

**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 29(1), 38 and 40; and the Reporting Requirements for Licensees Regulation, O. Reg. 193/08, in particular sections 2 and 15;

**AND IN THE MATTER OF** an Order issued by the Superintendent of Financial Services on November 18, 2009, imposing an administrative monetary penalty of \$1,000 on Gregory A. Viau (“GAV”) for its failure to file an Annual Information Return on or before March 31, 2009;

**AND IN THE MATTER OF** a Notice of Appeal filed by Gregory A. Viau on behalf of GAV on December 11, 2009, pursuant to subsection 40(4) of the Act.

**BETWEEN:**

**GREGORY A. VIAU**

Appellant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

Mr. Denis Boivin  
Member of the Tribunal

**WRITTEN SUBMISSIONS:**

Mr. Gregory A. Viau, Principal Broker for the Appellant GAV

Mr. Stephen Scharbach, representing the Superintendent

## **REASONS FOR DECISION**

### **A. BACKGROUND**

On November 18, 2009, by way of an Order, the Superintendent of Financial Services (the “Superintendent”) imposed an Administrative Monetary Penalty of \$1,000 on the mortgage brokerage named Gregory A. Viau (hereinafter “GAV”) for its failure to file an Annual Information Return on or before March 31, 2009. This penalty was imposed pursuant to subsection 40(1) of the *Mortgage Brokerages, Lenders and Administrators Act* 2006, S.O. 2006, c. 29 (hereinafter the “MBLA Act”).

Subsection 40(4) of the MBLA Act provides that a person or entity, such as GAV, may appeal the Superintendent’s order to the Financial Services Tribunal (hereinafter the “Tribunal”) in writing “within 15 days after the order ... is received”. A specific reference to subsection 40(4) was included in the Order issued by the Superintendent and served upon the mortgage brokerage. On December 11, 2009, the Registrar of the Tribunal received a Notice of Appeal prepared and submitted by Mr. Gregory Viau, Principal Broker for the brokerage GAV.

In a letter dated December 17, 2009, the Registrar of the Tribunal informed Mr. Viau that his Notice of Appeal had been received on the 11<sup>th</sup>, but that this notice was nonetheless filed beyond the fifteen-day statutory deadline imposed by subsection 40(4) of the MBLA Act. The Registrar invited Mr. Viau to make written submissions on the following jurisdictional matters: 1) whether the Tribunal had authority to waive or extend the statutory deadline and, if so, 2) whether the Tribunal should exercise that authority in the circumstances of this case. In this letter, Mr. Viau’s attention was directed to subsection 4(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (hereinafter the “SPP Act”), a provision that allows any “procedural requirement” to be waived “with the consent of the parties and the tribunal”. The Registrar’s letter was copied to Mr. Stephen Scharbach, counsel for the Superintendent, who was also invited to make written submissions with respect to the jurisdictional questions contained therein.

### **B. WRITTEN SUBMISSIONS**

On December 18, 2009, Mr. Viau responded to the letter sent by the Registrar on the previous day. In his response, Mr. Viau outlines a number of reasons why he believes the administrative monetary penalty imposed on his brokerage should be overturned, but there is only one brief submission addressing the questions outlined by the Registrar in her letter of December 17<sup>th</sup>. According to him, the Superintendent’s Order was not received in the offices of the mortgage brokerage until December 10, 2009, the day before the Notice of Appeal was sent to the Registrar. Furthermore, in reference to the method of service used by the Superintendent, Mr. Viau claims that the Order was “received by regular mail, not registered mail”. Accordingly, with respect to the issues currently before the Tribunal, it would appear that Mr. Viau is simply asserting that the statutory deadline imposed by subsection 40(4) of the MBLA Act was met in the circumstances of this case – not missed – as the order in question was not “received” by him until December 10<sup>th</sup>.

Counsel for the Superintendent filed written submissions on the jurisdictional questions on January 21, 2010. In essence, Mr. Scharbach submits that the fifteen-day time limit for commencing an appeal under subsection 40(4) of the MBLA Act is mandatory and that the Tribunal has no express statutory authority – under any piece of legislation – to waive or extend this deadline in order to hear an appeal commenced beyond this limit. However, on the assumption that the Tribunal rejects this submission, Mr. Scharbach notes that the Superintendent would be prepared to give his consent to an extension of the deadline in the circumstances of this case “based on the fact that the appeal was filed shortly after the deadline expired”.

