three letters attest to the Applicant’s professionalism, timeliness, diligence, integrity, reliability, and to the fact that his clients appeared to be very satisfied with his services. On this last point, the

Applicant has also submitted a list of 213 clients for whom he has provided mortgage services over the past three years.

During the Hearing, the Applicant testified that he had not disclosed to his referees the true reason for asking for references because he was embarrassed to reveal the truth. Instead, to paraphrase him, he told his referees that he was updating his business portfolio and required general letters of recommendation for this purpose. Moreover, with respect to the clients the Applicant had when the July 1<sup>st</sup> licensing deadline was reached, he testified that he had to “lie” to them in order to hide his embarrassment and to pass on their files to other licensed agents.

The Applicant also testified that he is a good mortgage agent, that he is honest with his clients, that he loves his job, the mortgage industry and wants to keep working within the industry, that he supports his wife and young daughter, and that he is prepared to work under any conditions the Tribunal considers appropriate in the circumstances. In closing, the Applicant implored the Tribunal to allow him to continue working as a mortgage agent with MB/MS.

## **E. ANALYSIS**

### ***a. Preliminary Observations***

To date, the Tribunal has released reasons in six matters decided under s. 21(3) of the Act: *Ian Douglas Henderson v. Superintendent of Financial Services* (FST Decision No. M0319-2008-1) (*Henderson*); *Jason William Reid v. Superintendent of Financial Services* (FST Decision No. M0321-2008-1) (*Reid*); *Alexandre Jose Alves v. Superintendent of Financial Services* (FST Decision No. M0315-2008-1) (*Alves*); *Ram Anandappa v. Superintendent of Financial Services* (FST Decision No. M0320-2008-1) (*Anandappa*); *Joel Richard Glaude v. Superintendent of Financial Services* (FST Decision No. M0325-2008-1) (*Glaude*); and *Patrice De-Ann Gooding v. Superintendent of Financial Services* (FST Decision No. M0326-2008-1) (*Gooding*).

In this jurisprudence, the Tribunal has established a number of guiding principles with respect to hearings conducted under s. 21(3) of the Act, whose licensing requirements only came into effect on July 1<sup>st</sup>, 2008. Among these principles, the following four are particularly relevant for present purposes:

1. Hearings held pursuant to s. 21(3) of the Act are *de novo* hearings. The Tribunal need not show any deference to the Superintendent’s determination with respect to the applicant’s suitability to be licensed as a mortgage broker or agent. Rather, the Tribunal must make its own assessment of suitability having regard to the prescribed circumstances invoked by the Superintendent and the evidence adduced during the hearing.
2. In determining whether there are reasonable grounds to conclude that the applicant is not suitable to be licensed, within the meaning of s. 14(1) of the Act, the Tribunal must be mindful of two overriding considerations: 1) the Act and Regulation are designed to protect the public interest and enhance public confidence in the mortgage

industry; 2) a decision to refuse to issue a licence under the Act can have severe financial consequences for the applicant.

3. In determining the weight that should be given to the prescribed circumstances listed in sections 10¶1 (past conduct) and 10¶3 (false statement) of the Regulation, in the context of its assessment of the applicant's suitability to be licensed, the Tribunal should adopt a contextual approach. In *Henderson*, the Tribunal identified a series of 9 relevant considerations with respect to s. 10¶1 (at p. 9). In *Alves*, the Tribunal identified a series of 4 relevant considerations with respect to s. 10¶3 (at p. 14). Neither of these lists was meant to be exhaustive, nor to represent a hierarchy of factors that must be addressed in each and every case.
4. The prescribed circumstances listed in sections 10¶1 (past conduct) and 10¶3 (false statement) of the Regulation can be considered conjunctively in determining whether there are reasonable grounds to conclude that the applicant is not suitable to be licensed.

In the following sub-sections, the Tribunal will apply these four guiding principles to the evidence adduced during the Hearing.

