

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 9, 14 and 21, and the Mortgage Brokers and Agents Licensing Regulation, SOR 409/07 (the “Regulation”), in particular, section 10;

AND IN THE MATTER OF Mr. Ram Anandappa

AND IN THE MATTER OF a request for hearing pursuant to subsection 21(3) of the Act.

BETWEEN:

RAM ANANDAPPA

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin McNairn
Member of the Tribunal and Chair of the Panel

Mr. Shiraz Bharmal
Member of the Tribunal of the Panel

Ms. Lily Harmer
Member of the Tribunal and of the Panel

APPEARANCES:

Mr. Gary Anandasangaree
for the Applicant

Mr. Joe Nemet
for the Superintendent of Financial Services

HEARD:

September 30, 2008

REASONS FOR DECISION

A. The Background

On May 28, 2008, the Applicant, Mr. Ram Anandappa, submitted an application to the Superintendent of Financial Services (the “Superintendent”), pursuant to the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the “Act”), for a mortgage agent’s licence. The Mortgage Alliance Company of Canada Inc. (“MACC”) was specified, in the application, as the mortgage brokerage for which the Applicant intended to work. In fact, the Applicant had worked for MACC since September or October of 2005 and previously for Property Mortgage Canada Inc. (“PMCI”) from the end of September of 2004. However, he did not have to be individually registered or licensed to carry on his mortgage brokerage activities until the Act came into force on July 1, 2008, requiring the licensing of mortgage agents for the first time.

This case arises out of a notice of proposal, dated July 11, 2008, by the Superintendent of Financial Services (the “Superintendent”), to refuse the Applicant’s application for a mortgage agent’s licence. Upon receipt of the notice, the Applicant made a request to the Tribunal, as he was entitled to do under the Act, for a hearing in respect of that proposal asking, by way of relief, that the Tribunal make an order for the issuance of a mortgage agent’s licence to him. At the hearing, the Applicant argued that if the Tribunal should decide against such relief, it should order the Superintendent to grant the mortgage agent’s licence applied for with conditions attached to the licence. The Tribunal has the authority, under subsection 21(4) of the Act, to order the Superintendent to carry out a particular proposal, with or without changes, or to substitute its opinion for that of the Superintendent and to impose such conditions as it considers appropriate in the circumstances.

The basis for the notice of proposal, as stated therein, is that the Superintendent believes that the Applicant is not suitable to be licensed because:

- (a) his past conduct affords reasonable grounds for the belief that he will not deal in mortgages in accordance with the law and with integrity and honesty; and
- (b) he made a false statement or provided false information in his licence application.

Subsection 2(3) of the Act prohibits an individual from dealing in mortgages in Ontario without a mortgage broker's licence or a mortgage agent's licence. The Act provides for mortgage agent's licences in the following terms:

- 9. (1) An individual may apply for a mortgage agent's licence.
 - (2) A mortgage agent's licence authorizes the licensee to deal in mortgages in Ontario or trade in mortgages in Ontario on behalf of one specified brokerage by engaging in the activities permitted under the licence issued to the licensee.
 - (3) A mortgage agent's licence is subject to such conditions as may be imposed by the Superintendent or the Tribunal.
 - (4) The licensee shall comply with such standards of practice as may be prescribed for the licence issued to the licensee.
 - (5) A person who has a mortgage agent's licence shall not deal in mortgages in Ontario or trade in mortgages in Ontario except under the supervision of a mortgage broker.

The Act directs the Superintendent as to when licences are to be issued and withheld, as follows:

- 14. (1) The Superintendent shall issue a licence to an applicant who satisfies the prescribed requirements for a licence unless the Superintendent believes, on reasonable grounds, that the applicant is not suitable to be licensed having regard to such circumstances as may be prescribed and such other matters as the Superintendent considers appropriate.

