

THE FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the *Act*), and particularly s. 21, and O. Reg. 409/07 as amended,

AND IN THE MATTER OF Ms. Sonia Williams

AND IN THE MATTER OF a Request for Hearing pursuant to subsection 21(3) of the *Act*

BETWEEN:

SONIA WILLIAMS

Applicant

and

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Ralph Scane
Member of the Tribunal and Chair of the Panel

Mr. Paul Litner
Member of the Tribunal and Member of the Panel

Mr. Jeffrey Richardson
Member of the Tribunal and Member of the Panel

APPEARANCES:

Ms Sonia Williams, the Applicant
Mr. Joe Nemet, for the Superintendent of Financial Services (the Superintendent)

HEARD: June 26, 2009

REASONS FOR DECISION

On June 20, 2008, an application under the *Act* for a licence for Ms Sonia Williams to work as a mortgage agent for Mortgage Alliance Company of Canada Inc. (Mortgage Alliance) was submitted to the Superintendent. The application was prepared and submitted electronically. A licence was issued to Ms. Williams on July 17, 2008 in accordance with the application.

Mortgage agent licences are issued pursuant to subsection 14(1) of the *Act*. That subsection reads:

14.(1) The Superintendent shall issue a licence to an applicant who satisfies the prescribed requirements for the 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 “prescribed requirements” are found in *O.Reg* 409/07, as amended by *O.Reg.* 23/08 (together, the *Regulation*), issued under the authority of the *Act*. This regulation applies to licensing of mortgage brokers and agents. One of the requirements for mortgage agents is set out in subsection 5(1) of the *Regulation* as follows:

5.(1) A mortgage agent’s licence may be issued under subsection 14(1) of the *Act* to an individual who satisfies the following requirements:

.....

5. The individual has successfully completed an approved education program for mortgage agents within two years before he or she applies for the licence.

There is no dispute that the Applicant had not complied with this education requirement at the time of her application, and has not complied with it since. However, at the time of her application, the *Regulation* contained some transitional exemptions from this requirement, for the benefit of certain persons who had been working as mortgage agents prior to the coming into force of the *Act* on July 1, 2008. The exemption primarily in issue here was contained in what was then subsection 15(1) of the *Regulation*:

15.(1) An individual who applies for a mortgage agent’s licence before July 1, 2008 is exempted from the prescribed education requirements for an agent’s licence,

(a) if, for a total of at least 24 of the 36 months before he or she applies for the licence, the individual was employed or authorized to deal in mortgages on behalf of a person who was registered under the *Mortgage Brokers Act*; and

(b) if throughout the 24 months, the Superintendent had notice under that Act that the individual was so employed or authorized.

In the portion of the electronic application form intended to be completed by the agent applying for the licence, the Applicant claimed this exemption by clicking a button beside the following statement:

“I have been employed or authorized to deal in mortgages on behalf of a person who was registered under the Mortgage Brokers Act for at least 24 of the last 36 months as of today, and the Superintendent had been notified under the Mortgage Brokers Act that I was employed or authorized.”

Subsequently, the Superintendent concluded that this statement was not true, and that the Applicant therefore did not qualify for exemption from the educational requirement. Satisfaction of this educational requirement is a condition precedent for the grant of a licence. On November 21, 2008, the Superintendent issued a Notice of Proposal to the Applicant, proposing to revoke the Applicant’s mortgage agent licence granted on July 17, 2008. The stated reasons were that the Applicant did not have the required educational qualifications, that she had made a false statement or provided false information in her application and that the Superintendent had reasonable grounds to believe that she will not deal or trade in mortgages in accordance with the law and with honesty and integrity.

Before the Tribunal, the Applicant stated that when she submitted the application, she believed that she was entitled to the exemption in question, based on the following evidence.

From about April of 2006, she started a form of collaboration with M, an agent working with a registered broker. This consisted of the Applicant bringing referrals to M from persons seeking mortgage loans, on the basis that M would share some of his commission from such loans with her. She regarded herself as an assistant to M, obtaining signed application forms from her “clients”, taking them to M for submission to prospective lenders, and where necessary communicating back to the applicants she was referring. Subsequently, when M changed his employment to Mortgage Alliance Company of Canada Inc., she continued her working relationship with him at that brokerage. Her relationship with M deteriorated over some financial issues. In September, 2007, following a suggestion from an officer of Mortgage Alliance, she decided to apply to be an authorized agent for that company in her own right. A notification form under the former *Mortgage Brokers Act* was prepared in September, 2007, but was not dated and completed until November, 2007, when the Applicant was able to supply the necessary fee. This notification was received by the Superintendent on November 20, 2007. A witness from the Superintendent’s office gave evidence that he had made a check through the Superintendent’s records, and that this notification in November, 2007 was the only record the Superintendent had of any employment or authorization of the Applicant to deal in mortgages by a person registered under the *Mortgage Brokers Act*. The Tribunal finds as a fact that this is so. The Applicant stated that she believed that M, or the brokerage with which he had formally been

employed when she commenced her working relationship with him, had submitted such a notification on her behalf in 2006, but no such notification was in fact submitted.

The Superintendent argued before the Tribunal that the nature of the Applicant's involvement in the mortgage business as an "assistant" to M, prior to her employment as an agent in her own right from November, 2007, was not of a nature or quality contemplated by subsection 15(1) of the *Regulation* to qualify for an exemption from the education requirement for mortgage agents, and could not be counted as part of the required minimum 24 months experience stipulated for in that subsection. The Tribunal does not find it necessary to enter into that question.