#### ***b. Past Conduct***

During the Hearing, Counsel for the Superintendent noted that he was not relying on the Applicant's 1992 conviction as a ground for rejecting his licence application, within the meaning of s. 10¶1 of the Regulation, but rather as evidence supporting the allegation that the statement made on the June 2008 electronic application was false within the meaning of s. 10¶3. Accordingly, the Tribunal has not given any weight to this conviction for the purpose of determining whether the Applicant's past conduct affords reasonable grounds to believe that he will "not deal or trade in mortgages in accordance with the law with integrity and honesty" within the meaning of s. 10¶1 of the Regulation.

Having said this, the Tribunal observes that the evidence with respect to the Applicant's past conduct is not limited to his criminal convictions in 2003 and 2005. Indeed, the Tribunal heard testimony from the Applicant with respect to various business activities arguably conducted outside of the law prior to his involvement in the mortgage industry, including evidence that the Applicant sold a number of vehicles without being registered as a dealer or registered as a salesperson employed by a registered dealer in accordance with the MVD Act. Although these activities are not outlined in the NOP issued by the Superintendent or in its accompanying reasons, and were presumably not considered by the Superintendent when he proposed to reject the Applicant's licence application, the Tribunal cannot disregard this evidence altogether in making its own *de novo* determination of suitability. Similarly, the Tribunal heard evidence that the Applicant made a false statement to the Commission and to his supervisor on July 25, 2005, in the context of the previous statutory regime applicable to mortgage brokers. Although this statement was not mentioned in the NOP and, presumably, was not relied upon by the Superintendent in his denial, this statement is also relevant evidence, before the Tribunal, of the Applicant's past conduct within the meaning of s. 10¶1 of the Regulation.

With respect to the considerations listed in the *Henderson* decision (at p. 9), the Tribunal makes the following observations and findings:

1. *The time that has elapsed since the conduct:* The March 2003 and January 2005 convictions stem from a series of facts that occurred in the Fall of 2001. There is little evidence pertaining to why the criminal matter took so long to proceed. However, with the exception of coming into contact with JC in March of 2003, the conduct at the root of these convictions is approximately seven years old. With respect to his dealings as a "curbsider", there is little evidence about the relevant timeframe other than the fact that these activities occurred sometime between his departure from Valca in 1999 or 2000 and his arrival at MB/MS in the summer of 2005. As for the false statement made to his supervisor and to the Commission, it was made approximately three years before the Applicant applied for a mortgage agent's licence.
2. *The prolonged or repetitive nature of the conduct:* Relatively speaking, the March 2003 conviction results from an isolated event, namely, the Applicant's contact with a person for whom he had given a recognizance to abstain from seeing. In comparison, the January 2005 convictions stem from his possession of stolen property over a prolonged period of time – conduct that could have potentially lasted 6 months if the police had not tracked the stolen vehicle a few weeks after the Applicant took possession. Likewise, the Applicant testified that he privately sold between 5 and 10 vehicles over the years, following his departure from Valca. With respect to the false statement made to Mr. Askew and to the Commission on July 25, 2005, the Tribunal simply notes that the Applicant repeated this falsehood three years later, in his June 2008 licence application.
3. *The advertent or inadvertent nature of the conduct:* With respect to this consideration, the Tribunal must take into account the fact that the Applicant pled guilty to the three criminal offences in question. Moreover, although he testified to having no knowledge that the vehicle and parts stored in his garage were stolen, the objective evidence suggests that he was, at a minimum, wilfully blind in this respect. With respect to his dealings as a "curbsider", the Applicant's testimony indicates that he knew that selling vehicles without a proper registration under the MVD Act was illegal – in fact, he specifically decided against registering under the Act, once criminal charges had been laid against him in the Fall of 2001, because he knew his chances of success would not be good. The only excuse offered by the Applicant for selling these cars was his need to make a living. As for the false statement made to his supervisor and to the Commission in July of 2005, the Applicant testified that he relied on assurances given from his attorney that his record would be cleansed. The Tribunal does not find this explanation of inadvertence credible, given the fact that only five months had elapsed since his convictions and given his admission of knowledge with respect to the impact of these offences on an application for registration under the MVD Act.
4. *The extent to which the conduct can be taken to call into question the integrity, honesty and law abiding nature of the individual:* Taken as a whole, the Applicant's

March 2003 and January 2005 convictions, his dealings in illegal private automobile sales, and his false statement to Mr. Askew and the Commission in July of 2005, paint a picture of an individual with a history of actions and omissions that directly impugn his moral rectitude. As noted below, in the last three years, the Applicant has proven that he can be a law abiding individual. However, notwithstanding this pattern of redeeming behaviour, the Tribunal is of the view that the past conduct of the Applicant remains a reliable indicator of significant concern with respect to his integrity and honesty – a view that is only confirmed by the false statement made by the Applicant on his electronic application in June of 2008.

