

March 6, 2020

BRIEFING NOTE

Mortgage Brokers Act Consultation: Employee Status

On behalf of the Canadian Mortgage Brokers Association - BC (CMBA-BC), I thank you for the opportunity to make submissions in response to the consultation by the Ministry of Finance on proposed amendments to the Mortgage Brokers Act (the “MBA”).

In this brief, we are reviewing the status of submortgage brokers as employees or independent contractors, and making recommendations accordingly.

Current Status

Submortgage brokers are defined in section 1 of the MBA as employees of the mortgage broker to which they are registered. More precisely section 1 provides that a submortgage is:

*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.*
(emphasis added)

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.

Challenges with the Current Status

By defining submortgage brokers as employees, section 1 contradicts actual practice as most submortgage brokers work as independent contractors and not employees. While some submortgage brokers clearly 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. Generally, submortgage brokers act independently to find and close transactions; they earn a commission when they do and receive no compensation when they do not. The mortgage brokerage's role is primarily to ensure compliance with regulatory requirements for the purposes of consumer protection.

When commissioned mortgage brokers are treated as employees, the mortgage brokerage incurs a potential liability for unpaid minimum wages, vacation pay or even severance pay. However, it makes no sense to pay minimum wage, vacation pay, or severance pay when a submortgage broker has no standard hours of work or production expectations. Theoretically, a submortgage could work only one hour per month and earn no commissions, yet they would be entitled to earn the equivalent of a full-time employee on minimum wage.

To mitigate this challenge, submortgage brokers who produce an insufficient level of volume may then be let go by their mortgage broker in order for it to minimize the

brokerages' exposure to liability under the Employment Standards Act ("ESA"). In this circumstance, the ESA's goal of protecting workers has the opposite effect, and actually harms the group of workers, by making their status with a mortgage broker more tenuous and susceptible to termination.

The ESA does not apply to 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:

1. the degree of control the worker has over their own work versus a putative employer;
2. whether the person supplies their own tools or whether the putative employer provides them;
3. the degree of financial risk assumed by the worker and whether the worker has an opportunity for profit; and
4. 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 becoming even more varied as work becomes more transitory and piece meal, with workers often working flexible schedules from the home and sometimes for limited durations. Even though these trends apply very much to the mortgage brokering industry, submortgage brokers are deprived of this independent contractor factor test, and are instead entitled to arbitrary employee protections under the ESA which make no sense.

Recommended Changes

We recommend that the definition of submortgage in the MBA be amended to exclude any element of or reference to being an employee. The test for determining whether a submortgage broker is an employee or an independent contractor would then default to the standard application of factor test, which is appropriate. True submortgage broker employees would then have access to the rights and protections under the ESA, while most submortgage brokers earning commissions would have remedies available under contract law.

Yours truly,

A handwritten signature in black ink, appearing to read "Samantha Gale".

Samantha Gale
CEO, Canadian Mortgage Brokers Association-BC