BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2018-MBA-001(a)

In the matter of an appeal under section 9 of the *Mortgage Brokers Act*, RSBC 1996, c 313, to the Financial Services Tribunal pursuant to section 242.2 of the *Financial Institutions Act*, RSBC 1996, c 141.

BETWEEN:	Arvind Shankar	**APPELLANT**
AND:	Registrar of Mortgage Brokers	**RESPONDENT**

BEFORE: A Panel of the Financial Services Tribunal
Michael Tourigny, Panel Chair

DATE: Conducted by way of written submissions concluding on October 5, 2018

APPEARING: For the Appellant: Patrick J. Sullivan, Legal Counsel
For the Respondent: Joni Worton, Legal Counsel

OVERVIEW

[1] Mr. Arvind Shankar (the "Appellant" or "Mr. Shankar") appeals to the Financial Services Tribunal (the "Tribunal") under section 9 of the *Mortgage Brokers Act,* RSBC 1996, c 313 (the "MBA") from two decisions made by the Appointee (the "Appointee") of the Registrar of Mortgage Brokers (the "Respondent" or "Registrar").

[2] The first decision under appeal, dated August 27, 2017 (the "Merits Decision"), found that Mr. Shankar conducted business as a submortgage broker without being registered to do so contrary to section 8(1.4) of the MBA in relation

to numerous mortgage financing applications made on behalf of two separate borrowers ("Borrower 1" and "Borrower 2").

[3] The second decision under appeal, dated January 15, 2018, involved the resultant assessment of penalty and costs against Mr. Shankar (the "Penalty Decision"). Mr. Shankar was ordered to pay the maximum administrative penalty under section 8(1.4) of the MBA in the amount of $50,000, and under section 6(9) of the MBA to pay investigation costs in the amount of $6,771.50, plus hearing costs to be assessed.

[4] In addition to Mr. Shankar, Mr. Dennis Rego and Shank Capital Systems Inc. ("Shank Capital") were parties in the underlying Merits and Penalty decisions. It is material to an understanding of the issues in this appeal that in relation to the same mortgage financing applications made on behalf of Borrower 1 and Borrower 2, the Appointee held that both Mr. Rego and Shank Capital (who at the time were respectively a registered submortgage broker and registered mortgage broker), conducted their business in a manner that was prejudicial to the public interest contrary to section 8(1)(i) of the MBA.

[5] In the Penalty Decision, Mr. Rego was ordered to pay the maximum administrative penalty under section 8(1.1) of the MBA in the amount of $50,000, and under section 6(9) of the MBA to pay investigation costs in the amount of $6,771.50.

[6] Neither Mr. Rego nor Shank Capital participated in the hearing before the Appointee, nor have they appealed from the Merits or Penalty Decisions made against them. Mr. Rego has not been registered as a submortgage broker under the MBA since September 2015, and Shank Capital was dissolved in September 2016.

[7] Section 242.2(11) of the *Financial Institutions Act,* RSBC 1996, c 141 (the "FIA") applies to this appeal and provides that the Tribunal may confirm, reverse or vary a decision or send the matter back for reconsideration, with or without directions.

[8] The Appellant asks that the Tribunal reverse or vary, or alternatively send back for reconsideration, each of the Merits and Penalty Decisions. The Appellant further seeks an award of costs under section 242.1(7) of the FIA.

[9] The Respondent opposes the appeal and requests that it be dismissed and the Decisions confirmed. In the alternative, if the appeal is not denied, the Respondent seeks that the matter be sent back for reconsideration. The Respondent also seeks an award of costs.

[10] For the reasons that follow, I find that Mr. Shankar's appeal should be dismissed in its entirety.

BACKGROUND

[11] The MBA establishes a regulatory scheme for the arranging of mortgages in British Columbia by requiring mortgage brokers and submortgage brokers to be registered with the Respondent. The MBA also requires those registered under it to

be suitable persons, and to meet the requirements of the MBA, including conduct and disclosure requirements.

[12] The MBA defines "mortgage broker" to include a person who, among other actions, does either of the following: carries on the business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker's own or that of another person; or, in any one year receives consideration in excess of $1,000 for arranging mortgages for other persons.

[13] The MBA defines "submortgage broker" to include any person who, in BC, actively engages in any of the defined activities of a "mortgage broker", and who is employed by, or who is a director or partner of, a "mortgage broker".

[14] Mr. Shankar was not registered at any time under the MBA as either a mortgage broker or submortgage broker.

[15] In October 2014, the Registrar's Office received a complaint alleging that a falsified contract of purchase and sale for a property in Vancouver had been sent to a lender by Mr. Rego.

[16] On April 23, 2015, following initial interviews of the complainant and other witnesses, staff investigator Mr. C, together with another investigator, attended the offices of Shank Capital, located at Mr. Rego's home, and conducted a search under section 6(7) of the MBA (the "Search"). As a result of the Search, electronic copies of mortgage business documents were taken from Mr. Rego's laptop along with electronic copies of Mr. Rego's emails and copies of certain mortgage applications from his Filogix[1] account relating to Borrower 1 and Borrower 2.

[17] While there is no dispute that the Search was properly authorized, the Appellant challenges the admissibility of, and weight given to, the documents obtained through the Search, based on the manner in which the Search was conducted and how the evidence obtained was handled by Registrar's staff.

[18] During the course of the investigation into the activities of Mr. Rego and Shank Capital, Mr. C discovered evidence that led him to expand the scope of the investigation to include Mr. Shankar.

[19] A Notice of Hearing dated September 30, 2016 was issued to Mr. Rego, Shank Capital, and Mr. Shankar; giving each of them notice that the Registrar intended to hold a hearing under section 8 of the MBA, and advising them that they would have an opportunity to "be heard" prior to the Registrar making any adverse findings against them. The content of the Notice of Hearing is central to issues of fairness raised by the Appellant in this appeal.

[20] On January 31, 2017, counsel for Mr. Shankar was provided with a set of investigation binders containing printed copies of the documents intended to be tendered in evidence at the hearing. The binders included copies of documents retrieved from Mr. Rego's laptop, and copies of Mr. Rego's emails obtained through the Search.

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[1] Filogix is an online database in which brokers input information about a borrower and then transmit the information to a potential lender as part of the mortgage application process.

[21] Prior to the commencement of the hearing, Mr. Shankar applied to the Appointee to have the allegations against him severed from the hearing into the allegations against Mr. Rego. The severance application was dismissed by written decision dated March 15, 2017.

[22] The hearing before the Appointee commenced on March 20, 2017. Several days into the hearing, Mr. Shankar sought an order for production of the original copy of the information taken from Mr. Rego's laptop, including from the email accounts. Written submissions were made. By written decision dated April 24, 2017, the Appointee dismissed the application, holding that procedural fairness did not necessitate such disclosure in order for Mr. Shankar to effectively participate in the proceedings (the "Decision on Disclosure Application"). This decision was not appealed.

[23] The hearing occupied 9 days, from March through July 2017, during which time staff of the Registrar led its evidence. Mr. Shankar did not testify at the hearing and the only evidence presented by him was that of Mr. Graf, who gave opinion evidence challenging the evidentiary value of the electronic documents obtained by Mr. C through the Search.

[24] The Appellant filed his Notice of Appeal from the Merits and Penalty Decisions on February 14, 2018. The Notice of Appeal advanced numerous grounds of appeal, including some grounds that have not been pursued by the Appellant in his written submissions. The Respondent argues those grounds not addressed by the Appellant in his written submissions should be treated as abandoned, relying on the decision of the Tribunal in *Bella Daniels v Real Estate Council of British Columbia and the Superintendent of Real Estate,* Decision FST-07-034 (July 19, 2007). In response, the Appellant states that he is only asking the Tribunal to address the issues specifically listed in his reply submissions. Accordingly, I will treat grounds of appeal that were set out in the Notice of Appeal but have not been referred to by the Appellant in his written submissions, as having been abandoned.

ISSUES

[25] For the purpose of articulating this decision, I have adopted the grounds of appeal from the Appellant's Reply; modified as appropriate by the evidence and the other written submissions of the parties.

a. Notice of the Nature of Mr. Shankar's Conduct

i. Did the Notice of Hearing give Mr. Shankar adequate notice of the conduct alleged against him?
ii. Did the Appointee err in finding that to the extent there was any defect in the Notice of Hearing, it was cured by full disclosure of all of the evidence?
iii. Did the Appointee err in penalizing Mr. Shankar for conduct that was not alleged against him in the Notice of Hearing?

b. Evidentiary Matters

i. Did the Appointee err in admitting the electronic evidence obtained through the Search?
ii. Did the Appointee err by applying an incorrect evidentiary standard and onus of proof at the hearing?
iii. Did the Appointee err in finding Mr. Shankar received compensation in excess of $1,000 in a year for arranging a mortgage on behalf of Borrower 2?

c. Penalty and Hearing Costs

i. Did the Appointee err in imposing the maximum administrative penalty against Mr. Shankar?
ii. Did the Appointee err in awarding legal costs of the hearing against Mr. Shankar?

