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Ministry of Finance  
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Dear Ministry Staff,

**Submissions Re: the Mortgage Brokers Act – Advance Fees Charged by Mortgage Brokers**

On behalf of the Mortgage Brokers Association of BC (MBABC) and the Mortgage Brokers Institute of BC (MBIBC), I would like to make submissions on changes to the *Mortgage Brokers Act* (the Act) concerning advance fees for residential mortgages charged by mortgage brokers.

By way of background, the MBABC is a 20 year old professional association which represents over 1600 mortgage professionals in British Columbia. The MBIBC is a non-profit organization which creates specialized mortgage industry education, which has been approved for relicensing qualification by FICOM.

**Current Legislation and Discussion**

Advance fees charged by anyone for arranging a residential mortgage are prohibited in British Columbia by the *Business Practices and Consumer Protection Act* (the BPCPA). Section 5 of the BPCPA prohibits mortgage brokers or lenders from engaging in deceptive acts or practices for transactions that are for primarily personal, family or household purposes. In addition, section 4(3) makes it a deceptive act or practice for any mortgage broker or lender to arrange a mortgage for a fee, **unless the fee is deducted from the mortgage advance at the time of closing**. Under s. 8 of the

*Mortgage Brokers Act*, the registrar of mortgage brokers may discipline a mortgage broker registrant for a breach of a provision of Part 2 of the BPCPA, which includes section 5. The result is that a registered mortgage broker or lender cannot take advance fees from clients for arranging residential mortgages, as fees can only be taken from the advance of mortgage funds at the time of mortgage funding.

One of the rationales behind the prohibition against advance fees would be to protect the public from a fraud, in which a fraudster, usually with an anonymous email address, website or cellular telephone number, solicits vulnerable, credit challenged people who seek funds, including mortgage funds. The fraudster then promises the mortgage funds to the vulnerable person in exchange for an advance fee, usually in the range of \$500 to \$2,000. The fraudster never funds the mortgage loan and keeps the advance fee. This kind of advance fee scam has been the subject of several cease and desist orders, which have been posted on the FICOM website since the registrar of mortgage brokers obtained administrative powers to issue cease and desist orders for unregistered activity. I note that all orders made by the registrar involving advance fee fraud involve unregistered persons and not any registered mortgage or submortgage brokers.

However, the problem with sections 4(3) and 5 of the BPCPC is that they are convoluted statutory prohibitions which define the taking of advance fees as a deceptive practice instead of simply prohibiting the activity. Additionally, these sections are exceptionally over reaching.

The challenge for many mortgage brokers is that they may be reluctant to take on difficult residential mortgage clients, when their fee is contingent on their application actually being approved and funded. Often mortgage files require many hours of preparation, document management and negotiation. Sometimes mortgage commitments are obtained by mortgage brokers after they have invested significant amounts of time into the file, but the client will eventually opt for alternative financing or decline the offered financing – this can happen even at the last minute, just prior to closing. Under the wording of sections 4(3) and 5, mortgage brokers will have no way of collecting fees when there is never any mortgage funding from which to deduct the fee.

All mortgage brokers who deal in residential mortgages are effectively prohibited from taking advance fees in order to assist in the prevention of a small number of fraudsters from taking advantage of the public. Most professionals, including lawyers, accountants

and realtors are able by contract to negotiate advance fees. Lawyers, for example, commonly ask for a retainer of funds from a client, which are kept in their trust account and withdrawn only when the services and an account have been rendered.

In Ontario, section 37(1) of the *Mortgage Brokerages, Lenders and Administrators Act* provides that “If the principal amount of a mortgage is \$300,000 or less, a brokerage shall not require a borrower to make, and shall not accept, an advance payment or deposit for services to be rendered or expenses to be incurred by the brokerage or any other person.” Advance fees are therefore permitted to be charged by mortgage brokers in Ontario for residential mortgages with a principal sum of over \$300,000.

In Alberta, section 71 of the *Real Estate Act Rules* (attached as Addendum “A”) place restrictions on the collection of an advance fee for assisting an individual in obtaining a mortgage from a lender. This Rule applies to a mortgage where the borrower is an individual who enters into a credit arrangement primarily for personal, family or household purposes. It prohibits collecting a fee from such an individual until the lender has provided written confirmation to fund the mortgage to the borrower, has provided an initial disclosure statement and at least two business days have passed since the disclosure statement was received (or the individual has waived the time period for its delivery in accordance with the *Fair Trading Act*). In Alberta then, mortgage brokers are entitled to charge fees in advance of mortgage funding if a mortgage commitment has been obtained and cost of credit disclosure rules are followed.

### Recommended Solutions

There should be a balance between safe guarding the public interest from advance fee fraud and permitting an industry member to charge fees or collect a retainer for work performed on behalf of the client. The MBABC and MBIBC propose that mortgage brokers should be entitled to collect advance fees for residential mortgage transactions so long as those funds are held in a trust account maintained by the mortgage broker, a lawyer or a notary, withdrawn in accordance with the terms of a Client Services Agreement and after the contractually agreed upon services of the mortgage broker have been performed. This is similar to the retainer system employed by lawyers in British Columbia (see rule 3-57 of the Law Society Rules, attached as Addendum “B” below).

