

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”), in particular sections 7, 18, 19, 21, 29, 38 and 39, and the following Regulations under the Act; the Mortgage Brokerages: Standards of Practice Regulation, O.Reg. 188/08, in particular section 42, and the Administrative Penalties Regulation, O.Reg. 192/08, in particular, section 3;

AND IN THE MATTER OF Rybak Realty Inc.;

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

BETWEEN:

RYBAK REALTY INC.

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. Martin Brown
Member of the Tribunal and of the Panel

APPEARANCES:

Mr. Reuben Botnick
Counsel for the Applicant,
Rybak Realty Inc.

Mr. Joe Nemet,
Counsel for the Respondent,
the Superintendent of Financial Services

HEARD:

July 21, 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 to corporations, partnerships or sole proprietorships, and mortgage broker licences to individuals, under the terms of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”).

For some time, Rybak Realty Inc. (“RRI”) has been registered as a real estate brokerage under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C, and its sole director, shareholder and broker, Ms. Sandra Roth, has also been registered, as a real estate broker, under that Act. By virtue of Ms. Roth’s registration as a real estate broker, she was also deemed, by the terms of subsection 4(4) of the *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, to be registered as a mortgage broker, with the result that she was entitled to carry on a mortgage brokering business, although she never did so. In anticipation of the MBLA Act coming into force and replacing the *Mortgage Brokers Act*, which was to happen on July 1, 2008, RRI applied for a mortgage brokerage licence under the MBLA Act by application dated June 24, 2008 (the “Application”). Immediately thereafter, Ms. Roth applied for a mortgage broker’s licence under the MBLA Act so that she could serve as the required principal broker for RRI. The MBLA Act, unlike the *Mortgage Brokers Act*, does not deem registered real estate brokers to be automatically authorized to engage in a mortgage brokerage business. Rather, any such real estate broker is required to apply for and hold an actual licence under the MBLA Act, but with the benefit of an effective waiver of certain educational requirements for such a licence if the application for a licence is made before July 1, 2008.

RRI’s Application was completed manually, as required, and signed by Ms. Roth in her capacity as Director of RRI. The version of the Application that was filed as an exhibit in

this case by counsel for the Superintendent includes an e-mail address for Ms. Roth as the proposed principal broker for RRI and “Licensing Link Primary User”. This address appears to be in a different printing style from that used in the rest of the document. The version of the document that was filed as an exhibit by counsel for Ms. Roth does not have an e-mail address for Ms. Roth filled in.

The printed form of application for a mortgage brokerage licence that was completed on behalf of RRI, which was titled “(For Real Estate Brokers) Mortgage Brokerage Licence Application”, contained a section that read as follows:

15. 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 from fraudulent acts in place.

Or

The corporation/partnership/sole proprietor, will have by July 1, 2008, the required errors and omissions insurance in place including extended coverage from fraudulent acts.

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

The second box was checked in the Application completed by Ms. Roth on behalf of RRI.

The form of application for a mortgage brokerage licence also contained an attestation to the effect that the person signing stated that he or she was familiar with the laws of Ontario relating to the licensing of mortgage brokerages, that he or she promised to abide by these laws and regulations and that the statements, declarations and answers contained in the application, as completed, were true, correct and complete.

The “Instructions for Completing Application”, which FSCO routinely provided to applicants to assist them in completing the particular form of application for a mortgage brokerage licence used by RRI, stated that:

- under the MBLA Act, brokerages must have errors and omissions insurance, in an approved form, with extended coverage for loss resulting from fraudulent acts, in place as of July 1, 2008; reference was then made to the FSCO website for more information on that required insurance,
- all of the licensing of individuals (such as the licensing of mortgage brokers) under the MBLA Act would be completed electronically via FSCO’s on-line service – Licensing Link – and, upon receipt of a completed mortgage brokerage

licence application in paper form, FSCO would send an acknowledgement to the e-mail address for the “Licensing Link Primary User” that was provided in the completed application,

- once FSCO has reviewed the application, FSCO would send another e-mail to the “Licensing Link Primary User” identified in the application instructing him or her to proceed with applications to licence the brokerage’s principal broker and other brokers and agents, and
- once the brokerage’s licence was approved, an e-mail would be sent to the principal broker to notify him or her of the brokerage’s licence number; a reference was then made to the FSCO website for additional information on the mortgage broker licensing process.