DISCUSSION AND ANALYSIS

Standard of Review

[26] The Respondent relies on the decision of the Tribunal in *Hensel v Registrar of Mortgage Brokers,* Decision No. 2016-MBA-001(a) ("*Hensel*"). In *Hensel* this Tribunal considered the standard of review that applies to decisions of first instance decision-makers, such as the Appointee, on questions of fact, law and discretion. The Tribunal Chair held (at paras 17-18):

> [17] In recognition of these principles, the Tribunal has developed its own appellate "standard of review" jurisprudence. It has held that the case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings *de novo*, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nguyen v. Registrar of Mortgage Brokers*, July 20, 2005, p.9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision".
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> [18] On the other hand, where the first instance regulator has made a finding of law, the Tribunal has generally held that deference is not required. Indeed, just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the Tribunal is also entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator. I note that the British Columbia Court of Appeal has considered this

> position to be a reasonable one in *Westergaard v British Columbia (Registrar of Mortgage Brokers),* 2011 BCCA 344.

[27] The Respondent submits that the appropriate standard of review for procedural fairness is that of fairness, as expressed by the Tribunal in *Lin v Real Estate Council of British Columbia,* Decision No. 2016-RSA-002(d) ("*Lin*"), as follows (at paras 24-27):

> [24] The use of the fairness approach in *Seaspan* to an issue of procedural fairness was adopted by this tribunal in *Kadioglu v. Real Estate Council of British Columbia*, FST 2015-RSA-003(b). It was held there that the fairness test was appropriately applied by this tribunal in deciding whether the proceedings below were fair, though from the unique perspective of specialized knowledge of the industry factors falling within that tribunal's responsibility.
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> [25] I note as well that in *Hensel v. Registrar of Mortgage Brokers*, FST 2016-MBA-001(a) this tribunal also assessed a procedural fairness submission on the basis of whether the procedure below had been fair in all of the circumstances.
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> [26] I am not bound either by the Court decisions I have just referenced or even by the foregoing decisions of this tribunal, though as to the latter it is certainly desirable to strive for tribunal consistency wherever it can rightly be found.
>
> [27] I have indeed decided to consider the procedural fairness submissions made by the Appellant on the basis of whether what took place in each of the investigative and adjudicative processes below was fair, in all of the circumstances. That will need to be assessed in light of both the evidence and the legal principles applying in those spheres.

[28] I conclude from the parties submissions that they agree with the following standards of review:

(a) correctness for questions of law;

(b) fairness for procedural fairness questions; and

(c) reasonableness for questions of fact and discretion.

[29] For the purposes of this appeal, I agree with and adopt the standard of review analyses quoted above from *Hensel* and *Lin* on questions of law, fact, discretion and procedural fairness.

[30] The parties do not agree on the appropriate standard of review applicable to all of the specific issues being addressed in this appeal. I will identify those issues where the parties disagree, and rule on the applicable standard later in my decision when addressing the particular issues in question.

[31] This leaves for determination the standard of review applicable to penalty decisions.

[32] The Respondent's written submissions assert that the standard of review applicable to the Penalty Decision is reasonableness. In support of this proposition, reference is made to the decision of the Tribunal in *Mann v Insurance Council of British Columbia,* Decision No. 2015-FIA-002(a) ("*Mann*"), where Member Lewis held (at para 39 (g)):

> …With those considerations in mind, it makes eminently good sense that a penalty decision by Council should be maintained by the FST unless unreasonable, as would be the case with an appeal centered on facts or, possibly, mixed facts and law. While it is doubtless the case that an appellate tribunal is less able, for example, to determine whether a witness before the hearing below was a truth teller than to select a penalty based on accepted facts and authorities, that does not mean that it should be more active in the latter case than the former, where the matter of penalty has been entrusted by legislation to the first instance, specialist tribunal that bears primary responsibility to deliver it. That is a consideration equally deserving of deference, even if logically sanction is a more comfortable issue for an appeal body than, say, the credibility of a witness it did not see.

[33] Following the close of submissions in this appeal, the Tribunal released its decision in *Financial Institutions Commission v Insurance Council of BC et al,* Decision No. 2017-FIA-002(a)-008(a) ("*FICOM*"). *FICOM* addresses the issue of the appropriate standard of review to be applied by this Tribunal in penalty appeals. Accordingly, I requested supplemental submissions on the issue of whether and how the decision in *FICOM* affected each party's position on the appropriate standard of review applicable to the Penalty Decision.

[34] In *Soheil Arman Kia v The Registrar of Mortgage Brokers,* Decision No. 2017-MBA-002(b) ("*Kia*"), the Panel held as follows with respect to the impact of *FICOM* on the standard of review applicable to penalty decisions made under the MBA:

> [26] As observed in *Lin*, the Panel is not bound by prior decisions of the Tribunal, although it is certainly desirable to strive for Tribunal consistency wherever it can rightly be found. The Chair in *FICOM* made it clear that it is sensible for the Tribunal to adopt a consistent approach to the standard of review applied in all penalty appeals within its jurisdiction. I agree.
>
> [27] The Chair in *FICOM* started his analysis of the appropriate standard of review in penalty appeals, as he did in *Hensel* on questions of fact, law and discretion, from the proposition that because the Tribunal is a specialized tribunal and not a generalist court, it is appropriate to approach with a degree of caution those judicial authorities that, in recognition of the distinct institutional roles of courts of law and tribunals, have addressed the standard of review to be applied by generalist courts to specialized tribunals.
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> [28] In paragraph 63 of *FICOM* the Chair of the Tribunal stated:
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> > Unless the legislature expressly prescribes the standard of review the tribunal must apply, the relevant question for an appeal tribunal is not "what would a court do?" but "what standard or review would be most consistent with the legislature's intent in creating the tribunal given its purpose and the larger purposes of the statute?" There is and should be no starting assumption that *Dunsmuir* applies.
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> [29] After reviewing *Mann* and other relevant authorities including *Harding v Law Society of British Columbia,* 2017 BCCA 171, the Chair held as follows regarding the standard of review to be applied by the Tribunal to penalty appeals (at paras 77-78):

> [77] Taking all these factors into account, it is my view that the Tribunal should unapologetically accept that the Legislature expected it to intervene in any penalty appeal where it finds that there has been an error in principle as opposed to an "error" in line-drawing by the Insurance Council, and that it is for the Tribunal to determine where an error in principle has occurred. The Tribunal should apply this test not as if it were a court, but should apply it from its specialized institutional vantage point and with a careful eye to the public interest. …
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> [78] The approach cautions against the Tribunal simply substituting its discretion for that of the body appealed from. However, it also recognizes the special role entrusted to the Tribunal in cases where the debate centres, as it does here, on whether the penalties in question fall below the standard necessary to protect the public interest in cases involving dishonest conduct.

[30] With respect to the standard of review to be applied to the within penalty appeal under the MBA, I agree with and will apply the less deferential reasonableness standard outlined in *FICOM* as quoted above.

[35] In response to the request for supplemental submissions in this appeal, the Respondent referred to the above decision in *Kia* as well as the decision in *FICOM,* and disagreed with the approach and interpretation in both decisions. The Respondent submits that the analysis in *FICOM* does not modify the reasonableness standard applicable to penalty decisions to any appreciable degree. The Respondent asserts that the *FICOM* analysis is limited to its particular facts, and that the facts in the present appeal are distinguishable from those in *FICOM* such that there is no basis or need to apply either an "error in principle" analysis or a "less deferential reasonableness standard" to this appeal.

[36] The supplemental submissions of the Appellant in reply conclude that the *FICOM* decision clearly modified the reasonableness standard to include an overarching consideration of matters of principle guided by the public interest viewed from the specialized vantage point of the Tribunal. The Appellant also asserts that the "jump to a maximum fine" raises a "matter of principle" related to the special role of the Tribunal in the statutory structure.

[37] I am of the view that the decision in *FICOM* does represent a change to a less deferential reasonableness standard of review that should be applied by the Tribunal in appeals of penalty decisions, including those under the MBA. I agree with the Appellant that *FICOM* modified the reasonableness standard applicable in penalty appeals to include an overarching consideration of matters of principle guided by the public interest viewed from the specialized vantage point of the Tribunal.

[38] I also observe and agree with the Appellant that the "error in principle" threshold identified in *FICOM* is not limited by the nature of the particular error in principle that was found by the Chair on the facts in *FICOM* as suggested by the Respondent.

[39] The less deferential reasonableness standard of review involves an assessment by the Tribunal of whether, in the particular circumstances under appeal, there has or has not been an error in principle made by the decision-maker in coming to his or her decision on penalty.

[40] I will apply the less deferential reasonableness standard of review set out in *FICOM* and as adopted in *Kia* to the Penalty Decision on this appeal.

