

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”), in particular sections 7, 38 and 39; the Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, in particular section 42; and the Administrative Penalties Regulation, O. Reg. 192/08, in particular section 3;

**AND IN THE MATTER OF** a Notice of Proposal to impose an Administrative Monetary Penalty on Rebecca Au, dated February 17, 2009;

**AND IN THE MATTER OF** Rebecca Au’s Request for a Hearing before the Financial Services Tribunal (the “Tribunal”) pursuant to subsection 39(5) of the Act.

**BETWEEN:**

**REBECCA AU**

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

Mr. Denis Boivin  
Member of the Tribunal, Chair of the Written Hearing

**WRITTEN SUBMISSIONS:**

Ms. Rebecca Au, Principal Broker for the Applicant

Mr. Stephen Scharbach, representing the Superintendent

## REASONS FOR DECISION

### A. INTRODUCTION

Ms. Rebecca Au requested a Hearing before the Financial Services Tribunal (the “Tribunal”) following a Notice of Proposal issued by the Superintendent of Financial Services (the “Superintendent”) to revoke the licence of a mortgage brokerage carrying her name, and a Notice of Proposal to impose an administrative monetary penalty of \$1,000 on said brokerage for its failure to have the required liability insurance on or before July 1<sup>st</sup>, 2008. At the request of Ms. Au, the Tribunal decided to hold a written hearing to resolve this matter pursuant to Rule 21.01 of its *Rules of Practice and Procedure*. Accordingly, the parties submitted an Agreed Statement of Facts containing thirteen paragraphs (the “ASF”) setting-out the timeline of events, as well as an Agreed Book of Documents containing eight tabs (the “ABD”). Both parties also filed written submissions with the Tribunal.

### B. FACTUAL BACKGROUND

The evidence outlined in the ASF and ABD is both straightforward and un-contradicted. Having read this evidence, the Tribunal makes the following findings of fact.

On June 18, 2008, Ms. Rebecca Au applied for a mortgage brokerage licence on behalf of a proposed brokerage carrying her own name (ABD – Tab 1). In this application, Ms. Au was identified as the Sole Proprietor and Principal Broker of the proposed brokerage, and she declared that her brokerage would have by July 1<sup>st</sup>, 2008, the required errors and omissions insurance in place.

The Superintendent issued a brokerage licence to “Rebecca Au” with an effective date of July 1, 2008. However, during the course of an audit conducted in the Fall of 2008, it was determined that this brokerage did not have the liability insurance that was required by the *Mortgage Brokerages, Lenders and Administrators Act* 2006, S.O. 2006, c. 29 (the “Act”) and its regulations.

Compliance officers with the Financial Services Commission of Ontario (the “Commission”) informed Ms. Au of this deficiency by email on November 26, 2008 (ABD – Tab 2). In the email, she was asked to contact the Commission and provide proof of liability insurance on behalf of her brokerage on or before December 3, 2008.

Ms. Au complied with this deadline. In two emails dated December 2, 2008 (one sent at 3:22 PM and another sent at 4:16 PM), she responded to the request for information sent the previous week (ABD – Tab 2). In the first response, Ms. Au explained that she had never done any business and that she would like to “cancel [the] licence effective immediately”. In this email, she also requested advice on the procedures or documents required for the purposes of cancelling the licence. The second email is identical to the first with one minor exception: she requested either a cancellation of the brokerage’s licence or some extra time to secure the required liability insurance.

There is no evidence before the Tribunal of any measures taken by the Commission to respond to the December 2<sup>nd</sup> emails sent by Ms. Au with respect to the six-week period between the date of these emails and January 16, 2009. On that day, the Commission sent an unregistered letter to the attention of Ms. Au, advising her to complete an attached Surrender Declaration form and return it to the Commission on or before January 30, 2009 (ABD – Tab 3). In the closing paragraph of this unregistered letter, Ms. Au is warned that unless she provides the required information, her brokerage “will be considered to be non-compliant with the E&O insurance requirement and FSCO may pursue enforcement action against you and your brokerage”.

