

CHAPTER 2

THE MORTGAGE BROKERS ACT AND PROFESSIONAL ETHICS



Learning Objectives

After studying this chapter, a student should be able to:

- Discuss the purpose and the scope of the *Mortgage Brokers Act* (the “Act”)
- Describe how the Act is administered
- Describe the system for registration of mortgage brokers
- Describe how the Act governs the conduct of mortgage brokers
- Discuss how the Act provides protection to the public
- Describe some of the consequences of a mortgage broker’s breach of the Act
- Describe the Registrar of Mortgage Brokers’ disciplinary and enforcement procedures
- Discuss the meaning of the term “professional ethics”
- Explain the purpose and scope of a code of ethics
- Discuss the wide variety of duties and responsibilities of mortgage brokers
- List the common disciplinary procedures available to a professional association

INTRODUCTION

The *Mortgage Brokers Act* (the “Act”) and the *Mortgage Brokers Act Regulations* (the “Regulations”) are provincial statutes that regulate the conduct of all persons who deal in mortgages in British Columbia. Furthermore, the *Business Practices and Consumer Protection Act* contains provisions governing mortgage broker conduct. This chapter begins by introducing the registration body and system for submortgage and mortgage brokers, including the powers of the regulator, the Registrar of Mortgage Brokers. Next, the chapter overviews the major regulated aspects of a mortgage broker’s market conduct. The chapter concludes with a discussion of professional ethics.

In this chapter, and those that follow, various sections of statutes will be referenced. As a student, you are not expected to memorize the section numbers of those statutes. Instead, you should focus on the content of the

provisions. You may want to familiarize yourself with the relevant legislation through the link provided on your Course Resources webpage.

THE REGISTRATION BODY – THE REGISTRAR OF MORTGAGE BROKERS FOR THE PROVINCE OF BRITISH COLUMBIA

Under the Act, the “registrar” has the powers, and must discharge the duties conferred or imposed on the registrar by the Act. In other words, the registrar is responsible for the administration of the Act. The Registrar of Mortgage Brokers (the “Registrar”) within BC Financial Services Authority (BCFSA) fulfils the duty of the registrar as provided for in the Act. BCFSA is an independent Crown regulatory agency that administers a number of statutes and regulations. BCFSA’s provincial regulatory jurisdiction extends to credit unions and trust companies, insurance, pensions, and mortgage brokerage.

Section 3 of the Act requires mortgage brokers and submortgage brokers to be registered in the mortgage broker register, which is maintained by the Registrar. The Registrar also periodically publishes Information Bulletins that clarify how the Act and Regulations will be interpreted in practice. Further information about the Registrar is available at: www.bcfsa.ca.

THE REGISTRATION SYSTEM

Purpose of the Registration System

The purpose of the Act is to protect the public by:

- ensuring that those offering mortgage brokerage services meet certain minimum reasonable competency requirements in order to obtain registration;
- setting out certain standards to ensure that mortgage brokers and submortgage brokers conduct themselves appropriately in the course of their business; and
- establishing a registrar to administer the Act, including the granting of registrations, investigating complaints, and providing for disciplinary powers in the case of a contravention of the Act or the Regulations,

including the freezing of trust funds, suspension or cancellation of registration and other administrative penalties.

In order to fulfil these three key objectives, the Act sets out a registration system for individuals involved in mortgage brokerage activities.

Key Registration Concepts in the Act

Section 1 of the Act defines two types of persons that require registration under the Act: mortgage brokers and submortgage brokers. An individual, corporation, firm, partnership, association, syndicate or unincorporated organization may be registered as a mortgage broker; however, only individuals may be registered as submortgage brokers.

Mortgage Broker

Section 1 of the Act defines a mortgage broker as follows:

“mortgage broker” means a person who does any of the following:

- (a) carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker’s own or that of another person;
- (b) holds himself or herself out as, or by an advertisement, notice or sign indicates that he or she is, a mortgage broker;
- (c) carries on a business of buying and selling mortgages or agreements for sale;
- (d) in any one year, receives an amount of \$1,000 or more in fees or other consideration, excluding legal fees for arranging mortgages for other persons;
- (e) during any one year, lends money on the security of 10 or more mortgages; or
- (f) carries on a business of collecting money secured by mortgages.

The Registrar interprets the phrase “arranging mortgages” in section 1(d) to include any essential activity which is part of the process of a borrower obtaining a mortgage from a lender. Moreover, an individual begins the process

of arranging a mortgage from the time they begin to communicate with a prospective borrower about mortgages.

The Registrar's Information Bulletin MB 08-001 sets out specific activities which may be regarded as part of the mortgage arranging process, depending on the totality of circumstances of the particular case. These include:

- engaging in the businesses of soliciting borrowers for the purpose of mortgage referrals, including engaging in the business of offering mortgage lead generation services by gathering the names of potential mortgage borrowers and providing lists of those potential borrowers to mortgage brokers;
- taking mortgage applications, including simple applications which may be used by mortgage lead generators to collect borrower data or gathering application information through the telephone or other telecommunication mediums;
- explaining mortgage terms and options, including the provision of simple mortgage information or advice on websites intended to attract potential mortgage borrowers;
- reviewing mortgage documentation;
- obtaining credit checks; and
- providing mortgage advice, including advice on how to deal with mortgage proceeds or mortgage payments.

In regard to the activity of engaging in the business of soliciting borrowers for the purpose of mortgage referrals, registration is not required under the Act if an individual simply becomes aware of prospective borrowers and does no more than provide the name of a mortgage broker or lender to a borrower, or likewise, the name of a borrower to a mortgage broker or lender, regardless of the amount of compensation they receive for the referral.

Under the Act, the registered mortgage broker is generally the company, partnership or sole proprietorship involved in mortgage brokerage. Submortgage brokers are the individual employees of the mortgage broker who arrange mortgages on behalf of the mortgage broker. In the case of a sole

proprietor, the proprietor may effectively be both the mortgage broker and submortgage broker.

Each mortgage broker must have a registered submortgage broker act as the Designated Individual responsible for the mortgage brokerage office. The Designated Individual will generally be an officer or director of a corporate mortgage broker, a general partner in a mortgage broker partnership, or the sole proprietor. The responsibilities and required qualifications of a Designated Individual are discussed later in this chapter.

As a Mortgage Broker...

It is important to understand the distinction between a submortgage broker and mortgage broker and to ensure that you are referring to yourself in the correct manner in the industry. If you are a submortgage broker, you should not be calling yourself a mortgage broker.

Completing this course, the Mortgage Brokerage in British Columbia course, satisfies the minimum educational requirements for registration as a submortgage broker in British Columbia and will qualify you to work for a registered mortgage broker.

To apply to become a mortgage broker (with the ability to hire submortgage brokers), you must first be registered as a submortgage broker. You will read more about the requirements for becoming a mortgage broker, including the requirement to have a registered submortgage broker acting as its Designated Individual, later in this chapter.

Submortgage Broker

A submortgage broker is an individual (not a company, partnership, etc.) who does any or all of the things that a mortgage broker (which *can* be a company, partnership, etc.) does, and is employed by a mortgage broker, or is a director or a partner of a mortgage broker. Section 1 of the Act defines a submortgage broker as follows:

“submortgage broker” means any person who, in British Columbia, actively engages in any of the things referred to in the definition of mortgage broker and is employed, either generally or in a particular case, by, or is a director or a partner of, a mortgage broker.

A submortgage broker designation is the level for which an individual meeting the educational requirements can be registered. In order to maintain registration as a submortgage broker, an individual must be employed by, or be a director or partner of, a mortgage broker.

Offences and Penalties

Under sections 21 and 22 of the Act, a person commits an offence if that person:

- carries on business as a mortgage broker or submortgage broker unless the person is registered under the Act; or
- employs as a submortgage broker any person not registered under the Act.

If the person is an individual, he or she is liable:

- on a first conviction, for a fine of not more than \$100,000 or to imprisonment for not more than 2 years or to both; and
- on each subsequent conviction, to a fine of not more than \$200,000 or to imprisonment for not more than 2 years or to both.

If the person is a corporation, it is liable, on a first conviction to a fine of not more than \$100,000 and on each subsequent conviction to a fine of not more than \$200,000.

Mortgages Not Voided by Failure to Register

Section 13 of the Act states that no mortgage is rendered void or unenforceable because of the failure of a person acting as a mortgage broker to register properly under the Act. The effect of this section is retroactive to January 1, 1972, and as such any mortgage agreement that commenced after that date is covered by the section. This provision is designed to give certainty to both lenders and borrowers in that a mortgage transaction will not collapse simply because the mortgage broker was improperly registered.

Employee vs. Independent Contractor

In the past, some submortgage brokers have set up payment arrangements with their brokerage whereby commissions are paid to a company that is solely owned by the submortgage broker. This arrangement effectively created an independent contractor relationship between mortgage broker and submortgage broker. In June of 2004, a letter from the Registrar issued to all mortgage brokerages clarified that the Registrar does not consider this practice to conform to the legislation. The letter made it clear that the practice of the

Registrar is to register only individuals as submortgage brokers, and that companies do not meet this legislative requirement. If the company belonging to the submortgage broker receives payment for providing mortgage services (commission paid by the employing broker), the company is actually carrying on business as a mortgage broker itself in that it is receiving money for providing mortgage services, and therefore breaching section 21(1)(a) of the Act because it is not separately registered.

Exemptions from Registration

While the registration requirements apply generally across the province, there are numerous exemptions for individuals or entities that may otherwise fall within the expansive definition of a mortgage broker. These exemptions are set out at section 11 of the Act and include:

- insurance companies licensed under the *Financial Institutions Act*, and their directors and employees;
- banks under the *Bank Act* (Canada), and their directors and employees;
- credit unions, and their directors and employees;
- extraprovincial trust companies authorized by the *Financial Institutions Act*, and their directors and employees;
- a lawyer, if the loan transaction is made in the course of his or her practice as a lawyer;
- any person acting for the government or for an agency of the government;
- a liquidator, receiver, trustee in bankruptcy, or person acting under the authority of any court or an executor or trustee acting under the terms of a will or marriage settlement while acting as mortgage broker or submortgage broker under their proper name;
- a person, or an employee of a person, lending money, directly or indirectly, on the security of land to provide housing for the person's employees; or
- any other person or class of persons who are exempted by the Registrar.

The preceding exemptions are included in the Act either because, in the case of an individual, training and educational requirements that meet or exceed those required of mortgage brokers are already required, or because the legislature has decided that registration under the Act is not necessary to protect the public interest.

Unregistered Assistants

Mortgage brokers may employ assistants, who are not registered under the Act, to perform day-to-day administrative work. However, unregistered assistants may not perform any of the essential functions of a “mortgage broker”, as defined in section 1(a) to (f) of the Act.

An unregistered person may not, among other things:

- conduct certain marketing activities or solicit mortgage business from the public or other related industry members;
- provide mortgage advice or information to, or review and explain certain documents, or negotiate fees or commissions with, clients, potential clients, borrowers or lenders;
- accept mortgage applications from borrowers or lenders;
- communicate with lenders about the merits of borrower applications, and vice versa;
- determine what documentation is required from a borrower or a lender in a mortgage transaction; or
- review and vet borrower qualification information.

Unregistered assistants, while under the supervision of a registered broker, may:

- order certain documents or send and accept certain documentation between the registered broker and the borrower or lender;
- perform accounting or bookkeeping services for the broker; and
- prepare documentation for the broker to execute with clients, provided that the documentation will be reviewed and vetted by the registered broker.

Mortgage brokers will be liable for the actions of their assistants and must ensure that unregistered assistants are competent, supervised and identified as their assistants to the public, clients and other industry members. For further guidance on the permissible role and conduct of unregistered assistants, see the Registrar's Information Bulletin MB 12-002.

Licensees Under the Real Estate Services Act

Prior to 2001, individuals licensed under the *Real Estate Act* (now the *Real Estate Services Act*) were exempt from the registration requirements of the Act. This was the case because the course that is required to obtain a licence as a real estate representative was also deemed to satisfy the educational requirements to become a submortgage broker. Notwithstanding the partial overlap in educational requirements, the blanket exemption has been taken out of the Act.

Division 7 of the Regulations still creates a specific exemption from the registration requirements of the Act for real estate licensees who facilitate the sale of a vendor take-back mortgage where that transaction is ancillary to the real estate licensee's role in the transaction that gave rise to the mortgage. This would be relevant where the real estate licensee was a representative who was involved in a transaction where a vendor take-back mortgage was necessary to finance the purchase of the property. The licensee is exempt only from the registration provisions of the Act, and therefore all of the sections dealing with conduct of mortgage brokers apply equally to real estate licensees.

Aside from this exemption, a licensee under the *Real Estate Services Act* must now register with the Registrar of Mortgage Brokers in order to provide any of the services for which the Act requires registration (described previously).

Registration Requirements

Section 3 of the Act governs the registration of mortgage brokers and submortgage brokers in British Columbia. As mentioned earlier, registration as a mortgage broker can be granted to an individual, corporation, firm, partnership, association, syndicate or any unincorporated organization. Employees of the mortgage broker who are engaged in any of the activities mentioned in the definition of "mortgage broker" must be registered as submortgage brokers.

In order to qualify as a mortgage broker, each applicant must fill out a registration application, submit a criminal record check (in the case of a corporation, this applies to every mortgage broker or submortgage broker who will be employed, whether active in the mortgage brokering business or not), and pay a fee of \$1,000. Corporate applicants must also provide a Certificate of Incorporation or Certificate of Extra-Provincial Registration, and are required to maintain an address for service in British Columbia. Each submortgage broker who will be employed at the brokerage must also submit a criminal record check, provide evidence of satisfying the educational requirement and pay a fee of \$1,000.

There are a number of courses and programs that satisfy the educational requirement, with the most popular being this course, the Mortgage Brokerage in British Columbia course. The educational requirement can be modified or waived for certain individuals if they have significant experience in the mortgage broker industry, they are licensed or registered as a mortgage broker in another province, they have obtained other real estate related education or experience, or they are a former registrant who is seeking to reactivate their registration.

Additionally, every person applying to be registered as a submortgage broker must be sponsored by a mortgage broker. On the application to register as a submortgage broker, the Designated Individual responsible for a mortgage brokerage office is required to certify that they are satisfied through personal knowledge that the applicant has a good business reputation and the qualifications required to be a submortgage broker.

ALERT

From the Registrar

The certification on the submortgage broker's application for registration is an important responsibility of the Designated Individual. Before providing such certification, the Registrar states that the Designated Individual is required to:

...exercise due diligence to determine the experience, qualities and business reputation of the applicant. This may require the Designated Individual to interview the applicant, contact references, verify the applicant's employment history, or ensure that full details of an applicant's criminal record or outstanding civil proceedings and judgments are attached to the application and are discussed with the applicant.

The Registrar may take regulatory action against mortgage brokers who sponsor applicants for registration if they fail to exercise due diligence to ascertain the experience, qualities and business reputation of the applicant submortgage broker. As a prospective submortgage broker, it is important that you assist your Designated Individual in assessing your suitability for registration, as regulatory action against your Designated Individual and mortgage broker could impact your continuing career and practice with that broker.

Source: BCFSA. Bulletin MB 07-001 (January 4, 2007)

Renewal Requirements

For both mortgage brokers and submortgage brokers, registration must be renewed every two years. The Registrar requires registrants seeking registration renewal to complete education delivered by BCFSA and/or other approved providers such as the Mortgage Brokers Institute of British Columbia (MBIBC) or Mortgage Professionals Canada. Renewal requirements change periodically – current requirement information can be found at www.bcfsa.ca within Information Bulletin MB 14-002.