Assessing Reasonableness

[41] Relying on *Dunsmuir v New Brunswick,* 2008 SCC 9 ("*Dunsmuir*"), the Respondent submits that a decision is reasonable if it falls within a range of possible, acceptable outcomes, and is reached through a decision-making process that demonstrates the existence of "justification, transparency and intelligibility".

[42] Relying on *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 ("*McLean*"), the Respondent further asserts that where an appellant offers a competing interpretation on an issue subject to reasonableness review, the appellant must show two things: first, that the appellant's own interpretation is reasonable, and second, that the decision-maker's interpretation was unreasonable.

[43] In order to show that a decision-maker's interpretation is unreasonable, the Respondent submits that the Appellant must show the decision is "not justified, not transparent, **and** unintelligible." In reply, the Appellant correctly asserts that the Appellant must show that the decision is "not justified, not transparent, **or** unintelligible."

[44] I agree with and will apply the *Dunsmuir* and *McLean* analyses of the reasonableness standard in this appeal.

a. Notice of the Nature of Mr. Shankar's Conduct

Standard of review

[45] The Appellant asserts the role of the Notice of Hearing is a question of law attracting a correctness standard of review, but the Appellant's submissions focus on issues of procedural fairness.

[46] The Respondent submits that the Appointee's finding that there was proper notice attracts a fairness standard of review.

[47] I have determined that three interrelated issues arise from the Appellant's submissions relating to the Notice of Hearing and the alleged absence of particulars. What constitutes notice, and how notice is provided in the context of hearings conducted under section 8 of the MBA, are questions of procedural fairness. As a result, I will apply a fairness standard of review on all three of the interrelated notice issues.

i. Did the Notice of Hearing give Mr. Shankar adequate notice of the conduct alleged against him?

Analysis

[48] The Appellant makes the point, and I agree, that unregistered submortgage broker activity that contravenes section 8(1.4) of the MBA encompasses a broad range of possible conduct; from arguably inadvertent, to fraudulent. A finding of dishonest conduct is not required to establish a contravention of section 8(1.4).

[49] The essence of the Appellant's position is that while he knew he was facing allegations that he breached section 8(1.4) of the MBA in his activities in relation to Borrower 1 and Borrower 2, the Notice of Hearing did not give him any notice that the case being advanced against him included allegations that could expose him to adverse findings regarding dishonest conduct.

[50] The Appellant asserts that this alleged absence of notice was a fundamental breach of his right to legal counsel, and his right to know the case against him. The Appellant argues that the Appointee penalized him for conduct that was not alleged against him in the Notice of Hearing.

[51] To address this issue I must determine the requisite notice of the nature of the conduct that Mr. Shankar was alleged to have engaged in, and whether or not that notice requirement was met in the Notice of Hearing.

[52] As held by the Appointee, the proceeding which the Appellant participated in was not a criminal proceeding. The onerous disclosure duties imposed on the Crown in criminal proceedings do not apply in this administrative context.

[53] The proceeding the Appellant participated in was an administrative proceeding, which was required to be conducted in accordance with the principles of procedural fairness. As stated by the Appointee in the Decision on Disclosure Application, generally speaking, these principles require that the parties have an opportunity to know the case against them and an opportunity to respond, but the extent of the required disclosure is dependent on the statutory scheme and all of the circumstances. I agree.

[54] As correctly held by the Appointee in both the Decision on Disclosure Application and the Merits Decision, the requirements of procedural fairness in any given case must be assessed contextually as stated by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 ("*Baker*"). The *Baker* "criteria" to be reviewed in determining the procedural rights required by the duty of procedural fairness in any particular case include:

i. the nature of the decision being made and the process followed in making it;

ii. the nature of the statutory scheme;

iii. the importance of the decision to the individuals affected by it;

iv. the legitimate expectations of the individuals challenging the decision; and

v. the procedural choices made by the agency itself.

Application of the Baker criteria

[55] Relying on *British Columbia (Securities Commission) v Pacific International Securities Inc.,* 2002 BCCA 421, and *Cooper v Hobart*, 2001 SCC 79, the Appointee held that the regulatory scheme of the MBA is intended to protect the public interest. In addressing hearings under section 8 of the MBA the Appointee held (Merits Decision at p 10):

> Section 8 of the *Act* gives the Registrar the power to make certain orders and impose administrative penalties on a person after giving the person an opportunity to be heard. As in the case of a hearing under the *Securities Act,* the purpose of the hearing is not to determine rights but to protect and serve the public interest. Any sanctions that may be imposed are not penal in nature but are intended to promote compliance with the legislation and regulatory scheme.

I agree with the above findings of the Appointee concerning the overriding public protection nature of the scheme of the MBA, as well as the nature and purpose of decisions being made in hearings under section 8.

[56] In the context of the importance of the decision to the person affected by it, the liberty of a person subject to a section 8(1.4) hearing is not at stake. Sanctions imposed are not penal in nature. However, as acknowledged by the Appointee in the Decision on Disclosure Application, the procedural rights to be afforded to respondents in hearings under section 8 of the MBA are high given the impact of a decision imposing administrative penalties may be significant.

[57] As to the legitimate expectations of a person subject to a section 8(1.4) hearing there is nothing in the MBA specifying the requisite content of a Notice of Hearing. No published rules of practice or procedure for section 8 hearings have been brought to my attention addressing the issue. However, section 8(1.4) begins with the words “After giving a person an opportunity to be heard”. This phrase imports with it a legitimate expectation that the person will have a reasonable opportunity to know the case against him or her, and a meaningful opportunity to respond.

[58] The procedural choices made by the Registrar’s staff are evidenced by the following: 1) the decision to proceed against Mr. Shankar together with Mr. Rego and Shank Capital under a single Notice of Hearing; 2) the drafting of the Notice of Hearing itself; and 3) the production to Mr. Shankar prior to the hearing of a set of investigation binders containing printed copies of the documents intended to be tendered in evidence at the hearing.

[59] Based on the forgoing application of the *Baker* criteria, in all of the circumstances of this case I find that the Appellant was entitled to a high degree of procedural fairness in the context of the section 8 proceeding. Notice of the nature of the conduct that Mr. Shankar was alleged to have engaged in should have been given to him, and he should have had a meaningful opportunity to respond to the conduct alleged. Whether that notice must be found within the four corners of the Notice of Hearing will be addressed later in this decision.

[60] The Appellant refers to *Law Society of Upper Canada v Paradiso*, 2015 ONLSTA 3, para 16 (“*Paradiso*”), in support of the proposition that notice of the

nature of the conduct he was alleged to have been involved in needed to be adequate enough to provide him with an opportunity to prepare his case. I agree with the Appellant's characterization of this proposition, and will apply it on this appeal.

[61] The Appellant also refers to *Paradiso* in support of the proposition that adequate notice not only includes knowing the allegations made, but also includes knowing the consequences that may flow from those allegations. Insofar as this notice obligation goes beyond the giving of notice of the penalties permitted by the charging statute, (which notice was provided to the Appellant in the Notice of Hearing in this case), I reject this submission. A broader interpretation of this aspect of notice is not supported by either *Paradiso* or the authorities quoted therein.

The Notice of Hearing

[62] By initiating the process utilizing a single Notice of Hearing with respect to the allegations against Mr. Shankar, Mr. Rego and Shank Capital, and by calling for a joint hearing, it was clear that the Registrar's staff were advancing a theory that the allegations against each respondent were interrelated.

[63] Before the hearing commenced, Mr. Shankar applied to the Appointee to have the allegations against him severed from the hearing into the allegations against Mr. Rego. In dismissing the application the Appointee held (decision regarding severance at p 2):

> In this case, the allegations in the Notice of Hearing, while not identical against each respondent, are interrelated. They raise allegations that both Mr. Rego and Mr. Shankar acted together or worked jointly in some matters. I am satisfied that the Notice of Hearing raises allegations that suggest a joint hearing will be more efficient.

[64] Even a cursory reading of the Notice of Hearing gives clear notice to the reader that the Registrar's staff alleged that Mr. Rego and Mr. Shankar acted together or worked jointly in some matters particularized in the Notice of Hearing. It would be unreasonable in the circumstances for Mr. Shankar to focus solely on the particulars alleged against him in paragraph 14, and to ignore the particulars of his alleged conduct set out elsewhere in the Notice of Hearing as part of the narrative of the alleged joint enterprise.

[65] In the circumstances, I find that it is fair and reasonable that the entire contents of the Notice of Hearing are to be looked to for particulars advanced against Mr. Shankar in support of the allegation that he conducted business as a submortgage broker in BC without being registered to do so. The Appointee acted fairly in considering the allegations against Mr. Shankar in paragraph 14 in the context of the Notice of Hearing as a whole.

[66] An examination of the contents of the entire Notice of Hearing is called for to determine the actual particulars that were advanced against Mr. Shankar in support of the alleged breach of section 8(1.4) of the MBA.

