

# Financial Services Tribunal

## Revised Practice Direction Pertaining to Proceedings Held Pursuant to the Mortgage Brokerages, Lenders & Administrators Act, 2006

Effective November 6, 2009

WHEREAS the *Rules of Practice and Procedure for Proceedings Before the Financial Services Tribunal* ("Rules") apply to all proceedings before the Financial Services Tribunal ("Tribunal") subject to any Practice Direction issued under Rule 2.04;

AND WHEREAS the Rules must be broadly interpreted to produce the quickest, most just and least expensive determination of the issues before the Tribunal;

AND WHEREAS the *Mortgage Brokerages, Lenders and Administrators Act, 2006* ("MBLA Act") came into force on July 1, 2008;

AND WHEREAS sections 21(3), 35(4), 39(5) and 40(4) of the *MBLA Act* have the potential to increase the number of proceedings before the Tribunal;

AND WHEREAS it is in the interest of all stakeholders in the mortgage brokerage industry in Ontario that disputes stemming from proposals issued by the Superintendent of Financial Services ("Superintendent") pursuant to sections 21, 35 and 39 of the *MBLA Act* and from orders made by the Superintendent pursuant to section 40 of the *MBLA Act* be resolved as quickly, fairly and efficiently as reasonably possible;

THEREFORE, pursuant to Rule 2.04, the Tribunal issues the following Practice Direction in order to clarify and qualify some of its Rules for the purpose of hearings requested under sections 21(3), 35(4) and 39(5) of the *MBLA Act* and appeals launched under section 40(4) of the *MBLA Act*.

### Application

1. The Rules of the Tribunal apply to proceedings held pursuant to sections 21(3), 35(4), 39(5) and 40(4) of the *MBLA Act* except to the extent they are modified by this Practice Direction.
2. This Practice Direction applies only to proceedings held pursuant to sections 21(3), 35(4), 39(5) and 40(4) of the *MBLA Act*
3. This Practice Direction replaces the one issued on December 9, 2008, and shall remain in effect until it is repealed by the Tribunal.

### **Commencement, Format and Scheduling of Proceedings**

4. A hearing requested pursuant to sections 21(3), 35(4) or 39(5) of the *MBLA Act* is initiated by a Request for Hearing (in Form 1). An appeal launched under section 40(4) of the *MBLA Act* is initiated by a Notice of Appeal (in Form 2).
5. Unless the Tribunal directs otherwise, proceedings requested pursuant to sections 21(3), 35(4), 39(5) and 40(4) of the *MBLA Act* shall be held orally, in Toronto, before a panel of one (1), two (2) or three (3).
6. A calendar shall be created by the Registrar in order to schedule proceedings requested pursuant to sections 21(3), 35(4), 39(5) and 40(4) of the *MBLA Act*. Using this calendar, the Registrar shall assign a date for the proceeding and give written notice to the parties containing the information described in Rule 22.03.
7. For scheduling purposes, and unless the Tribunal directs otherwise, proceedings requested pursuant to sections 21(3), 35(4), 39(5) and 40(4) of the *MBLA Act* will be full day proceedings.
8. Once proceeding dates are fixed by the Registrar, they cannot be modified without the permission of the Tribunal.

### **Pre-hearing Conferences**

9. As a general rule, pre-hearing conferences will be held with respect to hearings requested under sections 21(3), 35(4) or 39(5) of the *MBLA Act*. However, the Tribunal may dispense with a pre-hearing conference when, in the opinion of the Tribunal, such a conference would not assist in the just and expeditious disposition of the proceeding.
10. As a general rule, pre-hearing conferences will not be held with respect to appeals launched under section 40(4) of the *MBLA Act*. However, at the request of a party or on its own initiative, the Tribunal may direct the parties to participate in a pre-hearing conference when, in the opinion of the Tribunal, such a conference may assist in the just and expeditious disposition of the proceeding.
11. Pre-hearing conferences shall be held by teleconference, unless a party satisfies the Tribunal that holding it in this format would be likely to cause that party significant prejudice.

