

Applications for Reconsideration

- by -

Kirk Capital Corporation  
("KCC")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act R.S.B.C. 1996, C.113 (as amended)*

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2008A/96

**DATE OF DECISION:** March 12, 2009

## DECISION

### OVERVIEW

1. This decision deals with applications by Kirk Capital Corporation (“KCC”) under Section 116 of the *Employment Standards Act* (the “Act”) for Reconsideration of three decisions issued by the Employment Standards Tribunal (the “Tribunal”), namely, BC EST #D011/07 (the “Original Decision”), BC EST #D013/08 (the “Referral Back Decision”) and BC EST D#086/08 (the “Final Decision”). I will, after reviewing the protracted history of Mr. Howard’s complaint against KCC, delineate the orders of the Tribunal in each decision and consider the basis of KCC’s applications for reconsideration in each case.
2. Mr. Howard was employed by KCC as a sub-mortgage broker on a commission basis. He filed a complaint against KCC (the “Complaint”) with the Director of Employment Standards (the “Director”) alleging that KCC wrongfully terminated his employment; failed to pay his commissions respecting ten transactions he was involved in; and improperly deducted legal fees from some of his commissions. The delegate of the Director investigated the Complaint and issued her Determination on November 25, 2002 (the “Determination”).
3. Mr. Howard appealed the Determination and the Tribunal ultimately considered the appeal in the Original Decision, which is a precursor to the Referral Back Decision and the Final Decision. In the Referral Back Decision, the Tribunal concisely reviews the Determination and the history of the proceedings taken thereafter and I propose to refer to that history verbatim as follows:

This decision completes an appeal filed by Grant Howard (“Howard”) under Section 112 of the *Employment Standards Act* (the “Act”) of a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on November 25, 2002.

The Determination addressed a complaint filed by Howard against Kirk Capital Corporation (“Kirk Capital”). Following an investigation of the complaint, the Director found that Kirk Capital had contravened Section 18(1), Section 45, Section 58(1) and Section 63(2) of the Act and calculated Howard was entitled to an amount of \$29,535.29 in respect of those contraventions.

Howard appealed the Determination on December 24, 2002. The Tribunal concluded the appeal was filed outside of the time allowed for appeal under subsection 112(3). The Tribunal considered whether the appeal period should be extended under subsection 109(1) of the Act and, in BC EST #D076/03, decided no extension would be allowed. That decision was confirmed in BC EST #RD231/03.

Howard sought judicial review of the above decisions of the Tribunal and, in a decision of the Supreme Court of British Columbia issued on May 18, 2006, they were set aside and Howard’s appeal was remitted to the Tribunal for consideration on its merits.

Following the Court’s decision, the Tribunal considered the appeal and issued a decision, BC EST #D011/07 (the “original decision”). In the original decision, the Tribunal dismissed a substantial part of the appeal, confirming the Determination in respect of those matters, but found the Director had not fully considered Howard’s claim for commission wages on the financing transaction relating to the property at 4351 No. 3 Road from the perspective of a possible continuity between the efforts Howard had made to bring about financing for that property and the mortgage financing that was completed approximately 11 months after he was terminated.

That matter was remitted back to the Director under the statutory authority given to the Tribunal in Section 115 of the Act...

Howard objects to both the authority of the Tribunal to make a decision to refer back and to the referral back process. Counsel for Kirk Capital has referred to the Tribunal's decision *Hub-City Boat Yard Ltd.*, BC EST #D027/04 as summarizing the authority, the policy rationale and the statutory objective of the Tribunal referring a matter back to the Director under Section 115. I agree with that summary and adopt it as an appropriate response to Howard's criticism of and opposition to the process adopted in the original decision for dealing with the gap in the Determination:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST #D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

In accordance with the order made in the original decision, the Director has conducted a further investigation and has issued a supplement to the Determination, dated November 2, 2007 (the "Supplement"). Howard did not participate in the investigation relating to the Supplement.

In the Supplement, the Director has concluded that Howard was not the effective cause of the completed financial transaction on 4351 No. 3 Road (the "property") and dismissed that part of his claim. The Director found that "it was the preponderance of Hoehn's efforts that were the eventual cause of bringing a conclusion to the financing on the No. 3 Road property".

The Supplement has been provided to Howard and Kirk Capital for review and comment. Counsel for Kirk Capital has filed two submissions, one generally accepting the conclusion reached by the Director and the other responding to a submission delivered to the Tribunal by Howard on December 7, 2007. Howard has also filed two submissions.

Notwithstanding the view taken by Howard, the Supplement and this decision continue to be elements of the appeal process commenced by Howard on December 24, 2002.