Renewal applications, which are similar in format to registration applications, require certain disclosure, a criminal record check and a fee (\$500).

Review of Registration and Renewal Applications

According to section 4 of the Act, the Registrar must grant registration to an applicant if he or she is suitable for registration and the proposed registration is not objectionable. Furthermore, the Registrar must not refuse to grant registration without giving the applicant an opportunity to be heard, and the Registrar may attach conditions or restrictions to the registration. For example, the Registrar may require that all of a submortgage broker's transactions be approved by the Designated Individual.

The Act confers wide-ranging powers of investigation on the Registrar to obtain information that can inform the decision of whether to grant registration to an individual or organization.

As mentioned previously, in addition to meeting the applicable educational requirements, individual applicants for registration or renewal under the Act are required to demonstrate that they are suitable for registration and that the proposed registration is not objectionable. It is important to note that the

suitability of a registrant is an ongoing assessment, which begins when the applicant applies for registration, and continues to each registration renewal. Suitability will be lacking when an applicant's honesty, reliability and integrity are put into question. Examples of situations where suitability will be questioned are when the applicant lies on the application or submits false documents in support of an application. Furthermore, in order for the Registrar to assess applicant suitability, the application form requires disclosure relating to the following matters:

- 1. Criminal Convictions and Pending Criminal Charges:** whether the applicant has been charged or convicted without pardon of any criminal offence or offences, anywhere in the world. If so, the applicant must provide a detailed explanation of them, including the circumstance under which the charges were laid, the specific offences, whether they resulted in convictions, relevant dates, and a description of the disposition of the charges and any penalty imposed. The existence of a criminal record or outstanding criminal charges will not necessarily preclude the applicant from registration.
- 2. Regulatory Issues with Related Licensing or Registration:** whether the applicant is or has been licensed, registered or authorized in any capacity under a related statute (*Financial Institutions Act, Real Estate Services Act, Securities Act*, etc.) in British Columbia or elsewhere, and if he or she has ever been refused a licence or registration or been disciplined by a regulatory body.
- 3. Judgments and Pending Litigation:** whether the applicant has had any judgments rendered against him or her within the last five years for any reason whatsoever from any civil court in British Columbia or elsewhere, and the details in each case. Furthermore, the applicant must disclose whether there are any pending legal proceedings which have been brought against him or her (see the Alert! box below for an example).
- 4. Bankruptcy:** whether the applicant has ever been subject to bankruptcy proceedings, and if so, whether he or she has been discharged.

Furthermore, as previously mentioned, applicants must supply the Registrar with a current and original “Certified Criminal Record Check” (CCRC), which is dated not more than six months prior to the date of application. The Registrar will also examine the CCRC in aid of its determination on applicant suitability.

ALERT

In Information Bulletin MB 11-002, the Registrar highlights the importance of being truthful in one’s application for registration. The Bulletin states:

The Registrar expects that each applicant will complete registration applications with truthful and complete information. The Registrar considers it a serious matter for any applicant to provide false information in an application by either making false statements or failing to provide complete and truthful statements. Providing false or incomplete information to the Registrar’s staff may affect an applicant’s suitability to be registered and may result in the refusal, suspension or cancellation of registration. Applicants are advised to read the application questions carefully, and to contact their Designated Individual and the Registrar’s staff if uncertain about how to provide a clear response to a question or issue.

In one particular case, a submortgage broker, Mr. C, was subject to disciplinary proceedings because, among other things, he submitted a number of applications for registration which contained false and misleading statements, concealing the fact that he had a multitude of unsatisfied judgments and foreclosure proceedings rendered against him. The Registrar highlighted the importance of complete and accurate disclosure in the following manner:

Mortgage transactions are complicated areas for most consumers, and as a result, an information imbalance exists between the broker and the consumer. The legislation recognizes this and, in order to ensure consumers are protected, the financial services professional is required to provide stringent disclosure to consumers. [Mr. C] has admitted to not making disclosure in five separate applications for registration. His excuse for doing so is that he did not place importance on the disclosure process. The public needs protection from individuals who do not think the disclosure process is important.

Furthermore, the Registrar noted that, because of the submortgage broker’s outstanding debt obligations, which totalled over \$195,000, he was not in a position to advise consumers of mortgage transactions. In conclusion, the Registrar determined that the submortgage broker could not apply for registration for a period of five years.

The overarching principle here is that by not being truthful on one’s application, one could be making a relatively minor issue a much larger one.

Suspension of Registration

Pursuant to section 3(8) of the Act, if a submortgage broker ceases to be employed at a brokerage, the termination of that employment operates as a suspension of the submortgage broker’s registration until he or she gains employment with another registered mortgage broker, who must provide

written notice of the employment to the Registrar. Furthermore, the mortgage broker under which the submortgage broker ceased to be employed must provide the Registrar with notice of such fact, including the reason for the termination of employment.

THE REGISTRAR'S POWERS OF INVESTIGATION

Sections 5 and 6 of the Act regulate the Registrar's power to investigate and conduct inquiries into the conduct of mortgage brokers and submortgage brokers. Section 5 states that the Registrar may, on its own volition, or must, in response to a complaint, investigate any matter or thing arising out of the Act or Regulations. As you can see, the scope of investigation can be extremely broad.

According to section 6, the Registrar's powers of investigation are wide and allow its staff to enter brokerage offices, inspect all books of account and other records, and to seize any relevant information. Furthermore, the Registrar has the same power as a court (for the trial of civil actions) to summon and enforce the attendance of witnesses and compel them to give evidence and produce documents, property, assets, etc. Registrants are required to cooperate with the Registrar in its investigation. The Act states that failure or refusal of a person to attend, to answer questions or to produce the records, property, assets or things in the person's custody or possession, makes that person liable to be convicted for contempt by a court. Furthermore, a person must not withhold, destroy, conceal or refuse to give any information, or produce any record, property or asset that is required by the Registrar.

ALERT

In one case,¹ a submortgage broker entered a consent order with BCFSA in which the Registrar found that the submortgage broker contravened the Act by failing to comply with a summons issued by the Registrar when the submortgage broker unilaterally terminated an interview at the Office of the Registrar. As a result of this failure to comply, the Registrar ordered the submortgage broker to pay an administrative penalty of \$50,000 and investigation costs of \$1,500. The submortgage broker was registered from 2010 to 2018, but never brokered any mortgage transactions nor submitted any mortgage applications to a lender. During that same time period, the submortgage broker applied twice, as a borrower, for two separate mortgages to purchase two separate properties, with the assistance of two different registered submortgage brokers. It was discovered that certain information and documents submitted by these two different submortgage brokers in relation to these two mortgages were not genuine. As part of the investigation into these two different submortgage brokers, the submortgage broker at issue in this case was being interviewed as a witness when they unilaterally left the interview before it concluded. This is a reminder that mortgage brokers have a duty to attend and

cooperate during an investigation and that ignoring questions from the Registrar can result in disciplinary action.

Authority under section 7 is also given to freeze the trust funds of any mortgage broker pending the outcome of an investigation.

ALERT

In one particularly egregious case of mortgage broker misconduct, Eron Mortgage Corporation (which will also be discussed in detail at a later point in this chapter), a company registered as a mortgage broker, was alleged to have inappropriately used funds provided to it by lenders and investors for purposes unauthorized by the Act, including paying for personal expenses and investing in corporations in which Eron had an interest. At the time of investigation, it was estimated that Eron would only be able to repay 18% of the loans advanced to it. This led the Registrar to suspend Eron's registration as a mortgage broker and issue a "freeze" order in respect of its assets pursuant to section 7 of the Act.

POWERS OF DISCIPLINARY ACTION

Once the Registrar has completed its investigation, it may take enforcement action if, in its opinion, any of the following apply:

- the person is no longer suitable to be registered or continued registration is objectionable;
- the person is in breach of the Act, the Regulations or a condition of registration;
- the person is a party to a mortgage transaction that is harsh and unconscionable or otherwise inequitable;
- the person, in a record filed or provided under the Act, has made a false or misleading statement of a material fact, or omitted to state a material fact;
- the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest; or
- the person breached any provision in the *Business Practices and Consumer Protection Act* that are incorporated under the *Mortgage Brokers Act*.

Section 8 states that such action must only be taken after it has given the person an opportunity to be heard. However, there may be circumstances where it would, in the Registrar's opinion, be prejudicial to the public interest to wait the length of time necessary to give the person the opportunity to be heard before acting. In these urgent circumstances, the Registrar may exercise some of its disciplinary powers without giving a person the opportunity to be heard.

ALERT

In one particular case, the Registrar found that a company identifying itself as a mortgage investment corporation ("MIC"), was carrying on business without being registered as a mortgage broker. Furthermore, the Registrar had received complaints of misconduct by one of MIC's directors, Mr. L (a registered submortgage broker), with respect to his prior involvement in a number of other mortgage investment corporations. Due to the fact that MIC was a key sponsor at an upcoming investment conference, the Registrar issued an urgent cease and desist order against MIC and a suspension order against Mr. L, without giving either the opportunity to be heard. The Registrar stated that,

I AGREE with Staff that hearings in relation to [Mr. L's] suitability and [MIC]'s unregistered mortgage broker activity would require more time than is available between now and February 15, 2014, when [Mr. L] and MIC are expected to promote investment opportunities in MIC to the public at the Investment Alternatives Conference.

I AM THEREFORE OF THE OPINION that the length of time that would be required to hold hearings to make orders under ss. 8(1) or 8(1.4) of the Act would be detrimental to the due administration of the Act given that it would likely result in further non-compliance with the provisions of the Act and therefore significant further potential risk to the public.

Source: www.bcfsa.ca/pdf/enforcement/mb/mba20140211.pdf

With respect to the enforcement action available to the Registrar, section 8 states that the Registrar may make one or more of the following orders:

- suspension of the person's registration;
- cancellation of the person's registration;
- that the person cease a specified activity; and
- that the person must carry out specified actions that the Registrar considers necessary to remedy the situation.

Furthermore, the Registrar has the power to order a person to pay an administrative penalty of up to \$50,000 if the person:

- is in breach of the Act, the Regulations or a condition of registration;

- is a party to a mortgage transaction that is harsh and unconscionable or otherwise inequitable;
- in a record filed or provided under the Act, has made a false or misleading statement of a material fact, or omitted to state a material fact;
- has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest; or
- breached any provision in the *Business Practices and Consumer Protection Act* that are incorporated under the *Mortgage Brokers Act*.

ALERT

In regulatory proceedings against a submortgage broker in 2013, the Registrar ordered that the submortgage broker pay \$45,000 as an administrative penalty. The submortgage broker admitted to submitting numerous mortgage applications containing false information, handling falsified documentation in support of numerous mortgage applications, failing to conduct reasonable due diligence in the financial circumstances of her clients by not confirming unusual/suspicious financial information, and receiving remuneration as a result of arranging four mortgages while she was not registered as a submortgage broker.

Source: www.bcfsa.ca/pdf/enforcement/mb/mba20131024.pdf

Unregistered Persons Carrying on Business as Mortgage Brokers

If, in the Registrar's opinion, a person is (or was) carrying on business as a mortgage broker or submortgage broker without being registered, the Registrar may:

- order the person to cease a specified activity;
- order the person to carry out specified actions that the Registrar considers necessary to remedy the situation; or
- order the person to pay an administrative penalty of not more than \$50,000.

The Registrar must give the person an opportunity to be heard before exercising these powers, except in urgent circumstances as mentioned earlier.

As a Mortgage Broker...

Mortgage brokers and submortgage brokers must never facilitate the mortgage brokering activity of unregistered persons. The practice of registered persons facilitating the mortgage brokering activity of unregistered persons is commonly referred to as “fronting”. Fronted loan applications may include falsified documents that are used to mislead lenders and inflate an applicant’s borrowing capacity. BCFSA considers fronting to be prejudicial to the public interest. There have been many regulatory decisions involving fronting arrangements. A registered person who chooses to improperly front for an unregistered person will be the primary focus of BCFSA discipline.

For example, in one case,² a registered submortgage broker allowed an unregistered person to use their Filogix account to submit falsified mortgage applications under the submortgage broker’s name. The unregistered person improperly provided mortgage arranging services to various borrowers despite not being registered under the Act. The submortgage broker never met with or took direct instructions from any of the borrowers. The submortgage broker entered a consent order with BCFSA prohibiting them from ever re-applying for registration and requiring them to pay partial investigation costs of \$15,000. The unregistered person testified before the Cullen Commission on Money Laundering³ and admitted to personally altering documents to support fronted mortgage applications.⁴ The unregistered person explained that they had a network of registered mortgage brokers who fronted loan applications for them. The unregistered person stated that they typically did all the “legwork”, like finding and meeting with borrowers. Then, the unregistered person would provide the registered mortgage brokers with all of the documents they needed to submit the loan applications into Filogix. If the loan was approved, the registered mortgage broker would pay 25-30% of their commission (paid to them by the lender) back to the unregistered person, often in cash. The unregistered person would also charge 1 percent of the mortgage amount directly to the borrower, thus receiving additional compensation. In 2021, two further notices of disciplinary hearing were issued by BCFSA against registered individuals who allegedly fronted for the unregistered person.⁵ Additionally, in 2019, the Registrar issued a cease and desist order against the unregistered person under sections 21, 8(1.4), and 8(2) of the Act.⁶ The order was made on the basis that the unregistered person had secured over \$511 million in total mortgage proceeds from lenders between 2009 and 2018, produced falsified documents in support of mortgage applications, and was supported by a network of real estate and mortgage professionals who facilitated their unregistered mortgage broker activity.

As a mortgage broker, you must never engage in fronting arrangements. Doing so creates significant risk to lenders, borrowers, and your industry and community as a whole. Should you engage in fronting activity, you may be subject to BCFSA discipline, civil lawsuits against you (e.g., if your fronted applications contained false information which caused lender or borrower losses), and even criminal proceedings (e.g., for committing fraud).

An Example of a Disciplinary Decision of the Registrar of Mortgage Brokers

As discussed, the Registrar has a wide range of powers to investigate and discipline persons who breach the provisions of the Act and Regulations. Appendix 2.1 contains a sample suspension order made by the Registrar. While the facts of that case may be somewhat unusual (i.e., extensive forgery and fraud), it does illustrate the types of investigative powers conferred upon the

Registrar (i.e., a warrant for search and seizure of documents and computer records) and the ability to suspend or cancel a registration.

Right of Appeal

Under section 9 of the Act, a person affected by a direction, decision or order of the Registrar may appeal it to the Financial Services Tribunal, which is governed by the *Financial Institutions Act*. A detailed explanation of the grounds for appeal and procedures involved is beyond the scope of this chapter.

ALERT

In one Financial Services Tribunal case, Mr. C appealed the Registrar's decision that he may not apply for registration for a period of five years, on the grounds that the period was excessive. After a review of the Registrar's decision, the Financial Services Tribunal determined that it was reasonable in the circumstances. It noted:

The period selected by the Registrar involved an exercise of discretion. Therefore, his decision is entitled to a reasonable degree of deference, especially as the Registrar was in a better position than the Tribunal to assess any expression of remorse by [Mr. C], to ascertain the need for individual deterrence, and to evaluate other evidentiary considerations applicable to the imposition of professional discipline. The Tribunal should be reluctant to intervene if the Registrar turned his mind to the relevant factors and the penalty falls within an acceptable range, unless there are extenuating circumstances to support a contrary outcome.

MORTGAGE BROKER MARKET CONDUCT

This section will discuss some of the important statutory requirements that are placed on a mortgage broker's conduct in the marketplace. For the purposes of this course, the statutory provisions are broken down into a number of categories, including:

- disclosure requirements under both the *Mortgage Brokers Act* and *Business Practices and Consumer Protection Act*;
- deceptive and unconscionable acts or practices under the *Business Practices and Consumer Protection Act*;
- misleading the public;
- misleading lenders;

- acting as a mortgage administrator;
- acting as a Designated Individual; and
- handling trust funds.