Ms. Roth was shown on RRI’s Application as the “Licensing Link Primary User”. The Mortgage Brokerages: Standards of Practice Regulation, referred to below, requires, in section 58, that a brokerage shall maintain an e-mail address as well as a mailing address in Ontario that is suitable to permit service by registered mail. Ms. Roth testified that she did not provide her e-mail address on the Application, that the e-mail address appearing on FSCO’s copy of the Application is her e-mail address but that she did not regularly log into her e-mail. It was her evidence that FSCO had asked her for an e-mail address after the Application was submitted, so that she could proceed with an application, in her own name, for a mortgage broker’s licence, which had to be submitted electronically, using a password provided by FSCO. She testified that she provided her e-mail address for this purpose, while advising that she did not normally use her e-mail account.

We believe that Ms. Roth likely received the “Instructions for Completing Application” along with the form of application for a mortgage brokerage licence, for use by RRI; she didn’t testify otherwise. Had she followed up on the references to the FSCO website in those Instructions, she would have been ultimately directed to a document entitled “Errors and Omissions Insurance” which was posted on the website on May 1, 2008. That document;

- (a) stated that, under the MBLA Act, all mortgage brokerages are required to carry errors and omissions insurance with extended fraud coverage in a form approved by the Superintendent (or another form of approved assurance) with policy limits of a minimum of \$500,000 in respect of any one occurrence and \$1,000,000 in respect of all occurrences in a given year, and
- (b) listed four approved insurance company providers and their contact insurance brokers (a fifth was added later on) and two industry associations through which approved insurance could be obtained.

Mortgage brokerages are required to maintain errors and omissions insurance as described in (a) above (“E&O insurance”) by section 42 of the Mortgage Brokerages: Standards of Practice Regulation, O.Reg. 188/08, which was published on Ontario’s e-

laws website on June 9, 2008, was printed in *The Ontario Gazette* on June 21, 2008 and came into force on July 1, 2008. The same E&O insurance requirement is prescribed, as a pre-condition to the licensing of a mortgage brokerage, by the terms of an earlier regulation, the Mortgage Brokerages: Licensing Regulation, O.Reg. 408/07, which was published on Ontario's e-laws website on July 11, 2007, was printed in *The Ontario Gazette* on August 11, 2007 and came into force on March 11, 2008. That Regulation provides that in the case of a licence application made before July 1, 2008, the applicant must simply provide evidence that it will have the required E&O insurance on or after July 1, 2008, but need not have the insurance in place when the application is made.

As a registered real estate broker under the *Real Estate and Business Brokers Act, 2002*, Ms. Roth became insured, on payment of the applicable premium, under a group errors and omissions insurance policy issued in the name of the Real Estate Council of Ontario ("RECO"). RRI was also covered under that policy in respect of actions or omissions giving rise to claims against Ms. Roth in her role as a real estate broker. A copy of the policy, as in effect during the period September 1, 2007 to September 1, 2008, was received in evidence in this case. The limits of coverage under that policy were \$3 million per year and \$1 million per claim. The policy did not, however, cover any errors or omissions that were fraudulent or any claim in any way relating to or arising out of an insured acting as a mortgage broker.

The evidence of Ms. Roth was not very clear as to her understanding, at the time of completing the Application, as to whether or when RRI would be required, as a licensed mortgage broker, to obtain errors and omissions insurance and what the minimum specifications of such insurance might be. It seems that she thought that the RECO errors and omissions insurance would satisfy any requirement or that it would do so until such time as RRI actually undertook any mortgage brokerage business, although she admitted that she made no attempt to determine the extent of coverage under the RECO insurance policy at this time.