The unregistered letter dated January 16 was sent to the address that Ms. Au had indicated as the “Principal Place of Business Address in Ontario” and “Mailing Address for Service in Ontario” on her mortgage brokerage licence application (ASF – Tabs 1 and 3; ASF – Para. 8). However, according to the Agreed Statement of Facts, this address was not the actual residence of Ms. Au, but rather the residence of her brother, and she did not pick up her mail from him until February (ASF – Para. 9).

On February 17, 2009, approximately two weeks after the deadline indicated in the January 16<sup>th</sup> unregistered letter, the Superintendent issued an Interim Order suspending the brokerage licence of Rebecca Au, a Notice of Proposal to revoke its licence, and a Notice of Proposal to impose an administrative monetary penalty of \$1,000 on the brokerage (ABD – Tab 4). The Order, the Proposals and their accompanying reasons were sent by registered mail, by regular mail and by facsimile to the same address as the one used for the January letter. In addition, on the same day, the Licensing Compliance Unit of the Commission sent an email to Ms. Au informing her that the brokerage licence of Rebecca Au had been automatically suspended (ABD – Tab 5). Within six hours of the time stamp of this email, Ms. Au responded with an email in which she acknowledged the receipt of the fax and email, explained that she had “suspended [the] licence earlier ago and sent the notification to your department”, and requested a clarification as to why she was now involved “with [...] legal affairs” (ABD – Tab 5).

On February 19, 2009, Ms. Au completed and submitted a Surrender Declaration on behalf of her brokerage (ABD – Tab 6). Presumably, the form used by Ms. Au was the one sent by the Commission on January 16<sup>th</sup> as an attachment to the unregistered letter that she picked up from her brother’s residence. On February 23<sup>rd</sup>, Ms. Au requested a hearing before the Tribunal with respect to the two notices issued by the Superintendent. On March 20, 2009, the Superintendent granted the request to surrender Rebecca Au’s licence pursuant to subsection 20(3) of the Act (ABD – Tab 8).

The parties participated in a pre-hearing conference on October 22, 2009. During this occasion, counsel for the Superintendent confirmed that the Notice of Proposal to revoke the brokerage licence of Rebecca Au had been withdrawn and that the Interim Order suspending this licence had not been extended following her request for a hearing. Accordingly, the written hearing requested by Ms. Au relates only to the Superintendent’s proposal to impose an administrative monetary penalty on Rebecca Au.

### **C. ISSUES**

During the pre-hearing, the parties agreed that the written hearing would address two issues: 1) did the Superintendent have a proper basis for imposing an administrative monetary penalty on Rebecca Au? 2) In the affirmative, is a penalty of \$1,000 justified in the circumstances of this case?

### **D. STATUTORY FRAMEWORK**

Subsection 2(2) of the Act prohibits a person or entity such as Rebecca Au from carrying on the business of dealing in mortgages in Ontario without a mortgage brokerage licence, unless this person or entity is exempt from the requirement to have such a licence. In this case, there is no suggestion that the brokerage Rebecca Au benefited from any of the current licensing exemptions.

Mortgage brokerage licences are governed by section 7 of the Act. According to subsection 7(4), brokerages licensed under the Act are required to comply with such “standards of practice” as may be prescribed for the licence. Moreover, according to subsection 7(6), brokerages licensed under the Act must designate a “principal broker” to exercise such powers and perform such duties as may be prescribed, and provides that this person shall carry out his or her powers and duties in accordance with any regulations. In this case, it is not disputed that Ms. Au was the principal broker for the mortgage brokerage carrying her name.

Standards of practice for mortgage brokerages have been prescribed by O. Reg. 188/08, the “Standards of Practice Regulation”. According to section 42 of this regulation, every brokerage licensed under the Act shall maintain errors and omissions insurance of at least \$500,000 per occurrence and \$1 million per policy period in a form approved by the Superintendent, with extended coverage for loss resulting from fraudulent acts, or shall have some other form of assurance approved by the Superintendent. Section 42 creates no distinction on the basis of whether the licensed brokerage actually conducts any business with respect to mortgages. On the contrary, according to section 4 of the Standards of Practice Regulation, the requirement to maintain liability insurance is a standard of practice that applies to “every brokerage licence that is issued under the Act”.