Disclosure Requirements

Disclosure to the Borrower under the Business Practices and Consumer Protection Act

When the Disclosure is Required

Part 5 of the *Business Practices and Consumer Protection Act* (BPCPA) came into force on July 1, 2006 and requires that disclosure be given by mortgage brokers and lenders to individuals who borrow for primarily personal, family, or household purposes, regardless of whether the broker or lender is charging additional fees or expenses.

Purpose of the Disclosure

Because of the high cost of a mortgage in comparison to the average person's resources, the protection of mortgage consumers is very important.

Additionally, because of the complexity that can characterize mortgage finance transactions, the disclosure obligations imposed on mortgage brokers are designed to ensure that borrowers fully understand their mortgage transactions. Where a mortgage broker arranges a mortgage loan and the lender does not carry on the business of lending money, the mortgage broker is responsible for providing the disclosure statement to the borrower.

Content of the Disclosure

Part 5 requires that a *Disclosure Statement*, Notice or Statement of Account must be given to the borrower:

- two business days prior to the borrower incurring an obligation under a credit agreement, unless the two-day period is waived;
- once every 12 months if the interest rate is floating;
- within 30 days of any one percent or greater increase in the interest rate for credit agreements with fixed interest rates subject to change;

- within 30 days of the borrower missing a payment or a default charge being imposed by the lender if the outstanding principal changes as a result of the default and the total amount of the payments which the borrower is scheduled to make over a payment period does not cover the interest that will accrue in the payment period;
- within 30 days after an amendment to the credit agreement;
- within 21 days prior to the end of a mortgage term, if the mortgage is being renewed; and
- every month if the loan is for open credit.

disclosure statement (cost of credit)

a statement that must be given to a borrower incurring an obligation under a credit agreement as required by Part 5 of the *Business Practices and Consumer Protection Act*

The BPCPA does not contain prescribed disclosure forms, notices or statements of account. However, it does prescribe the required content in sections 84 to 92. BPCPA disclosure statements are discussed further in [Chapter 11](#): “Mortgage Analysis in Real Estate Practice”.

Disclosure to Investors and Lenders – Form 9

When the Disclosure is Required

According to section 17.1 of the Act, in a transaction where a mortgage broker (1) arranges a mortgage in which another person is to be the mortgagee; (2) arranges a sale of a mortgagee’s interest in a mortgage to another person; or (3) sells the mortgage broker’s own interest as mortgagee under a mortgage to another person, the mortgage broker must provide a written disclosure statement to the other person. The prescribed form for such disclosure is the Form 9, which can be found in the Regulations. For your convenience, Form 9 is included in Appendix 2.2.

The disclosure must be given to the lender/investor before any advances are made, or if the funds are paid into trust, before the funds are released from trust. Upon mortgage renewal, the mortgage broker must deliver an updated disclosure to the lender/investor. A lender/investor is not obligated to advance funds unless the mortgage broker has provided the disclosure to the

lender/investor. More information on the Form 9 is available in the Registrar's Information Bulletin MB 11-005.

Purpose of the Disclosure

The purpose of the section 17.1 disclosure is to ensure that those lending money, or investing in mortgages, are provided with certain basic information about the transaction in which they are about to enter. This is important because mortgage brokers, especially those advising private lenders, may owe a duty to the lender/investor to ensure that the mortgage investment is one that is suitable for them. This prescribed form will allow key information to be succinctly presented to satisfy both the lender/investor's informational needs as well as the broker's compliance with statutory and other legal duties.

A mortgage broker must retain a copy of the Form 9 for a period of at least seven years (section 17.2).

Content of the Disclosure

As mentioned previously, the prescribed form for disclosure under section 17.1 of the Act is the Form 9. A section entitled "Cautions" is found on the first page of the Form 9. This section cautions the lender/investor on concerns regarding mortgage investment risk, seeking independent legal advice, providing funds "in trust", and enforceability of repayments where there are several investors. This section also reminds the lender/investor to obtain sufficient property valuation documentation, consider the borrower's ability to meet payment obligations, and enter into a written agreement with the mortgage broker where it is intended that the broker will administer the mortgage (see the discussion on administration agreements later in this chapter).

After the "Cautions" section, the Form 9 contains information pertaining to the following topics:

- borrower/guarantor/covenantor information;
- whether there are other parties to the transaction that are, or will be, represented by the mortgage broker;
- whether there are pre-existing or existing defaults in the mortgage;
- how the mortgage interest will be registered;

- whether the investment represents the entire mortgage or only a portion of the mortgage;
- whether the investment funds will be held in trust pending the execution of the mortgage;
- details on how the mortgage will be administered;
- details about the property to be mortgaged (address, type, taxes, value, etc.);
- particulars/terms of the mortgage;
- the rank of the mortgage and the loan to value ratio; and
- whether certain documents will also be provided (copies of existing mortgages on the property, any appraisal, any contract of purchase and sale, the borrower's application for a mortgage, the cost of credit disclosure provided to the borrower, etc.).

The mortgage broker is also required to provide the lender/investor with all other information an investor of ordinary prudence would consider to be material to a decision whether to lend money on the security of the property or the credit worthiness of the borrower, so that they can make an informed decision before committing to invest. Such information might include leasing arrangements if the property is a rental property, or environmental considerations affecting the value of the property.

The mortgage broker is also required to sign the Form 9, certifying that it has been lawfully completed and is accurate in every respect. On receipt, the lender/investor will sign the Form 9, acknowledging receipt.

Mortgage brokers should ensure that they exercise reasonable due diligence in order to verify the information being provided to the lender/investor by way of the Form 9. Failure to do so can result in a mortgage broker being found by a court to have been negligent and liable to the lender/investor for any losses arising from the negligence. The law of negligence and some case examples relevant to mortgage brokers are discussed in [Chapter 5](#): “The Professional Liability of Mortgage Brokers”.

Despite the protection that the Form 9 may offer lenders/investors, the legislation recognizes the fact that certain parties are capable of sufficiently protecting their own interests, such that a Form 9 is not necessary.

Sophisticated Persons Exemption. Section 16 of the Regulations states that a mortgage broker does not have to provide a lender/investor with a Form 9 if the lender/investor is a “sophisticated person”, which is defined to be any of the following:

- a government corporation or agency whether federal or provincial;
- a municipal corporation, public board or commission;
- a savings institution;
- a cooperative credit society as defined in the *Cooperative Credit Associations Act* (Canada) or a savings and credit union, federation or confederation as defined in the *Savings and Credit Unions Act* (Quebec);
- the Business Development Bank of Canada;
- a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a provincial pension supervisory authority;
- an insurance company;
- a trust company or insurer;
- a mortgage broker acting as principal;
- a corporate subsidiary of any of the above;
- a person registered under the *Securities Act* or the securities legislation of another province in Canada as an investment dealer acting as principal;
- a person registered under the *Securities Act* or the securities legislation of another province in Canada as a portfolio manager or equivalent, acting as principal or as an agent or trustee for accounts that are fully managed by it;

- a mutual fund or non-redeemable investment fund, if the investment portfolio of the fund is managed by a person that is registered under the *Securities Act* or the securities legislation of another province in Canada as a portfolio manager or equivalent; or
- a person or trust that acquires mortgages or interests in mortgages for the purpose of offering, as a security as defined in the *Securities Act*, interests in a pool of those mortgages or interests in mortgages.

As you can see, most sophisticated lenders will be covered by this exemption. Of particular interest is the exception for “a mortgage broker acting as principal.” As discussed earlier, any entity that is carrying on the business of lending money secured by mortgages, buying and selling mortgages, or lending money on the security of ten or more mortgages per year, among other activities, falls within the definition of a mortgage broker (section 1). Therefore, that entity must be duly registered as a mortgage broker. Since these entities are mortgage brokers acting as a principal when lending out their own money, it is not necessary to provide them with a Form 9, as they are sophisticated and trained industry members.

Exemptions are included in the Regulations because the listed entities are presumed to be adequately protected from the possibility of deception or confusion resulting from the conduct of mortgage brokers. Most of the corporate entities listed here will be well represented by their own brokers or legal advisors and the exemptions concerning individuals are for trained industry members. Accordingly, legislators have chosen not to require mortgage brokers to employ the otherwise mandatory disclosure when dealing with these exempt classes.

Other Exemptions. In addition to the exemption for sophisticated persons, there are two other exemptions from Form 9 disclosure. Firstly, if the mortgage is part of a pool of mortgages and an interest in the pool is being offered by the mortgage broker as a security as defined in the *Securities Act*, and the interest is fully guaranteed by the government of Canada or by a province of Canada, then a Form 9 is not required. Secondly, a Form 9 is not required if an offering memorandum or a prospectus has been provided to the lender/investor in accordance with the *Securities Act*.

The Registrar's Information Bulletin MB 11-005 provides mortgage brokers with guidance for completing the Form 9.

Example

In one particular case, a submortgage broker was approached by a couple seeking to obtain a second mortgage on their property in order to open a restaurant and pay off a variety of their bills. The submortgage broker had obtained a provisional approval for a second mortgage from a lender, on the condition that the holder of the first mortgage approve it. The couple's lawyer sought approval from the first mortgagee; however, the first mortgagee refused to provide the appropriate authorization. As such, the lawyer refused to process the second mortgage. Despite this, the submortgage broker helped the couple arrange the second mortgage through a different lawyer, assuring the couple that the second mortgage would not put their property at risk, as long as the appropriate mortgage payments were made. The couple were unable to make the mortgage payments, and the first mortgagee began foreclosure proceedings. There were numerous legal breaches, one being that a Form 9 was not provided to the second mortgagee. In another situation involving the same submortgage broker, the submortgage broker arranged mortgages totalling approximately \$10 million for a development in Kelowna, funded primarily by private investors. The Registrar also found that the submortgage broker had not provided the required Form 9s to the investors. These breaches of the submortgage and mortgage brokers, in addition to others, resulted in the submortgage broker's registration being suspended for six months and both being jointly and severally liable for an administrative penalty of \$18,000, plus investigation costs of \$5,000.

CONFLICT OF INTEREST DISCLOSURE TO BORROWERS AND LENDERS – FORM 10

When the Disclosure is Required

Sections 17.3 and 17.4 of the Act require disclosure on the part of a mortgage broker to borrowers and lenders of any direct or indirect interest the mortgage broker or any associate or related party of the mortgage broker may acquire in the transaction. The definition of "associate", for the purposes of sections 17.3 and 17.4, includes submortgage brokers employed by the mortgage broker. In other words, the Act places equal obligation to provide *conflict of interest* disclosure on both mortgage brokers (i.e., brokerage firms) and individual submortgage brokers. Furthermore, according to sections 17.3 and 17.4, the disclosure must be provided to each person who is a borrower or lender in the transaction. The content contained in the disclosure should be identical, regardless of the recipient. Disclosure is made by way of a prescribed form known as the "Form 10", which will be discussed in more detail shortly.

conflict of interest

a situation in which a mortgage broker's advice to one party may be influenced by the interests of another party

As mentioned in the preceding paragraph, both direct and indirect interests must be disclosed. A “direct interest” is one in which the interest is immediately known and flows directly from the transaction, and it can include both monetary and non-monetary interests. The following is a non-exhaustive list of common direct interests:

- Base commissions
- Volume or efficiency bonuses
- Loyalty or rewards points
- A mortgage broker or family member is the lender or has ownership interests in the lender or is a part of a syndicate lender
- A family member or business partner of the mortgage broker is the borrower
- The mortgage broker receives a fee from the borrower

An “indirect interest” is one in which the interest is not triggered immediately or obviously, but may be contingent upon other factors for it to be acquired. Indirect interests include any kind of benefit, monetary or not. The following is a non-exhaustive list of common indirect interests:

- Expected trailer fees or other compensation payable, as a dollar amount, based on current circumstances, if the borrower renews the mortgage with the lender at maturity Expected trailer fees or other compensation payable during the term of the mortgage
- Potential volume or efficiency-based bonuses based on the amount of business a mortgage broker brings to the lender
- The amount of any fees paid by a lender to a network, franchise or mortgage broker for any purpose related to mortgage transactions being directed by that firm or associate or related party to that lender (including but not limited to access fees and fees paid by a lender to be identified as a preferred lender)

- Reduced network, franchise, desk, franchise or network fees, or similar, payable by mortgage brokers based on achieving certain targets, such as volume, with a preferred lender of the firm
- Ability to offer preferential pricing to borrowers in future mortgage transactions based on volume or efficiency-based targets being met
- Any benefit arising from achieving a certain status or designation with a lender
- Beneficial ownership interests in the lender or the borrower

An example of a conflict of interest that may arise with a borrower from a “reward points” system is set out next.

Example

Angela, a submortgage broker, is working with Franklin, a borrower seeking financing for the purchase of a new condominium unit. Angela submits a lot of mortgage applications from her clients to Lender A. Lender A provides brokers with reward points for every mortgage funded, where brokers can use their rewards points to ‘buy’ items such as electronics and airline tickets. Angela also submits some of her clients’ mortgage applications to Lender B (since Lender B’s mortgage products are sometimes better than those offered by Lender A); however, Lender B does not provide brokers with any reward points for funded mortgages. In the case of Franklin, Angela chooses to submit the mortgage application only to Lender A, since she is close to having enough reward points for a new laptop computer. Lender A approves Franklin’s application and the file proceeds to funding.

In this example, the mortgage broker employing Angela, in providing a Form 10 to Franklin and Lender A, must disclose the fact that, in addition to any monetary compensation that it will receive from Lender A, Lender A will pay a certain number of reward points. Furthermore, the approximate dollar value of the reward points must be included in the total compensation disclosed.

An example of a conflict of interest that may arise with a lender is set out below.

Example

Alan, a submortgage broker, was recently approached by his brother, Steven, who is seeking a mortgage loan for the purchase of his first house. Steven, who has had credit issues in the past, has been rejected for a mortgage loan from a number of banks and credit unions. Alan contacts Jessica, a private investor who has occasionally funded mortgage loans for Alan’s clients, to speak to her about funding a mortgage loan to Steven.

In this example, if Jessica ends up funding a mortgage loan to Steven, the mortgage broker employing Alan would be required to provide a Form 10 to Jessica, the private investor, and Steven, the borrower. Timing of this disclosure is discussed in detail later in this chapter.

Purpose of the Disclosure

Generally, a conflict of interest exists when there is a risk that a mortgage broker's advice to one party may be influenced by the interests of another party. The Registrar recognizes that competing interests are not always avoidable, and that the existence of a conflict does not necessarily mean that the mortgage broker has committed any wrongdoing. However, conflicts have the potential to influence the objective performance of a mortgage broker's duties to its clients.

In some cases, lenders who are registered as mortgage brokers do not have to provide conflict of interest disclosures. Only originating mortgage brokers, acting as intermediaries, must provide these disclosures, as they are the ones acting in the transaction between borrower and the lender. Lenders who are registered as mortgage brokers who are not acting as intermediaries are not in a conflict of interest when involved in a mortgage transaction because the lender's sole interest is for itself, which is understood by the borrower.

Due to the importance of conflict of interest disclosure to the integrity of the mortgage brokering industry and the protection of the public, breaches of sections 17.3 and 17.4 can lead to serious consequences. A breach occurs when a disclosure is not made at all or is made but does not fulfil the requirements of the Act. A mortgage broker who breaches these sections may be subject to an administrative hearing under the Act, whereby the Registrar, after giving the broker an opportunity to be heard, may suspend or cancel the broker's registration, order that the broker cease a specific activity, order that the broker carry out certain actions to remedy the situation, or order that the broker pay an administrative penalty of not more than \$50,000. A breach of these sections is also an offence under the Act that can lead to significant monetary penalties, and even imprisonment; however, the Registrar typically treats initial breaches of the Act by way of an administrative hearing first.