Subsection 15(1) of the *Regulation* not only requires a prescribed level and quantity of experience, but also requires that, during the entire period while an applicant was obtaining the required experience, the Superintendent be under notice that the employment or authorization referred to in the subsection existed. In fact, as the Tribunal has found, the Superintendent was under such notice only from November 20, 2007, a period of about seven months prior to the application. This statutory requirement is mandatory, and either is or is not factually satisfied. Here, it is not, and the *Regulation* affords no power in anyone to waive the requirement. Accordingly, whatever an analysis of the quality of the Applicant's experience in the mortgage business since April, 2006 would conclude, subsection 15(1) of the *Regulation* could not be satisfied, and therefore this exemption from the normal education requirement was not available to the Applicant. As the Applicant did not meet the education requirement set out in the *Regulation*, under the combined provisions of sections 18 and 19 of the *Act*, the Superintendent was entitled to suspend or revoke the Applicant's licence.

The Memorandum of the Prehearing Conference in this matter held on January 14, 2009, dated January 27, 2009, also poses as an issue for the Tribunal the question whether the Applicant met the criteria for exemption from the education requirement set out in subsection 15(3) of the *Regulation*, and if so, whether she was entitled to be granted the exemption even though she did not request an exemption under that subsection prior to July 1, 2008. At the time of the application for the licence in this matter, that subsection provided:

- (3) An individual who applies for an agent's licence before July 1, 2008 is exempted from the prescribed education requirements for an agent's licence,
 - (a) if, on the date he or she applies for the licence, the individual is employed or authorized to deal in mortgages on behalf of a person who is registered under the *Mortgage Brokers Act*;
 - (b) if, before the individual applies for the licence, the Superintendent has been notified under that Act that the individual is so employed or authorized; and
 - (c) if the individual undertakes, as a condition of his or her licence, to successfully complete an approved education program for mortgage agents before July 1, 2009.

While paragraphs (a) and (b) of this subsection are satisfied, (c) is not. The Applicant did not apply for this exemption, and did not provide the required undertaking. The Tribunal holds that the subsection requires that the required undertaking be given as part of the application, and be imported into the licence granted, as a condition of that licence. Neither element occurred. The Tribunal holds that the *Regulation* does not enable it to create retroactively the necessary undertaking and condition and direct such a condition to be inserted *nunc pro tunc* into the original licence, so as to qualify an applicant, otherwise unqualified, to be licenced. Accordingly, subsection 15(3) cannot be employed by this Applicant to exempt her from the education requirement.

However, the Tribunal found the Applicant to be a candid and credible witness. While it is far from certain that her argument that her business relationship with M from April, 2006 would be found to satisfy the experience requirement in subsection 15(1) of the *Regulation*, the argument is also not absurd, and the Tribunal finds that she believed her statement in her application to that effect was true. The Applicant was also told by another agent with the brokerage in question, when she sought advice, that she came within the exemption. Her belief, however honest, does not cure the fact that she did not meet the educational requirement, and was not exempted from it, but it is relevant when considering the appropriate penalty. As mentioned above, in the Notice of Proposal, and in the Reasons accompanying it, the Superintendent relied upon the false statement or false information in her application as to her prior education and experience as a ground for concluding that she would not deal or trade in mortgages in accordance with the law and with honesty and integrity. The Tribunal has weighed that statement, which is literally erroneous at least as far as the portion relating to notification to the Superintendent of her prior employment is concerned, against the criteria set out in the Tribunal's decision in *Alves, M0315-2008-1*, at page 14. In *Alves*, the Tribunal applied these criteria to determine whether, as required by subsection 14(1) of the *Act*, the Superintendent had reasonable grounds to believe that the applicant was not suitable to be licensed. Here, the Tribunal also finds the criteria useful in considering the appropriate penalty where such reasonable grounds are found to exist.

The Tribunal finds that the evidence before it does not justify a conclusion that the Applicant is unlikely to deal in mortgages with honesty and integrity. The penalty of revocation, proposed by the Superintendent, is severe, not just because of the immediate loss of the right to engage in certain employment, but also because, pursuant to subsection 8(1)(a) of the *Regulation*, where a mortgage agent's licence is revoked, an individual cannot reapply for an agent's licence until 12 months have passed since the revocation. Here, such penalty is unnecessarily severe. On the particular facts of this case, the Tribunal concludes that the appropriate initial penalty is suspension until the Applicant has an opportunity to satisfy the educational requirement. However, this opportunity cannot be completely open-ended. The Applicant has already tried and failed one approved course, and if she is to meet the requirement, she should do so within a finite time, or suffer the harsher penalty of revocation.

Order

1. The Superintendent shall suspend the operation of the proposed order in the Notice of Proposal herein, dated November 21, 2008, until the earlier of:

(a) the date the Applicant submits proof to the Superintendent that she has successfully completed an approved education program for mortgage agents, or

(b) 120 days from the date of this order, or such further period if any as the Superintendent may in his or her discretion allow.

2. During the suspension of the operation of the proposed order in the Notice of Proposal, the Applicant's licence as a mortgage agent shall be suspended.

3. If the Applicant submits proof of successfully completing an approved education program within the period of 120 days, or such further period if any as may be allowed by the Superintendent, the Notice of Proposal shall not be carried out and the suspension of the licence shall be lifted.

4. If the Applicant does not submit such proof within the period of 120 days, or such further time if any as may be allowed by the Superintendent, the suspension of the proposed order in the Notice of Proposal shall be lifted, and the proposed order to revoke the Applicant's licence as a mortgage agent shall be carried out.

Dated at Toronto this 9th day of July, 2009.

"Ralph Scane"

Ralph Scane
Member of the Tribunal and Chair of the Panel

"Paul Litner"

Paul Litner
Member of the Tribunal and Member of the Panel

"Jeffrey Richardson"

Jeffrey Richardson
Member of the Tribunal and Member of the Panel