

**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, 14, 19, 21, 38 and 39, and the following Regulations under the Act; the *Mortgages Brokerages: Licensing Regulation*, O. Reg. 408/07, as amended, in particular s. 1, the *Mortgage Brokerages: Standards of Practice Regulation*, O. Reg. 188/08, in particular s. 42, and the *Administrative Penalties Regulation*, O. Reg. 192/08, in particular, section 3;

**AND IN THE MATTER OF** Millennium Mortgage Corporation;

**AND IN THE MATTER OF** a request for hearing pursuant to subsections 21(3) and 39(5) of the Act.

**BETWEEN:**

**MILLENNIUM MORTGAGE CORPORATION**

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

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

Mr. John Solursh  
Chair of the Tribunal and Member of the Panel

Mr. David Short  
Member of the Tribunal and of the Panel

**APPEARANCES:**

Mr. Roderick Furnivall, President and Principal Broker for Millennium Mortgage Corporation, representing the Applicant Millennium Mortgage Corporation

Ms. Larissa Easson, Counsel, representing the Respondent, the Superintendent of Financial Services

**HEARD:**

May 1, 2009

**REASONS FOR DECISION**

**A. Background and Relevant Facts**

The Superintendent of Financial Services (the “Superintendent”), the chief executive officer of the Financial Services Commission of Ontario (“FSCO”), is authorized to issue mortgage brokerage licences under the terms of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”), which came into force on July 1, 2008.

Millennium Mortgage Corporation (“MMC”) is an entity that engaged in the business of trading in mortgages but not in the placement of mortgage loans for lenders or in the securing of mortgage funding for real estate purchasers or owners. By application dated May 7, 2008, MMC applied for a mortgage brokerage licence under the Act. The application form contained a section that read as follows:

12. Errors and Omissions Insurance: (check applicable box)

The corporation/partnership/sole proprietor, currently has the required errors and omissions insurance in place. Note: if using an existing policy the applicant must have extended coverage for fraudulent acts in place.

or

The corporation/partnership/sole proprietor, will have by July 1, 2008, the required errors and omissions insurance in place.

Note: Only applicants with the required errors and omissions insurance are licensed on July 1, 2008.

The form also contained an attestation, by the signatory, as to the truth, correctness and completeness of the statements, declarations and answers to the questions in the form and to the signatory's familiarity with the laws of Ontario relating to the licensing of mortgage brokerages.

In the application form completed and signed on behalf of MMC by its president Mr. Roderick Furnivall (the "Application Form"), the second box in the errors and omissions insurance section is checked. The Application Form names Mr. Furnivall as the proposed principal broker for MMC.

FSCO encouraged all those who would require licences under the Act – mortgage brokerages, mortgage brokers, mortgage agents and mortgage administrators – to apply for the requisite licences before July 1, 2008, the effective date of the Act, so that they would be authorized to carry on, or to continue to carry on, their respective businesses from that date without delay or interruption.

Mortgage brokerages are required by the Act and the regulations thereunder to have errors and omissions insurance in a form approved by the Superintendent and with a minimum level of coverage ("E&O insurance"). In order to avoid requiring brokerages that applied for a licence before July 1, 2008 to pay for E&O insurance for a period in advance of that date, the licence application form, in use at the time, afforded an applicant the option of committing to have such insurance in place by July 1, 2008. That is the option that MMC exercised in completing the form, as we have already noted.

Upon submission of the Application Form, MMC was granted a mortgage brokerage licence under the Act.

On September 29, 2008, FSCO sent an "e-Blast" to all licensed mortgage brokerages advising them that in October it would be auditing brokerages for compliance with the requirement to maintain E&O insurance by collecting the relevant information from FSCO-approved insurance providers. Ms Danielle Katic, one of the witnesses for the Superintendent, whose evidence is referred to later in these reasons, testified that she had sought and received confirmation from FSCO's Web designer that this e-Blast had been received at Mr. Furnivall's e-mail address.