[67] In the Penalty Decision, the Appointee held (Penalty Decision at p 7-8):

> Further, despite that paragraph 14 of the Notice of Hearing containing the specific allegations against Mr. Shankar does not allege dishonest conduct, there can be no doubt, when the Notice of Hearing is read as a whole, and in the context of all of the disclosure provided by Staff to Mr. Shankar, that he was fully aware of the nature and extent of the allegations against him including that the specific mortgage brokering activities alleged in connection with the [Borrower 1 and Borrower 2] mortgages, and ultimately found to have been made out, involved alleged dishonest conduct.
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> For example, paragraph 12(b) of the Notice of Hearing alleges that Mr. Rego, collectively with Mr. Shankar, submitted three different contracts of purchase and sale in support of the [Borrower 1] mortgage application. Paragraph 12(d)(i) alleges Mr. Rego submitted a mortgage application on behalf of [Borrower 2] which he knew was misleading because of, among other things the contract alleged to have been sent to him by Mr. Shankar. At paragraph 12(f) Mr. Rego is alleged to have facilitated the unregistered broker activities of Mr. Shankar with respect to both [Borrower 1 and Borrower 2] mortgage applications, applications which were alleged to be knowingly misleading, including that he took instructions from Mr. Shankar with respect to these applications.
>
> The allegations against Mr. Shankar at paragraph 14 of the Notice of Hearing that he conducted business as a mortgage broker without being registered specifically allege involvement by Mr. Shankar in mortgage applications on behalf of [Borrower 1 and Borrower 2]. These allegations, when read in the context of the Notice of Hearing as a whole and in light of the complete disclosure by Staff of all of the evidence to be tendered at the hearing in support of the allegations, provided Mr. Shankar notice that he was alleged not only to have been conducting business as a mortgage broker while not registered, but that he was implicated in arranging mortgages that were alleged to have been based on false or knowingly misleading information.

[68] In the above quoted extract from the Penalty Decision, the Appointee references the disclosure of the evidence to be tendered at the hearing as being part of the notice which was provided to Mr. Shankar of the alleged dishonest nature of his conduct. I will address that aspect of disclosure later in this decision.

[69] In the context of the contents of the Notice of Hearing itself, the Appointee found notice of alleged dishonest conduct was provided to Mr. Shankar through specific allegations set out in paragraphs 12 and 14. The Appointee found that those paragraphs, read together with the rest of the Notice of Hearing, clearly amounted to allegations that Mr. Shankar was not only acting as an unregistered mortgage broker, but while doing so, was also preparing mortgage applications based on false or misleading information. I agree with the Appointee's finding that proper notice was given to Mr. Shankar in the Notice of Hearing; which finding was fair in all of the circumstances.

[70] With respect to the particulars of alleged conduct of a dishonest nature involving Mr. Shankar in the Notice of Hearing, I further find as follows:

i. Paragraph 14 alleges particularized offending conduct by Mr. Shankar relating to Borrower 1 and Borrower 2. The terms "Borrower 1" and "Borrower 2" are defined in paragraph 12. The use in paragraph 14 of these key terms defined in paragraph 12 clearly links the allegations in

those paragraphs. The specific transactions involved on behalf of Borrower 1 and Borrower 2 are particularized in paragraph 12.

ii. Particulars concerning Borrower 1: Paragraph 14.a.iii. and iv. allege that Mr. Shankar reviewed documents sent to him by Mr. Rego in respect of Borrower 1's mortgage application and that he submitted documents directly to a lender in support of Borrower 1's mortgage application. Paragraph 12.b. particularizes those documents and alleges that Mr. Rego, collectively with Mr. Shankar, submitted three different contracts of purchase and sale in support of the Borrower 1 mortgage application; documents that were alleged to be forgeries. In paragraph 12.b.ii. and iii. Mr. Shankar is alleged to have reviewed and sent on to a potential lender two of these three allegedly forged contracts of purchase and sale.

iii. Particulars concerning Borrower 2: Paragraph 14.b.i - v. allege that Mr. Shankar collected documents from Borrower 2, advised Mr. Rego as to the type of mortgage to apply for, reviewed documents, reviewed and revised emails to lenders, and approved mortgage applications before Mr. Rego submitted them to lenders. Paragraph 12.d. and e. particularize the documents involved, all of which are alleged to have been misleading documents. Paragraph 12.f. further particularizes Mr. Shankar's direction of Mr. Rego and their joint efforts in advancing misleading mortgage applications on behalf of Borrower 2.

[71] Contrary to the submissions of the Appellant, I find that the Notice of Hearing provided Mr. Shankar with adequate notice of particularized conduct of an alleged dishonest nature involving him in relation to both Borrower 1 and Borrower 2. Reading paragraphs 14 and 12 together, it is clear that the Appellant was alleged to have reviewed and sent forged documents to a potential lender for Borrower 1. He was also alleged to have directed Mr. Rego to send misleading mortgage applications to lenders for Borrower 2. Mr. Shankar had adequate notice and a meaningful opportunity to prepare his case in response. The notice provided was fair in all of the circumstances. Accordingly, this ground of appeal is dismissed.

[72] I make this finding being cognizant of the fact that while paragraph 12 of the Notice of Hearing alleges that Mr. Rego "knew or ought to have known" that the various documents were either not genuine or misleading, the same allegations were not advanced against Mr. Shankar in the Notice of Hearing.

ii. Did the Appointee err in finding that to the extent there was any defect in the Notice of Hearing, it was cured by full disclosure of all of the evidence?

[73] I have found above that the requisite notice of the nature of the conduct that Mr. Shankar was alleged to have been involved in was given to him in the Notice of Hearing. Given that finding, it logically follows that I also find that the Appointee did not err in finding that Mr. Shankar received notice through the Notice of Hearing, together with full disclosure of all of the evidence.

[74] The parties have made extensive submissions on the issue as to whether the notice duty can be met through the disclosure of evidence prior to the hearing. In the event that my finding that adequate notice was given in the Notice of Hearing is wrong, I have decided to address this issue with the benefit of the submissions of the parties.

[75] In the Penalty Decision, the Appointee held that to the extent there was any defect in notice provided in the Notice of Hearing, (without finding that there was such a defect), any such defect was cured by the full disclosure of the evidence to Mr. Shankar prior to the hearing.

[76] As authority, the Appointee relied on Sarah Blake, *Administrative Law in Canada* 6th ed., para. 2.121 ("*Blake*") which states:

> In professional discipline, factual particulars should be described in the notice of hearing or in a supplemental document. Both the client and the specific misconduct should be identified. However, a notice should not read like an Information in a criminal proceeding. How detailed it should be depends on the complexity and seriousness of the case. A failure to provide details in the notice of hearing can be cured by full disclosure of the evidence to be filed at the hearing. The tribunal is not restricted to considering only the facts alleged in the notice of hearing, but should make its decision in light off all of the facts adduced at the hearing. The notice is merely an outline of the alleged facts.

[77] The Appellant asserts that, particularly where different allegations are made against different respondents, the Notice of Hearing and any particulars must set out the case that a particular respondent has to meet. In support of this proposition, the Appellant relies on *Blackmont Capital Inc. (Re),* 2011 BCSECCOM 490("*Blackmont*"), which states (at para 24):

> A notice of hearing is the foundation of hearings before IIROC panels and this Commission. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a panel does not have jurisdiction to determine matters not alleged in the notice of hearing. (Particulars need not be in the notice of hearing, but must relate to an allegation that is in the notice.)

[78] The Appellant further asserts that while full disclosure of the evidence may act to fill in gaps with details regarding identified allegations, such full evidence disclosure cannot function to *create* new substantive allegations different from those already disclosed. If it did, this would deprive a respondent of the requisite notice of the nature of the case against him. I agree with this submission of the Appellant as a general proposition, but disagree that it is applicable on the facts of this case.

[79] In the circumstances of this case I find that the Appointee correctly applied *Blake* and that her findings were consistent with *Blackmont*. The Appointee found that the Notice of Hearing did provide notice of the nature of the conduct alleged against Mr. Shankar in support of the alleged breach of section 8(1.4) of the MBA. The full disclosure of the evidence constituted details in support of allegations found in the Notice of Hearing.

[80] The finding of the Appointee that any defect of notice in the Notice of Hearing was cured by full disclosure of all of the evidence was not in error. The finding was fair in all of the circumstances. Accordingly, this ground of appeal is dismissed.

iii. Did the Appointee err in penalizing Mr. Shankar for conduct that was not alleged against him in the Notice of Hearing?

[81] I have already found that Mr. Shankar received adequate and fair notice of the conduct he was alleged to have been engaged in.

[82] In the Merits Decision, the Appointee found that Mr. Shankar breached section 8(1.4) of the MBA in relation to both his actions on behalf of Borrower 1 (as alleged in paragraph 14.a. of the Notice of Hearing), and in relation to his actions on behalf of Borrower 2 (as alleged in paragraphs 14.b. and c).