Content of the Disclosure

To fulfil their responsibilities under sections 17.3 and 17.4 of the Act, mortgage brokers are required to use the prescribed Form 10 (“Conflict of Interest Disclosure Statement”), a copy of which is contained in the Regulations. A copy of the prescribed Form 10 can be found in Appendix 2.3. The key areas of disclosure by the mortgage broker on the Form 10 include:

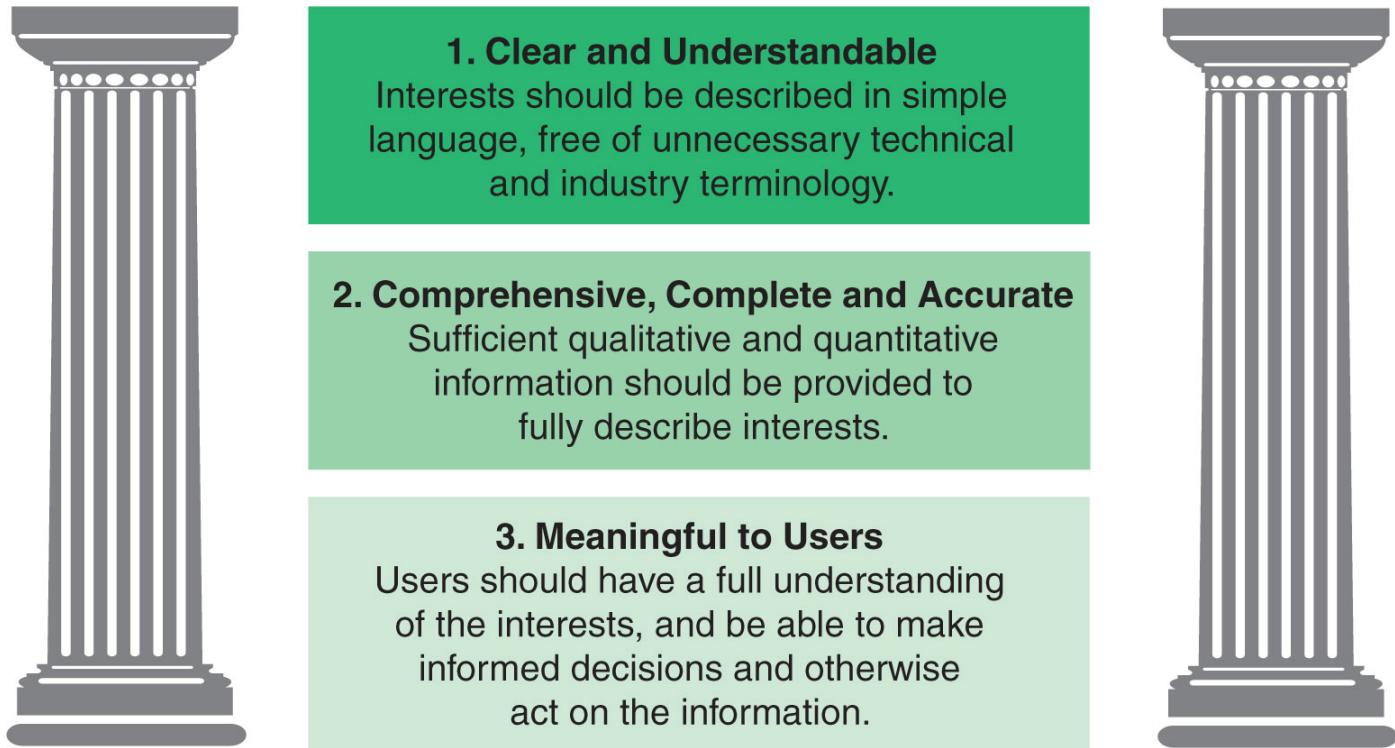
- the name, telephone number and address of the mortgage broker;
- information about the property to be mortgaged (address, legal description and postal code);
- a description of any direct or indirect interest the mortgage broker has or, as currently contemplated, may acquire in the transaction; and
- a description of any direct or indirect interest that a related party or associate of the mortgage broker has or, as currently contemplated, may acquire in the transaction.

The Form 10 concludes with a certification from the mortgage broker (or authorized representative) that the information provided in the Form 10 contains no untrue statement and does not omit any required information. Finally, there is a space for the person receiving the Form 10 (i.e., the borrower or lender) to acknowledge receipt.

As you will see from Appendix 2.3, the prescribed Form 10 is only a single page in length. In many cases, the required disclosure will simply not fit within this single page; therefore, the Registrar expects and encourages mortgage brokers to attach additional documents to the Form 10 whenever necessary to provide complete descriptions of conflicts of interest requiring disclosure. Furthermore, mortgage brokers and IT service providers may create their own electronic versions of the Form 10 to integrate into mortgage application software or web-based platforms; however, the content of any electronic form must be exactly the same as is found on the prescribed Form 10.

The Registrar expects that mortgage brokers provide information in the Form 10 in a manner that is consistent with three core principles, as shown in [Figure 2.1](#).

FIGURE 2.1: Principles of Conflict of Interest Disclosure



More specifically, the Registrar has also provided the following general guidance:

- Any interest which has a monetary value must be expressed as a dollar amount.
- Any interest which has no monetary value must be described in a manner that is true, plain, and not misleading.
- If a related party or associate acquires an interest in the transaction, the nature of the relationship must be described clearly to enable users to understand the relationship.

Ultimately, mortgage brokers may wish to seek their own legal advice for guidance in meeting their disclosure obligations under the Act.

Timing of the Disclosure

Section 14 of the Regulations sets out when the Form 10 must be provided:

- **When the Form 10 is being provided to a borrower**, it must be provided to the borrower at the earliest opportune time before they

sign:

- the mortgage; or
- any ancillary agreement with the mortgage broker or lender, including but not limited to an agency agreement with the mortgage broker, that commits the borrower to the mortgage transaction.
- **When the Form 10 is being provided to a lender,** it must be provided to the lender:
 - on or before release of the funds from trust at the direction of the lender; or
 - on or before the advancement of funds by the lender (if the funds are not paid into trust).

It is clear that, in order for conflict of interest disclosure to benefit borrowers and lenders, they need to receive the Form 10 prior to fully committing themselves to the particular mortgage transaction. Section 14 ensures that this occurs.

A copy of all Form 10s must be kept on file by the mortgage broker for at least 7 years (section 17.5 of the Act). A failure to do so could lead to an administrative hearing in front of the Registrar, which may include an order to pay an administrative penalty up to \$50,000, among other orders. A failure is also an offence under the Act, punishable by a fine of up to \$5,000 for a corporation or up to \$2,000 for an individual (section 22(3) of the Act).

Exemptions from Disclosure

Firstly, financial institutions, as defined in the *Financial Institutions Act*, that are acting in a mortgage transaction are exempt from section 17.3. Secondly, a mortgage broker is exempt from section 17.3 of the Act if the matters required to be disclosed under section 17.3 have been disclosed in an offering memorandum or a prospectus prepared in accordance with the *Securities Act* and the offering memorandum or prospectus has been provided to every person who is a borrower in the transaction to which section 17.3 of the Act would otherwise apply. A similar exemption applies with respect to disclosure

to lenders under section 17.4 if a duly prepared offering memorandum or prospectus has been provided to the lender.

From the Registrar of Mortgage Brokers: Disclosure Guidelines and FAQs

As part of its guidance for conflict of interest disclosure, the Registrar has provided the industry with Mortgage Broker Conflict of Interest Guidelines and a Frequently Asked Questions (FAQs) document, which provides answers to many common questions about the implementation of the conflict of interest disclosure requirements. One can access this document on the Registrar's website at: www.bcfsa.ca/index.aspx?p=mortgage_brokers/industry.

Deceptive and Unconscionable Acts or Practices

The BPCPA, which came into force in British Columbia in July 2004, is designed to protect the public from what the statute refers to as "deceptive" or "unconscionable" acts or practices in *consumer transactions*, which are defined as transactions for primarily personal, family or household purposes. Therefore, mortgages granted by investors or commercial mortgages will not generally be subject to the BPCPA. Section 8.2(1) of the *Mortgage Brokers Act Regulations* specifically states that certain sections in the BPCPA, which relate to disclosure requirements (discussed earlier), deceptive and unconscionable acts and practices, and advertising (discussed later), are expressly prescribed. This means that these sections apply to those registered under the *Mortgage Brokers Act*, and that violation of these BPCPA sections may result in enforcement and discipline by the Registrar.

consumer transactions

transactions for primarily personal, family, or household purposes

Deceptive Acts or Practices

Section 4 of the BPCPA states that a "*deceptive act or practice*" means "an oral, written, visual, descriptive or other representation by a supplier, or any conduct by a supplier, that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor." "Representation" is further explained to

include “any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.” It is a common misconception to believe that deceptive acts can only occur prior to the consumer transaction (e.g., a newspaper advertisement published before the customer bought the product). Section 4(2) specifies that a deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

deceptive act or practice

a representation by a supplier, or any other conduct by a supplier, that has the capability, tendency, or effect of deceiving or misleading a consumer or guarantor

Section 4(3) further provides guidance by illustrating some examples of acts or practices that are considered to be “deceptive.” For example, section 4(3)(b)(i) states that it is a deceptive act to have “a representation by a supplier that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have.” An example of this would be if a mortgage broker stated in his advertising that he has special approval and connections with certain banks that allow him to exclusively provide access to loans at promotional rates, when in fact, he does not have these “exclusive” connections. Some mortgage brokers or lenders may also say that they have endorsements from various consumer protection agencies (e.g., Better Business Bureau). If this is not true, making these representations could be considered deceptive. Another deceptive act or practice is using “exaggeration, innuendo or ambiguity about a material fact or failing to state a material fact, if the effect is misleading” (section 4(3)(b)(vi)). Advertisements for loans that promote the loan’s repayment flexibility without also stating that prepayment or interest penalties may apply (if that is the case) could constitute a deceptive act or practice.

Unconscionable Acts or Practices

In addition to deceptive acts or practices, the BPCPA also prohibits “unconscionable” acts or practices. Section 8 states that an unconscionable act or practice can take place before, during or after a mortgage transaction, and some factors that a court must consider when determining whether an unconscionable act or practice has taken place include:

- that the lender subjected the borrower or guarantor to undue pressure to enter into the consumer transaction;
- that the lender took advantage of the borrower or guarantor's inability or incapacity to reasonably protect his or her own interest because of any physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
- that, at the time the mortgage transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar mortgage transactions were readily obtainable by similar consumers;
- that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the borrower; and
- that the terms or conditions on, or subject to, which the borrower entered into the consumer transaction were so harsh or adverse to the borrower as to be inequitable.

When a court examines whether an unconscionable act or practice has taken place, it must also consider all of the surrounding circumstances of which the lender knew or ought to have known. The burden of proving that such a practice did not occur is placed on the lender.

Section 10(2) gives a court considerable discretion to alter or amend the financial state of affairs between lender and borrower where an unconscionable act or practice has occurred. Included in this discretionary authority is the ability to set aside all or part of the transaction, suspend the rights and obligations of the parties, and to order the lender to repay any excess that has been paid or allowed by the consumer (borrower).

ALERT

As mentioned, the Registrar has the ability to discipline registered persons who engage in "harsh and unconscionable or otherwise inequitable" mortgage transactions. Mortgage brokers have faced civil law suits for engaging in unconscionable mortgage transactions in the past.

In *May v. Dunster ("Dunster")*,⁷ a mortgage broker provided a mortgage loan to a borrower and then assigned the mortgage to a third-party. However, the mortgage was held to be invalid because it was

unconscionable. The court ordered the mortgage broker to compensate the third party for its losses under the invalid mortgage.

The borrower in *Dunster* was an elderly woman who obtained a mortgage loan for her foster son's diving business. The foster son had agreed to make the monthly payments, but he defaulted immediately. The court found that there was unequal bargaining power between the parties to the mortgage, and the mortgage agreement was substantially unfair (the two common law requirements for unconscionability). There were several facts which led to the mortgage being unconscionable. First, the borrower was an elderly woman, with a grade nine education who lacked business acumen. Further, she did not understand the consequences of the mortgage transaction, largely because they were not explained to her by the mortgage broker. In addition, the borrower was facing undue pressure as a result of the mother-son relationship and her strong desire to help her son succeed in his business. These factors resulted in unequal bargaining positions. Additionally, the mortgage was found to be substantially unfair because the funds were for the sole benefit of her son's business, while the mother bore all the risk. There were other concerning factors. For one, the borrower was not encouraged to seek independent legal advice. The mortgage broker also failed to obtain proof of income from the foster son despite the fact that all parties anticipated the foster son would make the mortgage payments. The borrower's income was insufficient to make the required payments if the foster son failed to do so. Finally, the mortgage broker chose to advance further funds to the borrower, even after the foster son defaulted.

Similarly, in *Eusanio v. Janolino*,⁸ a mortgage transaction was found to be unconscionable as a result of a mortgage broker's conduct. The court significantly altered the mortgage agreement in order to remedy the unfairness. This case involved borrowers who immigrated to Canada from the Philippines and later purchased a house on which they obtained two mortgages. When the borrowers faced financial difficulties, they reached out to the defendant mortgage broker. Rather than take steps to improve the borrowers' situation, the mortgage broker made high interest rate mortgage loans to the borrowers while charging them significant fees. The court found that nearly every indication of unconscionability outlined under the BPCPA was present. In particular, the borrowers did not understand the implications of the mortgage transactions due their limited English skills and lack of financial knowledge, making them unable to protect their own interests. Further, they paid significantly higher fees than other borrowers, the mortgage interest rates were unnecessarily high, and they were unnecessarily encouraged to borrow more than was needed, despite them clearly having limited ability to repay the borrowed amounts. Also, they were never encouraged to obtain independent legal advice. Had the borrowers simply sold their property before entering the transactions, they would have been much better off financially given the substantial amount of equity they possessed in their property at the time. Ultimately, the court found that the borrowers were taken advantage of by the mortgage broker, and that the mortgage transaction was unconscionable.

Mortgage brokers must ensure that borrowers understand the terms of their mortgage and their implications. Mortgage brokers should advise borrowers to obtain legal advice about a mortgage if the borrower appears vulnerable or if the mortgage agreement appears to be unfair.

The common law doctrine of unconscionability, and the BPCPA provisions, will be discussed again in later chapters of this Manual.

Misleading the Public

Under section 14 of the Act, mortgage brokers and submortgage brokers are prohibited from making any false, misleading or deceptive statements in any

advertisement, circular, pamphlet or other material used in promotion of their services. Registered mortgage and submortgage brokers must also publish the name under which they are registered in every publication they use so that their registered status is readily verifiable to the general public.

If, in the discretion of the Registrar, a registrant has failed to comply with this section, either by making a false or misleading statement or failing to use the correct registered name, the Registrar may force the registrant to cease using that form of publication. Under section 22 of the Act, any breach of section 14 of the Act is also an offence punishable, in the case of a corporation, by fine of up to \$100,000 and on each subsequent offense up to \$200,000. An individual breaching section 14 is subject to the same fines, as well as to the possibility of imprisonment under the Act for up to 2 years.

