

Mortgage Brokers Act Consultation: Response to Questions

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 document, we are responding (in red) to questions posed in the consultation document.

Questions:

- 1) Are there any unintended consequences or concerns with amending the scope of the MBA legislation to align with other modern provincial MBA legislation?

The scope of mortgage brokering, lending and administration activity which is captured by the MBA should be clear and without room for subjective interpretation. In other words, what are the bright lines of activity which trigger the requirement for licensing? The challenge with the “in the business” test is that it does not provide any bright lines. There are different “in the business” tests depending on the context of the question. For instance, CRA would have a different test for income tax purposes than a licensing regulator which is regulating the business activity. Ambiguities around a business test might revolve around the following questions:

- Are you in the business, if you operate out of a corporate entity, which in itself, is a vehicle for operating businesses?
- Are you in the business, if you are primarily doing activity A, but do a little lending or brokering on the side? Is this a threshold test?
- Are you in the business if you have contact with the public, and not in the business if you don’t have contact with the public?
- Are you in the business if you represent yourself that way to the public, eg. through a website, social media or

business cards?

The benefit of tying jurisdiction in BC for mortgage brokering, lending and administration activity to the registered mortgage location is that it provides a bright line. Mortgages and land registered in BC are governed by BC legislation, such as the Land Title Act – it makes sense to capture this activity clearly within the scope of BC legislation. However, there may be activity where the jurisdiction should be broadened beyond the scope of where the land is – eg. a person or entity conducting administration or sales activity within BC for mortgages located outside of BC. Consideration should be given to adding a substantial connection test to the land location criteria.

Conflicts of laws generally resolve by saying land is governed in rem (so mortgages for BC land are governed by BC law no matter where the regulated person is located) and conduct is governed in personam (so people within BC are governed by BC law no matter where the subject land is located). While simple in principle, problems arise in enforcing BC laws against people not within its physical jurisdiction or physically within a reciprocating jurisdiction.

2) To what extent should private lending be regulated?

A distinction should be made between investors and lenders – investors are more like clients receiving services from a professional, while lenders are more the actors who facilitate the transaction. Investors who do not: write commitment letters, provide disclosure; have contact with borrowers or do not hold themselves out as lenders should not require licensing. In addition, lenders who lend to family and perhaps friends, should be exempt from licensing requirements, while other lenders should be required to obtain licensing under the MBA

3) Are there any other mortgage broker or lending activities that should be subject to regulatory oversight?

There should be room for flexibility in capturing mortgage industry activities, which may be transformed by open banking.

Further, opening up the financial services ecosystem to a myriad of FinTech service providers will blur the lines between regulated financial services and completely unregulated more peripheral analytical or informational support services. Will third party FinTech providers undertaking critical, outsourced

functions from a regulated entity also require regulation? Compounding this problem is that services providers may operate outside of Canada's borders, making policing near impossible.

In the mortgage broker context, the development of mortgage lead generators provide an example of regulatory blurring. Generally, lead generators take simple, online mortgage applications from borrowers, which are then bundled into packages and sold to mortgage brokers. The broker can then follow up with the individual borrowers. In most provincial jurisdictions, the taking of application data from borrowers is activity triggering the need for mortgage broker licensing. However, it is unclear whether all provincial mortgage broker regulators require mortgage lead generators to obtain mortgage broker licensing.

Some leaders, such as Christine Lagarde, the Managing Director of the International Monetary Fund, have commented that: "Traditionally, regulators have focused on overseeing well-defined entities. But as new service providers come on stream in new shapes and forms, fitting these into buckets may not be so easy. Think of a social media company that is offering payments services without managing an active balance sheet. What label should we stick on that?"

Regulation for regulation's sake is never desirable. However, policy makers have already determined that there is a need to ensure a certain level of consumer protection through authorizations and licensing regimes. In anticipation of future industry transformations, we recommend that consideration be given to incorporating mechanisms in the MBA to capture different kinds of origination activity, which at this time is unknown or not contemplated.

Issue 2: Types of Licences and Related Obligations

Questions:

- 1) What are the challenges associated with moving to a more modern licencing regime described above?

We have made recommendations in a separate briefing note on how to logically structure a licensing regime for the mortgage industry.

Our industry members have made the further suggestion that licensees be required to exhibit their license number to the public

in advertisements and other communications, in order to ensure that the public is aware of the

Issue 3: Exemptions from Registration or Licencing

Questions:

- 1) In your view, what are the costs or benefits of matching the MBA registration exemptions to parallel modern mortgage legislation?