The circumstances to which the Superintendent may have regard, in coming to the view that an applicant is unsuitable to receive a mortgage agent's licence, are prescribed in the

following terms by the Mortgage Brokers and Agents Licensing Regulation, SOR 409/07 (the "Regulation"):

10. In determining whether an individual is not suitable to be licensed as a mortgage ... agent, the Superintendent is required by subsection 14(1) ... of the Act to have regard to the following prescribed circumstances:

1. Whether the individual's past conduct affords reasonable grounds for belief that he or she will not deal or trade in mortgages in accordance with the law and with integrity and honesty.
2. Whether the individual is carrying on activities that contravene or will contravene the Act or the regulation if he or she is licensed.
3. Whether the individual has made a false statement or has provided false information to the Superintendent with respect to the application for the licence.

It is clear from the Superintendent's notice of proposal that his proposal to refuse a mortgage agent's licence to the Applicant is founded on his belief that the Applicant is not suitable to be licensed having regard to the circumstances set out in paragraphs 1 and 3 of section 10 of the Regulation.

The factual basis for the Superintendent arriving at this belief is set out in separate reasons for proposal that were issued by the Superintendent along with the notice of proposal. The Superintendent relies:

- (a) on the past conduct of the Applicant that resulted in his conviction, on September 9, 2005, for fraud over \$5,000; and
- (b) the Applicant's failure to disclose, in his application for a mortgage agent's licence, the fact of that conviction.

The offence of fraud over \$5,000 is established by subsection 380(1)(a) of the *Criminal Code*, R.S. 1985, c. C-46, in the following terms:

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars.

B. The Facts

1. Past Conduct of the Applicant

The Applicant's conviction for fraud over \$5,000 arose out of his involvement in the withdrawal of money, without entitlement, from a bank machine on the night of September 17, 2004. The Applicant's testimony at the hearing as to this action and the events that immediately preceded and followed it can be summarized as follows:

The Applicant attended a party with two friends on this particular night. He became drunk at the party. He was dependent on his friends for a drive home from the party. One of the friends, SS, persuaded him to help out in withdrawing money from various bank machines using counterfeit debit cards that were given to SS by an acquaintance of his at the party. The Applicant initially resisted participating in this activity but eventually "went along with the flow". The Applicant was given to understand that the money they would withdraw was to be turned over to SS's acquaintance but that he and his friends would receive a commission for their efforts. The Applicant and his two friends left the party, taking with them approximately 100 cards, and drove to a bank at which the friends used some of the cards to withdraw money from bank machines. Then they drove to a CIBC bank branch. By this time, SS had told the Applicant how to figure out the withdrawal limit for the account to which access could be gained by using a particular card, the idea being "to go for the maximum". To gain access to the account, a PIN number printed on the back of the card had to be entered into the bank machine. The Applicant and his friends entered the CIBC branch, the Applicant having three or four cards in his pocket. The Applicant used three cards to withdraw money from a bank machine. That money was taken to the car one of his friends was driving and placed in a bag along with the other money withdrawn from bank machines that night. Shortly after the three left the CIBC branch, they were arrested by the police, the cards and the bag of money were seized and various charges were subsequently laid against the three, including a fraud over \$5,000 charge against the Applicant.

The Applicant also outlined his personal history up to the time of the events of the night of September 17, 2004, explaining that he had immigrated to Canada with his family in 1995 when he was 14 years of age and that the family had settled in Flemingdon Park in Toronto, a community with lots of gangs and drugs. Upon completion of high school, he had attended a community college graduating in February, 2004 from an information technology course. He was 23 years of age, unemployed and looking for work at the time of the events of the night of September 17, 2004. He had never run afoul of the law previously and, indeed, had always consciously avoided trouble.

The Applicant got his first job in the mortgage brokerage industry, with PMCI, around the end of September, 2004. At or about this time, in connection with his job at PMCI the Applicant had to complete a form of questionnaire that was required to be filed with the Financial Services Commission of Ontario ("FSCO"). That questionnaire asked whether

he had been convicted of an offence or whether there were any proceedings pending against him. He responded “no” to this question despite the charges that were outstanding at the time. He explained this answer in his testimony before the Tribunal by saying that he didn’t understand the second part of the question addressing pending proceedings. The form was completed before the Applicant had retained counsel to defend him against the criminal charges he was facing. He admitted that counsel later advised him that a criminal record could affect his job prospects.