The Registrar's Information Bulletin MB 06-002 provides guidelines on misleading advertising and requirements for mortgage loan advertising. Examples of misleading advertising include:

- providing sample monthly repayment figures for interest-only mortgage loans (i.e., no periodic repayment of principal) without identifying that the payments represent only the interest;
- advertising payment amounts for mortgage loans with unusually long amortization periods without specifying the amortization period.

The Registrar has issued guidelines stating that wherever repayment schedules or rates are advertised relative to a borrowed amount, the amortization period used in determining these repayment figures should be stated. The promotional materials should also indicate whether the monthly payment advertised is a repayment of the interest only and does not include the principal amount. Advertisements that do not include this information run the risk of being considered misleading.

Pursuant to Part 5 of the BPCPA, advertisements for fixed credit that state the interest rate or any amount of repayment must also state the term and annual percentage rate (APR). The APR must be displayed as prominently as the repayment figure or the interest rate. If an advertisement states or implies that no interest is payable for a certain period (i.e., a "grace period"), the advertisement must also state the conditions which apply to the interest free periods and state the APR that will apply if the conditions are not satisfied. If the

advertisement fails to state that there is a grace period or omits to describe the conditions or state the APR, then the advertisement is deemed to represent the loan as being unconditionally interest free during the relevant period. Annual percentage rates are discussed further in [Chapter 11](#).

If information that is required to be included in an advertisement is different for different mortgage loans, then the advertisement must explain that the information relates to a representative transaction. “Representative transactions” must be reasonably typical of the mortgage loans to which the advertisement relates.

Misleading Lenders

Not only must mortgage brokers be diligent in not misleading mortgage consumers, but they must also be cognizant of their responsibility to not mislead members of the lending community. When providing information about potential mortgagors to lending institutions, mortgage brokers must be conscientious in not providing false or misleading information about borrowers. In the past, pursuant to inquiries by the Registrar, disciplinary actions have been taken against mortgage brokers for forgery, uttering a forged document, and obtaining credit through false pretences.

Mortgage brokers have a duty to ensure the accuracy of information provided by the applicant. It is not sufficient for mortgage brokers to rely on the information provided to them in mortgage applications. While it is not suggested that mortgage brokers must conduct in-depth investigations, reasonable due diligence must be undertaken to ensure information passed on to the lending community is accurate, as the common practice in the lending industry is to rely on the information provided by mortgage brokers. If mortgage brokers do not verify the information they are forwarding to lending institutions, they should advise the lending institutions in writing that none of the information has been verified.

Financial institutions have been notified that they are to report any such false information to the Registrar so that the offending mortgage brokers can be dealt with accordingly. Such instances of providing false and harmful information to lending institutions, even unintentionally, can have a tremendous negative effect on the mortgage brokerage industry, and as such the Registrar takes any

providing of false information to the lending community very seriously. For example, in relation to the growing number of marijuana grow operation incidents, the Registrar's investigations reveal that the failure of the mortgage broker to perform due diligence (identify fictitious purchasers and false employment and down payment information) was instrumental to the proliferation of these incidents.

More information on misleading lenders is available in the Registrar's Information Bulletin MB 04-005.

Administration Agreements

Some mortgage brokers also act as *mortgage administrators*, where they receive mortgage payments from borrowers and send them to investors. Mortgage administrators may also take steps on behalf of investors and lenders to enforce mortgage payments. For example, a mortgage broker may both broker the mortgage (i.e., arrange for the loaning of funds from private lenders), and provide administration services for the lenders (e.g., collecting mortgage payments and forwarding them to the private lender), since smaller or individual private lenders may not have the requisite staff or operational functionalities (e.g., accounting clerk, payment software, etc.).

mortgage administrator

a mortgage broker who collects mortgage payments and forwards them to the lender

Section 14.1 of the Act imposes additional requirements on mortgage administrators. Mortgage brokers who administer, or arrange for a person to administer, a mortgage can only do so if they have a written agreement with the lender(s). This agreement must contain the full agreement respecting the payment of the mortgage broker or any other person providing services with respect to the transaction, as well as other expenses that are payable pursuant to the mortgage. The agreement must also specify the extent of the responsibilities of the mortgage broker (as well as any other person receiving money for services relating to the administration of the mortgage) with respect to the collection of money under the mortgage, prepayment of principal under the mortgage, discharge or partial discharge of the mortgage on satisfaction of the

debt, and the commencement of enforcement proceedings in the event of default under the mortgage.

Failure to comply with this section may result in an administrative penalty of up to \$50,000 under section 8(1.1) of the Act.

Designated Individuals

While the Act and Regulations place a number of obligations on a mortgage broker, the question becomes: who is responsible for exercising the rights and obligations of that mortgage broker? This is where the role of the *Designated Individual* comes into play. The role of the Designated Individual with respect to applications for registration was discussed earlier in this chapter. The Designated Individual is often simply referred to in the industry as the “DI”.

designated individual (DI)

the registered submortgage broker who is responsible for ensuring proper supervision, registration, and recordkeeping of all employees and transactions of the mortgage broker, as well as managing the mortgage broker’s year-end financial filings, registration application, and relevant information

The main responsibilities of the Designated Individual are:

- ensuring that all employees involved in “arranging mortgages” are properly supervised and registered under the Act;
- ensuring that the employees are aware of the Act, the Regulations, and the Information Bulletins and policies of the Registrar;
- ensuring that all books and records of the mortgage broker are accurate and up to date;
- ensuring that year-end financial filing reports are submitted to the Registrar, as required; and
- managing registration application and information of the mortgage broker.

Each mortgage broker which is a corporation or partnership must have a registered submortgage broker who acts as its Designated Individual. In the case of a sole proprietor, the individual sole proprietor must be qualified to act as a Designated Individual.

The Designated Individual will generally be an officer or director of a corporate mortgage broker, a general partner in a mortgage broker partnership, or a sole proprietor.

All interaction between the Registrar and the mortgage broker (and its registered submortgage brokers) will be conducted via the Designated Individual.

In order to qualify to act as a Designated Individual, a person must have been recently registered under the Act or similar legislation in another jurisdiction for a minimum of two years without having any record of regulatory compliance problems with the Act or any other legislation in British Columbia or elsewhere.

As mentioned previously, one of the key duties of a Designated Individual is to supervise the activities of the brokerage's submortgage brokers. As the case below demonstrates, your misconduct as a submortgage broker could have adverse consequences for your Designated Individual.

Example

In one particular case, Mr. A was the Designated Individual for a mortgage broker, which employed two submortgage brokers. The Registrar received a complaint from a lender about a number of one of the submortgage broker's mortgage applications. Upon investigation, the Registrar discovered that the applications contained fraudulent employment letters and pay stubs, altered residential tenancy agreements (used to demonstrate rental income), and numerous other information discrepancies and omissions. Furthermore, some of the files either did not include a Fixed Credit Disclosure Statement (which is required under the *Business Practices and Consumer Protection Act*) or contained improperly completed Fixed Credit Disclosure Statements or Conflict of Interest Disclosure Statements.

Despite the fact that Mr. A was cooperative with the Registrar's staff during the investigation and he surrendered the submortgage broker's registration when he became aware of the serious deficiencies in the submortgage broker's files, the Registrar concluded that he did not exercise proper due diligence in supervising the submortgage broker to ensure that documents produced in support of mortgage applications were verified to be true and accurate, and that the required disclosure and forms were done in a manner consistent with the legislative requirements. As a result, the Registrar ordered that the mortgage broker, and Mr. A, as the Designated Individual, jointly and severally pay an administrative penalty of \$10,000 and investigation costs of \$2,000.

Source: www.bcfsa.ca/pdf/enforcement/mb/mba20100503ConsentOrder.pdf

Handling Trust Funds

As a condition of registration, all mortgage brokers that hold money in trust as part of their mortgage broker practice must maintain a *trust account*, in the name of the mortgage broker, with a savings institution in BC for the purpose of administering such funds. Brokers need to ensure that, among other requirements, a written receipt is issued for all money received in cash and that a trust agreement between the mortgage broker, the client, and any other related parties is available in writing. Brokers must also file an Accountant's Report (Form 15), prepared by an accountant pursuant to an Engagement Letter (Form 13), within 120 days of the end of the broker's fiscal year.

trust account

an account where money is deposited by one for the benefit of another. These funds are devoted to a particular purpose and cannot or should not be diverted for other purposes

Mortgage brokers that do not handle trust funds as part of their practice do not need to file audited financial statements annually, but must file a statutory declaration sworn in front of a lawyer or notary public stating that the broker did not handle trust funds or money that should have been held in trust during the previous year. This declaration (Form 12) is filed annually and must be filed within 30 days of the end of the broker's fiscal year. Mortgage brokers should be aware that a person who files a statutory declaration that is subsequently shown to contain information that is false has committed the crime of perjury, and criminal charges could be laid.

More details of these requirements are set out in the Registrar's Information Bulletin MB 12-003.

ETHICS

The first part of this chapter outlined the legal requirements of mortgage brokerage activities as set out by the Act and other related enactments, a breach of which can attract the initiation of disciplinary proceedings by the Registrar. The remainder of the chapter will focus on the broad topic of *professional ethics* in the mortgage industry. There is ongoing debate in the industry whether mortgage brokers are properly classified as "professionals" or whether mortgage brokerage is a "profession". Regardless of the position one might take with respect to this issue, all will agree that it is important that mortgage brokers act professionally. One aspect of professional conduct is ethics.

professional ethics

the moral principles concerning the daily business conduct of professionals

It is intended that this section will provide the reader with an introduction to thinking about ethics, in addition to a discussion of their value and how to apply them in helping resolve day to day dilemmas.

While this section remains focused on mortgage brokerage, all professions generally tackle ethical issues in the same manner. After considering the meaning of the term “professional ethics”, we shall discuss professional codes of ethics and how they attempt to guide behaviour. We will examine the Code of Ethics and Standards of Professional Conduct (the “CMBA-BC Code”) of the Canadian Mortgage Brokers Association – British Columbia (“CMBA-BC”), which serves as an ethical guide for its members. Also included is an overview of the disciplinary procedures employed by professional associations to resolve breaches by individual members of the ethical standards. It should be noted that other professional associations in the mortgage industry, such as Mortgage Professionals Canada, employ their own codes of ethics. The various codes of ethics generally deal with the same subject matter; however, differences certainly exist. As such, industry members who are members of more than one professional association must be aware of the codes of conduct of each association.

The Eron case below illustrates the interplay between the legal obligations of a mortgage broker and the ethical considerations that inform a mortgage broker’s daily practice.

Case Study: Eron Mortgage Corporation

The case of Eron Mortgage Corporation is a good example of what can go wrong when ethics are sacrificed in the mortgage brokerage industry. The case also goes a long way in illustrating why measures are taken on behalf of the Registrar to ensure those entering the mortgage field are ethically suited to the practice, and why registration is necessary to protect the public.

Eron was a registered mortgage broker involved in arranging large syndicated loans. Eron would arrange for the pooling of loan funds provided by lenders and investors into large single loans that would be advanced to a commercial developer. The consolidated loans would be made in the name of Eron, and the security held in trust for the investors.

Loan funds provided by the investors were improperly used to fund interest payments on other non-performing loans and for the personal benefit of Eron’s principals. Even after Eron’s corporate directors were apprehended and exposed, around \$200 million of investors’ money remained incapable of being recovered, and as many as 4,000 investors’ retirement funds were decimated. Eron

founder and president, Brian Slobogian, received a sentence of six years in prison for his role in the fraud.

This case also resulted in a class-action lawsuit on behalf of the defrauded investors against the Registrar that made it all the way to the Supreme Court of Canada. The plaintiffs claimed that although the Registrar eventually revoked Eron's registration, the Registrar owed a duty to the public to protect investors from this type of conduct on the part of its mortgage brokers, and that Eron's registration should have been revoked sooner. The Supreme Court of Canada decided the case in favour of the Registrar and held that in this circumstance there was no duty of care owed to the investors by this particular regulatory body. As such, the Registrar was not responsible for any of the financial shortfall the investors suffered as a result of Eron's misconduct.

WHAT ARE PROFESSIONAL ETHICS?

One of the problems faced by society is the impossibility of devising a system of law which will always yield perfect justice. Legal rules are expressed in general terms and cannot hope to comprehend every aspect of human conduct which may cause harm to others. It is possible to do wrong without breaking any civil or criminal law. Codes of ethics exist to improve this situation by providing a set of guidelines to ensure that human actions will be morally fair as well as lawful.

The Oxford English Dictionary defines ethics as “[t]he science of morals; the department of study concerned with the principles of human duty,” and the “moral principles by which a person is guided.” Professional ethics are a branch of the science of morals which concerns the daily business conduct of professionals. Written codes contain guidelines voluntarily adopted by members of professional associations as the minimum standard of behaviour necessary to maintain the reputation of the profession as a whole, in the public opinion.

The Act sets only a minimum standard of conduct for mortgage brokers required by law. The codes of ethics of the professional associations in which mortgage brokers may be a member, such as CMBA-BC and Mortgage Professionals Canada, seek to impose a standard of conduct for mortgage brokers which reaches a higher moral level than what is merely legal. Breaches of these codes could attract disciplinary measures by the professional association.

It is important to note that suspension or cancellation of a mortgage broker's membership in a professional association does not disentitle the mortgage broker to continue their professional practice; the mortgage broker may retain

their registered status to practice even though the mortgage broker is subject to discipline for a breach of ethics. It would be wrong to conclude, however, that a mortgage broker is in a “better” position, or will suffer less drastic consequences for a breach of ethics than a breach of their governing legislation. A mortgage broker’s livelihood depends largely on their personal reputation and good standing in the community. Mortgage brokers who do not adhere to ethical standards will quickly lose their good reputation and the confidence of their colleagues and clients. This will result in a loss of business which, if severe enough, will force the unethical mortgage broker to leave the industry for economic reasons. To quote Ralph Waldo Emerson:

Every man takes care that his neighbour does not cheat him. But a day comes when he begins to take care that he does not cheat his neighbour. Then all goes well.⁹

These words reflect the underlying premise or “golden rule” of every code of professional ethics: do unto others as you would have them do unto you.

WHY STUDY PROFESSIONAL ETHICS?

The complexity of the modern mortgage industry, combined with the expanded legal responsibilities of registered mortgage brokers, make the study of professional ethics essential to maintaining a high standard of conduct in the industry, and to promoting the good reputation of mortgage brokers in the public opinion.

Simply stated, the wide variety of responsibilities undertaken by mortgage brokers particularly involves differing duties and the constant risk of conflicts of interest and other ethical problems. A good knowledge of the ethical code that governs an industry member’s conduct is essential for anyone employed or otherwise active in the industry. The CMBA-BC Code will be used as an example throughout the remainder of the chapter. A current version of the CMBA-BC Code can be found at Appendix 2.4.

PROFESSIONALISM

Elements of Professionalism

Anyone learning about professional ethics must begin by considering what is meant by the term “professional”. It is a term commonly used today to describe

someone who earns a living by applying some degree of skill and expertise in their chosen calling or field. F.A.R. Bennion, writing on the topic of professional ethics, has isolated six principal factors which, if present, indicate that an activity is “professional in the strictest sense.”¹⁰

1. **Academic Basis:** Every profession involves an intellectual or academic discipline, based on a course of education and tested by examinations. This factor arises by implication from the word “profession,” which “implies... professed attainments in special knowledge as distinguished from mere skill...”¹¹
2. **Private Practice:** Daily person-to-person interaction with individual clients and the requirement of acting only in their best interests engenders professional expertise and standards not necessarily derived otherwise from acting in the larger interests of a public or corporate employer as a salaried employee. For example, the activities of a mortgage broker are devoted to the best interests of the client who retains him or her in a principal-agent relationship. The interests of this client must be served in preference to the interests of third parties (subject to certain legal and ethical limitations) and in preference to the private interests of the agent.
3. **Advisory Function:** A consulting or advisory role is implicit in the modern use of the word professional together with activities such as negotiating, managing or coordinating the transaction that is the subject matter of the advice.
4. **Tradition of Service:** Bennion describes this as “an outlook which is essentially objective and disinterested, where the motive of making money is subordinated to serving the client in a manner not inconsistent with the public good”.¹²
5. **Representative Institute:** A professional institute is a group or brotherhood of practising members all of whom share a common goal of promoting and maintaining an ideal of professional conduct in the interests of the public.