[83] Findings made against Mr. Shankar in the Merits Decision concerning the nature of his conduct in relation to Borrower 1 included findings that he met with, advised and collected documents on behalf of Borrower 1 or her husband, met with a lender GM, reviewed documents sent to him by Mr. Rego and submitted documents to GM in relation to Borrower 1's mortgage application. The documents in question were found by the Appointee not to be genuine.

[84] Findings made against Mr. Shankar in the Merits Decision concerning the nature of his conduct in relation to Borrower 2 included findings that he discussed the application and received documents respecting the application from Borrower 1's husband on behalf of Borrower 2. The Appointee further found that he advised Mr. Rego with respect to the type of mortgage to apply for, reviewed documents sent to him by Mr. Rego, reviewed and revised Mr. Rego's email to lenders and approved mortgage applications before Mr. Rego submitted them, all with respect to Borrower 2's mortgage applications. The mortgage applications in question were held by the Appointee to contain misleading information.

[85] In the Penalty Decision, the Appointee referred to her findings concerning the nature of Mr. Shankar's conduct in relation to Borrower 1 as follows (Penalty Decision at p 8):

> I found Mr. Rego, collectively with Mr. Shankar, submitted two contracts of purchase and sale that were not genuine and that Mr. Shankar forwarded false contract to lenders.

Later in the Penalty Decision, in relation to both Borrower 1 and Borrower 2 the Appointee further stated (Penalty Decision at p 8):

> The Merits Decision found Mr. Shankar to be actively involved in arranging mortgages for …Borrower 1 and …Borrower 2 that were based on false information.

[86] The Appointee held that the specific mortgage broker activities Mr. Shankar was first alleged, and then found, to have engaged in involved dishonest conduct.

[87] I find that all of the Appointee's findings concerning the nature of the conduct Mr. Shankar was engaged in were consistent with the nature of conduct that he was alleged to have engaged in in the Notice of Hearing.

[88] I find that the Appointee did not punish Mr. Shankar for conduct that was not alleged against him in the Notice of Hearing. Accordingly, this ground of appeal is dismissed.

b. Evidentiary Matters

i. Did the Appointee err in admitting the electronic evidence obtained through the Search?

Standard of review

[89] The Appellant submits that this issue engages fundamental issues of procedural fairness in the context of Mr. Shankar's right to know the case being advanced against him. He argues for fairness as the standard of review.

[90] The Respondent, while acknowledging the fairness issues involved in the Appointee's findings, submits this issue also engages questions of the admissibility of evidence that call for a reasonableness standard of review.

[91] The Appointee addressed this issue in the Merits Decision from the procedural fairness perspective advanced by Mr. Shankar at the hearing, and ultimately admitted the evidence with the question being the weight to be given to it.

[92] I will apply a fairness standard of review to the Appointee's finding regarding admission of the electronic evidence.

Analysis

[93] During the Search, Mr. C copied and pasted a number of electronic folders and their contents from Mr. Rego's laptop onto a USB drive. Documents on the USB drive were photocopied. The electronic files were later deleted from the USB drive.

[94] Mr. C obtained the password to Mr. Rego's email account and instructed an IT analyst in the Registrar's office to change the password and download the entire contents of the email address. After the download was completed, Mr. C gave Mr. Rego back control of his email. Photocopies of relevant emails were made. The IT analyst did not give evidence at the hearing.

[95] Mr. C also obtained Mr. Rego's password to the Filogix system and made copies of PDF documents from Mr. Rego's Filogix account.

[96] Mr. C testified, and the Appointee found, that he did not alter any of the electronic documents (including email, eDocs and PDF's) in any way before printing them and including them in the investigation binders.

[97] The Appellant submits that the electronic documents were copied and maintained in a forensically unsound manner, which raised the risk that metadata may have been altered. Metadata is electronic information stored within or linked to an electronic file that is not normally seen by the creator or viewer of the file, such as the creation, modification, or last accessed date.

[98] The Appellant further submits that there was a continuity problem with the email evidence because the staff IT analyst did not testify at the hearing.

[99] In result, the Appellant argues that based on the principles of procedural fairness, the electronic documents obtained as a result of the Search should have been excluded.

[100] The expert evidence tendered at the hearing relating to how the electronic evidence was handled and preserved was as follows:

i. Both Mr. Shankar and Registrar's staff called expert witnesses in computer forensics during the hearing; Mr. Graf for the Appellant and Mr. Lo for the Respondent. The experts generally agreed that as a result of Mr. C copying the electronic documents onto his USB drive, the documents had not been obtained in a "forensically sound manner", in that metadata embedded in the electronic documents would likely have been changed as a result. The experts differed on the significance of this fact.

ii. Mr. Graf opined that where metadata is altered, authenticity of electronic documents cannot be established.

iii. Mr. Lo stated in his report that Mr. Graf did not present any information or evidence that showed that the contents of the materials presented by the staff had been altered or misconstrued as a direct result of the lack of a forensic collection. Mr. Lo suggested that other sources of evidence, such as Mr. Shankar's computer and email account, could have been accessed to compare against the evidence collected, and he saw no evidence that the contents of the electronic documents had been altered as a result of the method of collection.

iv. In cross-examination, Mr. Graf agreed that there may be cases where metadata has no material evidentiary value, and agreed that his report did not explain what made metadata important in this case. He agreed that nothing Mr. C did or did not do in collecting the electronic documents would change the content of the PDF files.

v. In this case, it was Mr. Lo's opinion that the act of copying an electronic document from Mr. Rego's computer to the USB drive would have likely changed the creation date and last accessed date. However, the modified date would likely have remained the same.

Procedural fairness applicable to preservation and continuity of evidence

[101] The Appointee found that the reliability and independence of Mr. Graf's report was compromised, and held that where the experts disagreed, she preferred the opinion of Mr. Lo.

[102] In the Merits Decision, the Appointee was clear that the only evidence before her was that metadata may not have been preserved, and there was no evidence that the metadata had any import to the proceedings before her. The evidence was that Mr. C had not altered any of the documents that he printed, and that the metadata would not affect the contents of the documents.

[103] The Appointee was satisfied on a balance of probabilities that the documents alleged to have come from Mr. Rego's computer did so. While the method of collecting electronic documents from Mr. Rego's computer was not forensically sound, it did not change the content of the documents.

[104] While the Appointee found there was a continuity problem with the emails because the IT analyst did not testify, she held this did not deprive Mr. Shankar of his ability to respond to the email evidence. The Appointee was satisfied on a balance of probabilities that the emails alleged to have been retrieved from Mr. Rego's email account were retrieved from that account, and that the method of collection did not change the content of the emails.

[105] The Appointee fully and carefully considered the content of procedural fairness, and applied the *Baker criteria* to her analysis; specifically addressing the admissibility of the electronic documents. The Appointee comprehensively reviewed and applied each of the *Baker criteria* to the facts before her, and determined that the process followed in relation to the electronic documents was procedurally fair to Mr. Shankar.

[106] In the Merits Decision the Appointee pointed out that the Registrar's investigation was not criminal in nature. In the Decision on Disclosure Application the Appointee stated (Decision on Disclosure Application at p 4):

> There is nothing in the *Act* to impose a duty on the Registrar or his or her Staff to preserve evidence to standards that might be required for criminal investigations. The *Act* contemplates that records and other evidence be returned to the person producing it, rather than being confiscated and even contemplates that records may be altered as reasonably necessary to facilitate inspection, examination or analysis.

[107] The Appointee went on to hold that there was nothing in the MBA which required the Registrar to establish chain of custody or evidentiary continuity to the same standard as would be required for a criminal investigation. She found that the MBA did not impose an obligation on the Registrar to present evidence that is "verifiable" in the way that evidence must be verifiable to meet the burden of proof beyond a reasonable doubt. The hearing to which Mr. Shankar was entitled was not a criminal trial, but an administrative proceeding in which allegations were to be proven on the civil standard of the balance of probabilities. Overall, the Appointee held that the MBA did not require the Registrar to conduct a forensically sound investigation, and in the circumstances of the case, a forensically sound investigation was not necessary to afford Mr. Shankar the right to know the case against him and the opportunity to respond. I agree with these findings.

[108] In submissions, the Appellant observes that the purpose of a search authorized under section 6(7) of the MBA is to determine if there has been a contravention of the MBA. The Appellant then asserts that this creates a legitimate expectation that documents obtained will be dealt with, maintained and preserved with that specific objective in mind. While I agree with this submission as a general proposition, there is no suggestion on the evidence or in submissions from the Appellant that the electronic evidence obtained in the Search was not dealt with, maintained and preserved with that specific objective in mind.

[109] Although the Appellant submits that copying and maintaining the electronic documents in a forensically unsound manner raised the risk that metadata may have been altered, he makes no submission as to how, on the facts, this risk actually compromised his right to know the case against him and to have the opportunity to respond. No evidence was led by the Appellant explaining what made metadata important in this case.

[110] The Appellant asserts that the continuity problem with the email evidence compromised his ability to answer the case against him, but again he does not specify how.