In October of 2008, FSCO conducted its audit of licensed mortgage brokerages to determine which of them were without E&O insurance. MMC was one of those found to be uninsured. FSCO therefore sent a standard form, urgent message, on November 28, 2008, to the attention of the principal broker for MMC;

- stating that the principal broker was responsible for ensuring that his mortgage brokerage complies with every requirement of the Act,
- advising that the mortgage brokerage was found, as a result of an audit, to have failed to obtain E&O insurance as of October 15, 2008,

- emphasizing the importance of the requirement, in the regulations under the Act, to have E&O insurance and that a failure to obtain such insurance could lead to enforcement action including an administrative penalty and revocation of licence,
- noting that the only acceptable insurance was specific E&O mortgage broker insurance secured from one of five FSCO –approved insurance providers, and
- requiring an e-mail response no later than December 3, 2008, such response to include a detailed description of why E&O insurance was not in place or documentation of such insurance and a statement of the amount of business conducted since July 1, 2008

Mr. Furnivall responded on December 3, 2008 confirming that his mortgage brokerage, MMC, had not yet obtained E&O insurance and stating that as MMC had been inactive since July 1, 2008, he incorrectly assumed that “insurance was not applicable”. He also indicated that he would now contact FSCO-approved insurance providers to obtain the required insurance. By e-mail sent January 16, 2009, FSCO reminded Mr. Furnivall that he had notified FSCO that he would be obtaining E&O insurance for MMC and asking for the declaration page of such an insurance policy no later than January 30, 2009. Mr. Furnivall responded by e-mail on January 30, 2009 stating that he was in Montreal on a family emergency until the beginning of the following week and that he had requested quotes from approved E&O insurance providers and was awaiting their replies.

Mr. Furnivall gave evidence before the Tribunal to the effect that in the course of the month of January, 2009 he had approached four of the five insurance providers on the FSCO-approved list through their respective insurance brokers as designated by FSCO. In two cases, formal applications for E&O insurance were completed. This led to an oral turndown of one application and to a request for further information, made on January 30, 2009, in respect of the other application. That further information was provided on March 25, 2009. There was no disposition of that application by the time of the hearing before this Tribunal. In the third case, Mr. Furnivall was advised that the insurance provider didn’t provide E&O coverage for small corporations. In the fourth case, apparently no insurance proposal was forthcoming from the approved insurance provider, although Mr. Furnivall didn’t provide any explanation as to why he was unable to get E&O insurance from this particular provider.

On February 17, 2009, the Superintendent issued two notices of proposal to, and an order against, MMC. The first notice proposed that MMC’s mortgage brokerage licence be revoked because of its failure to maintain E&O insurance in a form approved by the Superintendent. The second notice proposed to impose an administrative penalty of \$1,000 on MMC due to the same failure to obtain E&O insurance. The order was to the effect that MMC’s mortgage brokerage licence was immediately suspended on the basis of the Superintendent’s opinion that a delay in the revocation of MMC’s licence would adversely affect the public interest since MMC did not have E&O insurance. This order was subsequently extended, by further order of the Superintendent on March 5, 2009, until such time as the proposal set out in the first notice of proposal is finally determined. The first notice of proposal was accompanied by the Superintendent’s reasons for the

revocation proposal and the second notice of proposal was accompanied by details of the contravention of the Act that gave rise to the administrative penalty proposal.

On February 27, 2009, MMC filed a request with this Tribunal, pursuant to the Act, for a hearing in respect of both notices of proposal. In that request, MMC asked the Tribunal to reject the Superintendent's proposal to impose an administrative penalty against it and asked for further time to obtain E&O insurance and a postponement of the licence revocation proposal to that end.

