

April 29, 2020

BRIEFING NOTE

Mortgage Brokers Act Consultation: Exemptions for Bank Brokers

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 commenting on exemptions from the registration requirements for financial institutions and their employees under section 11 of the MBA.

Current Status

The MBA does not provide a full exemption from the application of the MBA to financial institutions and their employees who broker mortgages. What not many industry members realize, is that section 11 of the MBA only provides an exemption from the “**registration provisions**” of the MBA - firstly to a list of different entities and individuals, and secondly to their employees.

More specifically, section 11(1) provides that

“The registration provisions of this Act do not apply to any of the following while acting as mortgage brokers or submortgage brokers under their proper names:

(b) savings institutions . . .”

It further states in subsection (2) that:

“The registration provisions of this Act do not apply to any of the following:

(a) an employee, or director, of a person exempted from registration under subsection (1) (a) or (b) . . .”

Under ordinary rules of statutory interpretation, the specific reference to some provisions of a statute will exclude the other non-specified sections in the statute. In a

nutshell, the MBA, therefore, only exempts banks and their employees who deal in mortgages from having to register as a mortgage broker, and does not exempt them from other provisions of the MBA. By implication, this means that any exempted entity or person listed in section 11, which includes financial institutions and their employees, should be complying with the consumer protection requirements set out in the MBA when engaging in the registerable activity listed in section 1, which includes mortgage arranging.

Historically, mortgage dealing employees from financial institutions were registered under the MBA in a special category of registration, created by policy, called “Mortgage Development Brokers”. This policy was revisited by the Registrar in 2008 under Bulletin MB 08-002, “Registration Requirements for Mortgage Development Brokers Contracted by Financial Institutions” (see attached), which is no longer posted on the BCFSA and is presumed to be inoperative. The crux of MB 08-002 is that a “person who brokers mortgages between borrowers and third-party lenders, lends their own mortgage funds, or operates under a name other than that of the proper name of the financial institution will be considered to be an independent contractor and not an employee”. Under this analysis, persons who broker mortgages underneath a financial institution are not exempted from the MBA, and require registration under the MBA.

However, it appears that not many mortgage specialists or mortgage brokers working on behalf financial institutions obtained registration as a mortgage development broker. This interpretation of the MBA does not appear to have been widely accepted by financial intuitions, and nor is there is evidence that it was ever enforced.

Challenges with the Current Status

Some of the challenges with the exemptions set out in section 11 as they relate to mortgage arranging activity by financial institutions are obvious, and include:

1. Lack of clarity with wording and confusion over the purpose;
2. Nature of employment relationships, and the use of the term “employee”; and
3. Balancing constitutional issues with good public policy.

1. Lack of clarity with wording and confusion over purpose

As set out above, the reference to the registration provisions of the MBA not applying to certain entities and persons appears to clearly mean that rest of the MBA provisions do apply. However, it is not clear if the term “*registration provisions*” applies to only specific sections requiring persons who engage in registerable activity obtaining registration, or the entire Part 1 of the MBA, which is headlined “Registration” and encompasses more than registration requirements. Furthermore, any consumer protection requirements which are imposed on a sector of the mortgage brokering industry without the need for licensing or registration are unenforceable, and therefore provide little or perhaps absolutely no value. The licensing process provides regulators with the capacity to meet out discipline through licensing suspensions, terminations, suitability reviews and the imposition of conditions of registration. The Registrar is left with no tools to enforce compliance without the power to control, grant or revoke a person’s licensing status. It is therefore not clear what the original drafters of the MBA intended by wording section 11 as it is currently set out.

2. Nature of employment relationships, and the use of the term “employee”

Employment relationships are currently in transition. They 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. While some mortgage 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, mortgage brokers act independently to find and close transactions; they earn a commission when they do and receive no compensation when they do not. Exemptions which are dependent on the existence of true employment relationships, particularly in the field of mortgage brokering, may therefore not stick if put to the test in today’s new worker environment. Exemptions in the MBA should contemplate that

workers may not neatly fit into the boxes of “employee” and “independent contractor” – modernized exemption provisions should be drafted to provide more certainty in their application.

3. Balancing constitutional issues with good public policy

There is a confusing regulatory landscape in Canada within the financial services sector. Banking under the constitutional federal commerce and trade power is regulated by OSFI and the Financial Consumer Agency of Canada, while the provinces under the constitutional property and civil rights power, regulate the industries and professionals engaged in finance and real estate activity, usually under provincial licensing legislation and land titles requirements. Other provincial powers such as over matters of a merely local or private nature (such as BC lands being mortgaged by a BC borrower to a BC lender) may come into play as well.

The Supreme Court of Canada in a trilogy of cases (referred to as Marcotte) has determined that banks, while regulated federally, must also comply with provincial consumer protection legislation in certain circumstances. The Supreme Court concluded that “banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion.”

