



## MORTGAGE BROKERAGE – WHEN IS A LICENCE REQUIRED?

**Summary:** Real estate industry members representing buyers often want to assist their clients in obtaining a mortgage so that they can proceed with a property purchase. While the real estate industry member's motivation is commendable, real estate industry members must ensure they do not overstep the bounds of their authorization. A real estate broker who carries on the activities of a mortgage broker must obtain the necessary authorization from RECA. The activity of a real estate broker that encourages clients to go to a particular financial institution is considered "soliciting" for the purposes of the *Real Estate Act* and requires a mortgage broker licence. [See: *Real Estate Act*, s.1(1)(j)(r)]

*Note: For the purposes of this Information Bulletin, and where the context permits, the term "real estate broker" includes all industry members authorized to trade in real estate by the Real Estate Council of Alberta including a brokerage, broker, associate broker and associate.*

The mortgage brokerage industry in Alberta is regulated by the *Real Estate Act*. Banks and other financial institutions are exempt from the *Real Estate Act*. A person holding any class of real estate broker licence is not authorized to deal in mortgages and, therefore, must obtain a mortgage broker licence from the Real Estate Council of Alberta (RECA) to engage in mortgage brokerage activity.

The word mortgage has a broad meaning under the *Real Estate Act*. Generally, it is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt. A mortgage secured by the lessee's interest in the leased property is called a leasehold mortgage.

In order to understand what the word "dealing" means, the *Real Estate Act* references the activities of a mortgage broker [*Real Estate Act*, s.1(1)(j)(r)]. Thus, "dealing" means the activities of a mortgage broker including:

- the solicitation of people who borrow or lend money which can be secured by a charge on real property;
- the negotiation of mortgage transactions between a borrower and a lender;
- the collection of the mortgage payments and administering of renewals, and repayments as well as any other administrative duties on behalf of lenders;
- buying and selling or exchanging mortgages on the secondary market for mortgagees and mortgagors; and,
- holding oneself out as a person who can do any of the above; see definition of *Holding Out*.

In the 2002 case of *Toronto Dominion Bank v. Real Estate Council of Alberta* (Alberta Court of Queen's Bench), Madam Justice A.B. Moen reviewed the definition of "mortgage broker" and, in particular, what it means to "solicit" a person to borrow or lend money to be secured by a mortgage. Justice Moen concluded the following five scenarios constituted "soliciting" business for financial institutions and, therefore,

constituted a breach of the *Real Estate Act* respecting mortgage brokers, unless the persons doing the soliciting have the necessary authorization from RECA:

1. A real estate broker refers his client to a specific lender. The real estate broker does not promote that specific financial institution or provide any specific information to the client, but asks the client to advise the lender that he was referred by the real estate associate. The client uses that lender and mentions the name of the real estate broker as requested. A fee is paid to the real estate broker by the lender.
2. The real estate broker refers his client to a specific lender. The real estate broker promotes the lender or encourages the client to use the lender in some manner (e.g. the real estate broker indicates that the lender has quick service, a good mortgage program, competitive rates, etc. or that his former clients have had good dealings with that lender). The real estate broker asks the client to advise the lender that he was referred by the real estate broker. A fee is paid to the real estate broker by the lender.
3. The real estate broker refers his client to a specific lender. The real estate broker promotes the lender or encourages the client to use the lender in some manner. The real estate broker may take a mortgage application directly from the client and deliver it to the lender. In some cases, the real estate broker may arrange for a meeting between the client and the loans officer at the lender or attend the mortgage application session with the client. A fee is paid to the real estate broker by the lender.
4. An employee of a lender is located on-site at the real estate office. Clients are encouraged to use, are referred to or are “steered” in some manner toward the lender’s on-site employee for pre-approval and/or mortgage financing. A real estate broker actively recommends the on-site lender for various reasons (e.g. they have quick service, a good mortgage program, competitive rates or his former clients have had good dealings with the lender). A fee is paid to the real estate broker by the lender.
5. A real estate brokerage has an agreement with a specific lender. The lender offers the clients of the real estate brokerage a special mortgage program (e.g. special mortgage rates, or a “cash back” payment after closing). Sometimes an employee of the lender is located on-site at the real estate office. The real estate broker actively refers or “steers” his clients to this lender and the mortgage program negotiated by the real estate brokerage with the lender (e.g. indicating that the lender has a special program for the real estate brokerage’s clients, quick service, competitive rates, etc. or that his former clients have had good dealings with this lender). A fee is paid to the real estate broker by the lender.

Madam Justice Moen concluded her decision with the following comments:

“If real estate brokers wish to encourage their clients to go to a particular financial institution, they may obtain the necessary authorization as mortgage brokers. The Alberta legislature’s policy reason for enacting these provisions is, no doubt, to ensure that the public is aware that a mortgage broker may be receiving a benefit for a referral. Further, it is also clearly the legislature’s intention that the public should be protected by establishing a regulatory scheme in which mortgage brokers are governed by the Act and by the rules established by RECA.”