Two witnesses were called on behalf of the Superintendent, Mr. Grant Swanson, the Executive Director, Licensing and Market Conduct Division of FSCO, and Ms. Danielle Katic, Senior Co-ordinator, Communications of the Public Affairs Unit of FSCO. Mr. Swanson gave the following evidence with respect to the Act, its implementation and enforcement;

- the Act contemplates that each mortgage brokerage will have a principal broker who will serve as chief compliance officer for the brokerage with primary responsibility for compliance by the brokerage with the Act,
- FSCO uses a form of progressive regulation in respect of the requirements of the Act, first ensuring awareness, then admonishing for any lack of compliance and finally initiating disciplinary proceedings as necessary,
- before the Act came into force on July 1, 2008, FSCO carried out an extensive outreach program in respect of the Act, commencing in the summer of 2007, by holding seminars, operating information booths at trade shows, arranging for articles in industry association publications, posting information on the FSCO Website, all of which would usually have included references to the E&O insurance requirement for mortgage brokerages under the Act,
- based on the information returns, filed by mortgage brokerages with FSCO, for the six month period ended December 31, 2008, thirty-four percent of brokerages reported doing no business but those brokerages also reported that they had E&O insurance,
- the administrative penalty facility under the Act was designed to ensure compliance by the mortgage industry with the Act, avoiding the undue burden of proceeding by way of prosecution through the courts and allowing the regulator to demonstrate the fairness of the regulatory system by showing that action was being taken on non-compliance with the Act.

Ms. Katic testified as to FSCO's distribution of information about the Act before its implementation. She identified a mortgage broker tool kit, a mortgage broker e-information newsletter, slide material used at a FSCO information session, and frequently asked questions about the Act together with the answers as posted on the FSCO Website. Copies of all of these items were received in evidence by the Tribunal. All of the items

deal, amongst other things, with the requirement, under the Act, that mortgage brokerages maintain E&O insurance. Ms. Katic testified that FSCO distributed large numbers of each of the first two items she identified. She also testified that various “e-Blasts” were sent to mortgage industry participants, including mortgage brokerages, before and after the implementation date of the Act. Finally, she gave evidence of the communications between FSCO and Mr. Furnivall about the requirement that MMC maintain E&O insurance, which we have described earlier in these reasons.

## **B. Relevant Legislation and Regulations**

Subsection 2(2) of the Act prohibits a person or entity from carrying on the business of dealing in mortgages in Ontario without a mortgage brokerage licence. Section 7 of the the Act provides for such licences and, in subsection (4), requires any licensee to comply with such standards of practice as may be prescribed, by regulation, for its variety of licence. The Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08 prescribes standards of practice (section 4) for every mortgage brokerage licence that is issued under the Act, including the following:

**42.** (1) A brokerage shall maintain errors and omissions insurance in a form approved by the Superintendent with extended coverage for loss resulting from fraudulent acts or shall have some other form of assurance in a form approved by the Superintendent.

(2) The insurance or other assurance must be sufficient to pay a minimum of \$500,000 in respect of any one occurrence involving the brokerage or any broker or agent authorized to deal or trade in mortgages on its behalf and \$1 million in respect of all occurrences during a 365-day period involving the brokerage or any such broker or agent.

Subsection 19(1) of the Act authorizes the Superintendent to revoke a licence issued under the Act in any of the circumstances in which he would be authorized to suspend such a licence under the Act. The circumstances in which a licence may be suspended, and therefore the circumstances in which a licence may be revoked, include the following;

- “if the licensee contravenes or fails to comply with a requirement established under [the] Act” (subsection 18(1)(d) of the Act), and
- “if the Superintendent believes on reasonable grounds that the licensee is no longer suitable to be licensed” having regard to the fact that “a director or officer of the [licensee] has made a false statement or has provided false information to the Superintendent with respect to the application for a licence” (subsection 18(1)(b) of the Act, as read with clause 4 of subsection 1(2) of the Mortgage Brokerages: Licensing Regulation, O. Reg. 408/07, as amended).