Please see our briefing note on exemptions for bank brokers. I am aware of some instances in the past, where other professionals, such as lawyers, have operated as a mortgage brokerage, and engaged in mortgage conduct without providing legal services - this activity, which is not incidental to practicing law, should trigger licensing under the MBA without exemption.

- 2) Is the exemption from registration for persons lending money on the security of land to provide housing for the person's employees still relevant?

I believe it is not relevant.

- 3) Are there any other persons currently exempted from registration either under the MBA or modern legislation that should not be exempted?

Yes, please see our detailed briefing note on bank brokers.

- 4) Are there any other persons that should be exempted from registration under the MBA?

Exemptions should ensure that other professional licensees, such as lawyers, are not exempt from licensing if they engage in mortgage activity which represents a separate line of business activity and is not incidental to their professional license.

DUTIES OF ALL REGISTERED OR LICENCED PERSONS

Issue 1: Duty to Act Fairly, Honestly and in Good Faith

Questions:

- 1) Do you have any concerns with matching modern mortgage legislation to include a duty to act fairly, honestly and in good faith?
Our industry members have asked CMBA-BC to ensure that the MBA requires a high level of practice standards of licensees – we have no concerns with a duty to act fairly, honestly and in good faith. However, we do note that the deployment of such standards can be more complex than anticipated, and concerns may arise at a later date.
- 2) Should a positive obligation to require reporting misconduct be legislated?
Any duty to report misconduct should ensure that the specific misconduct to be reported can be clearly ascertained and never imposes a duty on a licensee where misconduct is uncertain or of a subjective nature.

DUTY TO BORROWERS

Issue 1: Duty to Act in Borrowers' Best Interest and Mortgage Suitability

Questions:

- 1) What do you consider to be acting in the best interest of the borrower? What parts of that should be required by legislation?

Acting in the best interests of a mortgage borrower should entail providing full disclosure and advice to borrowers concerning options and risks so as to allow the client to provide informed instructions. There should be recognition of factors other than the cheapest price that go to a product recommendation, including whether a particular lender would accept the application based on the consumer's particular circumstances, product features, flexibility, completion deadlines and consumer biases. Understanding how a regulator might weight the various factors when undertaking assessments for compliance with the best interests duty is a potential area of concern for the

industry as it will try to understand how a best interests duty will be administered.

- 2) If a duty is placed on a broker to determine suitability of a mortgage product for a borrower, what factors should a broker consider when determining suitability?

A mortgage which is suitable for a borrower should be assessed by reviewing a number of factors in their totality, and not just one factor. There are two primary factors to consider in assessing suitability. One is meeting the client's specified needs, such as by financing a purchase, or covering debts in a debt consolidation mortgage. The second is affordability, which means that the borrower has the capacity to afford the periodic mortgage payments or may have challenges in affording the payments, but has an alternative exit plan to repay the mortgage, such as by selling the property. There are of course complex cases, where borrowers are credit challenged and stuck with unaffordable debt, which needs to be refinanced to stave off foreclosure or other dire financial consequences. Such a mortgage may look "unsuitable" but is actually very "suitable" when the alternative is losing the property to foreclosure.

- 3) Are there borrowers who do not require the protection offered by a duty to determine mortgage suitability?

Yes, there are certain classes of borrowers who would not benefit from mortgage suitability advice, such as sophisticated high net worth borrowers, commercial property mortgage borrowers or corporate borrowers.

Issue 2: Disclosure of Brokerage Information

Question:

- 1) Is there information that should or should not be included in disclosures to borrowers?

The fees, remuneration or penalties payable by the borrower in connection with the services offered by the mortgage brokerage are not matters for disclosure, but rather elements which should go into a client services agreement between a client (lender or borrower) and the licensee.

Issue 3: Disclosure of Compensation Receivable or Payable

Question:

- 1) Are there any specific concerns with providing the Registrar with the flexibility to strengthen the MBA disclosure requirements as needed?

The Registrar should have the ability to amend forms as required, provided that consultation protocols have been followed.

Issue 4: Disclosure of Cost of Credit for Home Equity Loans

Question:

- 1) Is there a reason why disclosure of the cost of borrowing should not be required in every instance where an individual takes out a mortgage secured against residential property?

We have provided a detailed briefing note on advance fees, which addresses the need to permit advance fees for mortgage transactions, but with safety measures in place. Advance fees enable brokers to work on files and provide mortgage solutions to borrowers – restrictions on advance fees for consumer protection purposes need to be balanced with the ability of brokers perform their services and to be paid fairly for work performed.

Issue 5: Reverse Mortgages

Questions:

- 1) What are the benefits and costs of requiring independent legal advice before taking out a reverse mortgage?