The submissions made on behalf of the Superintendent on January 21<sup>st</sup> do not address the factual assertions made by Mr. Viau regarding the manner in which the Order was served or regarding the date on which the Order was received by the brokerage. The submissions of Mr. Scharbach simply assert that the appeal was commenced “three days after the 15 day deadline expired”. Accordingly, in a letter dated February 24, 2010, the Registrar of the Tribunal requested further submissions from counsel for the Superintendent in order to clarify these important factual issues. These facts are important because, in light of the clear wording of subsection 40(4) of the MBLA Act, the statutory deadline for commencing an appeal does not begin to run until the Superintendent’s order is “received” by the person or entity affected by the order. Thus, if the allegations made by Mr. Viau in his letter of December 18<sup>th</sup> are correct, the jurisdictional issues currently before the Tribunal would be academic in the circumstances of this case.

On March 11, 2010, counsel for the Superintendent responded to the Registrar’s request for additional submissions. On the basis of the documents attached to the letter of Mr. Scharbach, the following facts seem abundantly clear to the Tribunal: 1) the Order made by the Superintendent and covering letter dated November 18, 2009, were sent to the brokerage GAV by registered letter; 2) the items were successfully delivered to their recipient on November 20, 2009; and 3) the person who acknowledged receiving this letter by way of signature is described as “Gregory Viau”.

With respect to Mr. Viau’s allegation that the order in question was only received on December 10<sup>th</sup> by regular mail, counsel for the Superintendent suggests that Mr. Viau is probably confusing two different letters sent to his brokerage – by two different departments of the Government. Indeed, on November 27, 2009, the Ministry of Government Services sent an invoice to GAV in the amount of \$1,000 for an “administrative fine/penalty”, provided the brokerage with information as to where and how to make the payment, and attached a copy of the Superintendent’s Order previously issued and served on the brokerage by the Financial Services Commission of Ontario. According to Mr. Scharbach, this second letter is the one that Mr. Viau is probably referring to when he alleges that the order was only received by regular mail on December 10<sup>th</sup>; a submission that is supported by the fact that Mr. Viau attached to his Notice of Appeal a copy of the invoice sent by the Ministry of Government Services and a scanned copy of the envelope containing said invoice, postmarked December 1, 2009.

## **C. STATUTORY PROVISIONS**

Three statutory provisions are relevant with respect to the jurisdictional questions raised by this matter. The first is subsection 40(4) of the MBLA Act, the provision which gives a person or entity such as GAV the right to appeal an order imposed by the Superintendent pursuant to section 40. Subsection 40(4) reads as follows: “The person or entity may appeal the Superintendent’s order to the Tribunal in writing within 15 days after the order in subsection (1) is received by the person or entity.”

The second is section 6 of Ontario Regulation 190/08, a provision that applies with respect to the delivery of orders and interim orders under the MBLA Act and notices that the Superintendent is required under the MBLA Act to give to a person or entity. For present purposes, the relevance of this provision stems from the fact that the timeline imposed by subsection 40(4) begins when the order issued by the Superintendent is “received” by the person or entity. Section 6 reads as follows:

6. (1) An order, interim order or notice is deemed to have been delivered to a licensee or applicant by the Superintendent if it is delivered in either of the following ways:
  1. By registered mail addressed to the mailing address in Ontario of the licensee or applicant as it appears in the records maintained by the Superintendent.
  2. By fax sent to the fax number, if any, of the licensee or applicant as it appears in the records maintained by the Superintendent.
- (2) Delivery of an order, interim order or notice by the Superintendent is effective on the day indicated:
  1. If sent by registered mail, on the earlier of the fifth day after mailing or the day after its receipt was acknowledged by the addressee or an individual accepting it on behalf of the addressee.
  2. If sent by fax, on the same day it is sent.
- (3) An order, interim order or notice that is delivered after 5 p.m. is deemed to have been delivered on the following day.

The third provision that is relevant with respect to the jurisdictional questions raised by this matter is subsection 4(1) of the SPP Act, which reads as follows: “Any procedural requirement of this Act, or of another Act or a regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal.” This is the provision that the Registrar of the Tribunal brought to the attention of Mr. Viau in her letter of December 17, 2009.

## **D. ISSUE**

As discussed below, the ultimate question is whether the fifteen-day statutory deadline imposed by subsection 40(4) of the MBLA Act is a “procedural requirement ... that applies to a proceeding” within the meaning of subsection 4(1) of the SPP Act. If the answer is yes, the Tribunal would be prepared to waive the deadline in light of the consent expressed by counsel for the Superintendent in his alternative submissions. However, if the answer is no, the Tribunal would have no jurisdiction to hear this appeal regardless of how short the delay on the part of Mr. Viau may have been.