4. In the Referral Back Decision, the Tribunal, after reviewing the Director's supplementary report (the "First Supplementary Report") concluded that while Mr. Howard might not have been the sole cause of the of the completed financial transaction pertaining to the property at 4351 No. 3 Road, Richmond (the "Richmond Property"), the Director made an error of law in concluding that Mr. Howard was not the effective cause. According to the Tribunal, Mr. Howard was entitled to commission wages for the work he performed pertaining to the financing on the Richmond Property and referred back to the Director the task of calculating the commission wages with specific instructions to attempt to mediate a settlement between the parties pertaining to this matter. Unfortunately, the Director was not successful in mediating a settlement between the parties and ultimately issued another supplementary report (the "Second

Supplementary Report”) wherein he concluded that Mr. Howard is entitled to \$4,501.21 as commission wages in respect of his work pertaining to the financing on the Richmond Property.

5. The Tribunal requested and received submissions from both parties on the Director’s calculations in the Second Supplement. While KCC agreed with the Director’s calculations in the Second Supplement, Mr. Howard did not. The Tribunal, in the Final Decision, considered the submissions of the parties and was not persuaded by Mr. Howard’s submissions and went on to confirm the Director’s calculations stating:

In the final analysis, the commission wage calculations made by the Director are not unreasonable or absurd. Nor do they appear to be manifestly unfair from an objective standard. They are based on evidence that was before the Director and are justifiable on that evidence. The Director has complied with the direction provided in the referral back decision.

Howard has not met the burden on him as it relates to the Director’s calculation of the commission wages owed to him for his work on the property.

The Supplement 2 is confirmed.

6. Mr. Howard applied to this Tribunal to reconsider the Original Decision, the Referral Back Decision and the Final Decision (collectively the “Decisions”) and the Tribunal, in a separate decision, BC EST #RD024/09, dismissed all reconsideration applications.
7. In this decision, the Tribunal will only consider KCC’s applications for reconsideration of the Original Decision, the Referral Back Decision and the Final Decision.
8. Pursuant to Section 36 of the *Administrative Tribunal’s Act* (the “ATA”), which is incorporated into the Act (S. 103), and Rule 17 of the Tribunal Rules of Practice and Procedure, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the reconsideration applications of KCC is not necessary and therefore, I propose to adjudicate KCC’s reconsideration applications based on the written submissions of the parties and a review of each of the Original Decision and the Referral Back Decision under separate descriptive headings below.

### **THE LAW GOVERNING A RECONSIDERATION APPLICATIONS AND THE TWO-PART PROCESS THE TRIBUNAL WILL EMPLOY IN DECIDING MR. HOWARD’S RECONSIDERATION APPLICATIONS**

9. Section 116 of the *Act* confers the Tribunal with the authority to reconsider and confirm, cancel or vary its own orders or decisions:

#### **Reconsideration of orders and decisions**

- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
  - (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
- (3) An application may be made only once with respect to the same order or decision.

10. The Tribunal's authority under Section 116 of the Act is discretionary in nature as the Tribunal "may" reconsider its own orders or decisions. Furthermore, the Tribunal's discretion in this regard is to be exercised with caution. As indicated by the Tribunal in *Re Eckman Land Surveying Ltd.* BC EST #D413/02:

*Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.*

11. In *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98, the Tribunal delineated a two-stage process that it employs in determining whether or not to exercise its reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the Member; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
12. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.
13. In the case of KCC's reconsideration applications, this approach will be employed with respect to each of the two reconsideration applications. That is, the Tribunal will first consider the threshold or preliminary issue of whether it should exercise its discretion under Section 116 of the *Act*. Only if the Tribunal is satisfied the case is appropriate for reconsideration, then the Tribunal will proceed to the second stage and consider the substantive issues raised by KCC in each reconsideration application.

### **APPLICATION FOR THE RECONSIDERATION OF THE ORIGINAL DECISION**

14. In the Original Decision, the Member summarized the issues in Mr. Howard's appeal as follows:
1. Did the Director err in law in deciding Howard's entitlement to commission wages on 4351 No. 3 Road, 970 Burrard Street and 3115 Crescentview Place?
  2. Did the Director err in law in deciding Kirk Capital was entitled to make certain deductions from Howard's commission wages?
  3. Did the Director fail to observe principles of natural justice in making the Determination, and more particularly, did the Director fail to properly investigate the complaint and as a result fail to take into account evidence that was relevant to an issue in dispute?

15. The Member, after careful consideration of all of the submissions of the parties, found only a single error of law on the part of the Director pertaining to the entitlement of Mr. Howard to commission wages on the Richmond Property and confirmed the Determination in all other respects. With respect to the Richmond Property, the Member stated:

The facts of this case, however, are that the mortgage transaction was concluded by another submortgage broker some 11 months after Howard was terminated and that it was not the same deal as Howard was working to secure a commitment on before his termination.