6. Code of Conduct: A professional institution is typified by its internal organizational formalities, which include a written code of ethical conduct expressing the members' concept of professional standards. All such codes attempt to regulate the profession generally, focussing on conduct and disciplinary measures.

The following is a discussion of some of the more common ethical duties imposes on professionals, including mortgage brokers. Students are discouraged from adopting a narrow interpretation of the principles discussed below. These principles can be applied in many different situations and across many professions. Where appropriate, references to the CMBA-BC Code will be made. In order to be a member of the CMBA-BC, individuals and corporations must adhere to the Code. However, the CMBA-BC Code is just one code of professional conduct among many, and every code of professional ethics contains, either explicitly or implicitly, many provisions similar to those in the CMBA-BC Code, such as Mortgage Professionals Canada's Code of Ethics. As stated earlier, a particular member may be subject to multiple codes of ethics, depending on their membership with certain professional associations.

DUTY TO UPHOLD THE LAW

The mortgage industry, like many industries, is subject to specific legislation that is aimed at governing industry members' conduct. The CMBA-BC Code states in its section on Compliance: "Members will conduct business within the applicable laws of the Province of British Columbia and Canada and the governing regulations of [BCFSA]." This passage highlights a member's ethical duty to keep up-to-date with the relevant laws governing their practice and industry. As legislation is often modified, mortgage brokers must review the legislation on a regular basis and must reasonably attempt to stay informed of expected legislative changes that may become law in the future. To properly act on behalf of a client, a mortgage broker must understand the laws that regulate the industry.

The important legislation governing the activities of a mortgage broker includes the Act, the Regulations, and Information Bulletins issued by the Registrar. Furthermore, by virtue of section 9.1 of the Act, certain parts within the *Business Practices and Consumer Protection Act* apply specifically to

mortgage brokerage activities. However, there is other legislation that mortgage brokers will be required to observe. For example, a registered mortgage broker will also need to be familiar with the *Interest Act*, the *Criminal Code*, and the *Income Tax Act*.

It is important to note that a single act of misconduct by a mortgage broker may attract concurrent discipline from multiple sources. Regulatory sanctions may come from a government regulatory body, such as BCFSA. Criminal penalties may occur if the misconduct was serious enough to breach the *Criminal Code*, and lastly, the mortgage broker may be liable to a civil suit from members of the public that have suffered a loss as a result of the broker's actions. Courts have upheld that the sanctions from these three sources serve different purposes and amount to different punishments, and therefore, can all be applied to a single act of misconduct.

DUTY TO CLIENT IN PROVIDING MORTGAGE SERVICES

Competence

Competence is the hallmark of a member of any professional association. When a mortgage broker holds themselves out to a client or potential client as a professional, the broker is offering to perform a service with a high degree of skill and expertise. The public expects that a certain course of education and practical training has been successfully undertaken and, further, has been maintained over the period of time since professional accreditation was first obtained. To meet this expectation, it is necessary that mortgage brokers be competent within their area of expertise.

This responsibility imposed on mortgage brokers is embodied specifically in the CMBA-BC Code:

Members shall maintain professional competence by keeping informed of, and complying with, developments in the CMBA-BC's Practice Standards and Recommendations in all functions in which they practice. Members shall not undertake to provide professional services which they are not competent to provide by virtue of training or experience or are unable to become competent without undue delay, risk or expense to the client.

If this standard of service cannot be rendered, or a particular aspect is beyond a member's expertise, the member is directed to decline offering their services and seek assistance of persons with expertise in the particular field.

Duty to Advise Fully, Candidly, and Honestly

Part of being a competent professional is ensuring that both good and bad news are imparted to a client regardless of the fact that this degree of honesty may, on occasion, result in the loss of business. A professional mortgage broker must maintain their reputation for integrity at all costs.

To ensure that professionals uphold the standard of integrity and honesty the public expects of them, certain ethical rules have developed and have been made part of most written codes of conduct. For example, lawyers are bound by their Canons of Ethics to “give an open and undisguised opinion of the merits and probable results of the client’s cause” and to “be wary of bold … assurances to clients, especially where the lawyer’s employment may depend on such assurances.”¹³ Seldom in any situation are all the facts favourable to one party; it is usually true that there is a risk or negative aspect to any particular transaction.

Example

A lawyer acting for both a vendor and a purchaser of an apartment building discovered and did not disclose that a secret profit was being made indirectly by a financial consultant in connection with the sale of the building. The vendor was a corporation in which there were three equal shareholders, one of whom was the purchaser’s financial consultant who had advised him to purchase this particular building. This consultant did not reveal his opportunity for profit to the purchaser but had given his permission to the purchaser’s lawyer to make this disclosure. The price paid for the building was \$910,600 but its actual market value was later discovered to be \$700,000.

The secret profit was subsequently discovered by the purchaser and, as a result, a lawsuit was commenced for recovery of the purchaser’s loss and the secret profit. The financial consultant settled by repaying the undisclosed profit to the purchaser. The lawyer was found by the court to be in breach of his fiduciary obligation to the purchaser to make full disclosure of the secret profit. The purchaser’s damages flowing from the lawyer’s breach were assessed at the difference between the inflated price paid by the purchaser for the building and the true market value.

Source: *Jacks v. Davis*, 1982 CanLII 485 (BC CA).

Ethical Duty of Business Loyalty

A mortgage broker has the ethical duty to exercise the utmost business loyalty to the interests of their clients. Note that this ethical duty of loyalty is not exactly equivalent to the legal *fiduciary* duty of loyalty that some mortgage brokers may owe to their clients. Fiduciary duties will be discussed in more detail in [Chapter 5](#). For present purposes, the key difference between fiduciary duties and ethical

duties is that fiduciary duties are imposed by the common law, and enforced by lawsuits in the Courts. By contrast, ethical duties are imposed in ethical codes, such as the CMBA-BC Code, and are enforced by the professional association's disciplinary body.

fiduciary

a person who holds a position of trust with respect to someone else and is obliged, by virtue of the relationship of trust, to act solely in the other person's benefit

Having clarified the difference between fiduciary and ethical duties, we can now focus more on what the ethical duty of loyalty is. First, we need to understand why it is important for mortgage brokers to behave loyally towards their client. Almost inevitably, mortgage brokers will sometimes find themselves in positions where their loyalties conflict. For example, there could be a conflict between a mortgage broker's personal interests and the ethical duty of loyalty owed to a client. As another example, a conflict could arise due to competing duties owed to two independent clients. In the latter situation, even if the mortgage broker has the best of intentions, they will still be forced to make a decision against the interests of one of the parties. This is a common problem for professionals and, as a result, most professional codes of ethics deal with these types of situations.

Mortgage brokers are under an ethical duty to act diligently in the best interests of their clients. Not only must mortgage brokers refrain from engaging in any activity contrary to their client's best interests, but they must also avoid any activity that could reasonably be construed as being contrary to their client's interests. An exception to this principle is if the client has been notified in writing of the actual or potential conflict, and has given written consent. If a mortgage broker engages in another occupation besides mortgage brokerage, they must ensure that the other occupation does not jeopardize their personal integrity, independence or competence.

The CMBA-BC Code, in the section entitled, "General Principles" contains the following requirement:

Members who are engaged to provide professional services where there is an expectation of independence shall hold themselves free of any influence, or interest in respect of the client's affairs, which impairs their professional judgment or objectivity or which, from a public perspective, may reasonably be perceived to have that effect.

Furthermore, the CMBA-BC Code also states:

Members shall inform their clients of any business connections, any affiliations, and any interest of such Members and of any firm or entity in which they have an interest, of which the client might reasonably expect to be informed.

A principle closely linked to that of loyalty is the responsibility not to receive undisclosed benefits. A mortgage broker is acting for a client and any compensation that they receive from an external source must be disclosed to their client. In British Columbia, this disclosure of compensation must be done through the Form 10 (for borrowers and lenders). For example, a mortgage broker who will receive a discounted interest rate on her personal mortgage on her home if she refers a certain number of clients to a specific lender must disclose this benefit to the client and have it approved. This is a simple example, and conflicts of interest in mortgage brokerage can be much more subtle and challenging to identify. A mortgage broker must always be careful not to use their trusted relationship with a client for personal gain.

Disclosing All the Options

A mortgage broker is usually hired to provide expert advice to a client based on a combination of academic knowledge, practical expertise and confidential information imparted to the professional by their client. By applying these three sources of information to a given problem, different options or solutions often arise, each with its own unique positive and negative aspects. A mortgage broker cannot ignore the fact that every problem has more than one solution. Given this fact, it is important to consider the question of whether or not all options must be presented by an advisor to a client for consideration or whether the advisor can select and present only those options considered by them to be most favourable to the client.

A mortgage broker has an ethical duty to present all options to a client. This duty is implicit in the duty to advise fully, candidly and honestly. One very practical reason for observing this duty is to avoid giving incomplete advice which may lead to results that are not in a client's best interests.

Confidential Communications: The Duty of Discretion

It is often necessary for clients to entrust personal and financial confidences to their advisors. The reasons for this are obvious.

[The client] places his health and his fortune in the hands of his professional advisers, and he entrusts them with confidences of an intimate and personal kind. He is interested therefore not only in the technical, but also in what may be called the moral, quality of the service.¹⁴

Recognizing the importance of maintaining clients' confidences with utmost discretion, many professions have implemented ethical rules requiring their members to observe strict confidentiality. The legal profession, for example, has a special privilege in legal matters which is commonly recognized as being fundamental to our modern legal system. The medical profession requires all new entrants to swear an oath that the confidences of patients shall be preserved with absolute secrecy. Not all professions have made express rules for the purpose of promoting discretion, but it is undoubtedly professional misconduct to breach a client's confidence.

The duty of confidentiality continues after the particular transaction is finished. It is, for example, unethical to disclose a client's true bargaining position to a competitor even after a particular contract with the competitor is negotiated and the deal closed. Such a lack of discretion on the part of a professional undoubtedly diminishes their reputation in the eyes of both the client and the competitor. An indiscreet advisor also incurs the risk of personal civil liability for damages caused to a party as a result of a disclosure of confidential information.

The CMBA-BC Code deals with confidentiality in two places. First, in the "General Principles" section, it states:

Members have a duty of confidentiality in respect of the affairs of any client or former client and shall not disclose, without proper cause, any information obtained in the course of one's duties, nor shall they in any way exploit such information to their advantage.

Secondly, in the CMBA-BC Code section entitled, "Confidentiality of Information", it states:

A Member shall hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship. No such information shall be disclosed to others except with the consent of such client or where required by law to do so. In addition, such information shall not be used by the Member for personal advantage or the advantage of any other person.

Duty of Professional Courtesy and Good Faith

One reason for the existence of a professional association is to promote the members' common goal of devising and maintaining a set of professional standards embodied in a written code. The public expects that members of a given professional association govern themselves according to high standards of ethical conduct. In return for this reliance and trust, a professional association should make every effort to ensure that the public's reliance is not misplaced.

Public confidence in a professional association is endangered when one of its members does something calculated to cause injury to a colleague. For this reason, unethical practices are discouraged. As a matter of professional courtesy, a professional who is called upon to speak or act against a colleague in an official proceeding should give the colleague prior informal notice of this fact, although no discussions should occur so as to avoid creating any impression of collusion.¹⁵

Another aspect of professional conduct is the duty to act with *good faith* in all dealings with other professionals. This duty requires that undertakings (special promises and understandings between professionals) be carried out as strictly and honourably as though they were legally binding contracts, the purpose being to ensure honest conduct. For example, the legal and notarial professions require that members' undertakings impose a very high ethical duty on the promisor and render them personally liable for the consequences of a failure to fulfil an undertaking.

duty of good faith

a sincere intention to deal fairly with others

ENFORCEMENT OF PROFESSIONAL ETHICS

Introduction: Professional Standards and Discipline Committees

Each professional association establishes its own principles that members are expected to follow, outlined in their respective codes of ethics. To ensure that members adhere to these principles, some system of enforcement is needed. The way each professional association chooses to enforce its code of ethics can vary but the general system is similar across professional boundaries. The

various rules and regulations, bylaws, and standards surrounding an association's enforcement amount to a private judicial system. This private judicial system provides a means of maintaining ethical standards and disciplining members who breach these standards. It is through this system that the integrity of the professional association is maintained. What follows is a broad overview of a typical professional association's enforcement procedure.

The foundation of an enforcement system is the disciplinary committee (or Ethics Committee in the case of the CMBA-BC). A disciplinary committee is comprised of members who are elected by fellow board members or selected by an elected discipline committee chairperson. Discipline committee members are the watchdogs of the moral standards of their colleagues, carrying out a number of specific functions which are described below.

The principal purpose and function of a discipline committee is to protect the interests of the public and to safeguard the integrity of the professional association's members. Basic to the judicial system of this country is the principle that a person charged with some form of wrongdoing is to be considered innocent until proven guilty. This basic principle applies equally to professional standards and discipline committees. In a disciplinary hearing it must be proven that a member has broken the rules of professional conduct before disciplinary action is taken against the member.

The second function and purpose of a disciplinary committee is to act as an educator. It must ensure that members understand not only the specific ethical rules of the professional association, but also the spirit and intent of their application. This is accomplished by providing educational seminars to members and publishing the results of disciplinary hearings. Factual reporting of a member's misconduct is a powerful tool to advise all members that ethical misconduct is unacceptable and will result in disciplinary action. In this way, such reports act as a deterrent to other members.

Members act as their own judge and jury in disciplinary hearings. In doing so, they assume a large responsibility. A disciplinary committee must make decisions regarding the personal reputation, business conduct, and the livelihood of individual members. These decisions must not only be just but must also be perceived by peers and by the public as being just. The actions of committees charged with these responsibilities must be fair, not vindictive. Ethical rules must be applied in an unbiased manner to all members.

Committees must render decisions that are based on fact and are equitable. In carrying out its duties and functions, a committee can do no better than to follow the golden rule.

Complaints and Disciplinary Procedures

Complaints may originate from several locations. Typically, complaints come from either a member of the public, a fellow member of the professional association, another professional association, or a regulatory body within the industry. A complaint must be in writing and provide a full description of the events giving rise to a particular complaint. The member is then informed of the complaint and is requested to respond to the complaint in writing.

After a written reply has been received from a member against whom a complaint has been made, an informal hearing may take place. Generally, this informal hearing is carried out by a professional standards committee which investigates the complaint and decides whether or not a formal disciplinary hearing is required.

In the event that a formal hearing is required, the standards committee passes the complaint on to a discipline committee comprised of a hearing panel. The powers of the discipline committee to compel the attendance of witnesses are generally restricted by the bylaws of the professional association. The professional association can only require its own members to attend and give evidence at a hearing. Failure by a member to comply with a request by the discipline committee to attend a hearing may be considered to be a breach of the professional association's bylaws and is itself a disciplinary offence. Procedural rules of a disciplinary hearing are established by the bylaws of the professional association.

The parties may choose to be represented by a lawyer or by another member. In the event that a member who is the subject of a complaint fails to attend the hearing, the hearing panel may proceed to hear and determine the complaint in their absence. Those involved in the complaint are allowed to call as a witness any person who may have knowledge of the events which led to the complaint.