In response to the Application, RRI was granted a mortgage brokerage licence on July 7, 2008.

Ms. Danielle Katic, the Senior Co-ordinator, Strategic Communications, in the Corporate Policy and Public Affairs Unit of FSCO, testified that FSCO had engaged in an extensive industry outreach program, prior to the implementation of the MBLA Act on July 1, 2008, and thereafter, through information sessions (sponsored by FSCO or industry associations), trade show information booths, "E-blasts" (generic e-mails), newsletters and postings on the FSCO website. She also testified that some of the FSCO information sessions were publicized through real estate industry association newsletters and other publications directed to members of the real estate industry.

FSCO sent an "E-blast", on September 29, 2008, to all licensed mortgage brokerages reciting that all such brokerages are required to carry errors and omissions insurance with extended fraud coverage as a condition of their licences and advising brokerages that FSCO would be auditing them for compliance with this requirement by collecting

information from insurance providers offering E&O insurance in the approved form. There was no evidence in this case as to whether Ms. Roth received this E-blast.

On November 26, 2008, FSCO sent an urgent, standard form message, addressed to Ms. Roth's e-mail address, directed to the attention of the principal broker. This e-mail message;

- stated that the principal broker was responsible for ensuring that the mortgage brokerage complies with every requirement of the Act,
- advised 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,
- emphasized the importance of the requirement 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,
- noted that the only acceptable insurance was specific E&O mortgage broker insurance secured from one of five FSCO-approved insurance providers, which were listed,
- advised that errors and omissions insurance coverage that might be held through RECO only applies to transactions under the *Real Estate and Business Brokers Act, 2002* and does not cover mortgage services, and
- required 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, supporting documentation including any insurance policy/declaration page and a statement of the amount of business conducted since July 1, 2008.

This e-mail also included a series of additional questions and answers ("Q and A's"), including the following:

Q: I have not done any business under the MBLA Act and/or got my licence just in case I wanted to do business in the future. Do I still need coverage and am I still in violation of the MBLA Act?

A: Yes you still require coverage and are in violation of the MBLA Act.

Q: I have E&O coverage but not from one of the FSCO-approved providers. What should I do and does this exempt me from possible enforcement action?

A: Send a copy of your declaration/policy to the e-mail address or the fax number set out below and FSCO will assess the coverage against the requirements under the MBLA Act. You may still be subject to sanctions.

Q: I have assumed my errors and omissions insurance through RECO would cover me and since you tell me this is not sufficient, what do I do now?

A: Your brokerage is in breach of the MBLA Act. You should obtain the insurance immediately and provide proof of the coverage to FSCO along with a listing of all business conducted while non-compliant.

Ms. Roth testified that she did not see this e-mail, which she attributed to the fact that she rarely accessed her e-mail in-box.

On December 12, 2008, FSCO sent a registered letter to Ms. Roth, in her capacity as principal broker for RRI, referring to the November 26, 2008 e-mail (a copy of which was enclosed), noting that no response had been received and requiring a response by December 31, 2008 along with an explanation of the failure to respond, by the due date, to the original e-mail.

At no time did Ms. Roth attempt to contact any of the approved insurers, even after receipt of FSCO's registered letter. She did, however, reply to that letter, by faxed letter of December 28, 2008. In her letter, Ms. Roth stated that;

- she had not received FSCO's November 26 e-mail and had only become aware of it as a result of FSCO's registered letter of December 12,
- she did not typically use e-mail and all future correspondence should be delivered by certified mail or fax and never via e-mail,
- she maintained errors and omissions insurance in respect of her business as "principal broker" [real estate broker of record] of RRI,
- prior to completing RRI's application for a mortgage brokerage licence, she reviewed the MBLA Act, but not the Regulations under it, and the Act did not disclose any requirement for an additional or new policy of errors and omissions insurance and the Regulation requiring the maintenance of such a policy, which had now been brought to her attention, did not come into effect until after the date of RRI's Application, and
- although authorized to do so, she had never carried on any business in the capacity of a mortgage broker and it was her understanding that no errors and omissions insurance would be required until such time as she actually undertook such business.