As a matter of law, those facts do not disentitle Howard to his commission wages, unless the continuity between the original relation brought about by him and the concluded transaction has been not merely dislocated or postponed, but broken.... I accept, therefore, the submission of counsel for Kirk Capital that if Howard is to claim any entitlement to commission wages, the facts must show an unbroken continuity between his efforts and the resulting mortgage. In *Taylor v. Silver Giant Mines Ltd.*, supra, the Court said the following: . . . the agent is entitled to his commission unless the continuity between the original relation brought about by him has been *entirely severed* and he took no part in the proceedings which re-initiated the relation and led to the eventual conclusion of the deal. (emphasis added)

I am not persuaded that the language used in the employment contract or the context in which that language was intended to operate abrogates the application of the above legal principles in this case.

Returning to the Determination, none of the findings made in denying Howard commission wages on 4351 No. 3 Road are, as a matter of law, determinative of his entitlement because none of them, either individually or collectively, show the continuity in the relationship between the client and SMSCU, which was originally brought about by him, has been broken. Neither the passage of time, differences in the mortgage commitment and the concluded mortgage or the introduction of another submortgage broker are determinative of a break in continuity. The Director has not considered Howard's entitlement from the perspective of continuity. All of the facts and circumstances between the date of Howard's termination and the completion of the transaction, including all documentation and correspondence, need to be examined before deciding whether a break in continuity between his efforts and the eventual conclusion of the deal has occurred.

I am satisfied the Director erred in law in the analysis of his claim for entitlement. I am also satisfied the Director has failed to observe principles of natural justice by failing to acquire and consider evidence that was relevant to the question of law that had to be addressed.

This aspect of the Determination is cancelled. I must decide the appropriate remedy. I could either attempt to decide these issues myself based on the Record before me, or cancel this part of the Determination and remit this matter back to the Director. Howard objects to the matter being referred back to the Director. He says such a result would be unfair and inefficient.

Except for the failure of the investigating delegate to properly address the question of continuity, I have found no error in the Determination. Particularly, Howard has not been successful in attempting to demonstrate a pervasive failure to comply with principles of natural justice in making the Determination. The Record reveals a comprehensive investigation that was flawed by an incorrect view on a question of law, and a consequent failure to appreciate the need for relevant evidence to be acquired and analyzed. For that reason only, the appeal has partly succeeded.

At present, the factual record is not sufficient for a proper assessment of the issue of Howard's entitlement on the 4351 No. 3 Road file, so I am not in a position to make this determination myself. Further, given the limited grounds of appeal under the Act, it is more in keeping with the Tribunal's role to remit this case back to the Director for further investigation and consideration. In my view, the appropriate remedy in this case is to remit the matter back.

16. While the Member in the Original Decision set aside the Determination relating to Howard's entitlement to commission wages on the Richmond Property and referred the matter back to the Director to further investigate and address the question of continuity between Mr. Howard's efforts and the resulting mortgage on the Richmond Property, KCC, on February 28, 2007, applied for a reconsideration of the Original Decision challenging the Member's decision which the Tribunal held in abeyance until the referral back process was completed.
17. KCC, in its submissions in support of its application for reconsideration of the Original Decision, states that the Member erred in setting aside the Director's conclusions pertaining to the Richmond Property. In particular, KCC submits that the Member erred in law by interpreting the agreement dated November 11, 1997 between KCC and Mr. Howard (the "Working Agreement") to include provisions from a separate and independent agreement to which Mr. Howard was not a party, namely, the agreement between KCC and the client seeking financing for the Richmond Property (the "Exclusive Agency Agreement") which contained provisions governing KCC's commission entitlement.
18. According to KCC, the Member's foundation for the interpretation of the Working Agreement "rests on an unsupported assumption that the Exclusive Agency Agreement provisions were intended to be read into the Working Agreement". It is this assumption, according to KCC, that led the Member to err in law by concluding that Mr. Howard was entitled to commission entitlements for the Richmond Property "that far exceed the clear language of his Working Agreement".
19. KCC further submits that the Member failed to read the words of the contract in the Working Agreement in their ordinary and natural sense and "distort[ed] them beyond their actual meaning". If, according to KCC, the parties intended "the sub-mortgage broker to be entitled to commissions for such extensive circumstances as found in the Exclusive Agency Agreement" then they would have included it expressly in the Working Agreement". However, the Member, by interpreting the Working Agreement in light of the Exclusive Agency Agreement, effectively rewrites the Working Agreement, according to KCC. Otherwise, there is nothing in the Determination that suggests that the Director was wrong in concluding that Mr. Howard was not entitled to commission on the Richmond Property, states KCC. In the circumstances, KCC submits that the conclusion the Member reached was one that, on a proper and correct view of the evidence and the agreement between KCC and Mr. Howard, could not be made.
20. KCC also argues, in the alternative, that if the appropriate question to consider with respect to the matter of Mr. Howard's entitlement to commissions on the Richmond Property is whether there was an unbroken continuity between his efforts and the resulting mortgage financing on the said property, the answer is in the negative. In particular, KCC states:
- The July 27, 2000 letter from the client clearly indicates that they would not continue a relationship with Mr. Howard beyond the five-day deadline. That deadline expired without a deal. The evidence of Mr. Ford, of the lender SMSCU, stated that Mr. Howard's deal collapsed and that a new deal was brokered. Further, the intervention of Ms. Hoehn was the critical factor in the mortgage for No. 3 Road eventually being arranged 11 months after the Client refused to deal with Mr. Howard.
21. KCC also submits that despite affirmatively referencing the case of *McDonald Realty (1974) Ltd. v. Saunders*, [1997] B.C.J. No. 1182(S.C.) which delineates the "unbroken continuity test" for determining entitlement to commissions in context of real estate transactions, the Member "erred in not following the relevant, analogous and persuasive findings" in the said case. According to KCC, if the Member had applied "the facts on the record of the test in *McDonald Realty*", he would have concluded that continuity