Subsection 20(1) of the Act provides that a licensee “may apply to the Superintendent for permission to surrender his, her or its licence”. Paragraph 20(2) provides that in order to surrender a licence, the licensee “shall submit the application to the Superintendent in the manner required by the Superintendent and shall give the Superintendent such information and documents as he or she may require”. The Superintendent is not obliged to accept an application made under section 20 of the Act. Indeed, according to paragraph 20(3), the Superintendent has the authority to refuse to allow the surrender of a licence if he or she is of the opinion that such a surrender would not be in the public interest. With respect to brokerage licences, such as the one issued to Rebecca Au, the criteria that the Superintendent must apply to determine whether the public interest would be compromised by a surrender are prescribed by section 4.1 of O. Reg. 408/07.

When they are read together, sections 38 and 39 of the Act provide that a general administrative penalty may be imposed on a mortgage brokerage such as Rebecca Au if three conditions are met:

- 1) The brokerage is contravening or not complying with or has contravened or not complied with a requirement established under the Act, other than a requirement for which a penalty is provided under section 40 or a requirement prescribed under subsection 55(5)(a).
- 2) The penalty is aimed at promoting compliance with the requirements of the Act or at preventing the brokerage from deriving an economic benefit from not complying with said requirements.
- 3) The Superintendent has followed the procedural steps prescribed by section 39, in particular the requirements to give written notice of the proposal to impose a monetary penalty to the brokerage and to inform the brokerage of its right to request a hearing before the Tribunal.

With respect to the amount of the administrative penalty, section 41 of the Act provides a maximum penalty of \$25,000 for a brokerage such as Rebecca Au and O. Reg. 192/08, the “Administrative Penalties Regulation”, provides that the Superintendent is authorised to determine the amount of the penalty up to this limit (section 2) having regard “only” to the five criteria listed in section 3 of the regulation. These criteria are discussed below under the heading “Analysis”. At this point, however, it should be noted that financial hardship on the brokerage is **not** amongst the criteria listed in section 3.

Lastly, according to subsection 39(6) of the Act, when the Tribunal has held a hearing following a notice of proposal to impose an administrative penalty, the Tribunal may, by order, direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent. The wording of this provision suggests that hearings held pursuant to subsection 39(5) of the Act are *de novo* hearings. Accordingly, the Tribunal need not show any deference to the Superintendent’s determination with respect to whether a proper basis exists for imposing an administrative monetary penalty on a licensee, or with respect to the amount that is appropriate in the circumstances of the case. Rather, the Tribunal must make its own determinations having regard to the five criteria prescribed by the Administrative Penalties Regulation and the evidence adduced during the hearing.

## **E. WRITTEN SUBMISSIONS**

Ms. Au filed written submissions with the Registrar of the Tribunal on December 15, 2009. Moreover, in an email dated March 4, 2009, sent to a lawyer of the Commission with whom she was discussing the possibility of settling the Interim Order and the Notice of Proposal to revoke her brokerage’s licence, Ms. Au outlines a number of points that can also be considered as submissions for present purposes (ABD – Tab 7).

In essence, the submissions of the applicant can be summarised as follows: 1) she responded to the email dated November 26, 2008 (the request for information) and to the email dated February 17, 2009 (the notice of suspension), and she followed the procedures required to surrender the licence; 2) her brokerage never conducted any business during the timeframe in question; 3) because the brokerage did not conduct any business, there was no risk to the public stemming from her failure to secure liability insurance; 4) she did not make any false statement in her declaration, nor did she provide the Superintendent with any false information; 5) she was suffering from asthma and bronchitis during a three-month period between December 2008 and February 2009, but still responded to the emails received from the Commission; 6) she was faced with financial difficulties during the timeframe in question and makes an annual income of less than \$30,000; and 7) she regrets not having purchased insurance and admits that it is the result of “negligence” on her part.

