

April 20, 2020

BRIEFING NOTE

Mortgage Brokers Act Consultation: Independence in the Adjudication Process

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 independence in the adjudication process for determining breaches of the MBA and disciplining registrants.

Current Status

Under the MBA, the Registrar, who is appointed by the Lieutenant Governor in Council, adjudicates disciplinary matters, which are pursued by the Registrar’s staff under a Notice of Hearing. Generally, his staff will investigate suitability issues or suspected breaches of the MBA and collect relevant facts and evidence which are assembled into a hearing brief. Lawyers for the Attorney General act to represent the interests of the Registrar, and if warranted, will assist in a negotiation process to attempt to resolve the matter by way of consent, in the form of a Consent Order which is granted by the Registrar and signed by the opposing party. If matters cannot be resolved by consent, they proceed to a hearing, wherein, the Registrar will sit as an adjudicator. In several past hearings, another person has been appointed (presumably by the Registrar) to act as an adjudicator in his place.

Whether by consent or following a hearing, the Registrar can make various orders pursuant to the provisions of the MBA, which include:

- a. Suspending or cancelling a person’s registration;
- b. Paying monetary penalties and costs; and
- c. Directing a person to cease certain activities or perform certain activities.

Challenges with the Current Status

An all too frequent criticism of the MBA adjudication process by registration subjects is that it lacks fairness, as the adjudicator governs all aspects of the regulatory program under the MBA, including its staff, and the very investigative process which brings the subject before the Registrar for adjudication of allegations against him or her. Even if the BCFSA erect internal information firewalls on specific investigations between investigators and the ultimate adjudicator, there is still a clear perception of institutional bias. In the infamous English case of *R. v. Sussex Justices*, which concerned the impartiality and recusal of judges, the court found that the mere appearance of bias is sufficient to overturn a decision, as it is “of fundamental importance that justice should both be done and be manifestly seen to be done.”

We know that disciplinary hearings conducted pursuant to the MBA need to meet the requirements of natural justice or the duty to act fairly. The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration) (1999)* set out a list of non-exhaustive factors that impact the nature of the duty of fairness required to be dispensed by a tribunal. Those factors include the nature of the decision being made and the process followed in making it, the statutory scheme under which the decision-maker operates, the importance of the decision to the person challenging it, the person's legitimate expectations, and the choice of procedure made by the decision-maker.

Professional disciplinary proceedings have been found to be quasi-judicial proceedings, requiring regulatory bodies to maintain independence in the decision-making process. In *Lim v. Assn. of Professional Engineers of Ontario*, 2011 ONSC 106, for instance, the discipline committee was found to lack independence from the staff who were tasked with providing it with logistical and administrative support. This lack of independence ultimately resulted in the extraordinary remedy of the committee's decision being quashed.

Ensuring that regulatory bodies both act impartially and are seen to act impartially helps to instill confidence in them - not only from the industry members who they regulate but also from the public. This is critical requirement in building and maintaining a culture of compliance, within which proactive industry members believe in the value of regulation and its enforcement. Efforts to fight money laundering will be challenged when industry members do not have faith in the fairness and impartiality of a regulator – they may adopt an “us vs them” approach filled with distrust and extreme caution.

Other BC regulatory bodies, such as the BC Real Estate Council, which is soon to be incorporated under the BCFSA umbrella, have ensured that they have detailed, robust and clearly laid out adjudication processes which satisfy the rules of natural justice and procedural fairness.

For instance, the Real Estate Council has published a 9-page document, *“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.”

Real Estate Council consent orders are reviewed by formal Consent Order Review Committees, which are comprised of a “combination of members of Council and possibly non-Council members appointed from approved rosters of lawyers and real estate industry professionals.” Likewise, for hearings, the *Real Estate Services Act* (RESA) sets out detailed requirements for constituting hearing committees with permitted members including RESA licensees, lawyers or other persons with industry expertise sufficient to sit on a disciplinary panel.

Recommended Changes

In order to ensure the impartiality and the appearance of impartiality in the discipline process which is a fundamental component of natural justice and procedural fairness, the MBA should be amended to ensure that all license suitability matters and disciplinary proceedings are adjudicated by persons who are not paid BCFSA staff or contractors. In addition, adjudication should be undertaken by a panel or a committee which is comprised of lawyers, mortgage licensees or other related industry experts who have knowledge of the mortgage industry and compliance requirements. This will help instill confidence in the regulator amongst industry members and the public, which is essential to building a culture of compliance and tackling wide scale problems such as money laundering.

Yours truly,

A handwritten signature in cursive script, appearing to read 'S. Gale', is written in black ink on a light-colored background.

Samantha Gale
CEO, Canadian Mortgage Brokers Association-BC