between the efforts of Mr. Howard and the ultimate mortgage financing on the Richmond Property was broken as “(t)he negotiations between the client for No. 3 Road and Mr. Howard were clearly at an end. The intervention of a different sub-mortgage broker brought the client and the lender back together and resulted in the ultimate sale.”

22. In the further alternative, KCC submits that the Original Decision is internally inconsistent as the Member, on the one hand, remits to the Director for further investigation and consideration the matter of Mr. Howard’s entitlement to commission wages on the Richmond Property, and “on the other hand, ... interprets the Working Agreement and specifically the term ‘arranged’ on the investigation record, ‘... that was flawed by an incorrect view on a question of law, and consequent failure to appreciate the need for relevant evidence to be acquired and analyzed”. According to KCC, the Member “erred in interpreting the words of the contract despite acknowledging that he did not have a complete record of the surrounding circumstances”.
23. KCC argues, “a full and proper investigation by the Director will alter the circumstances in which the contract is to be interpreted, and that the Director, upon conducting its investigation will be in the best position to determine what surrounding circumstances are applicable to the interpretation of the Working Agreement”. In KCC’s view, the interpretation of the contract between Mr. Howard and KCC should be reserved until there has been an opportunity for the Director to conduct an adequate investigation that addresses the substance of the dispute. KCC, therefore, requests that the Member’s statements and interpretation of the Working Agreement pertaining to the Richmond Property be set aside and declared not binding on the Director’s investigation or any other Members. To do otherwise, according to KCC, is highly prejudicial to its interest.
24. Supplementing KCC’s submissions on the substantive issues in its reconsideration application are submissions in support of its request that this Tribunal exercise its discretionary authority under Section 116 of the *Act* to reconsider the Original Decision. I do not find it necessary to reiterate those submissions here expect to say that I have carefully reviewed and considered them and I am sufficiently persuaded that the substantive issues in KCC’s reconsideration application raise important questions of fact, law, principle and procedure to warrant the exercise of this Tribunal’s reconsideration power. Accordingly, the Tribunal will exercise its discretion under Section 116 of the *Act* and consider KCC’s reconsideration application by proceeding to the second stage in the two-stage process delineated in the *Milan Holdings* decision and consider the substantive issues raised in KCC’s reconsideration application.
25. With respect to the substantive issues raised by KCC delineated above, it is clear that the Member referred to the Exclusive Agency Agreement in interpreting the Working Agreement. The former is between KCC and the client and the later between KCC and Mr. Howard. The former expressly sets out “extensive circumstances” under which KCC may be entitled to commissions, whether or not a loan is made to the client. The later, conversely, does not expressly incorporate those “extensive circumstances”. Therefore, I can understand why KCC is opposed to the Member’s approach of referring to the Exclusive Agency Agreement in interpreting the Working Agreement and the resulting charge it levels against the Member of effectively rewriting the Working Agreement by incorporating the terms governing KCC’s commission entitlement in the Exclusive Agency Agreement that Mr Howard was not a party to.
26. Having said this, I subscribe to the principles governing the interpretation of contracts delineated by the Member in the Original Decision. In particular, I agree with the Member that:

The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made and that the most significant tool of reference for the decision-maker is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties.

27. In the case of the Working Agreement, the instructive provisions on the issue of Mr. Howard's entitlement to commissions in mortgage transactions are paragraphs 2.1 and 2.2. They provide:

2.1 100% of all gross fee revenue resulting from the mortgages arranged by Howard, pursuant to the Act, shall be credited to Howard upon receipt. [Emphasis added]

2.2 Where Howard and another submortgage broker both arrange the same mortgage, the fee revenue shall be divided on an agreed and negotiated basis between Howard and the other submortgage broker. [Emphasis added]

28. The Member, in the Original Decision, referred to the Merriam Webster Online Dictionary to define the word "arranged" in paragraph 2.1 and I share his subsequent conclusion with respect to the meaning of "arranged":

There can be no argument that the term is being used in the [Working Agreement] in the sense of bringing about an agreement or understanding.