In conclusion, she asked that consideration be given to the following facts; any breach of the requirements was unintentional, she had undertaken no mortgage brokerage business and she had not profited, nor had any one suffered, as a result of the breach. She then requested that the licence be placed "on hold" so that it could be reactivated, if and when

required, at which time she would take action to satisfy the E&O insurance requirement. On December 29, FSCO acknowledged receipt of this letter by telephone voice message.

Ms. Yen Quan Low Sin, Senior Registration Specialist, Licensing Registration and Analysis Unit of FSCO, testified that she had called Ms. Roth on February 10, 2009 and left a message with her service, indicating that she would like to speak with Ms. Roth, but never received a call back. However, Ms. Roth testified that she had received no such message and, indeed, that she received no response from FSCO to her faxed letter of December 28 other than the acknowledgement of receipt.

On March 5, 2009, the Superintendent issued a notice of proposal to revoke RRI's mortgage brokerage licence, a notice of proposal to impose an administrative penalty on RRI in the amount of \$1,000 and an interim order suspending RRI's licence for the 15 day period during which it was entitled, under the MBLA Act, to apply to this Tribunal for a hearing on the proposal to revoke its licence.

RRI filed a request for a hearing with the Tribunal on March 19, 2009 in respect of both of the Superintendent's notices of proposal. By order of March 24, 2009, the Superintendent extended the interim order of suspension of RRI's mortgage brokerage licence.

At the commencement of the hearing in this matter, counsel for the parties advised the Tribunal that agreement had been reached on the appropriate disposition with respect to the Superintendent's proposal to revoke RRI's mortgage brokerage licence. In particular, the Superintendent should be directed to carry out that proposal but only if RRI did not surrender its licence within the next two months. This agreement is reflected in the orders that we make at the end of these reasons for decision.

B. Issues

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

1. Is the imposition of an administrative penalty against RRI justified in the circumstances of this case, and
2. If so, what should be the amount of that penalty in those circumstances.

C. Analysis

1. Whether an Administrative Penalty is Justified

Subsection 39(1) of the MBLA Act provides that if the Superintendent is satisfied that a person has failed to comply with a requirement established under the MBLA Act, he may, by order, impose an administrative penalty on that person. If a hearing is requested, in respect of a proposal by the Superintendent to make such an order, the Tribunal must

be satisfied that there has been such a failure to comply before confirming the proposal, with or without amendments, and directing the Superintendent to carry it out.

We are satisfied that RRI failed to comply with the requirement, established under the MBLA Act, to maintain E&O insurance. That failure continued from July 7, 2008, when RRI's mortgage brokerage licence was issued, until March 5, 2009, when the Superintendent issued his notices of proposal and made an order suspending the licence. Therefore, we have the discretion to order the imposition on an administrative penalty on RRI. The question, then, is whether there is any basis for our declining to exercise that discretion in the circumstances of this case.

Ms. Roth suggested that she understood that the RECO errors and omissions insurance would satisfy any errors and omissions insurance requirement for mortgage brokerages. However, this is inconsistent with the manner in which she completed RRI's Application for a mortgage brokerage licence. In the errors and omissions insurance section of the form, she marked the box that indicated that RRI would have such insurance, including extended coverage for fraudulent acts, by July 1, 2008. She declined to mark the alternative box that would have indicated that RRI currently had the required errors and omissions insurance in place. The latter box would have been the logical choice if she thought that the existing RECO insurance policy, of which RRI had the benefit, would satisfy the errors and omissions insurance requirement for mortgage brokerages. Moreover, had the RECO insurance fit the bill, it could be expected that the form of application that Ms. Roth completed on behalf of RRI, which was specifically designed for completion by applicants that were real estate brokers, would have said as much. In any event, after Ms. Roth received and read a copy of FSCO's e-mail of November 26, 2008, which was enclosed with its registered letter of December 12, 2008, she would have been duly informed, in unequivocal terms, that any errors and omissions insurance coverage that RRI might have through RECO would not satisfy the E&O insurance requirement for mortgage brokerages.