[111] The Appointee's decision to admit the electronic documents was fair in all of the circumstances. The Appointee appropriately considered whether admitting the electronic evidence interfered with Mr. Shankar's right to procedural fairness, and determined it did not. The Appointee underwent a careful analysis of all of the evidence before her, and finding no evidence that metadata was of any import to the proceedings, and finding that Mr. C did not alter the content of the documents, she admitted them.

[112] I find that there was no error in the Appointee's decision to admit the electronic documents. This ground of appeal is dismissed.

Privacy issue

[113] The Appellant has also raised an issue on this appeal which was not advanced before the Appointee: that the Search, conducted under the authority of section 6(7) of the MBA, engaged privacy concerns that should have been a significant factor in the decision made by the Appointee.

[114] The Appellant briefly refers to authorities in support of the proposition that a search by a government body can create very real and significant privacy concerns. The Appellant then goes on to submit that it would be reasonable to expect that the seized electronic documents would be kept in a forensically sound manner that protected privacy interests. The Appellant makes no submission in support of this alleged reasonable expectation, and does not make any effort to link this submission to the facts of the case. The Appellant does not suggest how privacy concerns "should have been a significant factor in the decision made by the Appointee."

[115] The Respondent submits that the Appellant should not be permitted to raise this privacy issue for the first time on appeal, and no exceptional circumstances are present to warrant a departure from that rule. The Respondent relies on the authority of *Johnson v British Columbia (Workers' Compensation Board),* 2011 BCCA 255, at paras. 42-52.

[116] Appeals to this Tribunal are an appeal on the record, not a *de novo* hearing. On this procedural fairness issue the standard of review I am applying is fairness. The question is whether the Appointee's decision was fair in all of the circumstances. That review is to be based on the record. I do not have the benefit of knowing the views of the Appointee on this privacy submission as it was not put to her at the hearing. I agree with the Respondent that the Appellant should not be permitted to raise this new issue for the first time on a review of the Appointee's

decision. No circumstances have been raised by the Appellant that would lead me to conclude otherwise.

[117] Insofar as the Appellant's submissions on the privacy issue are legal argument based on principles of fairness, as suggested by the Appellant in reply, I do not find them persuasive.

ii. Did the Appointee err by applying an incorrect evidentiary standard and onus of proof at the hearing?

Standard of review

[118] As this is a question of law, both parties agree that the applicable standard of review is correctness. I will apply the correctness standard to the Appointee's application of the evidentiary standard and onus of proof.

Analysis

[119] The parties also agree that the appropriate evidentiary standard of proof is the balance of probabilities, as summarized by the Supreme Court of Canada in *F.H. v McDougall*, 2008 SCC 53, as follows (at para 49):

> In the result I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[120] It is also common ground that the onus of proof lies with Registrar's staff to prove their case on a balance of probabilities.

[121] In the Merits Decision, while considering whether the evidence was sufficiently reliable to discharge the Registrar's evidentiary and legal burden, the Appointee commenced her analysis with the following paragraph (Merits Decision at p 15):

> Mr. Galambos, [counsel for Mr. Shankar], submitted that Staff's evidence can be given no weight. He submits the evidentiary burden does not shift to the Respondents if there is no evidence to rebut. However, there is evidence to rebut. Mr. Galambos made a no evidence motion at the close of Staff's case and I dismissed that application. I found there was some evidence, which if found to be sufficiently reliable, could support Staff's allegations. While the ultimate burden lies with Staff to prove the allegations on the balance of probabilities, having made the finding that there was evidence to support Staff's case, the evidentiary onus shifted to the Respondents to present evidence to rebut Staff's case.

[122] This issue arises in large part by reason of the concluding phrase in the last sentence of the quoted paragraph stating that:

> [T]he evidentiary onus shifted to the Respondents to present evidence to rebut Staff's case (the "*phrase*").

[123] The obvious concern is that the *phrase,* if read alone and out of context, is incorrect in law. At all times, the evidentiary onus stayed with Registrar's staff to prove their case on a balance of probabilities.

[124] The Appellant refers to the *phrase* and argues that the Appointee erroneously shifted the onus of proof from staff to Mr. Shankar resulting in the Appointee applying a *prima facie* evidentiary standard rather than the standard of proof on a balance of probabilities for staff's case.

[125] I note at the outset that the *phrase* must be read in the context of the paragraph and sentence in which it is found. The overall paragraph addresses the fact that an unsuccessful no evidence motion had been brought by counsel for Mr. Shankar and his submission, in the face of evidence from staff having been admitted, that the evidentiary burden does not shift to the Respondents if there is no evidence of any weight to rebut. The sentence in question starts with the phrase "[w]hile the ultimate burden lies with Staff to prove the allegations on the balance of probabilities". This shows that the Appointee was clearly aware of the legal standard and onus of proof on staff. Although the words used in the *phrase* are inconsistent with the introductory phrase of the sentence, in my view this inconsistency is no more than an unfortunate drafting error.

[126] The question on this issue under appeal is not whether the *phrase* was incorrect in law, but rather, whether the Appointee in fact applied the wrong standard and onus of proof necessary for staff to prove the case against Mr. Shankar.

[127] The Respondent submits that the Appellant has incorrectly focused solely on the *phrase* without considering the full context of the Merits Decision. I agree with the Respondent that in considering whether the Appointee in fact applied the wrong onus and standard of proof, the whole of the Merits Decision must be considered. This approach is supported by the decision of the BC Court of Appeal in *Francescutti v Vancouver (City),* 2017 BCCA 242 (at para 47):

> Nor is the Tribunal's decision analyzed "line by line"; it is reviewed on the basis of the whole of the decision.

[128] The Respondent submits that the Appellant has mischaracterized the quoted portion of the Appointee's decision and assumed an error where there is none. I agree.

[129] I have examined the Merits Decision in its entirety to determine what standard and onus of proof the Appointee in fact applied at the hearing. The Appointee analyzed and weighed the evidence introduced by staff together with the evidence tendered by Mr. Shankar, in a thorough and thoughtful manner. She did not simply accept staff's evidence on a *prima facie* basis and shift the onus of proof to Mr. Shankar. The findings of fact made by the Appointee are clearly supported by the admitted evidence.

[130] Throughout the Merits Decision the Appointee analyzed and weighed the evidence and applied the balance of probabilities as the evidentiary standard of proof and placed the onus of proof on Registrar's staff.

[131] The Appointee expressly applied the balance of probabilities as the standard of proof in finding that the documents alleged to have come from Mr. Rego's computer, the documents alleged to have come from Mr. Rego's Filogix account and the emails alleged to have been retrieved from Mr. Rego's email account did so, and that the method of collection did not change the content of the emails.

[132] The Appointee expressly placed the onus of proof on Registrar's staff to prove their case on a balance of probabilities. As set out in the above quoted paragraph from page 15 of the Merits Decision, the Appointee stated: "[w]hile the ultimate burden lies with Staff to prove the allegations on the balance of probabilities". Likewise, at page 14 of the Merits Decision the Appointee stated: "[w]hether the evidence tendered is sufficiently reliable to meet the Staff's burden of proving the allegations on the balance of probabilities is another issue and will be discussed below."

[133] I agree with the Respondent that throughout the Merits Decision the Appointee referred to and correctly applied the balance of probabilities as the standard of proof, and correctly placed the onus of proof on Registrar's staff. The Appointee did not err in her approach on these matters. This ground of appeal is dismissed.

iii. Did the Appointee err in finding Mr. Shankar received compensation in excess of $1,000 in a year for arranging a mortgage on behalf of Borrower 2?

Standard of review

[134] The Appellant submits that there was no basis for the Appointee's finding that he received compensation in excess of $1,000 in a year for arranging a mortgage on behalf of Borrower 2 on two bases:

i. there was no reliable evidence to support this finding and no basis on which the Appointee could have made that finding; and

ii. the Appointee applied the wrong standard and onus of proof.

[135] I have already held above that the Appointee correctly applied the balance of probabilities as the standard of proof, and correctly placed the onus of proof on Registrar's staff. That ruling applies to the Appointee's approach taken throughout the Merits Decision, including the particular findings made by the Appointee in relation to the compensation received by Mr. Shankar.

[136] The remaining question on this issue is one of the weighing of evidence and findings of fact by the Appointee.

[137] In *Hensel,* this Tribunal held that the case for deference to a first instance regulator such as the Appointee is most compelling where he or she has made findings of fact. As this Tribunal hears appeals on the record, its decisions should properly accord deference where an appeal takes issue with evidentiary findings and related assessments. I agree with the approach in *Hensel.* Accordingly, the standard of review I will apply to this issue is reasonableness.

Analysis

[138] The Appellant refers to one of the electronic documents obtained through the Search titled "*Statement of Deals Closed 2014-Fee Agreements –Shank Capital*", which was entered as part of Exhibit C2 at the hearing ("C2"), and relied upon by the Appointee. The Appellant argues C2 contains hearsay, and alleges Mr. C's testimony concerning C2 was hearsay. While the Appellant acknowledges that a tribunal can admit hearsay evidence, he argues that a tribunal must be careful to avoid placing undue emphasis on uncorroborated evidence that lacks sufficient indicia of reliability.