In addition, like mortgage brokers in Alberta, mortgage brokers in British Columbia should be permitted to take a fee at the time they provide a mortgage commitment to the client, provided that cost of credit disclosure rules have been followed. Harmonizing the advance fee rule in British Columbia with that in Alberta for mortgage brokers further assists in fulfilling the mandate of the New West Partnership and Trade Agreement and the Agreement on Internal Trade, which promote labour mobility and harmonization between British Columbia and other provinces.

I note that there is currently no statutory requirement for mortgage brokers to enter into a Client Services Agreement, which sets out the services to be performed by the mortgage broker, the fees and costs to be charged to the client and the authorizations provided by the client to the mortgage broker needed to disclose information to lenders and obtain a credit bureau search. However, it is standard practice in the mortgage broker industry for an agreement and authorization to be entered into by the broker and client. Amending the *Mortgage Brokers Act* to require mortgage brokers to enter into a Client Services Agreement is an important consumer protection measure which will provide improved regulatory oversight concerning the charging of fees - such a provision will thereby enhance the protection of the public.

Recommendations: The MBABC and MBIBC recommend that:

- There be a statutory requirement for or a statutorily authorized rule requiring mortgage brokers to enter into of a Client Services Agreement with a client, which sets out the services to be performed by the mortgage broker, the fees and costs to be paid by the client, the terms of a retainer, and required authorizations to disclose client information to lenders and perform a credit bureau search on the client.
- Part 2 of the BPCPA in general, and more specifically sections 4(3) and 5 should be removed from the *Mortgage Brokers Act*.
- The *Mortgage Brokers Act* be amended to permit mortgage brokers to take a residential client fee retainer, which is to be kept in a trust account of a mortgage broker, lawyer or notary until the contractually agreed upon services have been performed, and/or permit mortgage brokers to collect a fee in advance of

mortgage funding upon obtaining a mortgage commitment and providing the client with cost of credit disclosure.

Yours truly,



Samantha Gale  
CEO, MBABC and MBIBC

#### Addendum "A"

#### Alberta Real Estate Act Rules

##### Collection of Fees

- 71(1) Subject to section 71(2), a brokerage must not charge, collect or attempt to collect a fee from a person for assisting the person in obtaining a mortgage from a lender until the following conditions have been met:
- (a) the lender has provided a written confirmation to fund the mortgage, accepted by the borrower and the commitment has been provided to the borrower or the borrower's associate; and
  - (b) the lender or the lender's agent has provided the person with an initial disclosure statement and at least two business days have passed since the initial disclosure statement was received by the person or the person has waived the time period for delivery in accordance with the *Fair Trading Act*.
- 71(2) Section 71(1),
- (a) only applies to a mortgage where the person is an individual who enters into a credit arrangement primarily for personal, family, or household purposes; and
  - (b) does not apply to actual fees disbursed by the brokerage to third parties for credit reports, Alberta Registries, courier and appraisal services if a written agreement exists between the brokerage and the person where the person agrees to compensate the brokerage for these costs.

## Addendum "B"

### Law Society Rules

#### PAYMENT OF FEES FROM TRUST

**3-57** (1) In this Rule, "**fees**" means fees for services performed by a lawyer or a non-lawyer member of the lawyer's MDP, and taxes on those fees.

(2) A lawyer who withdraws or authorizes the withdrawal of trust funds under Rule 3-56 in payment for the lawyer's fees must first prepare a bill for those fees and immediately deliver the bill to the client.

(3) A bill or letter is delivered within the meaning of this Rule if it is

(a) mailed to the client at the client's last known address,

(b) delivered personally to the client,

(c) transmitted by electronic facsimile to the client at the client's last known electronic facsimile number,

(d) transmitted by electronic mail to the client at the client's last known electronic mail address, or

(e) made available to the client

(i) by means that allow the client to review the content of the document and save or print a copy, or

(ii) by other means agreed to by the client.

(4) As an exception to subrule (2), a lawyer need not deliver a bill if the client instructs the lawyer otherwise in writing.

(5) A lawyer must not take fees from trust funds when the lawyer knows that the client disputes the right of the lawyer to receive payment from trust funds, unless

(a) the client has agreed that the lawyer may take funds from trust to satisfy the lawyer's account and the client has acknowledged that agreement in writing or the lawyer has confirmed the client's agreement in a letter delivered to the client,

(b) a bill has been delivered under subrule (3), whether or not the client has directed otherwise under subrule (4),

(c) the lawyer has given the client written notice that the fees will be taken from trust unless, within one month, the client commences a fee review under section 70 of the Act or an action disputing the lawyer's right to the funds, and

(d) the client has not commenced a fee review under section 70 of the Act or an action at least one month after written notice is given under paragraph (c).

(6) Despite subrule (5), if a lawyer knows that the client disputes a part of the lawyer's account, the lawyer may take from trust funds fees that are not disputed.

(7) A lawyer must not take fees from trust funds impressed with a specific purpose, if the object of the trust has not been fulfilled, without the express consent of the client or another person authorized to give direction on the application of the trust funds.