29. While KCC, in Mr. Howard's appeal of the Determination and subsequently in its submissions in support of its application for reconsideration of the Original Decision, argues for a narrow construction of the word "arranged" in paragraph 2.1 of the Working Agreement such that only if Mr. Howard concluded a mortgage transaction he would be entitled to commission wages, I do not find the language of the Working Agreement, independent of the language of the Exclusive Agency Agreement the Member relied upon in the Original Decision for interpreting the Working Agreement, so restrictive. The word "arranged" in paragraph 2.1, in my view, should be interpreted taking into consideration paragraph 2.2 that contemplates the involvement or participation of "another submortgage broker" in arranging or "bringing about an agreement or understanding" of "the same mortgage". Surely there are various ways in which two sub-mortgage brokers may participate in arranging the same mortgage. It is reasonably conceivable that they may participate jointly at all stages leading to a loan being made to the client or they may each work at different points of in the financing transaction leading to the advancement of a loan to the client. Having said this, like the Member, I do not find that the word "arranged" in the Working Agreement must be interpreted to mean "completed" and I agree with the Member that while the Director concludes in the Determination that Mr. Howard was not owed any commissions for the Richmond Property as he did not complete that transaction, there is no finding in the Determination that the term "arranged" in the Working Agreement must be interpreted to mean "completed". Accordingly, I do not read paragraph 2.1 as denying Mr. Howard the fruits of his efforts, commission wages, if he worked at the earlier stage of the transaction on the Richmond Property provided there is "an unbroken continuity" between his efforts and the final financing transaction (a question I will shortly return to in this decision).

30. In light of my view of the Working Agreement above, I do not think it is necessary for me to rule on the matter of the Member's reference to the Exclusive Agency Agreement in interpreting the Working Agreement. However, I would find it difficult to justify or reconcile a scenario wherein Mr. Howard's efforts to arrange financing for the Richmond Property met one of the "extensive circumstances" in the

Exclusive Agency Agreement short of a loan being made to the client and KCC received commissions as a result but Mr. Howard did not under the Working Agreement because the loan was not made. Surely, the parties, Mr. Howard and KCC, could not have, at the time of entering into the Working Agreement, intended for such a result. However, KCC's narrow construction of the word "arranged" in paragraph 2.1 of the Working Agreement would allow for such a result.

31. With respect to the question of Mr. Howard's efforts and the final financing transaction on the Richmond Property, the Member correctly adopted the principles of law governing claims for commissions in real estate transactions calling for an examination of continuity between the efforts of an agent and the final or eventual conclusion of a transaction. I do not find any error in the Member's conclusion that:

... none of the findings made in denying Howard commission wages on 4351 No. 3 Road are, as a matter of law, determinative of his entitlement because none of them, either individually or collectively, show the continuity in the relationship between the client and SMSCU, which was originally brought about by him, has been broken. Neither the passage of time, differences in the mortgage commitment and the concluded mortgage or the introduction of another submortgage broker are determinative of a break in continuity. The Director has not considered Howard's entitlement from the perspective of continuity. All of the facts and circumstances between the date of Howard's termination and the completion of the transaction, including all documentation and correspondence, need to be examined before deciding whether a break in continuity between his efforts and the eventual conclusion of the deal has occurred.

I am satisfied the Director erred in law in the analysis of his claim for entitlement. I am also satisfied the Director has failed to observe principles of natural justice by failing to acquire and consider evidence that was relevant to the question of law that had to be addressed.

32. I also find that the July 27, 2000 letter from the client suggesting that they would not continue a relationship with Mr. Howard beyond the five-day deadline is not determinative of a break in continuity between Mr. Howard's involvement and the eventual conclusion of the mortgage transaction as there is no evidence that the client clearly severed ties with KCC thereafter and the Member, in my view, was correct in referring the matter back to the Director for further investigation on the matter of Mr. Howard's entitlement to commissions from the perspective of continuity.
33. I also do not think that the Member's rejection of the narrow construction of the word "arranged" advocated by KCC is inconsistent with his decision to send the matter back for further investigation on the issue of continuity of Mr. Howard's efforts in the conclusion of the financing on the Richmond Property nor do I find the Member's interpretation of the Working Agreement inappropriate for the Director to consider and be bound by in his investigation in the referral back and therefore, reject KCC's related submissions.
34. In light of my decisions above on the substantive issues, I dismiss KCC's application for reconsideration of the Original Decision.
35. I do not find it necessary to delineate Mr. Howard's submissions here except to reiterate that Mr. Howard filed his own application for reconsideration of the Original Decision, which is the subject of a separate decision.