[139] The admission by the Appointee of C2 into evidence was acceptable, whether or not it constituted hearsay evidence. The Appellant has conceded this point as indicated above. The question is whether, on the totality of the evidence, the finding that Mr. Shankar received compensation in excess of $1,000 a year for arranging a mortgage on behalf of Borrower 2 was reasonable. This question involves assessment of the issue of whether the evidence relied on by the Appointee in making this finding was, in fact, reliable.

[140] Entries recorded in C2 indicate that in 2014 two transactions took place on behalf of Borrower 2 in which brokerage fees were received. One transaction involved Antrim as the lender with net fees received of $15,000, being split $12,000 to Mr. Shankar, and $3,000 to Mr. Rego. The second transaction involved BlueShore as the lender with net fees received of $16,250, being split $12,250 to Mr. Shankar, and $4,000 to Mr. Rego.

[141] In the Merits Decision the Appointee referred to C2, and, in particular, to the sheet titled "*Statement of Deals Closed 2014-Fee Agreements –Shank Capital"*, in support of her finding that Mr. Shankar received $24,250 in commissions on deals for Borrower 2. In further support of this finding the Appointee stated:

> In his interview, Mr. Rego said that Mr. Shankar decided how much commission each of them would take. In his interview, Mr. Shankar acknowledged receiving money from Shank Capital. I find on the basis of documents detailing commissions paid retrieved from Mr. Rego's computer supported by the evidence from both Mr. Rego and Mr. Shankar's interviews that Mr. Shankar received compensation from Shank Capital for arranging mortgages.

[142] As found by the Appointee, Mr. Shankar acknowledged in his interview that he received money from Shank Capital. Mr. Rego stated in his interview that Mr. Shankar decided how much commission each of them would take. These statements constitute further relevant evidence that was considered by the Appointee on this issue.

[143] While I observe that the Appointee did not specifically identify all of the particular "documents" she was referring to in the excerpt quoted above, I find that many such documents detailing commissions paid and received were admitted as evidence at the hearing. For example, documents entered as part of Exhibit B that had been retrieved from Mr. Rego's computer and reviewed in the testimony of Mr. C included commitment letters dated in 2014 relating to financings on behalf of Borrower 2 in which gross brokerage fees payable were disclosed. The Antrim commitment letter specified gross fees payable of $33,600. The BlueShore

commitment and covering email to Mr. Rego specified gross fees payable of $32,500 to be split (1/2 of $32,500 = $16,250, which amount is recorded as the net fees received on this transaction in C2*).* This documentary evidence is corroborative of the particular entries in C2 showing brokerage fees being paid to Mr. Shankar in the total amount of $24,250 in relation to Borrower 2 in 2014.

[144] I find that the evidence in C2 showing that Mr. Shankar received compensation in excess of $1,000 in a year on behalf of Borrower 2 was corroborated by the exhibited commitment letters from lenders referred to above, and the interview statements of Mr. Rego and Mr. Shankar referred to that formed part of the record before the Appointee.

[145] On the totality of the evidence the Appointee's finding of fact that Mr. Shankar received compensation in excess of $1,000 in a year on behalf of Borrower 2 was reasonable. The Appointee carefully scrutinized the evidence and found cogent evidence corroborating C2 and providing indicia of its reliability. The Appointee's finding is justifiable, and her reasoning is transparent. The Appointee did not err. Accordingly, this ground of appeal is dismissed.

c. Penalty and Hearing Costs

i. Did the Appointee err in imposing the maximum administrative penalty against Mr. Shankar?

Standard of review

[146] Further to my analysis earlier in this decision[2] regarding the standard of review to be applied by the Tribunal when reviewing penalty decisions, I will apply the less deferential reasonableness standard set out in *FICOM* to this issue.

Analysis

[147] The Appellant submits that the imposition of the maximum fine of $50,000 amounts to a penal sanction, and was not warranted given the particular findings made against Mr. Shankar. He submits that a maximum penalty is unnecessary to achieve the goal of protection of the public or deterrence. The Appellant also asserts in his reply submission on the applicability of *FICOM* that the "jump to a maximum fine" raises a matter of principle related to the special role of the Tribunal in review of penalty.

[148] Based on the fact that the findings were necessarily limited in scope to dealings on behalf of two borrowers, together with the fact that most cases involving unregistered mortgage broker activity do not result in fines, the Appellant submits that the penalty imposed was unreasonable, and a fine of $5,000 would reasonable in the circumstances.

[149] The Respondent submits that the penalty as ordered by the Appointee was reasonable and should be confirmed.

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[2] At paras 31-40.

[150] In considering the appropriate penalty, the Appointee stated that the purpose of administrative sanctions in the regulatory context is fundamentally to ensure compliance with legislation in the public interest. The Appointee referred to and relied upon the authority of *Cooper v Hobart*[3], and held that in the specific context of the regulation of mortgage brokering activity in BC, the role of the MBA is protection of the public and maintenance of public confidence in the mortgage industry. The purpose of administrative sanctions imposed under the MBA is to protect the public from mortgage brokering activity that is non-compliant, not in the public interest, and that may result in loss of public confidence in the mortgage industry. I agree.

[151] In considering the appropriate penalty, the Appointee specifically considered the principles of specific and general deterrence. Relying on the decision of the Supreme Court of Canada in *Re Cartaway Resources Corp.,* 2004 SCC 26, the Appointee held that general deterrence is an appropriate factor in formulating a penalty in the public interest; observing it is both prospective and preventative in orientation. I agree.

[152] The Appointee confirmed that in assessing the appropriate sanction she had to be mindful of the specific circumstances individual to each case. The Appointee acknowledged that in this exercise she was able to consider various factors including: the nature and gravity of the conduct proven, the existence of a prior discipline record, the advantage gained or to be gained by the person at issue, and the range of penalties imposed in similar cases. I again agree.

[153] No prior discipline record was alleged against Mr. Shankar.

[154] In finding that Mr. Shankar conducted business as a submortgage broker while unregistered in breach of section 8(1.4) of the MBA, the Appointee found that the evidence supported three of six alleged instances of unregistered mortgage brokering activity. She found that the evidence did not support three alleged instances of unregistered activity, namely, that Mr. Shankar actually solicited mortgage business, that he negotiated fees with borrowers, and that he discussed mortgage commitments with borrowers.

Nature and gravity of Mr. Shankar's conduct

[155] The Appointee considered the nature and gravity of the conduct proven against Mr. Shankar in breaching section 8(1.4) of the MBA. As previously set out in this decision, the Appointee found that Mr. Shankar:

i. in relation to Borrower 1, met with, advised and collected documents on behalf of Borrower 1 or her husband, met with a lender GM, reviewed documents sent to him by Mr. Rego and submitted documents to GM in relation to Borrower 1's mortgage application. The documents in question were held by the Appointee not to be genuine.

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[3] *Supra* at para 55.

ii. in relation to Borrower 1, collectively with Mr. Rego submitted two contracts of purchase and sale that were not genuine, and forwarded false contract to lenders.

iii. in relation to Borrower 2, discussed the application and received documents respecting the application from Borrower 1's husband on behalf of Borrower 2. The Appointee further found that he advised Mr. Rego with respect to the type of mortgage to apply for, reviewed documents sent to him by Mr. Rego, reviewed and revised Mr. Rego's email to lenders and approved mortgage applications before Mr. Rego submitted them, all with respect to Borrower 2's mortgage applications. The mortgage applications in question were held by the Appointee to contain misleading information.

iv. in relation to both Borrower 1 and Borrower 2, was actively involved in arranging mortgages that were based on false information and involved alleged dishonest conduct.

[156] The Appointee found Mr. Shankar was involved in the mortgage brokerage business of Shank Capital, that most of the business of Shank Capital came from referrals from him, and that he received the bulk of the commissions and contributed to half of the expenses.

[157] The Appointee found that regardless of the nature of the mortgage broker activities that Mr. Shankar was found to be involved in, the fact that he was conducting business as a mortgage broker without being registered over more than a two year period was, in and of itself, serious conduct that demonstrated complete disregard for the regulatory scheme. Mr. Shankar knew he should have been registered, but instead of doing so he had Mr. Rego "front" the business for him. The Appointee found this to be egregious conduct that posed significant threat to the public interest and the public's confidence in the mortgage industry.

[158] In the context of the advantage gained by Mr. Shankar the Appointee stated that documents indicated that in excess of $172,000 in Shank Capital commissions had been distributed to Mr. Shankar in 2014 and 2015. The Appointee found Mr. Shankar received consideration in excess of $1,000 in a given year in relation to Borrower 2, which amount was $24,250 in 2014.