## E. ANALYSIS

Before addressing the jurisdictional issue, I must first dispose of Mr. Viau's only submission in this matter, namely, that the statutory deadline imposed by subsection 40(4) of the MBLA Act was met in the circumstances of this case because the order in question was not "received" by him until December 10, 2009, one day before he communicated his Notice of Appeal to the Registrar. Although the Tribunal is only seized with a jurisdictional issue at this stage, it must nonetheless address the factual assertion made by Mr. Viau to ensure that this question is not moot or academic.

Having reviewed the documents supplied by counsel for the Superintendent with his submissions of March 11, 2010, I conclude that the order made by the Superintendent was sent to the brokerage GAV by registered letter, that this order was successfully delivered on November 20, 2009, and that the person who acknowledged receiving the order was Mr. Viau. Thus, pursuant to subsection 6(2) of Ontario Regulation 190/08, the Superintendent's order is deemed to have been delivered to GAV – and hence "received" with the meaning of subsection 40(4) of the MBLA Act – on November 21<sup>st</sup>, namely, the day after the registered letter's receipt was acknowledged by GAV or by someone acting on behalf of GAV. Although these conclusions are sufficient to dispose of Mr. Viau's submission, I wish to add one point. On the basis of the documents that Mr. Viau attached to his Notice of Appeal, it is possible that he is confusing two letters when he alleges that the order was not received until December 10<sup>th</sup>: the registered letter sent by the Financial Services Commission of Ontario and the letter sent by the Ministry of Government Services on November 27<sup>th</sup> with an invoice for \$1,000. However, whether his submission is based on a mistake or not, the fact remains that the order of the Superintendent is deemed to have been received by GAV on November 21<sup>st</sup> and, accordingly, the Notice of Appeal communicated to the Registrar on December 11<sup>th</sup> was beyond the fifteen-day deadline imposed by subsection 40(4) of the MBLA Act.

Turning to the jurisdictional matter, the starting point of my analysis is the fact that the Tribunal is established by statute, namely, by subsection 6(1) of the *Financial Services Commission of Ontario Act, 1997* (hereinafter the "FSCO Act"). Sections 6 and 7 of the FSCO Act provide for the composition of the Tribunal and establish a general framework for its governance. Section 20 grants exclusive jurisdiction to the Tribunal to "exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it", whereas sections 21 to 24 confer to the Tribunal a number of procedural powers for the conduct of "proceedings before the Tribunal", including the power to make rules of practice and procedure with respect to said proceedings. However, there is nothing in the FSCO Act that grants jurisdiction to the Tribunal to conduct proceedings in any given matter, that is, there is nothing in this statute that determines what matters may actually be brought "before" the Tribunal. Rather, the jurisdiction of the Tribunal to conduct proceedings – whether hearings or appeals – is conferred by a number of enabling statutes, including the *Insurance Act*, R.S.O. 1990, c. I.8, the *Credit Unions and Caisses Populaires Act*, S.O. 1994, c. 11, the *Pension Benefits Act*, R.S.O. 1990, c. P.8, and more recently the MBLA Act.

Like other administrative tribunals, the Tribunal is a creature of statute. It has exclusive jurisdiction to exercise the powers conferred upon it by the Ontario legislature, but it has no inherent jurisdiction to conduct legal proceedings. Accordingly, unless a person or entity has an express statutory right to request a hearing before the Tribunal, or an express statutory right to appeal a decision of the Superintendent to the Tribunal, the grievance of this person or entity cannot be brought before the Tribunal. Subsection 4(1) of the SPP Act does not alter this basic principle of administrative law. As noted, this section provides that a “procedural requirement ... that applies to a proceeding, may be waived with the consent of the parties and the tribunal”. However, these words do not imply that an administrative tribunal can grant itself authority to conduct a proceeding with respect to a matter over which it does not otherwise have express jurisdiction, simply because the parties agree that the matter should be heard. Stated somewhat differently, subsection 4(1) of the SPP Act is not an independent source of jurisdiction; it is simply a power that is available with respect to a proceeding over which an administrative tribunal has authority pursuant to its enabling statute.

