



June 6, 2017

Standing Committee on Finance
Parliament of Canada
Ottawa, Ontario
K1A 0A9

Dear Committee Members:

Re: Consumer Protection and Oversight in Relation to Schedule I Banks

The Canadian Mortgage Brokers Association (CMBA) wishes to make submissions to your committee on the subject of the “Consumer Protection and Oversight in Relation to Schedule I Banks”, which we understand the Committee to be currently reviewing. We wish to make comments on the subject of banks engaging in mortgage brokering without being licensed under provincial mortgage broker legislation and following mortgage broker conduct rules.

About the CMBA

The CMBA is an inter-jurisdictional umbrella association consisting of provincial mortgage broker associations in Canada, which include associations in Atlantic Canada (Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador), Ontario and British Columbia. We estimate that mortgage brokers in Canada fund over \$ 70 billion in mortgages annually.

Lack of a Level Playing Field with Bank Mortgage Brokering

In August of 2014, the Mortgage Broker Regulators’ Council of Canada published a report on its assessment of mortgage broker practices around ensuring mortgage product suitability for clients¹. In reviewing this report, many mortgage brokers have favoured the creation of mortgage broker product suitability standards, but only if the banks had to comply with the same standards in order to create a level playing field. Both mortgage brokers and provincially regulated private lenders have continuously questioned why banks do not have to comply with the various consumer protection rules and standards imposed by provincial authorities.

¹ <https://www.mbrcc.ca/files/pdfs/en/Product%20Suitability%20Review.pdf>

For example, In British Columbia, some banks routinely charge more for executing a mortgage discharge than the \$75 limit imposed by the *Business Practises and Consumer Protection Act*.

Overlapping Mandates with Regulatory Gaps

The Canadian Bankers Association (CBA), in recent submissions on Canada’s Financial Consumer Protection Mandate asserted, “Despite the fact that the Constitution gives the federal government exclusive jurisdiction over “banks” and “banking,” some proponents continue to believe that provinces have a complementary role to play in this area. That would not be good for consumers. It would be confusing to have overlapping and conflicting federal and provincial disclosure requirements, and consumers would not know whether to complain to the federal regulator or their provincial regulator if they had a concern about their bank.”²

The CMBA would agree with the CBA that overlapping or duplicate regulation does not benefit consumers. Advocating for banks to deliver both federal and provincial forms of cost of credit disclosure does not make sense. However, we need to look more carefully at the question of whether federally regulated financial institutions should comply with provincial requirements where there are clearly regulatory gaps in federal legislation, such as with the lack of limits on discharge fees.

Bank Mortgage Brokering

However, a more poignant example of a regulatory gap with banks can be found with the concept of bank mortgage brokers – the ones who negotiate mortgage arrangements for borrowers, not with the bank itself, but with other third-party lenders. An article in the Globe and Mail (Rob McLister, February 11, 2013) examined this practice at the Royal Bank of Canada: “RBC . . . mortgage reps route applicants that don’t meet normal guidelines to their Alternate Mortgage Solutions (AMS) team. RBC’s AMS employees then farm those customers out to other lenders and the bank’s mortgage rep gets paid when the mortgages close.” According to Steven Gargani from CanadaMortgageNews.ca (April 25, 2011), “Back in the early 2000s, RBC created the Alternative Mortgage Solutions (AMS). This department would take declined mortgage applications and broker them to secondary Lenders like Home Trust, Equitable Trust and other institutional Lenders or Private Lenders. The intention was to retain as much client business as possible while also generating a new source of revenue.”

Some of these deals truly befuddle borrowers who walk into a bank expecting to get a conventional bank mortgage, and instead end up with a private mortgage with an unfamiliar lender and sizeable broker fees. Bank brokers do not provide borrowers with conflict of interest disclosures which explains who the bank broker represents or how and how much the bank broker gets paid. In fact banks operate like a mortgage shop, where

² http://www.cba.ca/Assets/CBA/Files/Article%20Category/PDF/sub_20140227_consumerprotection_en.pdf, page 4

qualified mortgage borrowers are offered a bank mortgage to which they can say “yes, please” or “no, thank you.” This service model is fundamentally different from how most mortgage brokers operate. They work on behalf of clients as agents or quasi-fiduciaries to get them the best mortgage deal possible. So exactly how do bank brokers work, and is there adequate federal legislation in place to regulate them? Is the bank broker an employee of the bank who is just funnelling a declined mortgage application through private channels to make the bank a buck, or are they agents of the borrower who work as a fiduciary to find the borrower the best deal?