Had Ms. Roth read the section on errors and omissions insurance in the "Instructions for Completing Application" which, we believe, accompanied the copy of the form of application that she completed on behalf of RRI, it would have been clear to her that under the MBLA Act, "brokerages must have errors and omissions insurance in an approved form with extended coverage for loss resulting from fraudulent acts, covering the brokerage and its brokers and agents, in place as of July 1, 2008." If she had then followed up on the reference in the Instructions to the FSCO website, for further information on this subject, she would have discovered, with a little bit of diligence, that the required errors and omissions insurance would have to be in a form approved by the Superintendent and that there were four approved insurance company providers and two industry associations through which approved insurance could be obtained, all as disclosed in the posted document "Errors and Omissions Insurance". In fact, she never approached any of those who could provide approved insurance about obtaining E&O insurance for RRI.

Counsel for RRI tried to make something of the fact that the MBLA Act itself, which Ms. Roth testified she had reviewed, did not specifically require that licensed mortgage brokerages maintain errors and omissions insurance. However, various FSCO documents, including the “Instructions for Completing Application”, refer to the errors and omissions insurance requirement as arising “under” the MBLA Act, which would embrace Regulations pursuant to the MBLA Act. Other FSCO documents which state that the MBLA Act imposes that requirement should, in our view, be read in a non-technical sense as referring to the scheme of regulation introduced by the Act, parts of which are in the body of the Act and parts of which are in the Regulations contemplated by the Act. In any case the need for someone signing an application for a mortgage brokerage licence to have familiarity with and to be guided by the Regulations, as well as the Act, was brought home by the attestation in the form of application. In that attestation, the individual signing the application – in this case, Ms. Roth - states that he or she is familiar with the “laws of Ontario relating to the licensing of mortgage brokerages” and promises “to abide by these laws and regulations”.

Counsel for RRI maintained that even if Ms. Roth had also reviewed the Regulations under the MBLA Act when she was completing the Application, it is unlikely that her attention would have been drawn to the Mortgage Brokerages: Standards of Practice Regulation, which requires mortgage brokerages to maintain E&O insurance, as this Regulation was not gazetted until June 21, 2008 and did not come into force until July 1, 2008. However, another Regulation, the Mortgage Brokerages: Licensing Regulation, which was gazetted on August 11, 2007 and came into force on March 21, 2008, clearly prescribes the same E&O insurance requirement as a pre-condition to the licensing of a mortgage brokerage. It then provides that if an application for a mortgage brokerage licence is made before July 1, 2008, the applicant is not required to meet this requirement at the time the application is made; the Superintendent is authorized to accept evidence satisfactory to him that the applicant will have the required insurance on or after July 1, 2008, which is what the Superintendent did in the present case.

There was, in our view, no reasonable basis for Ms. Roth concluding that the E&O insurance requirement did not have to be met until such time as a mortgage brokerage commenced business. This is not consistent with the fact that satisfying the E&O insurance requirement is a pre-condition to obtaining a mortgage brokerage licence, as set out in the Mortgage Brokerages: Licensing Regulation, subject only to the possible substitution of a promise to obtain that insurance by July 1, 2008 from anyone who applied for a licence before that date. None of the information about mortgage brokerage licensing that was made available by FSCO could be taken to create the impression that E&O insurance didn’t have to be obtained until such time as any mortgage brokerage business was undertaken. Certainly, after Ms. Roth received and read the copy of the November 26, 2008 e-mail from FSCO, which was enclosed with its registered letter to her of December 12, 2008, there could be no basis for the persistence of any such impression on her part. A Q and A, contained in the e-mail, confirmed the need for E&O insurance even if no mortgage brokerage business had been conducted and even if a licence was obtained just in case the applicant might want to do such business in the future.