Counsel for the Superintendent filed written submissions with the Registrar on December 1<sup>st</sup>, 2009, and also replied to the submissions made by Ms. Au by way of a letter dated December 29, 2009. In essence, the Superintendent makes three submissions. Firstly, the brokerage in question contravened a requirement under the Act by failing to have the required insurance from July 1<sup>st</sup>, 2008, until March 20, 2009. Secondly, a monetary penalty would serve both of the objectives outlined in section 38 of the Act. Thirdly, a penalty of \$1,000 is appropriate in light of the five criteria listed in section 3 of the Administrative Penalties Regulation. For reasons that follow, the Tribunal agrees with the first two submissions made by Counsel for the Superintendent, but does not fully endorse the third given the specific circumstances of this case.

## **F. ANALYSIS**

### *1. Basis for Imposing an Administrative Penalty*

In her written submissions, Ms. Au requests that the proposed monetary penalty be waived or reduced as much as possible. Having reviewed the circumstances outlined in her submissions carefully, the Tribunal cannot find any reasons for questioning the appropriateness of imposing an administrative monetary penalty upon her brokerage. Some of the facts outlined in her submissions are relevant with respect to the quantum issue. However, none of these facts constitutes a valid excuse or justification for her decision to not secure errors and omissions insurance on or before July 1<sup>st</sup>, 2008. Indeed, in view of the evidence submitted by the parties and the submissions made by Ms. Au herself, it is clear that both of the substantive conditions outlined in sections 38 and 39 are present in the circumstances of this case.

*a) Contravention with a requirement established under the Act:* For a period of approximately nine months (1 July 2008 to 20 March 2009), the brokerage named Rebecca Au was in contravention of the requirement imposed by subsection 7(4) of the Act, namely, the requirement to comply with the standards of practice prescribed for brokerage licences. Liability insurance is a standard prescribed by section 42 of the Standards of Practice Regulation. As principal broker, Ms. Au had the statutory obligation to carry out her powers and duties in accordance with said regulation

(subsection 7(6) of the Act). In her submissions, Ms. Au did not allege that she was unaware that brokerages licensed under the new Act needed errors and omissions insurance. On the contrary, she raises financial constraints as an excuse for not purchasing insurance and uses language that suggest that she knew about the requirement when she submitted the licence application or shortly thereafter: “I [...] regret to postpone buying the E & O insurance”; “I knew that I did not have E and O coverage”; and “This is completely my negligence”.

- b) *Purposes of an administrative penalty*: The imposition of a monetary penalty on the brokerage Rebecca Au would serve both of the purposes for which a penalty may be imposed under the Act. First, even though the brokerage ultimately surrendered its own licence, a penalty has the potential of deterring other mortgage brokerages from contravening the requirement for liability insurance, a standard of practice primarily designed to protect the public from the financial consequences of negligence and fraud by a brokerage or its authorised agents and brokers. A penalty could also promote compliance from Ms. Au herself if ever she decides to re-enter the mortgage industry as an agent, broker or principal broker for another brokerage. Second, a monetary penalty would prevent her brokerage from having derived an economic benefit as a result of having failed to comply with the requirement for liability insurance for nine months, that is, the period of time between July 1, 2008 (the effective date of the licence) and March 20, 2009 (the date on which the request to surrender the licence was granted). In other cases, the Tribunal has heard evidence with respect to the annual cost of the insurance required to comply with the Act, evidence which estimates the range of annual premiums at \$800-\$1200. Although there is no actual evidence before the Tribunal in the present case, the Tribunal is nonetheless prepared to find that the brokerage did derive a modest economic benefit from avoiding the cost of paying insurance premiums for nine months.

## 2. *Criteria for Determining Amount of Penalty*

Do the circumstances of this case warrant a monetary penalty of \$1,000? In determining the amount of an administrative penalty to be imposed under section 39 of the Act for a purpose set out in section 38, the Tribunal must take into account **only** the five criteria listed in section 3 of the Administrative Penalties Regulation, just as the Superintendent was obliged to limit himself to those criteria in the first instance.

As noted earlier, financial hardship is not one of the criteria identified in section 3 of the Administrative Penalties Regulation. Accordingly, the Tribunal does not rest its determination of the appropriate penalty on the alleged financial difficulties facing Ms. Au during the timeframe in question, nor does the Tribunal give any weight to her declared modest annual income in reaching this determination. These factors are immaterial under the current regulatory framework.