## APPLICATION FOR THE RECONSIDERATION OF THE REFERRAL BACK DECISION

36. Pursuant to the order made by the Member in the Original Decision, the Director conducted a further investigation in the matter of Mr. Howard's entitlement to commission wages pertaining to the Richmond Property and produced the First Supplementary Report. In the First Supplementary Report, the Director concluded that Mr. Howard was not the effective cause of the completed financial transaction on the Richmond Property and thus not entitled to any additional wages and dismissed that part of Mr. Howard's claim. The Member entertained submissions from both Mr. Howard and KCC before making the Referral Back Decision.

37. In his analysis of the First Supplementary Report, the Member notes that the questions he must consider is whether there was a clear end to the efforts of Mr. Howard and the final transaction relating to the Richmond Property. According to the Member, "[i]f there was, it cannot logically follow that he either "arranged" the final financing transaction or was its "effective cause". The Member then goes on to state, with respect to the Director's finding of fact in the First Supplementary Report that there was a break in continuity between the efforts of Mr. Howard and the completion of the financing transaction, that such finding of the Director must be accepted for the purpose of the Tribunal's authority under Section 112 of the *Act*, unless it is found to be an error of law. The Member then goes on to state:

In the circumstances of this case the operative provisions of the Act may be summarized as follows: if there is evidence establishing facts which, reasonably considered, support the conclusion that the relation between the client and SMSCU which was brought about by Howard in April 2000 was terminated, or broken, at some point between April 2000 and June 2001, no error of law arises and the Tribunal is without authority to review that finding under Section 112 of the Act; on the other hand, if there is no evidence for the finding made by the Director or if the Director has taken a view of the facts that cannot reasonably be entertained, the Tribunal has authority to review that decision under section 112 of the Act as an error of law.

38. The Member then reviewed the evidence and findings of facts made by the Director in light of the "unbroken continuity test". While I do not find it necessary to set out the Member's entire analysis here, I have carefully reviewed it and find support for the Member's conclusion that the Director took a view of the facts that could not be entertained or supported and therefore made an error of law:

None of the facts relied on by the Director are such that would demonstrate to an objective viewer that there was a break in continuity in the relation between the client and SMSCU. On a complete examination of the facts, while there were delays in completing the transaction, I can find no break in the continuity from the original relation brought about by Howard and the final completed transaction. At no time did Kirk Capital, the client and SMSCU terminate the relationship with each other that had been established in April 2000. It is fair to say there were delays and changes to the terms and conditions of the relationship as it was first framed, but none of those show the relationship was at an end. Accordingly, I find the Director erred in law in deciding Howard was not the "effective cause" of the completed financial transaction. I do accept that Howard was not the exclusive cause of the completed transaction and that Hoehn contributed significantly to it.

It was, however, primarily Howard's effort that led to the commitment letters issued in August 2000. Howard performed the event that the parties had agreed would entitle him to remuneration. I find the appeal on this aspect of the Determination is successful and find that Howard was entitled to commission wages for work he performed relating to the financing of the 4351 No. 3 Road

property. I cancel that part of the Determination that concludes he was not entitled to wages for that work.

39. The Member, in the referral back Decision, refers back to the Director the matter of deciding the commission wages owing to Mr. Howard with respect to the Richmond Property with a specific direction to the Director to attempt to mediate a settlement with the parties, but failing a mediated settlement to decide the matter.

40. KCC, as previously indicated, appealed the referral Back Decision. I have reviewed KCC's submissions and to a large extent KCC repeats the submissions (in some cases verbatim) it made in its application for reconsideration of the Original Decision pertaining to the Member's decision to refer to the Exclusive Agency Agreement when interpreting the Working Agreement, which I rejected previously. Therefore, I will not revisit those submissions here as I reject them for the same reasons previously articulated.

41. However, KCC advances submissions countering the Member's decision to draw an adverse inference against KCC for not producing the August 17 and 22, 2000 commitment letters from the lender, SMSCU, which adverse inference is contained in the following passages in the Referral Back Decision:

On August 17, 2000 SMSCU issued a commitment letter. That commitment letter was reissued on August 22, 2000 following some discussions between the client and SMSCU. Neither commitment letter has been provided to the Director, nor has it been sought by the Director. The failure of Kirk Capital to provide the commitment letters amounts to an implied admission that they would not support their arguments: see J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999), at p. 297; R. v. Jolivet, [2000] 1 S.C.R. 751, 2000 SCC 29, 185 D.L.R. (4th) 626, at para. 28.