The Mortgage Brokerages: Standards of Practice Regulation requires, in section 58, that every mortgage brokerage maintain an e-mail address. The form of application for a mortgage brokerage licence called for the provision of an e-mail address for the proposed principal broker for the brokerage. In these circumstances, we think that it was reasonable for FSCO to communicate with mortgage brokerages by e-mail, as it did with its September 29, 2008 E-blast, about the forthcoming E&O insurance audit, and with its standard form e-mail of November 26, 2008, which was sent to all brokerages that were found, as a result of the audit, to be in breach of the E&O insurance requirement.

Information about the MBLA Act and Regulations, including the requirements for obtaining and maintaining a mortgage brokerage licence, was also made available in non-electronic form at various sessions about the new regulatory régime introduced by the Act that were held by FSCO or industry associations.

Counsel for RRI maintained that Ms. Roth's letter of December 28, 2008 to FSCO, on behalf of RRI, called for a response, which should have been provided before any licensing or administrative penalty was proposed against RRI. It is not clear to us that there was no such response, or rather no attempt to provide a response, given Ms. Low Sin's evidence that she left a message for Ms. Roth with her service on February 10, 2009 but never received a call back. We don't think that there was a compelling need for FSCO to reply to the December 28 letter. The letter simply provided certain information to FSCO, recited Ms. Roth's previous understanding about the need for RRI to obtain new or additional errors and omissions insurance, asked that FSCO consider certain facts in dealing with any breach by RRI of the E&O insurance requirement and asked that RRI's licence be put on "hold", subject to reactivation in the future when and if E&O insurance was obtained and mortgage brokerage business actually undertaken. Only this last proposal might be thought to require some kind of response, but the fact is that it was a proposal which neither the Superintendent nor FSCO had any apparent authority to grant under the MBLA Act and Regulations. FSCO may have said as much had it been able to make contact with Ms. Roth after receipt of her December 28 letter. We don't fault FSCO for failing to provide a written response to that letter.

We have concluded that there are no grounds for us to decline to exercise our discretion to order the imposition of an administrative penalty on RRI for failure to comply with the requirement, established under the MBLA Act, to maintain E&O insurance.

We are satisfied that the imposition of an administrative penalty on RRI would serve one or both of the purposes for which such a penalty may be imposed as set out in subsection 38(1) of the MBLA Act. Those purposes are to promote compliance with a requirement established under the MBLA Act and to prevent a person from deriving an economic benefit as a result of failing to comply with a requirement established under the MBLA Act. The situation in the present case is not unlike that in *Chen v. Superintendent of Financial Services* (FST Decision No. M0359-2009-1) and other previous cases, where the Tribunal concluded that the imposition of an administrative penalty would serve both of the permitted purposes of such a penalty.

2. The Appropriate Amount of the Administrative Penalty

In determining the appropriate amount of the administrative penalty, we must take into account only those criteria set out in section 3 of the Administrative Penalties Regulation, O.Reg. 192/08, just as the Superintendent is obliged to take those criteria into account when proposing a penalty.