Before revoking a licence, the Superintendent must first give a notice of proposal to do so to the licensee (subsection 19(2)), in which case the licensee may request a hearing on the proposal before this Tribunal (section 21), as has happened in this case. If the Superintendent is of the opinion that the interests of the public may be adversely affected by any delay in the revocation of a licence as a result of giving a notice of proposal, he may make an interim order suspending the licence (subsection 19(3)), as has also happened in this case.

The Act provides for the imposition of administrative penalties as follows:

**38.** (1) An administrative penalty may be imposed under section 39 or 40 for either of the following purposes:

1. To promote compliance with the requirements established under this Act.
2. To prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with a requirement established under this Act.

(2) An administrative penalty may be imposed alone or in conjunction with any other regulatory measure provided by this Act, including a compliance order or the amendment, suspension or revocation of a licence.

**39.** (1) If the Superintendent is satisfied that a person is contravening or not complying with or has contravened or not complied with a requirement established under this Act, other than a requirement for which a penalty is provided under section 40 or a requirement prescribed under clause 55(5) (a), the Superintendent may, by order, impose an administrative penalty on the person or entity in accordance with this section and the regulations.

Section 39 goes on to provide that the Superintendent shall give a notice of proposal to impose an administrative penalty, which may be combined with a notice of proposal authorized by any other section of the Act, and that the person on which the penalty would be imposed may request a hearing on the proposal before this Tribunal (subsections (2) and (3)), as has happened in this case.

The Administrative Penalties Regulation, O. Reg. 192/08, provides criteria to govern the amount of an administrative penalty as follows:

**3.** The Superintendent shall consider only the following criteria when determining the amount of an administrative penalty to be imposed under section 39 of the Act for a purpose set out in section 38 of the Act:

1. The degree to which the contravention or failure was intentional, reckless or negligent.

2. The extent of the harm or potential harm to others resulting from the contravention or failure.
3. The extent to which the person or entity tried to mitigate any loss or to take any other remedial action.
4. The extent to which the person or entity derived or reasonably might have expected to derive, directly or indirectly, any economic benefit from the contravention or failure.
5. Any other contraventions or failures to comply with a requirement established under the Act or with any other financial services legislation of Ontario or of any other jurisdiction during the five preceding years by the person or entity.

Section 41 provides that the maximum administrative penalty that may be imposed for a failure to comply with a requirement of the Act is \$25,000.

Upon holding a hearing on a notice of proposal under the provisions of the Act relating to a proposed revocation of a mortgage brokerage licence or a proposed imposition of an administrative penalty, the Tribunal may direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent (subsections 21(4) and 39(6)).

### **C. Issues**

The issues to be determined in this case are as follows:

1. Has there been a failure by MMC to comply with the requirement under the Act to maintain E&O insurance that would justify the revocation of its mortgage brokerage licence?
2. Are there reasonable grounds for believing that MMC is not suitable to continue to be licensed on the basis that Mr. Furnivall, an officer of MMC, made a false statement to the Superintendent with respect to MMC's application for a mortgage brokerage licence when he indicated on the Application Form that MMC would have the required E&O insurance in place by July 1, 2008?
3. Is the imposition of an administrative penalty against MMC appropriate given MMC's failure to obtain E&O insurance in the circumstances of this case and, if so, what should be the amount of that penalty in those circumstances?

### **D. Analysis**

The general approach by which this Tribunal had been guided in previous cases, decided in the context of proposed refusals by the Superintendent of a licence under the Act, is equally applicable in this case. Therefore, we take the view that:

(1) The Tribunal need not show any deference to the Superintendent's opinion on the question of whether there are grounds for the revocation of a mortgage brokerage licence, as proposed in his notice of proposal to revoke the licence and supported by the reasons for that proposal. In other words, the Tribunal must look at the matter afresh, as one of first impression, and come to its own conclusion, based on the evidence before it, as to whether there are grounds for the revocation of the mortgage brokerage licence.

