

August 30, 2018

BC Law Institute
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Email: bcli@bcli.org

Attn: Greg Blue

Re: BCLI Consultation Paper on the Employment Standards Act – Employees vs Independent Contractors

On behalf of the Canadian Mortgage Brokers Association - BC (CMBA-BC), I thank you for the opportunity to make submissions concerning the BC Law Institute (BCLI) Project Committee's consultation paper on redrafting the Employment Standards Act (ESA). The Committee has produced an insightful consultation paper on an outdated statute ripe for revision. We commend you for the thorough analyses and recommendations.

CMBA-BC

By way of background, CMBA-BC is a 28-year-old professional association representing many BC mortgage brokers and mortgage lenders.

Employee versus Contractor Distinction

In this letter we wish to examine the distinction between employee and contractor, as it pertains to the mortgage brokering industry. The manner in which the distinction is made presently is problematic.

The ESA, as the Project Committee has clearly laid out in its detailed analyses, does not apply to independent contractors, as they are persons who are engaged in business on "their own account". It is not always easy to determine whether someone is

an employee or an independent contractor. Various factors of the relationship have been identified in assisting in the determination, including the following:

- the degree of control the worker has over their own work versus a putative employer;
- whether the person supplies their own tools or whether the putative employer provides them;
- the degree of financial risk assumed by the worker and whether the worker has an opportunity for profit; and
- the capacity of the worker to delegate his or her functions to another person.

These factors allow proper determinations to be made in varying instances.

Employment relationships are indeed becoming even more varied as work becomes more transitory and piece meal, with workers often working flexible schedules from the home (sometimes for limited durations). Even though these changes apply very much to the mortgage brokering industry, mortgage brokers are to a large degree deprived of the factor test. They are largely viewed by ESA as employees due to the definition of “submortgage broker” contained in the Mortgage Brokers Act (MBA). We suggest that reliance on that definition for ESA purposes is improper and leads to injustice. We will now set out our reasons for this position.

Status of Mortgage Brokers

Mortgage brokers are regulated under the MBA. The MBA recognizes two categories of brokers – mortgage brokers and submortgage brokers. The first of the categories is mortgage brokers. Mortgage brokers are defined in the MBA, albeit in far more detailed language, as persons who do any of the following: mortgage arranging, mortgage lending, mortgage administration, and mortgage trading (buying and selling mortgages). In effect, a mortgage broker under the MBA is the mortgage brokerage.

The second of the categories is submortgage brokers. The MBA definition of submortgage brokers defines them as employees of a mortgage broker, more precisely in the following terms:

*any person who, in British Columbia, actively engages in any of the things referred to in the definition of mortgage broker and **is employed**, either generally or in a particular case, by, or is a director or a partner of, a mortgage broker.*

The Registrar of Mortgage Brokers has further commented in his policy (MB 05-001) as follows:

*A submortgage broker is defined in section 1 of the Act as a person who **actively engages** in any of the things referred to in the definition of mortgage broker **and is employed** by a mortgage broker. Being "employed" means that the submortgage broker is actively involved in providing mortgage broker services on behalf of his or her employer in exchange for some kind of remuneration. The Registrar's office is aware of cases where submortgage brokers, who have been considered to be inactive by their employers, have engaged in mortgage brokering activities on their own behalf and without the knowledge of the mortgage broker. Ultimately, mortgage brokers are responsible for supervising the activities of their employees and ensuring that they comply with the requirements of the Act.*

Notwithstanding the MBA distinction between submortgage brokers and mortgage brokers, in common usage and in industry both are generally referred to as mortgage brokers. The origins of collapsing the two categories into one is not clear but it may be related to the fact that most submortgage brokers are considered by peers to be independent contractors, in other words to be conducting themselves as mortgage brokers. While some submortgage brokers do act as true employees (such as

“assistants”), the vast majority work on commission and pay a desk fee or a small percentage of their commission to the mortgage brokerage. The mortgage brokerage’s role is primarily to ensure compliance with regulatory requirements for the purposes of consumer protection. Generally, mortgage brokers act independently to find and close transactions; they earn a commission when they do and receive no compensation when they do not. Considering those relationships to be employee-employer relationships runs very counter to the result that would occur if the factor test was applied.

Unfortunately, the Director of Employment Standards has in large part come to the conclusion that by virtue of the definition of submortgage brokers as employees in the MBA, they are employees for purposes of the ESA. He has determined¹ that the pertinent legislation is to be “interpreted in its plain language. The (MBA) specifically refers to “employment”; which indicates an intention that the legislation contemplates an employment relationship between submortgage broker and mortgage broker; otherwise the legislation would reference language appropriate to an independent contractual relationship”.

The result is that the relationship between the submortgage broker and the brokerage for employment standards purposes has been understood as an employee/employer relationship based on a definition provided for regulatory (protection of the public at large) purposes. That definition was never intended to determine the nature of the working relationship for employee compensation or employee protection purposes.

When commissioned mortgage brokers are treated as employees, the mortgage brokerage incurs a potential liability for perhaps, unpaid minimum wage, vacation pay or even severance pay, when the mortgage broker is ineffective at earning sufficient commissions or chooses not to work. Mortgage brokers who produce an insufficient level of volume may then be let go by the mortgage brokerage in order for it to minimize their exposure to liability under the ESA. In this circumstance, the ESA’s goal of protecting workers has the opposite effect, and actually harms the group of workers, by

¹ ER # 088-630, page 15

making their status with a mortgage broker more tenuous and susceptible to termination.

We would recommend that:

- the test for determining whether a worker is an employee or an independent contractor within the scope of the ESA be clarified so that it expressly excludes references to other statutes which may provide a fixed definition that does not serve the purposes of the ESA, and
- submortgage brokers be specifically included as being subject to have their status as an employee or contractor being determined by application of the factor test.

Thank you.

Yours truly,

A handwritten signature in cursive script, appearing to read 'S. Gale'.

Samantha Gale
CEO, the Canadian Mortgage Brokers Association - BC