The first criterion is the degree to which the failure to comply with a requirement under the MBLA Act was intentional, reckless or negligent. The combination of the following circumstances has led us to conclude that RRI, acting through Ms. Roth, was reckless in its failure to comply with the requirement under the MBLA Act to maintain E&O insurance;

- Ms. Roth did not carefully review the “Instructions for Completing Application”, which we believe accompanied the form of application for a mortgage brokerage licence provided to RRI, to determine the nature of the errors and omissions insurance that RRI would have to maintain, or, if she did, she did not take account of the relevant instructions,
- Ms. Roth did not, before receiving FSCO’s registered letter of December 12, 2008, take advantage of other available opportunities to determine the nature of the errors and omission insurance that RRI was required to maintain although she attested, in the Application, that she was familiar with the laws of Ontario relating to the licensing of mortgage brokerages,
- Ms. Roth completed the Application in such a way as to indicate that RRI would have errors and omissions insurance (including extended coverage for fraudulent acts) in place by July 1, 2008, one week after the Application was completed, but did not determine whether the existing RECO errors and insurance policy, of which RRI had the benefit, would qualify to meet that promise and she did not make any inquiries of approved insurers, before or after the Application was submitted, as to the availability of qualifying errors and omissions insurance,
- Ms. Roth did not, apparently, check her e-mail on a regular basis to determine whether she had received any communications from FSCO relating to RRI’s mortgage brokerage licence, although RRI was required, by Regulation, to maintain an e-mail address, and
- Ms. Roth did not take any steps, after she became aware of the nature of the E&O insurance requirement, as a result of FSCO’s registered letter of December 12, 2008, to acquire the required E&O insurance for RRI or, alternatively, to surrender RRI’s licence.

The second criterion is the harm or potential harm to others resulting from the failure to comply with a requirement under the MBLA Act. There was, in our view, no actual harm resulting from RRI’s failure to obtain E&O insurance as it never commenced a mortgage

brokerage business which would have put clients at risk in the absence of E&O insurance. While there may have been some potential for harm, it was very minimal given the fact that RRI did not, in fact, operate a mortgage brokerage business.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. RRI did not take any action, before the hearing in this matter, to request the surrender of its mortgage brokerage licence which, if accepted by the Superintendent, would have had a remedial effect, but only going forward from the date of the acceptance of any such surrender.

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 under the MBLA Act. RRI received a modest economic benefit that it would not otherwise enjoy, were it not offset by an administrative penalty, derived from its holding of a mortgage brokerage licence for the period from July 7, 2008, when the licence was issued, until March 5, 2009 when the Superintendent suspended the licence, which suspension was extended by the Superintendent on March 24, 2009 and remains in place at this time.

The fifth criterion is any other contraventions or failures to comply with a requirement established under the MBLA 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 the relevant criteria for determining the amount of an administrative penalty in their application to the circumstances of this case, we are of the opinion that the imposition of an administrative penalty on RRI in the amount of \$1,000, as proposed by the Superintendent, would be appropriate.

D. Orders

The Tribunal makes the following orders on consent of the parties:

The Tribunal directs the Superintendent, by order, to carry out his proposal to revoke the mortgage brokerage licence of Rybak Realty Inc, unless Rybak Realty Inc. provides the Superintendent by the close of business on September 25, 2009, with a completed declaration to surrender the brokerage licence of Rybak Realty Inc., acceptable to the Superintendent, such acceptance to not be unreasonably withheld, and without prejudice to the right of Rybak Realty Inc. to apply for a new brokerage licence provided it meets all of the qualifications and criteria for licensing at that time.

If Rybak Realty Inc. does not submit an acceptable declaration of surrender by that date, the Tribunal directs the Superintendent, by order, to carry out his proposal to revoke the brokerage licence of Rybak Realty Inc.

In the meanwhile, the interim order of the Superintendent made on March 5, 2009, and extended on March 24, 2009, suspending the brokerage licence of Rybak Realty Inc. is further extended to the close of business on September 25, 2009.

The Tribunal makes the following order on the basis of the reasons set out herein:

The Tribunal directs the Superintendent, by order, to carry out his proposal to impose an administrative penalty on Rybak Realty Inc. in the amount of \$1,000.

DATED at the City of Toronto, this 30th day of July, 2009.

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

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

“Martin Brown”
Martin Brown, Member of the Tribunal
and of the Panel