The Director has provided no reason for not seeking that letter. I do not view the suggestion that such documents are "dime a dozen" as a valid reason in the circumstances for not requiring their production. In the absence of evidence to the contrary, I am entitled to conclude that the financing commitment made by SMSCU through Kirk Capital on August 17, 2000 was consistent with the terms and conditions described in the Exclusive Agency Agreement and the July 27, 2000 expression of interest letter. There is just no evidence that the commitment letters issued by SMSCU on August 17, 2000, and reissued on August 22, 2000, were not substantially the product of Howard's efforts. Nor is there any evidence of a break in continuity between the efforts of Howard up to the end of July 2000 and the issuance of the commitment letters.

42. KCC submits that the commitment letters in question are over seven years old and KCC was unable to locate them. KCC's counsel also notes that it unsuccessfully attempted to get them from SMSCU and further requested the Director, subsequent to the Original Decision, to speak with members of SMSCU regarding any documents or issues not covered in the materials KCC produced to the Director during the latter's investigation. While the commitments letters of August 17 and 22, 2008 are very important, I am not sure from KCC's counsel's representation what precise efforts were made by KCC within its own organization and with SMSCU to obtain the documents in question beyond the bare assertion that KCC was unable to locate them and was also unsuccessful in obtaining them from SMSCU. It appears that KCC had many other documents relevant to the transaction involving the Richmond Property that either preceded or followed the dates of the two commitment letters but not the commitment letters in question. I find that the bare general assertions of KCC's counsel pertaining to the latter's efforts to find the documents themselves and to obtain them from SMSCU not persuasive for me to reverse the Member's decision to draw an adverse inference against KCC for failing to produce them.

43. I therefore dismiss KCC's application for reconsideration of the referral Back Decision.
44. I also note that I do not find it necessary to delineate Mr. Howard's submissions with respect to KCC's application for reconsideration of the referral Back Decision in light of my decision except to point out that Mr. Howard has submitted his own application for reconsideration of the Referral Back Decision, which is the subject of a separate decision.

### **APPLICATION FOR THE RECONSIDERATION OF THE FINAL DECISION**

45. As neither Mr. Howard nor KCC was interested in mediating a resolution of the issue of commission wages Mr. Howard was entitled to on the Richmond Property, the Director sought and received submissions from both parties on the subject and ultimately decided the matter in the Second Supplementary Report.
46. In the Second Supplementary Report, the Director notes that Mr. Howard is claiming 2% commission delineated in the Exclusive Agency Agreement dated April 17, 2000 KCC entered into with the client. That 2%, based on the \$7,000,000 advanced by the lender to the client, totals \$140,000 of commissions. However, notes the Director, KCC's position is that any commission owed to Mr. Howard must be based on the actual commission received by KCC which in this case was \$57,000, although KCC ultimately agreed to reduce the commission to .85% which would have netted \$59,500 in commissions. While Mr. Howard did not agree to the said reduction in commission, he agreed, according to the Director, "that the client had threatened to remove the financing if the commission fee was not reduced". Faced with this prospect, KCC reduced the commission rate to .85% rather than pursue litigation against the client which course of action made Mr. Howard unhappy.
47. According to the Director, KCC, as a party to the Exclusive Agency Agreement with the client, had the right to renegotiate terms and conditions of the said agreement including the commission fee. In the circumstances, the Director accepted the \$57,000 amount of commission received by KCC to base Mr. Howard's entitlement of commission wages for the Richmond Property.
48. The Director also noted, based on the findings of fact of the Member in the Referral Back Decision, including the Member's finding that Mr. Howard was not the exclusive cause in the completed mortgage financing on the Richmond Property and there was another mortgage broker, Ms. Hoehn, significantly involved in concluding the mortgage financing, he would have to determine a division of the commissions between the latter and Mr. Howard pursuant to the Working Agreement between the parties.
49. Having said this, the Director noted in the Second Supplementary Report that while KCC in its submissions assigned Ms Hoehn 75% of the received commissions and Mr. Howard 25% and Ms. Hoehn previously agreed to give him 10% of the commission, Mr. Howard sought 70% of the commissions based on the previous 2% commission rate. This left the Director with the herculean task of determining a fair and reasonable solution for dividing the commissions from the Richmond Property between Ms. Hoehn and Mr. Howard with no effective guidance in the Working Agreement as the latter did not contain any provision for an arbitrated solution if an agreement could not be attained between two brokers on the division of commissions where both participated in concluding the mortgage financing.
50. The approach the director ultimately chose in determining Mr. Howard's commission wages was based on "assign[ing] proportions based on the length of their involvement in concluding the mortgage on the [Richmond Property]" as the Director felt that would recognize the contributions made by both Ms.