Despite the Marcotte case, some banks have authorized their employees to act as financial intermediaries, such as mortgage brokers who place borrowers with third party lenders, without obtaining any provincial licensing. The absence of licensing is, in our view, an improper attempt to shield those bank employees from being subject to standards and discipline external to the banks (such as that imposed by provincial regulators on mortgage brokers and lenders).

Most bank customers looking for a traditional bank mortgage do not expect to encounter bank employees who will place them with third party lenders not

connected to the bank; yet such a placement is exactly what often occurs when the bank employee is unable to qualify the client for a bank mortgage. This is often done to the financial benefit of the bank and/or bank employee without the client having consented (or even been made aware of) to the relationship between the third party and the bank, and the additional expense. While duly licensed mortgage brokers act for borrowers to find them the best mortgage options, bank mortgage brokers do not. They may superficially resemble mortgage brokers, but they work for the bank and do not act in the borrower's best interests. As you likely know, high pressure sales tactics by banks have recently come under review by the Financial Consumer Agency of Canada.

A fragmented financial services eco-system will inevitably lead to even greater overlap and confusion between federally and provincially regulated services providers. Exemptions for banks and their employees or contractors who engage in mortgage brokering therefore represent bad public policy and put the public at risk. Accordingly, any revision of the MBA should not contain any exemptions for mortgage brokers working for banks from the requirement to obtain mortgage broker licensing. Just like other mortgage brokers who work underneath independent brokerages, mortgage brokers working underneath banks should be required to obtain mortgage brokering licensing under the MBA

Recommended Changes

We recommend that bank contracted or hired mortgage brokers be required to comply with certain provincial consumer protection statutes that govern areas of exclusive provincial jurisdiction, such as mortgage broker licensing. Mortgage broker licensing statutes provide detailed, well considered and essential consumer protection requirements in the absence of any similar federal requirements. It makes sense to put the bank mortgage broker on the same level playing field as other provincially licensed mortgage brokers to ensure that robust consumer protection rules are effective and enforceable against the entire mortgage brokering industry.

Revisions to the exemption sections of the MBA should be made to:

- exempt financial institutions from the requirements to obtain licensing as a mortgage brokerage under the MBA;
- exempt employees or contractors working for and under the proper name of a financial institution who place mortgages with the same institution (e.g. bank mortgage representatives) from the licensing requirements of the MBA;
- require the licensing without any exemption under the MBA of persons who act as brokers by placing borrowers with third party lenders (e.g. bank mortgage brokers), regardless of whether they have a business, contractor or employment relationship with a financial institution; and
- require the licensing without any exemption under the MBA of persons or entities who work for a financial institution and arrange mortgages for the financial institution but do not work under the proper name of the financial institution.

Yours truly,

A handwritten signature in cursive script, appearing to read 'S. Gale', is positioned above the typed name and title.

Samantha Gale
CEO, Canadian Mortgage Brokers Association-BC



Information Bulletin

Bulletin Number: MB 08-002

Topic: REGISTRATION REQUIREMENTS FOR MORTGAGE DEVELOPMENT BROKERS CONTRACTED BY FINANCIAL INSTITUTION

Issue Date: SEPTEMBER 12, 2008

Registration Requirements for Mortgage Development Brokers Contracted by Financial Institutions

All persons, unless exempted under section 11 of the Mortgage Brokers Act (the "Act"), who engage in mortgage brokering activity require registration as either a mortgage broker or a submortgage broker. Under section 1 of the Act, the activities which require mortgage broker registration include:

- (a) carrying on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker's own or that of another person;
- (b) holding oneself out as a mortgage broker in an advertisement, notice, or sign;
- (c) carrying on a business of buying and selling mortgages or agreements for sale;
- (d) in any one year, receiving an amount of \$1,000 or more in fees or other consideration, excluding legal fees for arranging mortgages for other persons;
- (e) during any one year, lending money on the security of 10 or more mortgages; and
- (f) carrying on a business of collecting money secured by mortgages.

Under section 11 of the Act, persons who are employed by a financial institution are exempt from the registration requirements. However, individuals, partnerships, or corporations who are contracted by a financial institution to engage in mortgage brokering activity on behalf of the financial institution are considered to be independent contractors and not employees of the financial institution. A person who brokers mortgages between borrowers and third party lenders, lends their own mortgage funds, or operates under a name other than that of the proper name of the financial institution will be considered to be an independent contractor and not an employee.

An independent contractor or a person deemed to be an independent contractor working with a financial institution must obtain mortgage broker registration. It is an offence under section 21(1) of the Act for a person to carry on the business of a mortgage broker or submortgage broker unless he or she is exempted under section 11.