The Applicant made various appearances in the criminal proceedings against him. He eventually decided, when told by his counsel that the proceedings could take two or three years or even more, that he wanted to get on with his life and that the better course would be to plead guilty to the charge of fraud over \$5,000, which he did on September 9, 2005. At that time four other charges against him were withdrawn. On the same date, the court convicted him and imposed a conditional sentence of six months imprisonment, ordering that the sentence be served in the community subject to the Applicant complying with a number of conditions. Those conditions included house arrest with supervision and compliance with an order of restitution in the amount of \$3,000. At the same time, the court made a probation order that required the Applicant to serve 12 months probation at the end of his sentence and to perform 75 hours of community service. The Applicant’s two friends, who were his co-accused, likewise pleaded guilty to a charge of fraud over \$5,000. They each received the same sentence as the Applicant. The penalties imposed do not reflect a lower level of involvement by the Applicant in the events of the night of September 17, 2004, despite his efforts to downplay his role in his testimony. We were not provided with a transcript of the sentencing hearing of the Applicant and his co-accused.

When the Applicant applied for a job with MACC in September or October of 2005, he had to fill out another form of questionnaire asking if he had ever been convicted of a criminal offence. This second time, he again answered “no”, although he had been convicted of the offence of fraud over \$5,000 by this time. The Applicant’s only explanation to the Tribunal for his inaccurate answer to the question about convictions was that he wanted to be able to work for MACC and he was scared he would lose his job if he answered yes.

Sometime during the course of 2006, the Applicant applied to be registered as a real estate salesperson with the Real Estate Council of Ontario and in that connection was again asked whether he had been convicted of any offences to which he responded in the negative. He was duly registered at the time but is no longer registered at present. The Applicant testified that sometime during the current year his counsel advised the Real Estate Council of the inaccurate information about convictions that the Applicant had provided to the Council. This apparently occurred after the Applicant had been asked by staff of FSCO to explain his failure to disclose his conviction for fraud over \$5,000 in his mortgage broker’s application (see below).

The Applicant has been very successful in achieving significant financial results for MACC (and, presumably, for himself) while building up a large roster of clients and

establishing a record of customer satisfaction with no complaints from purchaser clients or mortgage lenders about the services he provided for them. The Applicant and Mr. John Gabriel, the broker of record for MACC, both testified as to these positive business results. Mr. Gabriel also expressed a willingness on the part of MACC to co-operate in the implementation of any conditions that might be imposed on any mortgage agent's licence issued to the Applicant and to designate an experienced mortgage agent or broker to supervise the Applicant's activities.

2. Failure to Disclose in the Application

The form of application for a mortgage agent's licence that the Applicant completed, electronically, on May 28, 2008, asked whether the applicant had ever pleaded guilty or been found guilty of an offence under any law of any province, territory, state or country, to which the Applicant responded "no". The form contained a warning that providing false, misleading or incomplete information in the application is an offence under the Act and that doing so may be sufficient grounds for rejecting the application. It also contained an authorization and consent on the part of the applicant to FSCO conducting a criminal record check against the applicant.

On June 18, 2008, a representative of FSCO, of which the Superintendent is the CEO, sent a letter to the Applicant asking him to explain the circumstances of his conviction on September 7, 2005 for fraud over \$5,000, which had come to the attention of FSCO in the course of its review of the Applicant's application for a mortgage agent's licence. The Applicant responded, through his counsel, by letter dated June 23, 2008. That letter acknowledges the conviction, explains the Applicant's failure to disclose the conviction on the current and earlier occasions as designed to avoid embarrassment and to put the conviction behind him, and highlights the Applicant's successes in the mortgage brokerage industry.

3. The Potential Effect of a Failed Application

The Applicant testified that he had lost 20 to 25 deals since July 1, 2008, when he had to cease his mortgage agent activities for lack of a licence under the Act and that he had no sources of income other than from those activities. He was also having trouble in meeting his own mortgage payments and was receiving help from his mother in that regard. He was looking to get married based on his income as a mortgage agent but was now living on his savings. He would, he said, suffer severely if he did not get a mortgage agent's licence.