Having reviewed the limited evidence and submissions of both parties, the Tribunal makes the following findings with respect to the application of these five criteria to the circumstances of this case:

- a) *The degree to which the contravention was intentional, reckless or negligent:* By her own written admission, Ms. Au acted negligently in failing to secure liability insurance for her brokerage on or before July 1<sup>st</sup>, 2008. Counsel for the Superintendent submits that her omission in this respect was probably intentional. Given the limited amount of evidence on this point, the Tribunal is not prepared to infer that Ms. Au intentionally contravened the statutory requirement for errors and omissions insurance. However, as Principal Broker, there is no doubt that she acted negligently in this respect.
- b) *The extent of the harm or potential harm to others resulting from the contravention:* There is no evidence before the Tribunal to suggest that the brokerage in question solicited or engaged in any regulated mortgage activities from July 1, 2008 to March 20, 2009. As noted by Counsel for the Superintendent, there was a potential harm to the public during this period, given the fact that her brokerage was licensed to conduct business in Ontario and, accordingly, was able to hold itself out as having the permission to engage in mortgage business. However, because there is no evidence that Ms. Au actually held herself out in this fashion, the potential harm associated with her brokerage licence does not carry much weight in the Tribunal's determination of the appropriate penalty.
- c) *The extent to which Ms. Au took any remedial action:* The criterion that weighs most in favour of the brokerage is the extent to which Ms. Au took remedial actions to minimize the consequences of her failure to secure liability insurance. In the majority of cases heard thus far by the Tribunal under section 39 of the Act, the Commission was required to take many steps before obtaining a response from the brokerage in contravention with the Act. Indeed, the jurisprudence of the Tribunal contains numerous examples of cases where the uninsured brokerage ignored not only the email sent by the Commission on November 26, 2008 to all brokerages identified in the audit, but also a subsequent registered letter. In the present case, however, Ms. Au responded before the December 3<sup>rd</sup> deadline identified in the email and clearly stated her intent to surrender the licence of her brokerage. She also requested information on how to proceed and the required documents, but her questions were not answered until the Commission sent an unregistered letter to her attention on January 16, 2009, approximately six weeks later. There is no evidence before the Tribunal that Ms. Au received the letter sent to her brother's residence prior to February 17, 2009, the date on which the Superintendent issued (by registered mail, facsimile and regular mail) the Interim Order, the Notice of Proposal to revoke her licence, and the Notice of Proposal currently at issue. On the contrary, within six hours of the time stamp on the email sent by the Commission on February 17, confirming the automatic suspension of her brokerage licence, Ms. Au wrote to the Commission requesting clarifications and, within two days, she submitted the Surrender Declaration that had been attached to the January letter. Although the Tribunal recognises the fact that the January 16<sup>th</sup> letter was sent to the address provided by Ms. Au on her licence application, the fact remains that Ms. Au responded in a timely fashion to the request for information sent on November 26<sup>th</sup> and, once she became aware of the procedures involved, she submitted her Surrender Declaration without delay.

- d) *The extent to which Ms. Au derived any economic benefit from its contravention:* As noted, the applicant did derive a modest economic benefit from avoiding the cost of paying insurance premiums for approximately nine months.
- e) *Any other contraventions during the preceding five years:* This factor has no application in the circumstances of this case. There was no suggestion that either Ms. Au or the brokerage carrying her name has, in the past, failed to comply with any other requirement under the Act or with any other legislation.

In view of these findings, the Tribunal concludes that an administrative penalty of \$750 is sufficient to achieve the legislative purposes outlined in section 38 of the Act. Although her brokerage was in contravention of the Act for nine months, a length of time similar to the one involved in numerous Tribunal decisions upholding a monetary penalty of \$1,000, Ms. Au attempted to mitigate the situation as early as December 2<sup>nd</sup>.

#### **F. ORDER**

The Tribunal orders the Superintendent to carry out his Notice of Proposal to impose an administrative monetary on Rebecca Au, but with a change in the amount of the penalty from \$1,000 to \$750.

**DATED** at the City of Toronto, this 19th day of February, 2010.

“Denis Boivin”  
Denis Boivin, Member of the Tribunal  
and Chair of the Hearing