

April 20, 2020

BRIEFING NOTE

Mortgage Brokers Act Consultation: Adding Settlement Protocols

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 making recommendations for adding statutory protocols to the MBA for settling disciplinary matters by consent.

Current Status

As with most adversarial proceedings, the majority of disciplinary proceedings under the MBA are resolved by industry members and the Registrar by consent. A review of the BCFSAs website shows that over the last 5 years (excluding ex-parte proceedings), 13 matters were resolved by consent order while only 6 matters were decided through the adjudication process.

Concerns with Current Status

However, there are no formal processes set out in the MBA to facilitate the settlement of disciplinary matters by consent. All enforcement provisions in the MBA, which focus primarily on investigations and the production of witnesses and evidence, are geared for the formal adjudication process, with no process dedicated to resolving matters by consent or mutual settlement. This gap should be plugged.

Settling matters by consent saves parties from having to expend significant funds to pay legal defence costs, in addition to the necessary time to prepare litigation material, witness testimony and arguments. Both the civil and criminal justice systems have formal mechanisms to encourage the resolution of disputes, which helps to reduce a

backlog of cases and provides the parties with some control over the result, as they must all agree on the final resolution.

Other regulatory bodies have created detailed discipline settlement processes. The BC Real Estate Council, for example, has published a 9-page document, entitled “*A Guide to RECBC’s Consent Order Process*”, which sets out the process for entering into consent orders with industry members. The rationale for the detailed Consent Order process is set out in the beginning of the document: “Consent orders (COs) are not informal settlements of discipline matters; they result in formal discipline orders. COs are published and become part of a licensee’s public discipline record.”

Recommended Changes

We recommend that the MBA be amended to include protocols for entering into consent agreements between the Registrar and industry members, which represents a fair and efficient process. Elements of the protocol should include the following:

1. The opportunity for a settlement conference, which can be initiated by any party after a Notice of Hearing has been served but before a hearing of the matter;
2. All parties participating in the settlement conference must act in good faith;
3. The communications inside a settlement conference shall be privileged, confidential and without prejudice;
4. The settlement conference should be presided over by a neutral decision maker, such as a panel, which would not preside over the final, formal hearing; and
5. The settlement conference would enable the parties to explore a potential settlement of the substantive issues, but not the procedural issues arising from the Notice of Hearing.

Yours truly,



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