C. The Issue

The issue in this case, as identified by the parties, is whether there are reasonable grounds to believe that the Applicant is not suitable to be licensed as a mortgage agent within the meaning of section 14 of the Act and section 10 of the Regulation having regard to:

- (a) the Applicant's past conduct, in particular his conviction under the *Criminal Code* on September 7, 2005; and
- (b) a false statement made or false information provided to the Superintendent with respect to the Applicant's application for a mortgage broker's licence, in particular a statement to the effect that he had no criminal conviction at the time of his application.

For the reasons that follow, the Tribunal has concluded that the past conduct of the Applicant, coupled with the false statement made in his application for a mortgage agent licence, provide reasonable grounds to believe that he is not suitable to be licensed as a mortgage agent at this time.

D. The Analysis

We adopt the same general approach in this case that the Tribunal recently adopted in *Henderson v. Superintendent of Financial Services* (FST File No. M0319-2008, Decision No. M0319-2008-1), which also arose out of a request for hearing in respect of a proposed refusal of a mortgage agent's licence under the Act. In particular, as in that case:

- we consider the matter before us as one of first impression without according any deference to the opinion of the Superintendent as to the suitability of the Applicant to hold a mortgage agent's licence as expressed in his notice of proposal and supporting reasons; and
- we keep in mind both the fact that the Act is designed to protect the public interest and the fact that the denial of a licence under the Act can have severe implications for an applicant by precluding him or her from earning a livelihood in a chosen line of work.

Section 10 of the Regulation states that in determining whether an individual is not suitable for licensing as a mortgage agent, the Superintendent should have regard to the

circumstances prescribed by that section. Those circumstances include whether:

- the individual's past conduct affords reasonable grounds for belief that he will not deal or trade in mortgages in accordance with the law and with integrity and honesty; and
- the individual has made a false statement or provided false information to the Superintendent with respect to the application for a licence.

However, the existence of such reasonable grounds or of such a false statement or information does not mean that a licence should necessarily be refused by the Superintendent. That is because the governing statutory criterion for licence refusal, set out in subsection 14(1) of the Act, is whether the Superintendent has reasonable grounds for believing that the applicant is not suitable for licensing. In deciding whether there are such reasonable grounds, the Superintendent is simply directed to have "regard" to such circumstances as may be prescribed. For example, if an applicant has made a false statement in his or her application for a mortgage agent's licence, that does not automatically disqualify the applicant from receiving a licence. The Superintendent must still decide whether there are reasonable grounds for belief that the applicant is not suitable to hold a licence taking into account the false statement.

1. Past Conduct of the Applicant

In *Henderson*, the Tribunal set out a non-exhaustive list of considerations to be taken into account in determining whether past conduct of an applicant for a mortgage agent's licence affords reasonable grounds for belief that the individual "will not deal or trade in mortgages in accordance with law and with integrity and honesty" in the sense of paragraph 1 of section 10 of the Regulation. Although the past conduct of the applicant at issue in that case was not criminal conduct but conduct that was found to be professional misconduct by a disciplinary panel, the considerations in *Henderson* can be usefully applied, with minor modifications, in the present case. We now apply those modified considerations.

(i) The prolonged or repetitive nature of the conduct.

The conduct of the Applicant that led to his criminal conviction took place over one night, when the Applicant had been drinking. To that extent, his conduct was neither prolonged nor repetitive. However, the panel was also troubled by the conduct of the Applicant on the three occasions prior to his most recent application to FSCO in May, 2008, when he completed forms of questionnaire (in 2004, 2005 and 2006) in which he falsely stated that he had no convictions or proceedings pending against him. In fact, he did not take responsibility for his criminal conduct in the sense of admitting to the fact of his conviction to an employer or regulator until he was forced to do so by FSCO's letter of June 18, 2008 indicating that it had uncovered his conviction in the course of reviewing his application for a mortgage agent's licence. In our view, therefore, there was repetitive misconduct on the part of the Applicant which should be taken into account in assessing the Applicant's integrity and honesty.

(ii) The time that has elapsed since the conduct occurred.

A relatively short period of time – four years – has elapsed since the Applicant’s criminal conduct on the night of September 17, 2004, which led to his conviction for the offence of fraud over \$5,000. Moreover, it has only been approximately two years since the Applicant last denied the conviction in an employer’s or regulator’s form, not counting the denial in the Applicant’s current application in May, 2008 for a mortgage agent’s licence.