(2) The Tribunal must be mindful, in deciding whether to revoke a mortgage brokerage licence, of two considerations, namely:

- (i) the underlying rationale of the Act in that it is designed to protect the public interest and enhance public confidence in the mortgage industry; and
- (ii) the consequences of a decision to revoke a licence which can be financially severe for the licensee in that such a decision will preclude him or her from earning a livelihood in a chosen line of work.

These considerations must be balanced by the Tribunal.

The form of application for a mortgage brokerage licence that MMC completed contained a note that "only applicants with the required errors and omissions insurance are licensed on July 1, 2008". However, MMC was not apparently granted a licence that was subject to an express condition that E&O insurance be in place by July 1, 2008. Even if there were such a condition to its licence, this would not mean that the licence would be automatically revoked if the condition was not satisfied. Rather the scheme of the Act is such that the Superintendent would have to commence revocation proceedings, by way of a notice of proposal, affording the licensee all the protections of the Act, including the right to a hearing before this Tribunal, upon breach of the condition.

We now address the three specific matters that we have identified as issues in this case.

### *1. The Failure to Maintain E&O Insurance*

Mr. Furnivall must have been aware of the requirement that mortgage brokerages maintain E&O insurance as this was referred to in the licence application form that he completed on behalf of MMC. Moreover, the message was widely disseminated as part of the extensive communications initiatives that FSCO undertook, commencing almost a year ahead of July 1, 2008, the effective date of the Act, in order to alert the mortgage broking community to the requirements of the Act.

Ten months elapsed between July 1, 2008 and the date of the hearing in this matter, during which time MMC received reminders from FSCO of the requirement that MMC maintain E&O insurance and requests by FSCO for proof of insurance. Yet no such insurance was in place by the date of the hearing. Mr. Furnivall indicated to FSCO on December 3, 2008 that he had been under the impression that MMC didn't need to have

insurance as long as it remained inactive, which was the situation since July 1. But, by this time, he was disabused of this notion. From then, five months elapsed to the date of the hearing, during which time MMC failed to make successful arrangements for E&O insurance.

Mr. Furnivall's efforts, on behalf of MMC, to obtain E&O insurance were belated, not beginning until mid-January, 2009, and they were not exhaustive in that one of the FSCO-approved insurance providers was not contacted. Moreover, Mr. Furnivall did not provide a timely response to a request by one of the insurance providers for more information. The outcome of one of Mr. Furnivall's efforts to obtain E&O insurance was not fully explained at the hearing before the Tribunal. Had there clearly been serious and timely efforts to secure the required E&O insurance and some evidence that there was a reasonable prospect of ultimately obtaining such insurance, we might have been inclined to allow MMC some additional time to get insurance while it remained inactive.

Although the limited and specialized nature of MMC's business – the trading of mortgages – might mean that the risks to the public are less than would be the case if MMC were acting for mortgage lenders or mortgage borrowers, the Act and the regulations thereunder do not make such a distinction. The licensing requirement and the obligation to maintain E&O insurance apply indifferently to all mortgage brokerages.

We have concluded that there has been a failure by MMC to comply with the requirement under the Act to maintain E&O insurance that justifies the revocation of its mortgage brokerage licence under section 19(1) of the Act, as read with subsections 18(1)(d) of the Act.

*2. The Statement in the Application Form that MMC would have the Required E&O Insurance by July 1, 2008*

The form of application for a mortgage brokerage licence in use before July 1, 2008 gave the applicant the option of checking the second box on the errors and omissions section of the form to the effect that the applicant would have E&O insurance in place by July 1, 2008. This is the box that Mr. Furnivall checked in completing MMC's Application Form. By checking this box on the form, an applicant would be making a statement to the Superintendent with respect to the licence application that the applicant would have E&O insurance in place by July 1, 2008. This is clearly a prospective statement as it would be made before July 1, 2008. The statement was not required to be backed up by an existing errors and omissions insurance policy currently in force, by other evidence of insurability or by a commitment in principle to insure from an approved insurance provider. In our view, the statement should not be treated as involving an effective warranty as to its truth at a future date given that it doesn't speak to a matter over which the applicant would have complete control. At most, the statement should be interpreted as one of intention, as at the time it is made, to apply for E&O insurance and to attempt to have such insurance in place by July 1, 2008.