We have reviewed numerous transaction files from borrowers and found that lawyers providing independent legal advice on mortgage transactions often do not review documentation which is generated by a mortgage broker, such as cost of credit disclosure or conflict of interest disclosure, and review only conveyancing material compiled

by the conveyancing lawyer. Lawyers may not understand the financial implications and benefits of a reverse mortgage, and may provide little benefit to a reverse mortgage borrower. ILA should not be relied upon to explain the entire transaction as if the lawyer is a financial advisor. The lawyer in providing ILA would reasonably at most cover broad concepts and to determine whether the person understood the nature and key components of the deal. We have seen certificates of independent legal advice costing borrowers as much as \$500. While the requirement for independent legal advice may seem like a logical protection to implement for reverse mortgage borrowers, we have found that ILA is often completed in a perfunctory manner which provides the recipient with a false sense of security.

- 2) What is an appropriate extended cooling off period for reverse mortgages?
A cooling off period should provide the borrower with a sufficient number of business days in a week to consult with various professionals, advisors and family members. We understand that this period is 7 days in the province of Manitoba, which appears to be reasonable – although a longer period may be more appropriate.
- 3) Should disclosure of the effects of an interest rate change on the mortgage balance be required for reverse mortgages?
We have written a briefing note on cost of credit disclosure, which includes a discussion on reverse mortgage disclosure. Disclosure of reverse mortgages with variable interest rates could be delivered in a manner similar to variable interest rate mortgages.
- 4) Are there other disclosures or requirements that could better protect consumers not contemplated here?
There is currently no prescribed cost of credit disclosure form. We recommend that consideration be given to developing specific cost of credit disclosure forms for fixed credit, open credit, reverse mortgages and equity ownership mortgages, which are prescribed by regulation.

DUTY TO LENDERS AND INVESTOR

Issue 1: Suitability of Investment

Questions:

- 1) Should the duty to disclose mortgage information be amended and limited to private investors?
Lender disclosure should be provided to all investors/lenders except those who operate within a regulatory framework, such as MBA licensees, financial institutions regulated by OSFI or credit unions regulated by BCFSFA.
- 2) Should the mortgage broker duty to a private investor include determining mortgage investment suitability?
Product suitability requirements for private investors appear to be standard consumer protection measures in most modern mortgage broker jurisdictions. We see no reason to deviate from accepted standards. However, consider an alternative test - possibly rather than product suitability, the test should be whether the person has been given the information and is able to provide informed instructions

Issue 2: Best Interest of Private Investor

Questions:

- 1) Are there potential conflicts between the duties to a borrower as outlined above and acting in the best interest of a private investor?
The question of conflicts and duties is more complex than it might seem at first look. The Alberta regulator (RECA) has spent considerable time in developing a relationship disclosure model. This model is spelled out as follows:

It's important that borrowers understand the relationship they have with their mortgage broker.

A mortgage brokerage may:

- represent the borrower (you);
- represent the lender; or,
- act as an intermediary.

Mortgage brokers have a responsibility to clearly explain their role to borrowers they're working with.

When they are representing you, the borrower

When a mortgage brokerage represents you, as a borrower, you are a CLIENT. They must act in your best interests at all times, and will owe you general, fiduciary, and regulatory obligations. These include undivided loyalty, confidentiality, full disclosure, obedience, reasonable care and skill, and full accounting. They will recommend financing options to you, advocate on your behalf, and provide you with confidential advice.

When they are representing the lender

When a mortgage brokerage is representing the lender as their client, they will be acting in the lender's best interests at all times, not yours. They can still work with you; however, they will treat you as a customer.

When you are a customer, the mortgage brokerage must:

- treat you honestly and act with reasonable care and skill
- gather information on the property you want to finance and on your financial situation
- explain the lender's options to you
- complete the necessary documents and submit them to the lender
- tell you about the transaction's progress and pass along any communications from the lender to you

The mortgage brokerage cannot give you advice or act in any way that would be a detriment to their client, which is the lender. The lender has their undivided loyalty.

When they are acting as an intermediary

A mortgage brokerage may act as an intermediary between you, as a borrower, and potential lenders. In this case, both you and the lender are customers of the mortgage brokerage.

The brokerage will facilitate the mortgage deal by gathering information, explaining the options, completing the necessary documents and keeping both sides apprised of the deal's progress. They will not act to the benefit or detriment of you or the lender(s). Alberta mortgage brokerages often work as intermediaries when working with residential borrowers.

It is the mortgage brokerage's decision

Each mortgage brokerage decides its own business model. Some only represent lenders, some only represent buyers, and some will represent neither.

- 2) What would be the effect, if any, on your mortgage brokerage business if you are prohibited from acting for both the borrower and the private investor in a mortgage transaction?