(iii) The advertent or inadvertent nature of the conduct.

While the Applicant said that he was drunk and a somewhat reluctant participant in the events of the night of September 17, 2004, he did not suggest that he didn’t know what he was doing. Therefore, his conduct on that night should be taken to be advertent especially in light of his subsequent conviction for fraud for his participation in those events. On the three occasions, during the period between the end of September, 2004 and sometime in 2006, that the Applicant responded in writing to a question to the effect that he had no convictions or proceedings pending against him, the only occasion on which the Applicant’s evidence suggests that his inaccurate response may have been inadvertent was the first one, at which time he was not yet convicted of fraud. At that time, the Applicant may not have understood that “pending proceedings” included a criminal prosecution on charges that had not yet been heard.

(iv) The extent to which the conduct can be taken to call into question the integrity, honesty or law abiding nature of the individual.

The nature of the Applicant’s conduct on the night of September 17, 2004 clearly raises serious concerns about the integrity and honesty of the Applicant and his law abiding nature. That conduct was engaged in for the personal financial benefit of the Applicant, by way of commissions for his efforts, and led to a charge of fraud and subsequent conviction for criminal fraud, being an offence that clearly involves acting without integrity and honesty. The inaccurate responses by the Applicant, on several occasions, to questions about the Applicant’s convictions and pending proceedings also call into question the Applicant’s integrity and honesty.

(v) The closeness of the context of the conduct to the context of activities in which the individual would be engaged as a mortgage agent.

Counsel for the Superintendent argued that the conduct of the Applicant on the night of September 17, 2004 was in the context of financial transactions and the handling of personal information, which is the context of mortgage financing in which mortgage agents are involved. Counsel for the Applicant argued that the Applicant was a small cog in the fraud that was committed on the bank in this case (playing a mechanical but risky role much like a “mule” in the drug trade) who did not steal personal information or have access to personal information nor have any real knowledge of the sophisticated financial

fraud in which the principals were engaged. While the Applicant may have played a small part in the overall financial fraud perpetrated on the banks, the financial nature of the offence, and the fact that it involved the outright theft of money, leads us to conclude that there is a connection between the criminal conduct and the duties of a mortgage agent. Similarly, the Applicant's continued failure to acknowledge his criminal conviction in the various forms of questionnaire he completed for employment or regulatory purposes (in 2004, 2005 and 2006) is relevant to his activities as a mortgage agent. On this factor we conclude, therefore, that while the connection is not as close as it was in the *Henderson* case, there is enough of a connection to warrant concern.

(vi) The fairness of the process followed in the criminal proceeding.

The Applicant did not express any real concerns about the fairness of the criminal process that led to his conviction, although he did indicate that he had regrets about having pled guilty. The Applicant was represented by defence counsel throughout the criminal proceedings. There was no suggestion that his guilty plea was involuntary or entered without legal advice.

(vii) The seriousness with which the criminal court treated the conduct as reflected in the severity of the sanction it imposed.

Upon his plea of guilty on the charge of fraud over \$5,000, an indictable offence, the court ordered that the Applicant serve a custodial term of six months with the direction that it be served in the community and that he be subject to house arrest. The court also ordered him to pay restitution in the amount of \$3,000 and to serve an additional 12 months on probation, during which time he was to perform 75 hours of community service. In our view, these orders, taken together, represent a fairly severe sanction.

(viii) Any unusual and severe pressure the individual was under at the time of the conduct that would explain the conduct but is unlikely to reoccur.

Counsel for the Applicant argued that the Applicant was under the pressure of being a young immigrant from a rough neighbourhood who was unemployed at the time of the conduct in question. These circumstances represent not so much pressures as particular susceptibilities - to unhealthy peer pressures and to the lure of quick and easy money. We don't put a lot of weight on these circumstances given the fact that the Applicant was not an immature minor at the time of the conduct in question. Rather, he was 23 years of age - only four years younger than he is today - and had completed his secondary education and post secondary training.

(ix) Any consistent and prolonged pattern of reformed or redeeming behaviour on the part of the individual since the conduct occurred.