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:* Arguably, the rational connection between the March 2003 and January 2005 convictions and the typical business activities of mortgage agents is remote, in the sense that the offences in question occurred within a different industry altogether. However, the financial component to the conduct cannot be ignored: the offences for which the Applicant was convicted, not unlike his activities as a "curbsider" and his false statement to Mr. Askew and the Commission in July of 2005, all originate from a stated desire to obtain a financial advantage and to make a living. Viewed from this perspective, there is a close nexus between the Applicant's past conduct and his employment as a mortgage agent.
6. *The fairness of the process followed in the disciplinary proceeding:* With respect to the 2003 and 2005 convictions, the Applicant was represented by a criminal attorney and there is no suggestion of any procedural defects which may have led to his guilty pleas. With respect to the evidence of additional past conduct adduced during the Hearing, the Tribunal notes that the Applicant was self-represented and that neither the NOP nor the reasons attached thereto contain any reference to allegations of such conduct. Without suggesting that Counsel for the Superintendent acted improperly in adducing this evidence – evidence which is clearly relevant for the Tribunal's *de novo* determination of suitability – the Tribunal takes this opportunity to recommend that the Superintendent, whenever possible, furnish applicants who request hearings pursuant to s. 21(3) of the Act with further particulars as soon as they become available in order to minimize any element of surprise.
7. *The seriousness with which the disciplinary body treated the conduct as reflected in the severity of the sanction it imposed:* The Applicant received a \$100 fine for his failure to comply with his recognizance and he received a six month conditional sentence on each of the two counts of possession of stolen property. There is no evidence with respect to the relative severity of these sanctions, in comparison to other cases, but the Tribunal can take notice of the fact that conditional sentences are not trivial sanctions. Moreover, with respect to the other past conduct, it should be noted that the Applicant has yet to face any consequence for having sold cars without a proper registration in accordance with the MCD Act and for having made a false statement to his supervisor and the Commission in July of 2005.

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:* With respect to the conduct that led to the 2003 and 2005 convictions, the only pressures identified by the Applicant in his letter dated July 21, 2008, and in his testimony during the Hearing were financial ones. Likewise, with respect to his "curbsider" dealings, the Applicant candidly admitted that he engaged in these activities in order to make a living. As for the false statement made to Mr. Askew and the Commission in July of 2005, the only explanation provided by the Applicant is his reliance on his attorney's representations; an explanation that was later qualified by an acknowledgment of his sense of embarrassment. However, given the Applicant's legitimate desire to enter a new profession in the spring of 2005, and given his admission that his past charges were a known impediment to registration as a dealer under the MVD Act, another explanation can reasonably be inferred from the evidence, namely, the Applicant's desire to earn a living as a mortgage agent uninhibited by his past.
9. *Any consistent and prolonged pattern or reformed or redeeming behaviour on the part of the individual since the conduct occurred:* With the exception of the false statement made on his electronic licence application in June of 2008, a circumstance which shall be considered separately below, there is no evidence that the Applicant has engaged in any conduct since the summer of 2005 that calls into question his ability to deal or trade in mortgages in accordance with the law and with integrity and honesty. On the contrary, the evidence of good character and competence described above suggests that the Applicant has, over the last three years, shown a pattern of behaviour consistent with the professional responsibilities of mortgage agents. The Applicant's stated purpose in leaving the automotive industry, in the summer of 2005, was to start a new life and leave the past behind. The evidence leads the Tribunal to conclude that he has succeeded, to a large extent, in achieving this goal.

*c. False Statement*

During the Hearing, Counsel for the Superintendent observed that he was not relying on the false statement made to the Commission and to Mr. Askew in the July 2005 notification as an independent ground for rejecting the Applicant's licence application, within the meaning of s. 10¶3 of the Regulation, but rather for the purpose of challenging the credibility of the Applicant's explanation for the false statement made in his June 2008 application. As noted in the previous sub-section, the Tribunal has also considered this false statement as evidence of the Applicant's past conduct within the meaning of s. 10¶1 of the Regulation.