Penalties

The decision of a disciplinary committee must be in writing and specify any discipline imposed. Each professional association has different penalties. Generally, the forms of discipline that may be imposed include one or more of the following:

- a reprimand;
- a suspension of membership privileges;
- fine of a monetary amount set by the hearing panel;
- the costs of the hearing;
- expulsion from membership; and
- an order that the member attend and successfully complete certain educational courses.

The specific penalties to which a member of the CMBA-BC who violates the CMBA-BC Code may be subjected are listed under the section entitled “Discipline Procedure” at the end of Appendix 2.4.

Appeal Processes

The procedure for an appeal from a decision of a disciplinary committee is usually provided in the bylaws of the individual professional association. In some bylaws, there is no reference to any appeal procedure; in others there is a specific statement that no appeal is allowed. Some bylaws set out specific steps and time limitations which must be followed by a member in order to proceed with an appeal. In those situations where the bylaws do not provide for an appeal to the board administration itself, an aggrieved member may have to take the matter to a court. However, the CMBA-BC Code specifically includes a right of appeal to the Board of Directors of the CMBA-BC of a decision of the Ethics Committee.

CONCLUSION

It is extremely important for mortgage brokers to be familiar with the framework of the regulatory structure for mortgage brokers in British Columbia, including the *Mortgage Brokers Act*, Regulations and the role and

powers of the Registrar. This chapter began by introducing the regulatory structure in British Columbia, and ended with a discussion of professional ethics. While conducting oneself in accordance with mortgage brokerage legislation is crucial, abiding by professional ethics can be just as important.

APPENDIX 2.1:

Sample Disciplinary Decision of the Registrar of Mortgage Brokers

IN THE MATTER OF THE MORTGAGE BROKERS ACT R.S.B.C. 1996, C. 313

IN THE MATTER OF ABC MORTGAGE INC. AND MR. T AND MR. G SUSPENSION ORDER UNDER SECTION 8(2)

I AM ADVISED and of the opinion that:

1. ABC Mortgage Inc. (“ABC”) is registered in British Columbia as a mortgage broker under the *Mortgage Brokers Act* (“the Act”) with its registered office at ## - ##### ##th Ave., Surrey, British Columbia.
2. Mr. T is registered in British Columbia as a submortgage broker under the Act employed by ABC. He is also the only director and officer of ABC and is believed to be the sole shareholder.
3. Mr. G is registered in British Columbia as a submortgage broker under the Act employed by ABC.
4. Mr. T and Mr. G are the only registered submortgage brokers working regularly out of ABC’s registered office, although seven other registered submortgage brokers are employed by ABC. ABC’s registered office contains two small offices, one of which belongs to Mr. T, the other of which belongs to Mr. G.
5. As a result of a complaint received by the office of the Registrar on or about May 9, 2005, an investigation was commenced into the activities of ABC and _____, an unregistered individual purportedly involved in the brokering of mortgages.
6. The investigation revealed that ABC, working– in conjunction with _____ and another unregistered individual, brokered a mortgage with the

Canadian Imperial Bank of Commerce (“CIBC”) on behalf of the complainant.

7. The investigation further revealed that a Canada Revenue Agency T-4 slip, an employment letter on behalf of the complainant and an employment letter on behalf of the complainant’s wife had been forged and submitted to the ClBC in support of the mortgage application submitted by ABC. These documents were forged and uttered without the knowledge or consent of the complainant or his wife.
8. Mr. G was the submortgage broker handling the file of the complainant’s mortgage.
9. A search was conducted at the registered office of ABC on August 17, 2005 under the authority of a search warrant. Fifty-eight files containing documents pertaining to mortgage applications dated between November 2004 and August 2005 were seized and reviewed pursuant to that warrant. Thirteen of those files contained documents which were false and which were apparently provided to various lenders in support of mortgage applications. The false documents consisted of false employment and income verification letters and false T-4 slips.
10. It was also discovered that an unregistered individual, was employed by ABC and had activity on its behalf in 21 of the files reviewed.
11. On September 9th, 2005, another search was conducted at the registered office of ABC pursuant to a second warrant. During that search, two mortgages brokered through Mr. T and ABC were reviewed. The mortgage files contained false and forged documents which were apparently forwarded to lenders in support of the mortgage applications in circumstances which suggest Mr. T committed the forgeries or at least knew the documents were false. A number of files were then seized pursuant to the second search warrant.
12. A review of the computer records seized in the second search revealed that ABC brokered or attempted to broker mortgages with a combined value of at least \$220,705,077.26 between January 1, 2002 and September 9, 2005. Of

the 126 files that were cursorily reviewed, it appears that 100 of those files may contain false documents which were forwarded to lenders.

13. A detailed review of 22 files revealed that in 21 of those files, the disclosure requirements mandated by the Act to protect lenders and investors have not been fulfilled. Of those 22 files, Mr. T was the submortgage broker in 15 and Mr. G was the submortgage broker in three.
14. It is an offence under the Act to carry on business as a mortgage broker or submortgage broker unless a person is registered under the Act. It is also an offence to employ as a submortgage broker any person not registered under the Act.
15. ABC worked in concert with persons not registered under the Act, specifically ____ and ____ in arranging mortgages. The number of mortgages involved and the time period in which these mortgages were brokered indicate a complete disregard by ABC for the registration requirements of the Act.
16. Mr. T and Mr. G have brokered a number of mortgages supported by false and fraudulent documentation in circumstances which suggest that they either forged the documents themselves, or at least knew the documents were false.
17. ABC has further not complied with provisions of the Act with respect to borrower, lender, and conflict of interest disclosure.
18. These activities have continued over a significant period of time and within one office, leading to a conclusion that there has been insufficient supervision of the activities of registered submortgage brokers employed by ABC.
19. ABC is the subject of an on-going criminal investigation related to these activities and the activities of other persons.
20. The investigation into the conduct and activities of ABC, Mr. T and Mr. G by the staff of the Registrar is not complete and is ongoing.

I AM THEREFORE OF THE OPINION that ABC, Mr. T and Mr. G have conducted and are conducting business in breach of the Act and in a manner that is prejudicial to the public interest by knowingly facilitating mortgage applications which contain fraudulent mortgage documentation.

I AM FURTHER OF THE OPINION that the length of time that would be required to give ABC, Mr. T and Mr. G an opportunity to be heard under section 8(1) of the Act would be prejudicial to the public interest.

I HEREBY SUSPEND under section 8(2) of the Act the registration of ABC, Mr. T and Mr. G until the investigation into the conduct and activities of those parties is completed and a determination is made by the Registrar, after the aforementioned parties have had an opportunity to be heard, as to whether the registration of ABC, Mr. T or Mr. G should be suspended or cancelled pursuant to section 8(1) of the Act.

THIS SUSPENSION ORDER will remain in force for a period of one hundred and twenty days (120) from the date of this Order or until the determination referred to above is made by the Registrar, whichever is sooner. In the event that the determination referred to above is not made by the Registrar within one hundred and twenty days (120) days of the Order, the staff of the Registrar may apply for a further Order under section 8(2) of the Act.

TAKE NOTICE that ABC and Mr. T and Mr. G may, under section 9 of the Act, appeal this Order of Suspension to the Financial Services Tribunal.

Dated at the
City of Surrey,
Province of British Columbia
this 12th day of December, 2005.

W. Alan Clark; Registrar of Mortgage Brokers; Province of British Columbia

APPENDIX 2.2:

Form 9 – Lender Disclosure Statement



LENDER DISCLOSURE STATEMENT FORM 9- Section 17.1

INSTRUCTIONS

1. All applicable information must be provided
2. Please print clearly
3. If additional information is required, reference and attach a schedule to this form
4. Upon completion, one copy of this form must be provided to the prospective lender, and one copy must be retained by the mortgage broker.
5. Contact:

Registrar of Mortgage Brokers
2800 - 555 West Hastings Street,
Vancouver British Columbia, V6B 4N6

Email: Mortgagebrokers@bcfsa.ca
Web: <https://bcfsa.ca/>
Ph: 604-660-3555 / Toll-free: 1-866-206-3030 (BC)
Fax: 604-660-3365

Neither the Registrar of Mortgage Brokers nor any other authority of the government of the Province of British Columbia has in any way passed on the merits of the matters dealt with in this information statement. This information statement has not been filed with the Registrar of Mortgage Brokers and the registrar has not determined whether or not it complies with Part 2 of the *Mortgage Brokers Act*.

PART A - CAUTIONS

1. All mortgage investments carry risk. There is a relationship between risk and return. You should very carefully assess the risk of the transaction described in this Lender Disclosure Statement and in the supporting documentation before making a commitment.
2. You are advised to obtain independent legal advice regarding your decision to invest and to ensure that the transaction is structured appropriately to protect your interests.
3. You should only provide mortgage funds "in trust" to a registered mortgage broker or a licensed lawyer or notary. Never provide funds directly to the mortgage borrower or an individual submortgage broker.
4. If you are one of several investors in this mortgage, you may not be able to enforce repayments of your investment on your own if the borrower defaults.
5. You should ensure you have sufficient documentation to support the property valuation quoted in this Investor/Lender Disclosure Statement.
6. You should be satisfied with the borrower's ability to meet the payments required under the terms of this mortgage.
7. A mortgage broker must not administer, or arrange for another person to administer, a mortgage on your behalf unless the mortgage broker has a written agreement with you that covers matters set out in the *Mortgage Brokers Act*.
8. This Investor/Lender Disclosure Statement and the attached documents are not intended to provide a comprehensive list of factors to consider in making a decision concerning this investment. You should satisfy yourself regarding all factors relevant to this investment before you commit to invest.

PART B - BORROWER / GUARANTOR / COVENANTOR INFORMATION

FULL NAME OF BORROWER:

FULL NAME OF GUARANTOR/COVENANTOR (if applicable):

ADDRESS - include postal code

ADDRESS – include postal code

PART C - OTHER PARTIES TO THE TRANSACTION REPRESENTED BY THE MORTGAGE BROKER

The Mortgage Broker represents the following parties to the transaction:

The lender:

Name _____

The borrower(s):

Name _____

Syndicate mortgage lenders:

(attach list if more space required)

Name _____

Name _____

Name _____

A person or entity which will acquire the mortgage from the investor/lender:

Name _____

Other – please describe:

NOTE: If the Mortgage Broker has NOT indicated that it represents you, the Mortgage Broker must still exercise a duty of care to you and deal with you fairly. It is recommended that you obtain independent advice with respect to the transaction.

PART D - PRE-EXISTING OR EXISTING MORTGAGE IN DEFAULT

Will the lender/investor be acquiring an interest in a currently registered mortgage ?

Yes No

If yes, please explain any defaults by the borrower over the past 12 months which the mortgage broker is aware of:

If the mortgage is new, was there a previous mortgage registered against title with the same borrower?

Yes No

If yes, please explain any defaults by the borrower on the previous mortgage over the past 12 months which the mortgage broker is aware of:

PART E - REGISTERED INTEREST

Your interest as a lender will be directly registered in your name on the mortgage document filed at the Land Title Office; or

_____ will act as a trustee or nominee and will hold a registered interest in the mortgage in trust for you as beneficial owner; or

Your interest in the mortgage will be secured under the following arrangements:

PART F - MORTGAGE INVESTMENT

Your investment represents: the entire mortgage **OR** a portion of the mortgage

Your portion represents _____ % of the total. _____ other parties have an interest in this mortgage.

PART G – TRUST FUNDS

Will the funds be held in trust pending execution of the mortgage? Yes No

If yes, please indicate the party that will hold the funds in trust:

PART H – MORTGAGE ADMINISTRATION

Will the mortgage be administered for you? Yes No

If "yes", name and address of administrator:

Describe any fees or attach any fee agreement for the provision of administration services:

PART I – PROPERTY TO BE MORTGAGED

Is this an *inter alia* mortgage?

Yes No

If yes, please skip Sections I and K of this Form and complete Sections I and K of the Form 9 Addendum for *Inter Alia* Mortgages

Legal Description of Property:

Municipal Address of Property:

Type of Property:

Property with existing buildings

- Single family residential
- Five or more unit multifamily
- Industrial

Two to four unit multifamily

Commercial

Other: _____

Vacant land, development or construction project.

Details of project/proposed use:

Other (please describe): _____

Property Taxes:

Are taxes in arrears?

Yes No

If yes, amount arrears: \$ _____

Annual Property Taxes: \$ _____

Zoning

If mortgage proceeds are to be used for construction financing, is the zoning on the property to be developed appropriate for the proposed use?

Yes No

If no, details:

Property Valuation:

Based on:

Appraisal, dated _____

Amount: \$ _____

Municipal Assessment, Year _____

Sale Price \$ _____

Other (please describe) _____

If appraisal obtained:

Name and address of appraiser:

Valuation is: Current, as at date: _____

Projected Value: \$ _____

PART J – MORTGAGE PARTICULARS

Terms of the Mortgages

Amount of your investment: \$ _____

Maximum Indebtedness of Mortgage: \$ _____

Interest rate is fixed at _____ % per annum OR

Interest rate is variable, explain: _____

Compounding period: _____

Payment Frequency: _____

Interest only payments: Yes No

Payments to be made by Borrower: \$ _____

Term: _____ Amortization: _____

Borrower's first payment due: _____

Maturity Date: _____

Balance on maturity: \$ _____

Mortgage secures a running account: Yes No

If running account, provide details _____

PART K – RANK OF MORTGAGE AND LOAN TO VALUE RATIO

Rank of mortgage

This mortgage will rank: First Second Third Other: _____

Prior encumbrances (existing or anticipated)

None OR

(i)Lender/Charge Holder: _____ Priority: _____

Amount Owing:\$ _____ Maximum potential indebtedness allowable under Mortgage: \$ _____

In default? Yes No

(ii)Lender/Charge Holder: _____ Priority: _____

Amount Owing: \$ _____ Maximum potential indebtedness allowable under Mortgage: \$ _____

In default? Yes No

(iii)Lender/Charge Holder: _____ Priority: _____

Amount Owing: \$ _____ Maximum potential indebtedness allowable under Mortgage: \$ _____

In default? Yes No

(iv)Lender/Charge Holder: _____ Priority: _____

Amount Owing:\$ _____ Maximum potential indebtedness allowable under Mortgage: \$ _____

In default? Yes No

Loan to value ratio

a) Total amount owing or maximum indebtedness (whichever figure is higher) of all encumbrances which rank in priority:

\$ _____

b) Maximum Indebtedness of mortgage:

\$ _____

c) Total amount of mortgages: \$ _____
(a+b)

d) Value:
(from Part I) \$ _____

e) Loan to value:
(c/d x 100) _____ %

PART L – ATTACHED DOCUMENTS

You should review the following documents carefully and assess the risks of this investment before committing to invest.
The following documents are attached:

- A copy of any existing mortgage on the property;
- A copy of any appraisal;
- A copy of any purchase and sale contract entered into by borrower for the purchase of the property;
- Any documentary evidence respecting the borrower's ability to meet the mortgage payments, such as a credit bureau report or a letter from an employer disclosing the borrower's earnings.
- A copy of the borrower's application for a mortgage.
- If the mortgage is a new mortgage, documentary evidence of any down payment made by the borrower for the purchase of the property.
- A copy of any agreement that you may be asked to enter into with the mortgage broker or other administrator.
- A copy of the Cost of Credit Disclosure provided to the borrower.