Transactions would potentially be more expensive to the consumer if a mortgage broker could not act as an intermediary between borrowers and lenders – requiring separate representation from multiple mortgage brokers in all non-bank transactions would significantly add to the cost of borrowing for the borrower, who ultimately pays the financing costs.

Issue 3: *The Securities Act*

Question:

- 1) Does the current division of regulatory oversight between the *Securities Act* and the MBA create gaps or unnecessary duplication in regulation or oversight?

The activities regulated under the MBA and the *Securities Act* are different – lending vs. capital raising. However, jurisdiction over syndicated mortgage lending is split between the two regulators – qualified syndicated mortgages (MBA) vs non-qualified syndicated mortgages (SA). It is interesting to note that with non-qualified syndicated mortgages, which fall under the jurisdiction of the BC Securities Commission, mortgage brokers are still required to assemble and underwrite the mortgage transaction – only the *sales* activity with the investor

requires the employment of an exempt market dealer. A more thorough review should be undertaken on the relationship between the MBA and SA on the subject of syndicated mortgages to further ensure that the two statutes appropriately work in tandem on this subject.

Issue 4: Disclosure of Compensation Receivable or Payable

Question:

- 1) Should the disclosure to lenders of potential conflict of interests be limited and only required if the lender is a private investor?

It may not be entirely clear who is a private investor and who isn't – for instance, many large bank size monoline lenders are not financial institutions and require mortgage broker registration as a (private) lender, yet many industry members are not aware of this. All conflicts of interest should be disclosed to relevant parties, no matter the kind of lender. With all lenders, conflict of interest disclosure should be provided when the borrower applicant is either the broker or related to the broker, or the broker is receiving compensation directly from the borrower.

MODERN REGULATORY REQUIREMENTS AND POWERS

Issue 1: Regulations and Rule Making Powers

Question:

- 1) Please, provide your views on the Authority being provided with the power to make rules under the MBA?
BCFSA should have rule making power, provided that BCFSA follows standard consultation protocols in making or changing rules or policy.

Issue 2: Annual Information Returns

Questions:

- 1) What concerns, if any, would you have with requiring an annual information return from all brokerages and administrators?

Licensed brokerages, lenders and administrators should file an information return to advise the regulator of their activities – this is a fairly standard requirement with most licensing programs.

- 2) What are the expected impacts to your business in requiring audited financial statements in place of an accountant's report on trust funds.

This may be a gross oversimplification, but market conduct regulation generally focusses on protecting consumers against bad industry conduct. Whereas, prudential regulation focusses on ensuring the stability of an entity to protect stakeholders in the business, such as bank deposit holders. Licensing programs are primarily a market conduct form of regulation, which ensures that licensees engage in appropriate conduct in delivering services to consumers which are authorized by the license, eg ensuring trust account activity is sound and trust monies are properly handled. Prudential regulation, which includes a capital adequacy requirement, is not the best regulatory model for mortgage brokerages, lenders and administrators. There is no public policy interest to be served by ensuring their capital adequacy through minimum capital holdings evidenced by financial statements

Issue 3: Enforcement and the BPCPA

Questions:

- 1) Would the administrative and enforcement provisions be clearer if they were all embedded directly in the MBA, and not split between the MBA and the BPCPA?
We have written two briefing notes touching on the BPCPA – 1) advance fees and 2) cost of credit disclosure. We recommend that the MBA contain its own provisions which are equivalent to Parts 2 and 5 of the BPCPA.
- 2) If enforcement provisions continue to be split, are there clarifications that could be made in the MBA to reduce complexity and uncertainty?
The only way to reduce complexity and uncertainty is to place all Part 2 and Part 5 BPCPA provisions relating to the mortgage industry into the MBA.

Issue 4: Enforcement

Questions:

- 1) Do you have any suggestions on ways to further improve enforcement powers and remedies?

Yes, we have written two briefing notes on enforcement issues

1) recommending settlement protocols and 2) recommending that the adjudication process be independent.

- 2) Given the significant monetary value of mortgages and the significant increase to penalties provided in other legislation that regulates real estate services is the current \$50,000 limit on the administrative penalties still appropriate?

\$50,000 represents a significant monetary penalty that is sufficiently large to provide a deterrent effect. We do not see the need to increase it. It should be made clear that the maximum penalties are for the worst offenders and the worst offences. In addition, having a self-funded government agency determining fines does not breed public confidence in enforcement decisions being neutral. This is so regardless of any level of care by the agency to be fair.

We appreciate the opportunity to provide the above responses, and would appreciate any further opportunities to give additional input as the consultation process continues.

Yours truly,



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