The answers to the questions about errors and omissions insurance on the application form are covered by a blanket attestation as to the truth of all statements, declarations and answers to the questions on the form. When this attestation is applied to the check in the second box in the errors and omissions section of the form, we take it to mean that the applicant has a true intention to apply for E&O insurance and to attempt to have such insurance in place by July 1, 2008. Unless it can be shown that there was no such intention on the part of the applicant, the statement cannot be taken to be a false statement simply because it later turns out that the applicant has been unable to obtain E&O insurance by July 1, 2008.

In the present case, Mr. Furnivall told the Tribunal that, when he completed the Application Form on May 7, 2008, he fully intended to comply with the requirement to maintain E&O insurance. But he also said, in a December 3, 2008 communication to FSCO that he had assumed that E&O insurance was not applicable because MMC was inactive. The form itself may have encouraged that view with its note that only applicants with E&O insurance are licensed on July 1, 2008. That might suggest that if you don't have E&O insurance on July 1, there's no need for it at that point since you can't carry on a mortgage brokerage business for lack of the required licence.

We don't think that Mr. Furnivall's statement that he fully intended to comply with the requirement that MMC maintain E&O insurance, when he completed the Application Form on May 7, 2008, is necessarily inconsistent with the statement of his understanding about the need for insurance set out in his December 3, 2008 communication to FSCO. He may have originally intended to have MMC apply for E&O insurance and attempt to have such insurance in place by July 1, 2008 but, when he had not done so, he may have come to the view that E&O insurance wasn't necessary so long as MMC remained inactive.

We have concluded that there are no reasonable grounds for believing that MMC is not suitable to continue to be licensed as a mortgage brokerage on the basis that Mr. Furnivall, an officer of MMC, made a false statement to the Superintendent with respect to MMC's licence application when he indicated on the Application Form that MMC would have the required E&O insurance in place by July 1, 2008. This is not a case, therefore, where a mortgage brokerage licence can be revoked through a combination of the operation of subsections 18(1)(b) and 19(1) of the Act and subsection 1(2) of the Mortgage Brokerages: Licensing Regulation.

### *3. The Appropriateness of an Administrative Penalty and the Appropriate Amount of any such Penalty*

An administrative penalty may be imposed pursuant to the Act for either of two purposes, namely to promote compliance with a requirement established under the Act and to prevent a person from deriving an economic benefit as a result of failing to comply with a requirement established under the Act. In our view, the promotion-of-compliance purpose relates not just to compliance by the person to whom the order is directed but to compliance by others in the regulated mortgage brokering industry. In other words, there

can be a general deterrent element to a penalty; a penalty can be imposed to send a message, as it were, to others who are in a similar position to the person against whom the order is directed or to other industry participants generally.

In the present case, the imposition of an administrative penalty on MMC would serve the purpose of promoting compliance with the requirements of the Act, particularly the requirement that mortgage brokerages maintain E&O insurance. Such a penalty may promote compliance by other persons with the requirements of the Act and it may promote compliance by MMC with the requirements of the Act should it choose to make an application for a new mortgage brokerage licence at any later date, as it is free to do.

The imposition of an administrative penalty on MMC would also prevent it from realizing an economic benefit, the second permitted purpose of such a penalty. The modest economic benefit that MMC would otherwise enjoy, were it not offset by an administrative penalty, comes from its holding of a mortgage brokerage licence for the period from July 1, 2008 until February 17, 2009, when MMC's licence was suspended by order of the Superintendent, while not having paid any premium for E&O insurance coverage during that period. The fact that MMC did not carry on any mortgage brokerage business, pursuant to its licence, after July 1, 2008 does not eliminate this benefit since it derives from MMC's authority to undertake mortgage brokerage activities until February 17, 2009.