Review of penalty decisions in similar cases

[159] No cases were referred to the Appointee where a person found to have been conducting mortgage broker activities without being registered was sanctioned with an administrative penalty following a hearing under section 8(1.4) of the MBA.

[160] The Appellant referred the Appointee to nine decisions of the Registrar involving unregistered broker activity made under section 8(2) of the MBA. Under section 8(2), a person engaged in unregistered broker activity can be ordered to cease the activity, without having been provided with an opportunity to be heard.

[161] The Appellant asserts that the fact that Registrar's staff, in most circumstances, have proceeded by way of cease and desist orders under section 8(2) of the MBA without seeking a fine after a hearing under section 8(1.4) of the

MBA, informs industry expectations relevant to general deterrence. Relying on this assertion, the Appellant submits "jumping to the maximum fine" in Mr. Shankar's case would reduce respect for the process and diminish the deterrent effect of the penalty. This submission lacks a factual foundation and amounts to speculation. I reject it.

[162] The circumstances of any particular case of alleged unregistered mortgage broker activity will logically drive the decisions of Registrar's staff as to how to proceed. A cease and desist order can be sought *ex parte* without a hearing under section 8(2). Administrative penalties including a fine up to $50,000 can be sought after a hearing under section 8(1.4). In the most serious of cases, carrying on unregistered mortgage broker activity by a person can be an offence under section 21(1)(a) of the MBA subject to a fine of up to $100,000 and/or to imprisonment of up to 2 years on a first conviction.

[163] The Appointee held that section 8(2) of the MBA provides that the Registrar may make certain orders without a hearing, including that a person cease and desist from mortgage broker activity, if the length of time required to give a person the opportunity to be heard would be prejudicial to the public interest. These orders are urgent *ex parte* orders to ensure a particular activity stops immediately in order to protect the public. The Registrar does not have the authority to order an administrative penalty under section 8(2). An administrative penalty may only be ordered following a hearing. As the Registrar cannot give consideration to an administrative penalty when exercising authority under section 8(2), the section 8(2) orders cannot be compared to orders following a hearing for determining an appropriate administrative penalty, and should not be construed as orders for payment of $0. I agree.

[164] Penalty decisions made under section 8 of the MBA that were referred to the Appointee included, *In the matter of the Mortgage Brokers Act and Dahn Nguyen and Express Mortgages Ltd.,* (December 13, 2004) ("*Nguyen*"), *In the matter of the Mortgage Brokers Act and Margaret Schulz and W.I. Mortgage Pros Ltd. dba Dominion Lending Centers Mortgage Pros,* (Consent Order dated May 22, 2015) ("*Schulz*"), *In the matter of the Mortgage Brokers Act and Absolute Rate Mortgage Inc. and Donald Raymond Estrada,* (Consent Order dated January 28, 2009) ("*Estrada*"), and *In the matter of the Mortgage Brokers Act and Elham Amirmoazami aka Ellie Moazami,* (Consent Order dated October 24, 2013) ("*Amirmoazami*").

[165] The only penalty decision referred to the Appointee wherein an administrative penalty was imposed on a person alleged to have been engaged in the mortgage broker business without being registered was *Amirmoazami.* In that case, Ms. Amirmozami agreed to a consent order which stated that she had arranged four mortgages while unregistered, received compensation for doing so contrary to section 8(1.4) of the MBA, and that she had engaged in conduct prejudicial to the public interest by submitting misleading information and documents to lenders in several instances. Ms. Amirmozami consented to an order that she pay an administrative penalty of $45,000 plus investigation costs.

[166] While agreeing that a consent penalty may have less precedential value than an order after a hearing, the Appointee correctly observed that a settlement is also

likely to reflect a compromise on the part of the Registrar such that the agreed penalty will be lower than what would have been advocated for, and potentially ordered, following a hearing.

Finding on penalty

[167] The Appointee held that the principles of specific and general deterrence required a significant administrative penalty to send the message to both Mr. Shankar and to others engaging in the mortgage broker business in BC without being registered that such activity will not be tolerated. Considering primarily *Amirmoazami* as well as *Nguyen, Schultz,* and *Estrada,* and considering the particular circumstance of the case proven against Mr. Shankar, the Appointee held that the maximum administrative penalty of $50,000 was neither premature nor unreasonable. The Appointee held that a lesser administrative penalty would not meet the objectives of specific and general deterrence, or serve the public interest and promote confidence in the regulatory scheme or the mortgage industry.

[168] Given the findings of the Appointee in relation to the nature of Mr. Shankar's conduct summarized above, I reject the Appellant's submission that the facts of this case are so unlike those in *Amirmoazami* and *Nguyen* that those penalty decisions should not have been relied upon by the Appointee. In formulating a penalty for Mr. Shankar I find that the Appointee reasonably considered the relevant penalty decisions and that the penalty imposed was not inconsistent with those decisions.

[169] I find that the penalty ordered against Mr. Shankar was reasonable. The penalty decision does not fall outside of a range of possible, acceptable outcomes and was reached in a justified, transparent and intelligible manner.

[170] In the context of my application of the less deferential reasonableness standard set out in *FICOM* to my review of the Appointee's decision on penalty, I have considered whether any error in principle has occurred. While the Appellant asserts that the "jump to a maximum fine" raises a matter of principle related to the special role of the Tribunal in review of penalty, I find no substance to that assertion on the facts. The Appellant does not identify any principle that is guided by the public interest (as contemplated in *FICOM*) that has been offended by the imposition of the maximum administrative penalty in the circumstances of the findings of fact made against Mr. Shankar. I find no error in principle is present.

[171] For the above reasons, this ground of appeal is dismissed.

ii. Did the Appointee err in awarding legal costs of the hearing against Mr. Shankar?

Standard of review

[172] I agree with the parties that the reasonableness standard of review applies to the Appointee's exercise of discretion in awarding legal costs against Mr. Shankar under section 6(9) of the MBA.

Analysis

[173] Under Section 6(9) of the MBA the Appointee had the discretion to order costs to be paid by Mr. Shankar.

[174] The Penalty Decision included an order that Mr. Shankar must pay one third of the investigation costs incurred under section 6(9) of the MBA. The Appellant did not appeal this investigation costs order to the Tribunal.

[175] However, the Penalty Decision also included an order that Mr. Shankar pay legal costs of the hearing assessed at Scale B, pursuant to section 6(9) of the MBA, and the Appellant does appeal this order.

[176] Mr. Shankar was the only party who exercised his right to a hearing, and Registrar's staff only sought legal costs against him. In the Penalty Decision, the Appointee retained jurisdiction to make a final determination of the amount of hearing costs to be paid if the parties are unable to agree. I have not been advised as to any agreement regarding the amount.

[177] The Appellant asserts that he incurred costs in defending both the allegations set out in the Notice of Hearing that were made out, as well as the three particular allegations that were not. He asserts that significant time was used for allegations that were not made out against him. On this basis, the Appellant asserts success was divided and that each party should bear their own costs of the hearing based on the "well known adage" that costs follow the event.

[178] The three alleged instances of unregistered activity the Appointee found not to have been proven were that Mr. Shankar actually solicited mortgage business, that he negotiated fees with borrowers, and that he discussed mortgage commitments with borrowers. The Appellant advances no submissions in support of his assertion that significant time was used for these allegations that were not made out against him. My review of the record does not support this assertion. I also note that the only evidence led by Mr. Shankar at the hearing was that of Mr. Graf, which attacked the admissibility of the electronic documents on a global basis.

[179] In any event, the Appointee considered and rejected Mr. Shankar's submission that success was divided. The allegation against Mr. Shankar was that he conducted business as a submortgage broker while unregistered in breach of section 8(1.4) of the MBA by engaging in particularized activities. While finding that some of the particularized activities had not been proven, the Appointee did find that the alleged breach of the MBA had been proven. I agree with the Appointee that success was not divided.

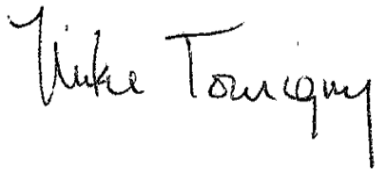
[180] I find that the Appointee acted reasonably in the exercise of her discretion in awarding legal costs against Mr. Shankar under section 6(9) of the MBA. This ground of appeal is dismissed.

DECISION

[181] In making this decision, I have carefully considered all of the evidence before me and the submissions and arguments made by each of the parties, whether or not they have been referred to in these reasons.

[182] Following my conclusions above that each issue on appeal advanced by the Appellant fails, I dismiss Mr. Shankar's appeal in totality, and confirm both the Merits Decision and the Penalty Decision.

[183] Both the Respondent and Appellant have sought costs against the other under the applicable statutory provisions. Either party shall be entitled to make submissions regarding costs by **February 15, 2019**, to which the other party will have a right of reply until **February 22, 2019**. In the event both parties make an initial submission, a right of reply will exist for both parties to the extent of dealing with matters not already addressed.



Michael Tourigny
Panel Chair

January 25, 2019