Hoehn and Mr. Howard. The Director counted 438 days from the date the execution of the Exclusive Agency Agreement between KCC and the client and the registration of the mortgage on the Richmond Property with Mr. Howard working on the matter for a period of 107 days and Ms. Hoehn for 331 days. Accordingly he apportioned Mr. Howard \$13,924.66 based on the actual commission received for his involvement ( $\$57,000 \times 107/438 = \$13,924.66$ ). As the Working Agreement between Mr. Howard and KCC allocates 40% of the revenue fee obtained to KCC, the Director apportioned 60% of the \$13,924.66 to Mr. Howard-i.e. \$8,354.79. As Mr. Howard was previously paid \$5,000, the Director subtracted that amount leaving the balance owing to Mr. Howard to \$3,354.79 plus interest on the said sum in the amount of \$1,146.42 for a total of \$4,501.21.

51. The Second Supplemental Report was submitted to the Tribunal and the Member sought and received submissions from both parties on the Second Supplemental Report, which the Member considered in the Final Decision.

52. The Member notes in the Final Decision that while KCC agreed with the Director's calculations, Mr. Howard did not. In his submissions, the Member notes Mr. Howard:

...disagrees with the Director's wage calculation. Essentially, his disagreement goes to two matters. First, with decision to divide the commission on the property between Howard and Hoehn based on an assessment of the time which each spent working on the financing. He asserts that such a method of dividing the commission is absurd and patently unreasonable. Second, he disagrees with the calculation of the commission at .85% of the funds advanced on the financing rather than the 2% that was initially included in the Exclusive Agency Agreement.

*In the course of his extensive submission, Howard revisits several aspects of the original decision and the first Supplement that he contends are incorrect. What I indicated in the referral back decision continues to hold: I do not intend to address arguments that have been fully addressed in previous decisions or which are largely unrelated to the matter being dealt with in this decision. This comment speaks most directly to that part of the original decision that considered the scope of the Tribunal's jurisdiction over many of the claims being made by Howard: see paragraphs 70-79. [emphasis added]*

Howard submits that the commission should be calculated at 2% of the funds advanced, that Kirk Capital Corporation should receive a 30% share of that commission, because they agreed to take that amount, that Ms. Hoehn should receive a 15% share of the commission, because that was the agreement with her, and the balance should be paid to Howard, "with interest and penalties".

Howard has also provided a reply to the response made by Kirk Capital Corporation. He addresses the submission made by Kirk Capital Corporation that the commission should be calculated on amounts actually received by them, that it was the continued involvement of Kirk Capital Corporation that crystallized the financing, that Howard has the burden of disproving the submission of the Director and that the conclusions of the Director are "reasonable".

53. The Member also notes Mr. Howard's submissions wherein he alleges bias against the Director and denial of a fair hearing but dismisses those allegations as lacking any foundation.

54. On the substantive issues, the Member notes that he is in agreement with the Director and KCC that the commission wages are properly calculated on the commission actually received by KCC and the matter of whether it was improper for KCC to agree to reduce the commission rate "is not a matter over which the tribunal has any jurisdiction" and if "Howard believes [KCC] has breached some legal obligation to him

in agreeing to a reduced rate of commission on this property and/or not litigating his commission claim, he will have to pursue those questions in another forum.”

55. With respect to Mr. Howard’s contention that Ms. Hoehn should receive only 15% of the commission on the Richmond Property, the Member rejects the said contention stating that it disregards the Member’s earlier finding that Ms. Hoehn “significantly contributed” to the completion of mortgage financing.
56. The Member also rejects Mr. Howard’s submission that his gross fee revenue to KCC under the Working Agreement should be reduced from 40% to 30% simply on the basis of his “assertion of a verbal agreement to that effect” when this is contrary to the “employment agreement between Howard and [KCC]”.
57. The Member, in confirming the Second Supplemental Report in the Final Decision, states:

In the final analysis, the commission wage calculations made by the Director are not unreasonable or absurd. Nor do they appear to be manifestly unfair from an objective standard. They are based on evidence that was before the Director and are justifiable on that evidence. The Director has complied with the direction provided in the referral back decision

58. Mr. Howard, not unexpectedly, filed an application for reconsideration of the Final Decision which application is the subject of a separate decision.
59. KCC also has filed an application for reconsideration of the Final Decision. KCC submits that if either or both of their applications for reconsideration of the Original Decision and Referral Back are accepted then Mr. Howard should not be entitled to the commission wages on the Richmond Property awarded to him in the Final Decision. In the alternative, if neither of the previous reconsideration applications of KCC is successful, then KCC submits that the commission wages awarded in the Final Decision are appropriate. As I have dismissed KCC’s applications for reconsideration of the Original Decision and the Referral Back Decision and confirmed the Original Decision in a separate decision involving Mr. Howard’s application for reconsideration, I accede to KCC’s alternative request.

## **ORDER**

60. Pursuant to Section 116 of the *Act*, I order the Original Decision (BC EST #D011/07), the Referral Back Decision (BC EST #D013/08) and the Final Decision (BC EST #D086/08) be confirmed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**