We have already concluded in section 1 of this part D of our reasons that MMC has not complied with a requirement established under the Act, namely the requirement to maintain E&O insurance. Therefore, there is a basis for imposing an administrative penalty upon MMC under subsection 39(1) of the Act. We have also concluded that such a penalty would serve both of the purposes for which a penalty may be imposed, as set out in section 38 of the Act, namely promoting compliance with the requirements of the Act, particularly the requirement to maintain E&O insurance, and preventing MMC from deriving an economic benefit as a result of failing to comply with that requirement. We have the discretion, therefore, to impose an administrative penalty, in the circumstances of this case, just as the Superintendent had that discretion in the first instance. We believe that it is appropriate in those circumstances to impose such a penalty.

In determining the appropriate amount of the penalty, we must take into account only those criteria set out in section 3 of the Administrative Penalties Regulation, just as the Superintendent was obliged to take into account those criteria in the first instance.

The first criterion is the degree to which the failure to comply with a requirement of the Act was intentional, reckless or negligent. It appears to us that Mr. Furnivall was negligent, if not reckless, in his pursuit on behalf of MMC of the required E&O insurance, in moving as slowly and inefficiently as he did. The second criterion is the harm or potential harm to others resulting from the failure. There was, in our view, no real harm or potential harm to others resulting from MMC's failure to obtain E&O insurance as it was not engaged in the mortgage brokerage business after July 1, 2008. The third criterion is the extent to which the person tried to mitigate any loss or take any

other remedial action. Mr. Furnivall did not take serious and timely action to remedy the failure of MMC to have E&O insurance in place by July 1, 2008, as we have already noted.

The fourth criterion is the extent to which the person derived or reasonably might have expected to derive any economic benefit from the failure to comply with a requirement of the Act. As we have already concluded, MMC has received a modest economic benefit, as a result of its failure to maintain E&O insurance. The fifth criterion is any other contraventions or failures to comply with a requirement established under the Act or with any other financial services legislation, of Ontario or another jurisdiction, within the preceding five years. There was no suggestion that there was any such contravention or failure in this case.

Taking account of these criteria in their application to the circumstances of this case, we are of the opinion that an administrative penalty upon MMC of at least \$1,000 would be appropriate. Since the Superintendent has not urged us to increase the proposed penalty of \$1,000, we have decided that an administrative penalty in that amount should be imposed in this case.

#### **E. Orders**

At the end of the hearing in this matter, the Superintendent offered to give MMC an additional two weeks, until May 14, 2009, to obtain E&O insurance. Mr. Furnivall, on behalf of MMC, agreed to accept that offer assuming that this Tribunal was not prepared to sanction a longer extension of time before the revocation of MMC's mortgage brokerage licence in the event of a continuing failure to maintain E&O insurance. We are prepared to accommodate that offer and acceptance in our order in respect of the Superintendent's proposal to revoke MMC's mortgage brokerage licence. Therefore, we hereby direct the Superintendent, by order, to carry out his proposal to revoke MMC's mortgage brokerage licence unless MMC provides the Superintendent, by the close of business on May 14, 2009, with evidence satisfactory to the Superintendent that it has the required E&O insurance. If it doesn't provide such evidence by that date, we hereby direct the Superintendent, by order, to carry out his proposal to revoke MMC's mortgage brokerage licence. In the meantime, the interim order of the Superintendent, made on February 17, 2009 and extended on March 5, 2009, to suspend MMC's mortgage brokerage licence is hereby further extended to the close of business on May 14, 2009.

We hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty upon MMC in the amount of \$1,000.

**DATED** at the City of Toronto, this 11 day of May, 2009.

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

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“John Solursh”  
John Solursh, Chair of the Tribunal  
and Member of the Panel

\_\_\_\_\_  
“David Short”  
David Short, Member of the Tribunal  
and of the Panel