With respect to the considerations listed in the *Alves* decision (at p. 14), the Tribunal makes the following observations and findings:

1. *The nature of the false statement:* The false statement made by the Applicant in his electronic licence application relates to a question that is directly relevant with respect to his suitability for a licence under the Act. The 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.

2. *The advertent or inadvertent nature of the falsehood:* Although the Applicant claims to have made an honest mistake in his June 25, 2008, application, the Tribunal does not find his evidence credible in this respect. As discussed below, the explanations provided by the Applicant support only one reasonable inference: he knowingly misrepresented the truth when submitting his licence application.
3. *The explanations provided by the individual for the falsehood:* The two explanations given by the Applicant in his written correspondence are at odds with each other. In his letter dated July 21, 2008 (ABD – Tab 4), the Applicant explains his false statement by placing the blame on his criminal attorney: he states that he had relied on representations made by his lawyer that his criminal record would be erased. However, in his Request for Hearing dated September 30, 2008 (ABD – Tab 9), the Applicant places the blame squarely on himself: he states that he was embarrassed at the time and wanted to put the past behind him. Manifestly, the second explanation is more consistent with the testimony given by the Applicant during the Hearing. This explanation is also more consistent with the fact that, in July of 2005, the Applicant made the exact same false statement to his supervisor and in his notification to the Commission – at a time when only five months had elapsed since his last convictions. Accordingly, with respect to the false statement made by the Applicant on his electronic licence application, the Tribunal finds that the explanation given in the letter dated July 21, 2008, is misleading. This explanation does not reveal the true reason why the Applicant falsely disclosed that he had not been convicted of any prior criminal offences. Based on the testimony given by the Applicant, the conflicting explanations found in his written correspondence with the Commission and Tribunal, and the false statement made to his supervisor and to the Commission in July of 2005, the Tribunal is led to the unavoidable conclusion that the real explanation for the false statement made on the licence application lies within the sense of embarrassment felt by the Applicant and his desire to start a new life, unfettered by his past actions.
4. *The circumstances in which the falsehood is made, including any unusual and severe pressure the individual was under at the time the false statement was made:* The Applicant has not presented any evidence of unusual and severe pressure during the summer of 2008.

#### *d. Conclusion*

For the purposes of this Hearing, the Tribunal need not decide conclusively whether the Applicant's past conduct or false statement, viewed independently, provide reasonable grounds to support a belief in his unsuitability for a mortgage agent's licence. Indeed, when these two sets of circumstances are viewed in conjunction with each other, they provide ample grounds to support this belief. Having reached the conclusion that the Applicant is not suitable to be licensed as a mortgage agent, the Tribunal need not address the second issue identified during the PHC, namely, the granting of a licence on conditions.

In reaching this conclusion, the Tribunal is mindful of the fact that our decision will have serious financial consequences on the Applicant. In particular, according to s. 8(1) of Regulation 409/07, an individual whose application for a mortgage agent's licence has been refused cannot apply for a new licence unless twelve months have passed since the refusal and the individual satisfies the Superintendent that "new or other evidence" is available or "that material circumstances have changed". The Tribunal also acknowledges the efforts made by Mr. Askew and his brokerage to give the Applicant a second chance. However, the new licensing regime adopted by the Ontario legislature in the summer of 2008 is primarily designed to protect the public interest and enhance public confidence in the mortgage industry. In view of the circumstances surrounding the Applicant's past conduct and false statement, the Tribunal believes there are sufficiently reasonable grounds to justify a denial of his licence application.

**F. ORDER**

The Tribunal orders the Superintendent to carry out his Notice of Proposal to refuse to issue a mortgage agent's licence to the Applicant.

**DATED** at the City of Toronto, this 8<sup>th</sup> day of December, 2008.

\_\_\_\_\_  
"Denis Boivin"

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

\_\_\_\_\_  
"John Solursh"

John Solursh, Chair of the Tribunal  
and Member of the Panel

\_\_\_\_\_  
"Shiraz Bharmal"

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