Having made these general observations, I turn to the statute that is most relevant for present purposes, the MBLA Act. At the outset, it should be noted that the Ontario legislature has created two distinct types of monetary penalties under this statutory scheme: “General Administrative Penalties” (section 39) and “Summary Administrative Penalties” (section 40). These penalties are available to the Superintendent with respect to different types of contraventions. Moreover, each penalty involves a different process: a General Administrative Penalty pursuant to section 39 may be imposed after the Superintendent issues a “notice of proposal” to the person or entity affected, a notice that must inform them of their right to “request a hearing by the Tribunal” and inform them of the “process for requesting a hearing”; a Summary Administrative Penalty pursuant to section 40 may be imposed “by order” provided the Superintendent gives the affected person or entity a “reasonable opportunity to make written submissions” beforehand.

In both cases, the MBLA Act confers jurisdiction on the Tribunal to conduct proceedings. However, there are some notable differences in the manner in which this authority is framed. Subsection 39(2) recognises the right of a person or entity to request a “hearing” with respect to a notice of proposal and subsection 39(5) provides that the Tribunal “shall hold a hearing” “if the person or entity requests a hearing in writing within 15 days after the notice ... is received”. Thus, with respect to General Administrative Penalties, a distinction has arguably been made between someone’s right to request a hearing (subsection 2) and the process involved for requesting said hearing (subsection 5). Furthermore, in this context, one could argue that the fifteen-day deadline incorporated in subsection 39(5) refers to the process for requesting a hearing and, accordingly, is a “procedural requirement ... that applies to a proceeding” within the meaning of subsection 4(1) of the SPP Act – a requirement that can be waived with the consent of the parties and the Tribunal. However, for present purposes, it is sufficient to note that section 40 is worded quite differently. Indeed, with respect to Summary Administrative Penalties, subsection 40(4) of the MBLA Act provides that the person or entity “**may appeal** the Superintendent’s order to the Tribunal in writing **within 15 days** after the order ... is received” [emphasis added]. Here, no distinction is made between right and process.

In his written submissions, counsel for the Superintendent has cited four appellate authorities to support his view that the fifteen-day deadline contained in subsection 40(4) of the MBLA Act is mandatory or substantive, rather than directory or procedural, and that the Tribunal has no authority to waive or extend this deadline: *Upper Lakes Shipping Ltd. v. Sheehan*, [1979] 1 S.C.R. 902; *Kirchmeir v. Edmonton (City) Police Service*, [2001] A.J. No. 1507 (C.A.); *Wascana Energy inc. V. Gull Lake (Rural Municipality No. 139)*, [1999] 1 W.W.R. 280 (Sask. C.A.); *Pagee v. Manitoba (Director, Winnipeg Central)*, [2000] M.J. No. 180 (C.A.). Likewise, in *Treeshin v. Yellowknief (City)*, [1994] N.W.T.J. No. 22 (S.C.), Vertes J. makes the following general observation at paragraph 2: “It is trite law to say that there is no power to extend or vary the time in which an appeal may be brought when the time is set by statute and the statute does not empower the court to extend the time”. Finally, there are at least two other decisions supporting the interpretation advanced by counsel for the Superintendent, decisions also involving a fifteen-day statutory deadline: *Larivee v. Prince Edward Island Eastern School Board*, [2002] P.E.I.J. No. 22 (S.C.) and *1512179 Ontario Ltd. v. Ontario (Ministry of Health)*, [2008] O.E.R.T.D. No. 9 (Environmental Review Tribunal).

There are precedents that support the contrary view, most notably a decision of the Tribunal itself interpreting a thirty-day deadline imposed by section 89 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, and a decision of the Ontario Divisional Court interpreting a thirty-day deadline imposed by section 4 of the *Commodity Futures Act*, R.S.O. 1990, c. C.20: *Constantin Munteanu v. Superintendent of Financial Services* (FST Decision No. P0240-2004-1); *Derivative Services Inc. v. Investment Dealers Assn. of Canada*, [2002] O.J. No. 1595 (Div. C.). However, the statutory provisions involved in each of these cases were quite different than subsection 40(4) of the MBLA Act. In fact, they were similar to section 39 of the MBLA Act in the sense that they created a right to a hearing, on the one hand, and specified a procedural deadline for this right to be exercised, on the other.

## **F. CONCLUSION**

Based on a textual and contextual interpretation of subsection 40(4) of the MBLA Act, I am compelled to conclude that the fifteen-day deadline incorporated in this provision is not a “procedural requirement ... that applies to a proceeding” within the meaning of subsection 4(1) of the SPP Act, but a substantive condition of the appeal right created therein. Thus, in the absence of express authority to waive or extend this deadline, the Tribunal has no jurisdiction to deal with this matter.

**DATED** at the City of Toronto, the 23rd day of April, 2010.

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“Denis Boivin”  
Denis Boivin  
Member of the Tribunal