### **Proceedings Held Pursuant to Sections 21(3), 35(4) and 39(5)**

12. In preparation for the hearing, the parties shall make reasonable efforts to prepare an Agreed Statement of Facts and an Agreed Book of Documents for all facts and documents not in dispute. Subject to section 24 of this Practice Direction, the Agreed Statement of Facts and Agreed Book of Documents, if any, shall be filed with the Registrar at least seven (7) days before the hearing or by such other date as established by the Tribunal.
13. For the purpose of the hearing, if either party intends to rely on evidence not contained in an Agreed Statement of Facts or an Agreed Book of Documents, said party shall disclose and produce to the opposing party the evidence in question at least fourteen (14) days prior to the hearing. This obligation applies to documents, written evidence, expert reports and witness statements as described in Rules 31, 33, 34 and 35. If, as a result, the opposing party wishes to present rebuttal evidence, said party shall disclose and produce the evidence in question at least seven (7) days prior to the hearing.
14. For the purpose of the hearing, if either party intends to rely on evidence not contained in an Agreed Statement of Facts or an Agreed Book of Documents, said party shall **not** file with the Registrar the evidence in question prior to the hearing, but shall present the evidence to the Tribunal during the hearing in order to determine the admissibility of said evidence.
15. If a party intends to present to the Tribunal written submissions during the hearing and/or a Book of Authorities, the party shall provide the opposing party with a copy of these submissions and/or Book of Authorities prior to the hearing, with sufficient time for the opposing party to prepare accordingly.

### **Proceedings Held Pursuant to Section 40(4)**

16. Upon receiving a Notice of Appeal, the Registrar shall request from the Superintendent a record for the appeal. Pursuant to this request, and subject to section 24 of this Practice Direction, the Superintendent shall provide the Registrar with copies of the order made under section 40(1) of the *MBLA Act*, of all documents relied upon in making this order, and of any submissions made by the appellant pursuant to section 40(2) *MBLA Act*.
17. Subject to sections 18-21 of this Practice Direction, no party to an appeal under section 40(4) of the *MBLA Act* shall enter, file or rely upon any written or oral evidence in the appeal that was not before the Superintendent at the time of making the order under appeal. For greater certainty, subject to sections 18-21, no party shall call any witness during the appeal for the purpose of adducing new evidence with respect to the matters in dispute.
18. If a party intends to enter, file or rely upon any written or oral evidence in the appeal that was not before the Superintendent, said party shall disclose and produce to the opposing party the evidence in question at least fourteen (14)

days prior to the hearing of the appeal. This obligation applies to documents, written evidence, expert reports and witness statements as described in Rules 31, 33, 34 and 35. If, as a result, the opposing party wishes to present rebuttal evidence, said party shall disclose and produce the evidence in question at least seven (7) days prior to the hearing of the appeal.

19. If a party intends to enter, file or rely upon any written or oral evidence in the appeal that was not before the Superintendent, said party shall **not** file with the Registrar the evidence in question prior to the appeal, but shall present the evidence to the Tribunal during the hearing of the appeal in order to determine the admissibility of said evidence.
20. When a party intends to enter, file or rely upon any written or oral evidence in the appeal that was not before the Superintendent, the opposing party shall indicate at the commencement of the appeal whether he or she consents to the admissibility of this new evidence. When consent is not given, the party intending to enter, file or rely upon the new evidence shall bring a motion at the commencement of the hearing of the appeal to determine the admissibility of the evidence.
21. In determining whether to allow new written or oral evidence in an appeal launched under section 40(4) of the *MBLA Act*, the Tribunal shall consider the following three factors: (1) whether the evidence was disclosed and produced in accordance with section 18 of this Practice Direction; (2) whether the evidence was reasonably available to the party tendering it at the time the Superintendent considered the matter; and (3) whether the evidence is significant to the issues raised in the appeal.
22. If a party intends to present to the Tribunal written submissions during the hearing of the appeal and/or a Book of Authorities, the party shall provide the opposing party with a copy of these submissions and/or Book of Authorities prior to the hearing of the appeal, with sufficient time for the opposing party to prepare accordingly.

### **Filing of Documents**

23. Depending on the composition of the panel, any party who wishes to file documentary evidence, written submissions or a Book of Authorities with the Tribunal is required to have four (panel of three), three (panel of two) or two (panel of one) copies available at the hearing.
24. Depending on the composition of the panel, the Agreed Statement of Facts and Agreed Book of Documents referred to in section 12 of this Practice Direction, and the record of appeal referred to in section 16 of this Practice Direction, shall be filed with the Registrar in four (panel of three), three (panel of two) or two (panel of one) copies.