

POTENTIAL CONFLICTS OF INTEREST UNDER THE MORTGAGE BROKERS ACT

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In British Columbia, the mortgage brokerage industry is regulated by the *Mortgage Brokers Act*, *Regulations* made pursuant to that Act, and certain other regulations that the Registrar of Mortgage Brokers is empowered to make. The Registrar's limits of authority under this legislative scheme were recently decided upon by the Supreme Court of British Columbia in its decision in the *Registrar of Mortgage Brokers v. Financial Services Tribunal*. The main question before the Court revolved around Section 17.3 of the Act, which requires mortgage brokers to provide borrowers with statements disclosing "any direct or indirect interest the *mortgage broker* or any *associate* or *related party* of the mortgage broker has or may acquire in the transaction." [writers' emphases]

The proceedings underlying this case originated in a hearing before the Registrar at which a submortgage broker was confronted with allegations that he had failed to disclose that his spouse, who had referred the borrower, had an interest in the mortgage transaction by virtue of her interest in her spouse's commission. It was common to all parties that his wife was an "associate" and a "related party," as defined in the *Regulations*. Despite the fact that Section 17.3, on its face, imposes an obligation on the mortgage broker only, the Registrar found that the submortgage broker had breached the Section. The decision was appealed to the Financial Services Tribunal (FST) which upheld the Registrar's finding.

The submortgage broker applied to the British Columbia Supreme Court for a judicial review of the FST's decision. Upon applying the appropriate standard of review, the Supreme Court found that, as a matter of law, the obligation to provide disclosure statements in compliance with Section 17.3 was solely that of the mortgage broker, not the submortgage broker, and overturned both the FST's and the Registrar's decision. Mortgage brokers, therefore, who fail to provide full and complete disclosure statements as required can be in breach of the Act — but not submortgage brokers.

A word of caution applies, however. A survey of various Consent Orders entered into by submortgage brokers shows that the Registrar has sought to impose upon "Designated Individuals" of the mortgage brokers a duty to "ensure" that a mortgage broker complies with the requirements of Section 17.3. According to publications of the Registrar, a "Designated Individual" is the person who completes the application to register the mortgage broker and who is therefore "responsible

for the office.” It is arguable that the submortgage broker cannot be held responsible in this fashion, as to do so would expand the obligations of submortgage brokers in much the same way that the Court in *Registrar of Mortgage Brokers v. Financial Services Tribunal* held was not legal. The courts have yet to determine this specific issue.

All submortgage brokers should be alive to the mortgage broker’s responsibility to provide disclosure statements. Submortgage brokers should carefully discern who the “associates” and “related parties” are to the mortgage broker and what interests must be disclosed in the disclosure statements, pursuant to Section 17.3. While that obligation rests, in law, with the mortgage broker, the failure to provide conforming disclosure statements — and the consequent penalty ramifications — will necessarily impact a submortgage broker’s business and professional standing.