We can address the concerns made by the CBA by asking whether these provincial consumer protection requirements unduly interfere with the federal jurisdiction over banking. Conveniently enough, the Supreme Court of Canada has rendered a long-awaited and ground breaking decision that provides guidance on this issue. In the case of *Bank of Montreal v. Real Marcott* (and two other cases), a class action suit was brought against the bank for failing to disclose exchange fees on credit cards as credit charges as required by the Quebec consumer protection legislation. The bank argued that the Canadian constitution gave the federal Parliament exclusive jurisdiction to regulate banks. However, the court decided that Quebec’s consumer protection legislation is “constitutionally applicable and operative” to banks. The concept of “interjurisdictional immunity”, which prevents one jurisdiction from encroaching on the laws of another, only applies if the encroaching law “seriously or significantly trammels” the core area of responsibility of the other jurisdiction. In this case, the obligation to disclose exchange costs, as required under the Quebec legislation, did not impair or prevent banks from exchanging foreign currency. The court concluded, “Requiring banks to inform customers of how their relationship will be governed or be subject to certain remedies does not limit banks’ abilities to dictate the terms of that relationship or otherwise limit their activities. Similarly, even if foreign currency conversion is accepted as being part of the core of the federal banking power, imposing a broad disclosure requirement for charges relating to currency conversion in no way impairs that power.”

We can easily apply the principles as set out by the Supreme Court in *Marcott* to the case of bank brokering. Complying with the requirements of the mortgage broker licensing does not prevent banks from brokering mortgages. There are not even any competing provisions of the Bank Act or regulations that govern the act of brokering mortgages.

The additional criticism from the CBA that provincial consumer protection requirements imposed on banks will confuse consumers is not necessarily accurate either. This is particularly true in the case of bank brokering, as the public generally views banks as deposit takers and lenders, and not as financial intermediaries. In the case of bank brokers, the public will surely be more confused (perhaps even shocked) by the concept of bank employees acting like brokers, than the provincial regulation which may govern this scenario.

Steven Gargani summed the issue up as follows: “The AMS is paid a referral fee from the secondary Lending institution and or charges a fee. That’s right . . . they charge a fee!! And you guessed it, the Mortgage Rep is compensated at the end of the day based on the fees earned on the mortgage . . . Effectively, RBC is brokering mortgages without being a broker . . . Let’s give credit where it’s due . . . they have become a mortgage brokerage without having to follow the strict regulations and guidelines of becoming a broker.”

Mortgage Broker Licensing Legislation Clearly Capturing Bank Brokers

Mortgage brokers and administrators in New Brunswick have been required to obtain licensing with the Financial and Consumer Services Commission (FCSC) as of April 1, 2016. The new licensing requirements mean that all persons who arrange mortgages for borrowers and private investors, or who administer mortgages on behalf of private investors, will no longer be able to operate without a required licence.

But exactly who is captured by the new licensing requirements? The New Brunswick legislature has taken a progressive approach to drafting its mortgage broker licensing statute, with many of the provisions mirroring those contained in the Ontario licensing statute. One is that New Brunswick appears poised to regulate bank brokers by requiring those who place borrowers with third-party mortgage lenders to get licensed.

As expected, financial institutions, which include banks and insurance companies, are exempt from New Brunswick licensing requirements for mortgage brokers. The FCSC explains the rationale: “Banks, including their affiliates and subsidiaries, as well as other federally regulated financial institutions, are subject to federal oversight.” However, the FCSC, when drafting the rules, received recommendations from the public which urged the FCSC not to exempt financial institutions from licensing requirements “when the person representing the financial institution arranges a mortgage with a third-party lender who is not that financial institution (or its affiliate or subsidiary).” This is because when “the lender is unable to place the borrower with their own mortgage products, then they are conducting mortgage brokering activities and should not benefit from the exemption for financial institutions.”

Accordingly, the majority of bank mortgage specialists who place mortgages with their own employer are exempt, while those, fewer in number, who broker or arrange mortgages with other lenders will now need to get licensed as a mortgage broker in the province of New Brunswick.

The Ontario mortgage broker legislation contains a similar exemption provision. However, despite being in force for the last 10 years, it appears to have had next to no traction, as not a single bank broker doing third party lending has yet obtained mortgage broker licensing in Ontario.

Recommendations for Improving Oversight in Relation to Bank Mortgage Brokering

The CMBA urges the government to take action to ensure that bank mortgage brokers 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.

Thank you for the opportunity to present submissions to your committee on the subject of Consumer Protection and Oversight in Relation to Schedule I Banks. Please know that any we are available for further discussion on this subject.

Yours truly,

A handwritten signature in cursive script, appearing to read 'S. Gale'.

Samantha Gale,
Executive Director, the Canadian Mortgage Brokers Association