The Mortgage Broker is also required to provide you with all other information an investor of ordinary prudence would consider to be material to a decision whether to lend money on the security of the property or the credit worthiness of the borrower, so that you can make an informed decision before you commit to invest. This information might include the following:

1. If the mortgage is for a construction or development project:
 - a. A detailed description of the project;
 - b. A schedule of the funds that have been advanced or are to be advanced to the borrower; and
 - c. The identity of any person who will monitor the disbursements of funds to the borrower and the use of those funds by the borrower.
2. If the property is rental property, details of leasing arrangements and vacancy status.
3. Environmental considerations affecting the value of the property.

PART M – CERTIFICATION

This Lender Disclosure Statement has been completed by:

Name and address of Mortgage Broker

I have fully completed the above Lender Disclosure Statement in accordance with the *Mortgage Brokers Act* and regulations and declare it to be accurate in every respect.

Date: _____

Signature of Mortgage Broker, or of a person authorized
to sign on behalf of the mortgage broker

Print name of person signing

PART N – ACKNOWLEDGEMENT

I, _____, of _____,
Print name _____ Address _____
acknowledge receipt of this Lender Disclosure Statement, signed by the mortgage broker.

Date: _____

Signature: _____

Dated by Investor/Lender: _____

APPENDIX 2.3:

Form 10 – Borrower Conflict of Interest Disclosure Statement

CONFLICT OF INTEREST DISCLOSURE STATEMENT FORM 10

INSTRUCTIONS

1. Please type or print clearly
2. If additional information is required, reference and attach a schedule to this form

Neither the Registrar of Mortgage Brokers nor any other authority of the government of the Province of British Columbia has any way passed on the merits of the matters dealt with in this information statement. This information statement has not been filed with the Registrar of Mortgage Brokers and the registrar has not determined whether or not it complies with Part 2 of the *Mortgage Brokers Act*.

PART 1 – INFORMATION

FULL NAME OF MORTGAGE BROKER	TELEPHONE NUMBER
ADDRESS (complete address including postal code)	
ADDRESS OF PROPERTY TO BE MORTGAGED (complete address including postal code)	
LEGAL DESCRIPTION OF PROPERTY TO BE MORTGAGED	

Describe any direct or indirect interest the mortgage broker has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

Describe any direct or indirect interest that a related party or associate of the mortgage broker, as defined in the *Mortgage Brokers Act* Regulations has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

PART 2 – CERTIFICATION

I certify that I am the mortgage broker or an authorized representative of the mortgage broker in this transaction and based on my knowledge, belief and information provided by third parties, this Disclosure Statement contains no untrue statement and does not omit to state a fact that is required to be stated or that is necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

FULL NAME OF MORTGAGE BROKER	ADDRESS (complete address including postal code)
SIGNATURE OF MORTGAGE BROKER OR AUTHORIZED REPRESENTATIVE	NAME OF AUTHORIZED REPRESENTATIVE OF MORTGAGE BROKER (PRINT NAME)
	DATE SIGNED (YYYY/MM/DD)
ACKNOWLEDGEMENT OF RECEIPT	PRINT NAME
SIGNATURE	DATE SIGNED (YYYY/MM/DD)

APPENDIX 2.4:

Code of Ethics and Standards of Professional Conduct

Canadian Mortgage Brokers Association – British Columbia (CMBA-BC)

FORWARD

The Code of Ethics is directed primarily at ensuring and safeguarding the quality of professional services provided by the Members of the Canadian Mortgage Brokers Association - British Columbia (CMBA-BC) to the public it serves; secondly, it is directed at achieving orderly and courteous professional conduct among Members of the CMBA-BC in the provision of mortgage brokering services.

The Code of Ethics provides a set of standards which Members can regard as a minimum level of acceptable professional conduct. The Code clarifies the nature of behaviour professional colleagues deem essential to maintain the reputation of the profession. The Code provides assurance to the public, that the CMBA-BC is imposing on its Members high professional standards by which they are willing to be judged. Further, the Code forms the basis of disciplinary procedures through which allegations of professional misconduct are addressed.

DEFINITIONS

“Code”: means the *Code of Ethical Principles and Professional Conduct*.

“CMBA-BC”: means the Canadian Mortgage Brokers Association – British Columbia.

“Association”: means the Canadian Mortgage Brokers Association – British Columbia.

“Act”: means the *Mortgage Brokers Act of British Columbia*

“Registrar” means the Registrar of the *Mortgage Brokers Act of British Columbia*

“Regulations”: means the *Mortgage Brokers Act Regulations*.

“Amendments”: means the *Mortgage Brokers Act Amendments*.

“Board”: means the Board of Directors of the CMBA-BC.

“Client”: The person or entity engaging a member for the performance of professional services.

“Member”: an individual who holds membership in good standing within CMBA-BC.

GENERAL PRINCIPLES

The standards established by this Code are premised on a number of general principles – fundamental statements of acceptable professional conduct required of a Member of the CMBA-BC – which can be stated as follows:

- (i) Members shall conduct themselves at all times in a manner which will maintain the good reputation and integrity of the profession and the CMBA-BC and their ability to serve the public interest.
- (ii) Members shall not engage in conduct or perform any act relevant to the practice of the profession that, having regard to all of the circumstances, would reasonably be regarded by Members as disgraceful, dishonourable or unprofessional.
- (iii) Members shall perform their professional services with integrity, good faith and due care and shall sustain their professional competence by keeping informed of, and complying with, developments in practice standards.
- (iv) Members who are engaged to provide professional services where there is an expectation of independence shall hold themselves free of any influence, or interest in respect of the client’s affairs, which impairs their professional judgment or objectivity or which, from a public perspective, may reasonably be perceived to have that effect.
- (v) Members have a duty of confidentiality in respect of the affairs of any client or former client and shall not disclose, without proper cause, any information obtained in the course of one’s duties, nor shall they in any way exploit such information to their advantage.
- (vi) The development of a Member’s practice shall be founded upon a reputation for professional excellence. The use of methods of

advertising which do not uphold professional good taste, or are misleading are not in keeping with this principle.

- (vii) A Member shall treat other Members with the courtesy and consideration due between professional colleagues and which, in turn, the Member would wish to be accorded by the other Member.

200 GENERAL STANDARDS OF CONDUCT

201 COMPLIANCE WITH BY-LAWS, REGULATIONS AND CODE

201.1

Members shall comply with the By-laws, Regulations, and the Code of Ethics and Standards of Professional Conduct of the CMBA-BC as they may be constituted from time to time and with any order or resolution passed by the CMBA-BC.

Members will conduct business within the applicable laws of the Province of British Columbia and Canada and the governing regulations of [BCFSA].

202 REPUTATION OF THE PROFESSION

202.1

Members shall conduct themselves at all times in a manner which will maintain the good reputation of the profession and of the CMBA-BC and their ability to serve the public interest.

202.2

Members shall not engage in conduct or perform any act relevant to the practice of the profession that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable or unprofessional.

203 INTEGRITY AND DUE CARE

203.1

Members shall perform their professional services with integrity, good faith and due care.

203.2

Members have a duty, in the practice of their profession, to be competent, conscientious, knowledgeable, diligent, and efficient.

204 MAINTAINING PROFESSIONAL COMPETENCE

Members shall maintain professional competence by keeping informed of, and complying with, developments in the CMBA-BC's Practice Standards and Recommendations in all functions in which they practice. Members shall not undertake to provide professional services which they are not competent to provide by virtue of training or experience or are unable to become competent without undue delay, risk or expense to the client.

205 FALSE OR MISLEADING DOCUMENTS AND ORAL REPRESENTATIONS

Members shall not:

- (i) sign or associate themselves with any letter, report, statement or representation which they know, or should know, is false or misleading, or
- (ii) make any oral report, statement or representation which they know, or should know, is false or misleading.
- (iii) knowingly omit information that would be relevant to the decision making ability of the user of such information.

206 COMPLIANCE WITH THE CODE OF ETHICS AND STANDARDS OF PROFESSIONAL CONDUCT

206.1

Members shall perform their professional services in accordance with the generally accepted standards of the practice of the profession, including the Code of Ethics as adopted by the CMBA-BC from time to time.

206.2

Members shall encourage a company with which the Member is associated as a partner, principal, director or officer to abide by the Code of Ethics.

206.3

Members who employ or retain and directly supervise non-members (including for the provision of professional services) shall be responsible for any failure of such non-members to abide by the Code of Ethics

207 CONFIDENTIALITY OF INFORMATION

207.1

A Member shall hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship. No such information shall be disclosed to others except with the consent of such client or where required by law to do so. In addition, such information shall not be used by the Member for personal advantage or the advantage of any other person.

207.2

Notwithstanding Rule 207.1, a Member shall be entitled to disclose information which is otherwise confidential in order to defend the Member or the associates, partners or employees of such Member against alleged professional misconduct, or in any legal proceeding for recovery of unpaid professional fees and disbursements, or by court order, but only to the extent necessary for such purpose.

208 DUTY TO REPORT BREACH

A Member shall notify the Board, or its delegated authority, of any apparent breach of the Code of Ethics and Standards of Professional Conduct, or any event which calls into question the competence, reputation or integrity of a Member.

209 ADVERTISING AND ENDORSEMENTS

209.1

A Member shall not engage in advertising or solicitation of professional engagements using unwarranted, inaccurate or misleading claims or promises. The development of a Member's practice shall be founded upon a reputation for professional excellence.

209.2

A Member shall not advertise, directly or indirectly, in any manner

- (i) which the Member knows, or should know, is false or misleading,
- (ii) which contravenes professional good taste or fails to uphold normal professional courtesy,
- (iii) which make unfavourable reflections on the competence or integrity of the profession, the CMBA-BC or any Member thereof, or
- (iv) which involves a statement, the contents of which the Member cannot substantiate.

209.3

All advertising must be in accordance with requirements of the *Mortgage Brokers Act*, any advertising bulletin or directive issued by the Registrar of Mortgage Brokers, and/or any other applicable legislation.

210 REFERENCE TO MEMBERSHIP

Members of the CMBA-BC may make reference to their affiliation with the CMBA-BC but shall, at all times, ensure that such reference accurately reflects the association with the CMBA-BC.

300 RELATIONS WITH FELLOW MEMBERS

301 COURTESY AND CONSIDERATION

A Member shall treat other Members with the courtesy and consideration due between professional colleagues and which, in turn, the Member would wish to

be accorded by the other Members.

302 FALSE OR MALICIOUS STATEMENTS

A Member shall not injure or attempt to injure by false or malicious statements, or by innuendo, the professional reputation or prospects of any Member.

303 LEGAL ACTION AGAINST ANOTHER MEMBER

A Member shall, having commenced a legal action against another Member which might tend to bring the profession or the CMBA-BC into disrepute, inform the CMBA-BC of the general details the action, subject to advice of counsel.

400 ORGANIZATION AND CONDUCT OF A PROFESSIONAL PRACTICE

401 TERMS OF ENGAGEMENT

It is good practice to have a written contract between the Member and client, covering the nature of the assignment, the subject matter of the assignment, scope of work, and nature or basis for the fees.

401.1

A member may charge fees provided the following conditions are met.

- the nature of fees payable to the Member must be discussed with the borrower at the onset of negotiations, and;
- the amount of the fees to be charged may take into account the borrower's credit standing, employment, overall financial stability, the value and condition of the property to be mortgaged, general market conditions, and;
- a Member must not take advantage of the borrower's situation by charging more than is reasonable given the circumstances of the transaction, and;

- a Member shall provide written disclosure to the borrower of all fees payable by the borrower that are relevant to the mortgage transaction, including fees payable by the borrower to the mortgage broker and/or the lender, in the prescribed form and within the time frame required under the Act and/or as may be required under any other applicable legislation.

401.2

A Member shall provide written disclosure to the borrower of the source of all referral fees received by the Member, or fees of a similar kind that are relevant to the mortgage transaction. This disclosure is to be provided in the prescribed form and within the time frame required under the Act and/or as may be required under any other applicable legislation.

402 WITHDRAWAL OF SERVICES

A Member must immediately terminate the Member's relationship with a client if:

- (i) the client instructs the Member to do so, subject to terms and conditions of any written or oral agreement between the borrower and the member
- (ii) the client instructs the Member to do anything that is illegal
- (iii) the client has provided false information that could deceive a lender or other person A Member shall advise any parties relevant to the mortgage transaction that the Member is no longer acting on behalf of the client.

404 CONFLICT OF INTEREST

Members shall inform their clients of any business connections, any affiliations, and any interest of such Members and of any firm or entity.

500 DISCIPLINE PROCEDURE

501 VIOLATION OF BY-LAWS, CODE OF ETHICS AND STANDARDS OF PROFFSSIONAL CONDUCT

Disciplinary action against any Member may be taken in the event of any violation of specific provisions of the CMBA-BC's By-Laws, Regulations, Code of Ethics and Standards of Professional Conduct, or the spirit and intent set forth therein.

502 JURISDICTION OF ETHICS COMMITTEE

The Discipline Procedure falls under the jurisdiction of the Ethics Committee as appointed by the Board.

503 CONVICTION OF CRIMINAL OR REGULATORY OFFENCE

Any Member who has been convicted of any criminal or regulatory offence or has pleaded guilty to any such offence must disclose the conviction or plea to the CMBA-BC. The Member may be charged with professional misconduct by the CMBA-BC and disciplinary procedures commenced as provided in the By-Laws of the CMBA-BC.

504 DISCIPLINARY ACTIONS

Members violating this Code may be subjected to one or more of the following as decided by Ethics Committee and ratified by the Board.

- a) Suspension of membership in the CMBA-BC
- b) Permanent expulsion from the CMBA-BC
- c) Written reprimand from the Ethics Committee
- d) Referral of the matter to the Registrar.

505 HEARING AND APPEAL

Members that are under review by the Ethics Committee for possible violation of this Code, and who may be subject to disciplinary action as per section 504, are entitled to a hearing with the Ethics Committee prior to any decision being finalized and may further appeal any decision of the Ethics Committee to the Board.

- 1 www.bcfsa.ca/media/3301/download
- 2 www.bcfsa.ca/media/268/download
- 3 The Commission of Inquiry into Money Laundering in British Columbia, otherwise known as the “Cullen Commission”, was established by the provincial government in order to investigate money laundering issues in the province. For more information, visit: cullencommission.ca.
- 4 cullencommission.ca/data/transcripts/Transcript%20February%202024,%202021.pdf
- 5 www.bcfsa.ca/media/286/download; www.bcfsa.ca/media/288/download
- 6 www.bcfsa.ca/media/258/download
- 7 1996 Canlii 3453 (BC SC)
- 8 1997 CanLII 1911 (BC SC)
- 9 Quoted in Watts, P. 1989. *Real Estate Practice and Ethics* (6th ed.), The British Columbia Real Estate Association: Vancouver. p. 3.
- 10 Bennion, F.A.R. 1969. *Professional Ethics – The Consultant Professions and Their Code*. Charles Knight & Co., Ltd.: London. pp. 14-15.
- 11 *Robbins Herbal Institute v. Federal Taxation Commissioner* (1923), 32C.L.R. 457 per Starke, J. (Australia) at pp. 14-15.
- 12 Bennion, F.A.R. 1969. *Professional Ethics – The Consultant Professions and their Code*. Charles Knight & Co., Ltd.: London.
- 13 The Law Society of British Columbia. *Code of Professional Conduct for British Columbia*, Canons of Legal Ethics. Rule 2.1-3.
- 14 Carr-Saunders, Sir A. and Wilson, P.A. 1933 (second imp. 1964). *The Professions*. Frank Cass & Co. Ltd.: London. p. 394.
- 15 Bennion, F.A.R. 1969. *Professional Ethics – The Consultant Professions and Their Code*. Charles Knight & Co., Ltd.: London. p.123. Bennion’s discussion at p. 123 of professional courtesy and solidarity includes this point regarding the legal profession. It is, however, applicable to all mortgage brokers.