Since the conduct in question, the Applicant has had a successful record as a mortgage agent and, while employed by MACC, has not been the subject of complaints from any of his purchaser or lender clients. However, this pattern of otherwise exemplary behaviour

in the mortgage brokerage business has been marred by the fact that he denied that he had any convictions against him in his current application for a mortgage agent's licence and made a similar denial on three previous occasions in responding to questions on forms of questionnaires that he was required to complete. This demonstrates to us that he was not, until very recently, prepared to accept full responsibility for his actions. Therefore, he cannot be said to have established a consistent pattern of reformed or redeeming behaviour during the period since September 17, 2004 when the conduct took place.

Counsel for the Applicant urged us to take account of another consideration, namely the lack of maturity and sophistication of the Applicant at the time of the conduct in question. We are not satisfied from the evidence that the Applicant was especially immature or unsophisticated. He was 23 years old and had completed his education at the time the conduct occurred. There was no evidence before us that the court that convicted the Applicant of the offence of fraud over \$5,000 was persuaded to discount the Applicant's conduct by imposing a lesser penalty, than it would otherwise have done, because of a lack of maturity and sophistication on the part of the Applicant.

2. Failure to Disclose in the Application

We now address the question of whether the false statement that the Applicant made in his application for a mortgage agent's licence - that he had never been found guilty of any offence - affects his suitability to hold such a licence. As we have noted previously, any and every false statement in a licence application does not necessarily have such an effect. For a false statement to affect suitability it would, in our view, have to relate to an issue that is ostensibly relevant to assessing or determining suitability, such as whether the applicant's past conduct has been honest and in accordance with the law. If an applicant misstated his or her home telephone number in the application form, that would likely be irrelevant to the determination of suitability to hold a mortgage agent's licence.

In the present case, the Applicant made a false statement on a matter that was ostensibly relevant to his suitability to hold a mortgage agent's licence, i.e. his criminal record. If he had such a record (as, in fact, he did), that record might go to show, depending on the nature of any conviction and the nature of the Applicant's conduct that led to the conviction, that there were reasonable grounds for the belief that he would not deal or trade in mortgages in accordance with law and with integrity and honesty. In fact, the Applicant recognized this when he admitted that he withheld this information so as not to jeopardize his career. There were no alleviating circumstances. The Applicant wasn't misled by an unclear or ambiguous question on the form, there was no evidence that he made the false statement innocently, he was not able to claim that he was unaware of the seriousness of making a false statement given the warning on the form, and he took no immediate steps to correct the false statement but only did so when confronted by FSCO's discovery of the public record of his conviction for fraud over \$5,000.

E. The Conclusion and Order

We conclude that there was clear, convincing and cogent evidence before us establishing that the Applicant is not suitable to be licensed as a mortgage agent having regard to the combination of two prescribed circumstances, namely:

- past conduct of the Applicant that affords reasonable grounds for belief that he will not deal or trade in mortgages in accordance with the law and with integrity and honesty: and
- the making of a false statement by the Applicant, to the Superintendent, in the application for a mortgage broker's licence.

In deciding on the appropriate order that we should make, we have given consideration to the very serious impact that a licence refusal would have on the Applicant and to the option of limiting the potential risks to the public, which might result from issuing a licence to him, by ordering the issue of a licence subject to restrictive conditions. We believe that those risks are serious enough in this case that the appropriate way of addressing them is by refusing to issue a licence. We also note that under subsection 8(1) of the Regulation, the Applicant may reapply for a mortgage agent's licence after a lapse of 12 months following the refusal of his application if he can satisfy the Superintendent that new or other evidence is available and that material circumstances have changed. We, therefore, order the Superintendent to carry out his notice of proposal to refuse to issue a mortgage agent's licence to the Applicant.

DATED at the City of Toronto, this 10th day of October, 2008.

"Colin McNairn"

Colin McNairn, Member of the Tribunal
and Chair of the Panel

"Shiraz Bharmal"

Shiraz Bharmal, Member of the Tribunal
and of the Panel

"Lily Harmer"

Lily Harmer, Member of the Tribunal
and of the Panel